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The Quality of Legal Acts and its Importance in Contemporary Legal Space

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Foreword

This collection of articles is published in connection with the international scientific conference organised by the University of Latvia, Faculty of Law on 4–5 October 2012. The theme for the conference and this collections is "The Quality of Legal Acts and its Importance in Contemporary Legal Space." It seems that there is no need to substantiate the relevance of this topic in the current legal-social space, it is self-evident to all lawyers and also to any person, who at least once in his or her lifetime has encountered legal acts, their actual implementation. A totality of high quality legal acts is needed to ensure legal order, stability and security in a state. This applies to both legal acts and the process for applying them, etc. Admittedly, selecting this topic for the international conference of this year was a daring and challenging act, understanding that this is not a simple topic, it has a number of controversial, "hot" aspects. In dealing with this topic clashes of opinions, harsh criticism and, hopefully, constructive proposals as well, are unavoidable. It has become clear already now that at least partially the hopes for constructive debate in the name of legal development have been met. Great interest expressed in participation in the conference is a proof of that. The organising committee of the conference, consisting of 16 persons representing 8 countries, meticulously assessed the applications submitted by the potential participants. The participation was approved for 77 applicants, of whom 40 will be presenting stand-reports, but 37 – give presentations at the conference. The participants represent various countries both from the EU and outside it. Thus, representatives from the US, Belorussia, Belgium, France, Georgia, Estonia, Latvia, Poland and Switzerland will be presenting their reports at the conference. All articles submitted by the conference participants underwent anonymous scientific review, as the result the editorial board of the collection of articles, consisting of 23 members representing 8 countries, decided on including articles in this collection. Thus, a volume consisting of 61 articles is awaiting readers' assessment. The articles cover a broad range of issues, pertaining both to general issues of law creation and its quality, as well as specific issues typical of concrete branches of law. The majority of articles examine topical problems and suggest possible solutions to them. So we can hope that the conference and this collection of articles will give a lasting contribution to aligning and strengthening legal space.

Chairperson, Conference Organising Committee,
Professor, *Dr. iur.* **K. Strada-Rozenberga**

Plenary Session

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DRAFTING THE LEGISLATION WITHIN EUROPEAN UNION INSTITUTIONS – TOWARDS COMMON LEGAL ACTS STANDARDS

Keywords: European Union legislation – better quality of acts – multilingualism – multiculturalism – lawmaking standards.

The European Union legal order has been defined by Court of Justice as a supranational legal order, which imposes on its members the duty to comply with its legislation. After more than 60 years of integration within European structures there have been thousands of acts adopted by EU institutions and some principles of drafting the law have been recognized. The primary and secondary law is actually created in 23 official languages and, because it is directly applied or needs implementation in all Members States, the need to ensure the high quality of legal acts is so important. As the harmonization of legal culture of Member States is one of the goals to achieve during integration process, the role of the proper drafting of legislation can be understood as crucial.

The aim of the paper is to discuss the main, in Author's view, obstacles of drafting the legislation within EU institutions and try to answer the questions, if EU, as some of its member states lately, tries to follow the same trend of improving the legislation and what are in general the standards of so called "Better Lawmaking" in EU?

The term "EU legislation", which would be used in the paper, is common to describe all European Union acts, together with those passed under EC Treaties, so called "Community acts" [1]. After the Lisbon Treaty entered into force in 2009, the term "EU legislation" started to be the most appropriate one to specify acts enacted under the Treaty on European Union[2] and Treaty on the Functioning of the European Union[3] as well.

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[1] Voermans W. Concern about the quality of EU legislation: what kind of problem, by what kind of standards? Erasmus Law Review, 2009, Vol. 02, issue 01, p. 60.

[2] See: Consolidated version of the Treaty on European Union, Official Journal of the European Union, 30.02.2010, C83/13.

[3] See: Consolidated version of the Treaty on the functioning of the European Union, Official Journal of the European Union, 30.03.2010, C83/47.

For European Union, law is a basic instrument to realize its functions, as are defined in Treaties. Those functions can be of instrumental, constitutional, political or even symbolic nature[4] if we combine all functions law realizes in states and apply them to EU law. That's why EU acts should meet several requirements: serve to realize the functions of EU, be understandable for citizens as required by the principle of foreseeability of law and be properly enacted as required by "Better Lawmaking" standards. Is it possible in 23 official languages of EU and with the participation of all institutions involved in the procedure together with 27 Member States?

The catalogue of sources of EU law was conceived in a way to guarantee some effects prescribed in primary law and influence on national laws with variable pressure. For example, the directive can be the best source of law to use in some specific areas of EU competences and the aim of it can be realized by states using their own methods, while the regulation does not leave any space for states to act in their own way and is generally used to regulate other than directive issues. In other words, the regulation imposes on states the unquestioning duty to comply with it, so its pressure on states is very strong[5]. The system of sources of EU law, conceived in this way, can be evaluated as an effective one, because for last sixty years it was not the subject of any considerable criticism or proposal of change. In this precisely built structure of legal instruments occur some problems. The functions of EU legislation, realized by its sources can be weakened because of the several obstacles.

The first obstacle to overcome are the effects of the principle of multilingualism, which means that all legal texts are published in 23 official languages of EU and citizens can communicate with EU institutions also in all languages. All texts are equally authentic,[6] but it is hard to say that they have exactly the same meaning. And if not, "the object of ensuring that in all circumstances the law is the same in all States of the Community"[7] as required by Court of Justice would be seriously affected. Theodor Schilling writes, that multilingualism can be considered on different levels and among them "are the respective language regimes applicable to administrative and court proceedings involving citizens and EU institutions, whose discussion should be guided by criteria taken from human and minority rights, as well as those applicable to parliamentary procedures and consultations between representatives of Member States whose discussion should be guided rather by aspects of the equality of states"[8]. Among reasons why linguistic versions of acts are not exactly the same is the whole procedure of preparing the law, starting from Commission's proposal (draft is usually prepared in English or French) and ending with the publishing in Official Journal. The imperfections of act can have political background and derive from application

[4] Voermans W., op. cit., p. 62.

[5] Tokarczyk R. The problems of harmonization of Polish legal culture with European Union legal culture. *European Studies*, 2004, No. 3, p. 71.

[6] Ibid., p. 49.

[7] Judgment of European Court of Justice, Case: 166/73, 1974, ECR 33, Rheinmühlen Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, para 2.

[8] Schilling T. Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law. *European Law Journal*, 2010, Vol. 16, January, No. 1, p. 48.

of the 'principle of inertia', from overreliance on technical experts, from inadequate knowledge of language on the part of persons involved in the legislative process, and from indifference about the quality of the language of legislation[9]. The consequences of wrong translations and low level of legislation are sometimes very serious as they can cause problems with proper application, implementation and enforcement of EU law, especially on national level. This can constitute a breach of EU law and can result with the proceedings instituted by the European Commission against Member State before the Court of Justice of EU under art. 258 of the Treaty on the functioning of the European Union. The institutions of EU are aware of the issue, but withdrawal of the principle of multilingualism is out of question, because its basis lie in the art. 342 of the Treaty on functioning of European Union and in the Council Regulation no 1 determining the languages to be used by the European Economic Community[10]. One of the European Commission policies is also to promote language diversity of Europe as they are the basis of European identity[11]. According to formulated by the doctrine *de lege ferenda* postulates, the EU law should be enacted in one authentic language[12], as it is practiced in international public law.

The second obstacle which makes difficult realizing by EU acts their functions is that legislative procedures in EU are not perfect as they lack not only speediness, but mainly effective mechanism of consultation and evaluation[13]. The legislative procedures in states are usually prescribed in constitutions and the law is enacted by appropriate institutions. So from procedural point of view lawmaking is clear and foreseeable. Although in European Union, the primary law prescribes the possible procedures, they can be characterized as complex and involving many institutions, which take part in them on different levels of lawmaking. The danger is aggravated by the fact that for all basic legislation, the texts produced by the Commission pass to the European Parliament and the Council, where they may be substantially changed by committees and working parties before adoption[14]. The institutions, after enacting of act often do not know precisely how do the states apply it and what are the main problems during implementation. According to data of the European Commission only five of 83 internal market directives in 2000 were transposed to national legislation[15]. As soon as EU Commission does not institute the proceedings under art. 258 of TfEU it can happen that individual problems of states of practical

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[9] Frame I. Linguistic oddities in European Union legislation: don't shoot the translator,.Clarity, 2005, May, No. 53, p. 22.

[10] Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385-386.

[11] See: Multilingualism in the EU: the European Commission calls for action to promote languages and launches a new Web portal. Available: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1451&format=HTML&aged=1&language=EN&guiLanguage=en [viewed 1 July 2012].

[12] See more about the idea of one authentic text and 22 translations: T. Schilling, op. cit., pp. 64-66.

[13] See: Schilling T., op. cit., p. 74.

[14] Robinson W. How the European Commission drafts legislation in 20 languages. Clarity 2005, May, No. 23, p. 7.

[15] White paper on European Governance. Brussels, 25.7.2001 COM(2001) 428 final. Available: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf [viewed 1 July 2012].

nature in applying and implementation of act do not see the daylight. Unfortunately, sometimes institutions do not provide effective feedback as regards the interpretation of acts, their long-term effects and importance for EU policies.

The third obstacle derives from the number of EU legislation which consists of thousands of acts. Many issues are regulated by legal instruments in a very detailed manner, and not always it is necessary. Because of imperfect quality of acts they are amended or replaced by other instruments, which creates large volume of acts. The bureaucracy causes also costs of translations, which could be avoided if some polices would not be realized by legislative means[16]. There is also the obstacle of technical nature – terms used in acts are unclear, they are too complex and difficult to read, especially for citizens. In its White Paper prepared in 2001 European Commission postulated the simplification of acts, so that states could also simplify their procedures of implementation[17] and the principle of foreseeability of law could be fully enjoyed. One should although bear in mind, that acts of EU have to combine the different approaches and different views, cultures and local conditions[18] in order to conserve multiculturalism, which next to multilingualism, constitutes one of the foundations of European Union. Unfortunately, the other side of multiculturalism is that the quality of acts is often assessed by application of national standards of legislation to EU legislation. States and lawyers look on the EU acts through the lens of their own standards, without trying to understand that law enacted in international organization needs particular procedures and special attitude, especially if we talk about supranational organization.

All these above mentioned obstacles were identified by institutions of EU and Member States over the last several years and led to defining the long-term strategy of better lawmaking called also Better Regulation. There have been many policies, acts, protocols and review methods prepared to deal with the issue of better legislation and great part of them was created after 1992, when during Edinburgh Council the need for better lawmaking by clearer and simpler acts has been recognized at the highest political level. First steps taken to improve drafting were proposed in Sutherland report from 1992[19], and then reaffirmed by Declaration no 39 on the quality of the drafting of Community legislation, annexed to the Final Act of the Amsterdam Treaty. As a result of that Declaration, the three institutions involved in the procedure for the adoption of Community acts, the European Parliament, the Council and the Commission, adopted common guidelines intended to improve the quality of drafting of Community legislation by the Inter-institutional Agreement of 22 December 1998 setting out 22 guidelines for drafting, based in large part on suggestions from the Member States. The first guidelines include general principles familiar to all drafters: draft in clear, simple and precise terms; think of the addressees; keep sentences and provisions short; use plain language; be consistent both within

[16] See: Schilling T., op. cit., p. 78.

[17] White paper on European Governance, op. cit.

[18] Robinson W., op. cit., p. 6.

[19] See: Schilling T., op. cit., p. 69.

one act and between acts in the same field[20]. There are several more agreements in the field of cooperation among institutions so as Inter-institutional Agreement on An Accelerated Working Method for Official Codification of Legislative Texts enacted in 1994, Inter-institutional Agreement on a Structured Use of the Recasting Technique for legal acts from 2002 and the newest: Inter-institutional Agreement on Better Lawmaking enacted in 2003[21]. All of them aim at improving the coordination of preparatory and legislative work of institutions in the context of the codecision procedure and to publish it in appropriate fashion. Besides, drafting legal instruments, the institutions undertook to enable their legal revisers to make drafting suggestions earlier in the process. The Commission's legal revisers have the opportunity to revise all draft legislation as soon as the originating department submits it to the other Commission departments for approval, and they handle some 2000 drafts a year. The institutions also committed themselves to providing drafting training to their staff. Since 2001 the Commission's legal revisers have been offering basic legislative drafting courses, which have been attended by some 400 staff[22].

European Commission launched the cooperation with OECD, which monitors the efficiency and effectiveness of regulatory policies in the OECD countries and has currently three projects related to Better Regulation (Measuring Administrative Burdens: The OECD Red Tape Scoreboard; Regulatory Quality Indicators and Ex-post Evaluation of Regulatory Tools and Institutions). There is also a joint EU-OECD project, which aims at promotion and improving better regulation practices in Central and Eastern Europe countries and is called SIGMA project (Support for Improvement in Governance and Management).

To provide a more complete picture of the activities taken by the institutions regarding better lawmaking it should be emphasized that they involve also many communications, white papers and working documents of the European Commission, which as an institution at the starting point of the legislative procedure is particularly responsible for implementation of Better Lawmaking standards. Documents of Commission refer to consultation procedure[23], use of expertise[24], reducing administrative costs, eg. costs of translations[25], issues of transposition and application of EU law[26], general and sectoral simplification of acts, codification and recasting and also to accessibility and presentation of EU law. Also the European Parliament has been actively looking

[20] Robinson W., op. cit., p. 7.

[21] All documents are available: http://ec.europa.eu/governance/better_regulation/key_docs_en.htm [viewed 3 July 2012].

[22] W. Robinson, op. cit., p. 8.

[23] See: Communication from the Commission – Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission. COM/2002/0704.

[24] See: Communication from the Commission on the collection and use of expertise by the Commission: principles and guidelines – "Improving the knowledge base for better policies". COM/2002/0713.

[25] See: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Action Programme for Reducing Administrative Burdens in the European Union. COM/2007/0023.

[26] See: 25th annual report from the Commission on monitoring the application of community law (2007) {SEC(2008) 2854} {SEC(2008) 2855}. COM/2008/0777.

at how to improve policymaking and has adopted several reports in 2006 looking at various aspects of Better Lawmaking. The Council of Ministers is equally interested in the issue, with successive presidencies announcing their intention to work on improving European law-making (for example United Kingdom in 2005)[27].

In 2010 European Commission in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions[28] presented a new idea of smart regulation which should be the continuation of earlier Better Regulation policy. Smart regulation regards the whole policy cycle – from the design of a piece of legislation, to implementation, enforcement, evaluation and revision and it is a shared responsibility of the European institutions and of Member States. It involves simplifying EU legislation and reducing administrative burdens, evaluating benefits and costs of existing legislation, ensuring that new legislation is the best possible and if not – improving it, making legislation clearer and more available and in the end improving the implementation process. Smart regulation engages all institutions and Member States, as they share responsibility for delivering it and should take active part in the process.

Summarizing the above presented standards and attempts taken by EU institutions and Member States towards implementing better lawmaking rules, it is quite obvious that huge part of these standards was formed in national legal traditions and they are applied more or less with success to EU legislation. These standards and traditions can be helpful on the level of setting common rules, but on the other side the different legal tradition of states also disturb, when it comes to details. As European Union is an organization of states, it is natural that it would profit of their experiences, even if its role is to find a scope for different solutions, rather than finding a uniform solution for common problems[29]. The very advantage of all better lawmaking and smart regulation policies is, that communication needs and expectations were precisely recognized on supranational level and there is a strong awareness of them. In Author's view better and smarter lawmaking trend in European Union is also a part of a process of democratization of it. Since EU has been sometimes criticized because of the low influence of States and citizens on its legislation, there have been many attempts to change it, like for example introduction of direct elections to European Parliament or so called European legislative initiative introduced by Lisbon Treaty. Better and smarter lawmaking is a part of this trend. If law is created in conformity with standards of good quality, it is also foreseeable and citizens enjoy legal certainty. This means they can also with greater awareness apply the law, profit from it direct effect and feel subjects not only of national, but also of European legislation.

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[27] European Commission. Better Regulation – simply explained. Luxembourg, 2006, p. 14.

[28] See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Smart regulation in the European Union. COM/2010/0543 final.

[29] Robinson W., op. cit., p. 8.

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THE PRINCIPLE OF GOOD LEGISLATION

Keywords: principle of good legislation, Satversme, legislation procedure, the Constitutional Court, law adopted in due procedure.

Introduction

In the 20th century principle of good administration has undergone fast development in Latvia and in other European Union member states. The principle of good administration is predominantly addressed to the state and defines good organisation and functioning of public administration. Likewise, the principle of good administration grants the right to private persons to demand fair, transparent, available and convenient treatment by public administration.[1] The Charter of the Fundamental Rights of the European Union envisages the principle of good administration[2] and it has been interpreted in a number of European Union and European Council soft law acts.[3] The Constitutional Court of the Republic of Latvia, in its turn, has derived the principle of good administration from the Satversme [Constitution][4] of the Republic of Latvia (hereinafter – the Satversme), its Article 1 and 89.[5]

The principle of good administration basically applies to the organisation of public administration and the concrete legal relationship between the state and the private person.[6] However, the scope of this principle and the elements included in it urge to

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1 See more: Levits E. Labas pārvaldības princips. In: Dišlera biedrības tiesībpolitikas konference 2006. Konferences materiālu krājums. Rīga: Publisko tiesību institūts, 2006, 65.-76. lpp.; Kovaļevska A. Tiesības uz labu pārvaldību: salīdzinošs skatījums uz Eiropas Savienības valstu praksi Latvijas kontekstā. *Likums un Tiesības,* 2006, 8. sējums, Nr. 8, 244.-247. lpp; Nr. 9, 276.-281. lpp.

2 Eiropas Savienības pamattiesību harta [The Charter of the Fundamental Rights of the Eurupean Union]. Available: http://eur-lex.europa.eu/lv/treaties/dat/32007X1214/htm/C2007303LV.01000101.htm

3 Eiropas Savienības ombuda Labas administratīvās prakses kodekss [The European Code of Good Administrative Behaviour]. Available: http://www.ombudsman.europa.eu/lv/resources/code.faces; Recommendation CM/Rec(2007)7of the Committee of Ministers to member states on good administration. https://wcd.coe.int/ViewDoc.jsp?id=1155877&Site=CM

4 Latvijas Republikas Satversme [The Satversme [Constitution] of the Republiv of Latvia]. *Valdības Vēstnesis,* 1922. gada 30. jūnijs, Nr. 141.

5 Satversmes tiesas 2003. gada 25. marta spriedums lietā Nr. 2002-12-01. *Latvijas Vēstnesis*, 2003. gada 26. marts, Nr. 47. Sprieduma secinājumu daļas 6.punkts [Judgement of the Constitutional Court of 25 March 2003 in case No. 2002-12-01]; Satversmes tiesas 2005. gada 6. aprīļa spriedums lietā Nr. 2004-21-01. *Latvijas Vēstnesis*, 2005. gada 7. aprīlis, Nr. 55. Sprieduma 9.3.1. punkts. Judgement of the Constitutional Court of 6 April 2005 in case No. 2004-21-01.

6 See more: Iļjanova D. Laba pārvaldība kā vispārējs tiesību princips: konkretizācija un piemērošana. In: Laba pārvaldība. Ozoliņa Ž., Reinholde I. (red.) Rīga: Zinātne, 2009, 137.-152. lpp.

assess, whether it would not be possible to apply a principle with similar content also to the organisation and functioning of other branches of state power, especially the legislator, whose actions affect almost every inhabitant of the state.

The author of this article, on the basis of conclusions expressed in the theory of law and the case law of the Constitutional Court, analyses a new general principle of law in Latvia's legal system – the principle of good legislation. The article examines the genesis of this principle and its necessity in a democratic, law-governed state. The largest part of the article is dedicated to outlining and briefly characterising the elements in the principle of good legislation.

Necessity and Essence of the Principle of Good Legislation

Article 6 of the French Declaration of the Rights of Man and a Citizen of 26 August 1789 envisages that law is the expression of general will of the nation.[7] The theoreticians of the French Revolution considered that no procedural or normative rules limited the general will: "Nation exists prior to everything and is the foundation for everything. Its will is always lawful; it is the very law. [..] It would be ridiculous to assert that the nation itself is linked to any formalities or even to the constitution to which it subjects its commissioners."[8]

However, with time the restrictions to legislator's activities by various procedural rules were increasing in various countries, defining the procedure for the creation of a law with increasing accuracy. In a sense this approach reached its climax in the theory developed by professor Hans Kelzen, who saw the basis for the validity of a law in compliance with the procedure for adopting the law. In accordance with this theory a legal provision is valid only if it has been issued in compliance with a certain provision, in the procedure set out in this provision.[9] Thus, a legal provision is considered to be valid because it has been created in compliance with the procedural order, defined by a legal provision with higher legal force.[10] In contemporary theory of law a pre-conditions for the validity of a legal provision is the test of its validity. This test verifies, whether the provision was adopted by a competent institution, complying with the set procedural order.[11] For a legal provision to be valid it should be recognisable as a law adopted in due procedure.[12] The Constitutional Court has indicated that a provision, which has been adopted and promulgated according to

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[7] Déclaration des Droits de l'Homme et du Citoyen de 1789. Available: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789.5076.html

[8] Сийес Э.Ж. Что такое третье сословие. In: Аббат Сийес: от Бурбонов к Бонапарту. Певзнер М.Б. (сост.) Санкт-Петербург: Алетейя, 2003, с. 196-197.

[9] Kelsen H. Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law. Oxford: Clarendon Press, 2002, p. 56.

[10] Ibid., p. 63.

[11] Kalniņš E. Tiesību normu spēkā esamība un intertemporālā piemērošana. *Likums un Tiesības,* 2000, 2. sējums, Nr. 7, 215. lpp.

[12] See more: Pleps J. Satversmes 116. pants. In: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Rīga: *Latvijas Vēstnesis*, 2011, 771.-774. lpp.

the procedure[13] set out in the Satversme and the Saeima Rules of Procedure[14] is considered a law adopted in due procedure.

However, a law adopted in due procedure is not only a provision, which has been adopted and promulgated in accordance with the procedural order envisaged for it. This criterion comprises also certain quality requirements.[15] In Latvia's case the quality requirements for this legal provision can be identified through interpretation of Article 90 of the Satversme.[16] As the Constitutional Court has pointed out: "The right of a person to know about his/her rights determines also the scope of the action of the legislator. The laws and other normative acts shall be publicly accessible, sufficiently clear and understandable. In the same way the person has the right to find out the practice of application of the normative acts, namely, in a democratic law-governed state court judicature shall be freely accessible to every person, interested in it."[17]

In addition to that the Constitutional Court has developed in its judicature several pre-conditions that the legislator has to comply with in the legislation process. The judicature of the Constitutional Court allows identifying stricter quality requirements for the legislator's work and limits of discretion. For example, Karina Korna, Parliamentary Secretary of the Ministry of Finance, has indicated: "Legal acts set certain requirements to the legislator – the Saeima – regarding the implementation of the legislation process. [..] The new legal regulation cannot be adopted in urgent procedure, because society should be duly informed about it, also the advice of experts, non-governmental organisations and social partners should be sought in the process of adopting the legal regulation."[18]

Apparently, the procedural and quality requirements set for the legislator could be joined in one separate principle of law, which, relying upon the analogy with the principle of good administration, could be called the principle of good legislation.

The theory of law understands as general principles of law such regulations, which express the highest values of the legal system, inter alia, the rights and obligations of institutions and persons, as well as the limits to their discretion in a democratic, law-governed state.[19] The general principles of law are unwritten

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[13] Satversmes tiesas 2010. gada 17. maija spriedums lietā Nr. 2009-93-01 [Judgement of the Constitutional Court of 17 May 2010 in case No. 2009-93-01]. *Latvijas Vēstnesis*, 2010. gada 20. maijs, Nr. 79. Sprieduma 12.1. punkts.

[14] Saeimas kārtības rullis [The Saeima Rules of Procedure]. *Latvijas Vēstnesis*, 1994. gada 18. augusts, Nr. 96.

[15] Plašāk skat.: Barak A. Proportionality. Constitutional Rights and their limitations. Cambridge: Cambridge University Press, 2012, p. 107-118.

[16] See more: Pleps J. Person's rights to know their rights in the Latvian Constitutional Law. In: Dostęp do informacji publicznej. Wybrane zagadnienia. Płock: Szkoła Wyższa im. Pawła Włodkowica w Płocku, 2011, p. 169-180.

[17] Satversmes tiesas 2006. gada 20. decembra spriedums lietā Nr. 2006-12-01 [Judgement of the Constitutional Court of 20 December 2006 in case No. 2006-12-01]. *Latvijas Vēstnesis*, 2006. gada 28. decembris, Nr. 206. Sprieduma 16. punkts.

[18] Korna K. Pensionēšanās vecuma paaugstināšana: juridiskie aspekti. *Jurista Vārds,* 2012. gada 17. aprīlis, Nr. 16, 10. lpp.

[19] Iljanova D. Vispārējo tiesību principu nozīme un piemērošana. Rīga: Ratio iuris, 2005, 19.-24. lpp.

legal provisions, which are equally applicable and binding as the written legal provisions.[20]

The principle of good legislation could be recognised as a general principle of law, because it can be derived from natural law and is indissolubly connected with the principle of law-governed state and is increasingly more often enshrined and recognised in the legal system.[21]

The principle of good legislation cannot be considered an original element of Latvian system of constitutional law. Philosopher of law Lon Fuller has defined eight ways for becoming a failing legislator. These eight principles point to the main requirements for good legislation. In accordance to Lon Fuller's views legal provisions should be publicised and must be publicly accessible, legal provisions should be clear and comprehensible, they should not be mutually contradictory and unstable. Likewise, retroactive force of law should be prohibited, as well as such application of the law that contradicts the legal provisions.[22] The Constitutional Tribunal of Poland has directly referred to the requirements of good legislation in its jurisprudence.[23]

Content of the Principle of Good Legislation

The analysis of opinions expressed in the legal doctrine and findings from the Constitutional Court judicature allows concluding that the principle of good legislation is quite complex, consisting of a number of elements. The following constituting elements of the principle of good jurisdiction can be generally recognised:

a) constitutional requirements set for the legislation process;
b) quality requirements set for the law;
c) legal technical requirements;
d) requirements regarding due preparation of the law.

It must be noted, first and foremost, that the foundation for the principle of good legislation is formed by the regulation on the legislation process defined in the Satversme and the Saeima Rules of Procedure, which define the order for adopting and promulgating a law. The Constitutional Court has noted that "the legislation process is a special procedural order, according to which the Saeima or the people achieve that a draft law prepared in advance becomes a law, i.e. a normative act that occupies a certain place in the system of normative acts."[24] Thus, in order for a law to

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[20] Rezevska D. Tiesiskās paļāvības principa satura konkretizācija un attīstība judikatūrā. In: Tiesību un juridiskās prakses ilgtspējīga attīstība. Rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2012, 9.-10. lpp.

[21] Compare: Iļjanova D. Laba pārvaldība kā vispārējs tiesību princips: konkretizācija un piemērošana. In: Laba pārvaldība. Ozoliņa Ž., Reinholde I. (red.) Rīga: Zinātne, 2009, 137.-139. lpp.

[22] Fuller L. The Morality of Law. Revised edition. Yale: Yale University Press, 1969, p. 33-94.

[23] Polijas Konstitucionālā tribunāla 2001. gada 21. marta spriedums lietā Nr. K24/2000 [Judgement of the Constitutional Tribunal of the Republic of Poland of 21 March 2001 in case No. K24/2000]. Available: http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm

[24] Satversmes tiesas 2009. gada 19. maija spriedums lietā Nr. 2008-40-01 [Judgement of the Constitutional Court of 19 May 2009 in case No. 2008-40-01]. *Latvijas Vēstnesis*, 2009. gada 20. maijs, Nr. 78. Sprieduma 9. punkts.

be recognised as being in force, it must be adopted and promulgated in the procedure set for it.[25]

The approach defined by the Constitutional Court in its jurisprudence shows: in case the Constitutional Court identifies that the law has not been adopted in due procedure, it will be recognised as being incompatible with Article 64 of the Satversme.[26] Thus, Article 64 of the Satversme *expressis verbis* defines a part of the principle of good legislation with regard to complying with the requirements set for the legislation procedure.

The Constitutional Court has admitted that "not every violation of the parliamentary procedure is sufficient grounds to consider the adopted legal act legally invalid. In order to recognise an act invalid because of violations of the parliamentary procedure, there should be reasonable doubts that, if the procedure were complied with, the Saeima would have decided differently."[27] It means that a law becomes invalid not because of any procedural violation, but such that can be assessed as substantial. The Constitutional Court has linked this substantiality with the impact of the procedural violation upon the decision adopted by the Saeima. However, it seems that also a procedural violation infringing upon the constitutionally mandatory principle of consultation or other significant principles of a law-governed state would also be substantial.[28]

It is generally recognised that the main objective of constitutional legislative procedure is the legal protection of the rights of the parliamentary minority. The majority will always be able to protect itself with the majority vote and the voting procedure, but the minority needs legal protection in order for the majority to respect it.[29] Therefore the Constitution must guarantee the minimum of minority rights, i.e., set out procedures for decision taking by the parliamentary majority.[30] A violation of these requirements, even if the decision adopted by the parliament would not have changed, should be recognised as substantial.

Quality requirements set for the law, undoubtedly, belong to the principle of good legislation. The legal doctrine recognises that the legal provisions have to be published or be otherwise accessible, so that a person would be able to find out his rights and obligations. Likewise, legal provisions have to be clear, comprehensible and accurately defined and harmonised.[31]

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[25] Satversmes tiesas 2010. gada 17. maija spriedums lietā Nr. 2009-93-01 [Judgement of the Constitutional Court of 17 May 2010 in case No. 2009-93-01]. *Latvijas Vēstnesis*, 2010. gada 20. maijs, Nr. 79. Sprieduma 12.1. punkts.

[26] Pleps J. Satversmes 116. pants. In: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Rīga: *Latvijas Vēstnesis*, 2011, 772. lpp.

[27] Satversmes tiesas 1998. gada 13. jūlija spriedums lietā Nr. 03-04(98) [Judgement of the Constitutional Court of 13 July 1998 in case No. 03-04 (98)]. *Latvijas Vēstnesis*, 1998. gada 14. jūlijs, Nr. 208/210. Sprieduma secinājumu daļas 3. punkts.

[28] Compare: Satversmes tiesas 2007. gada 26. aprīļa spriedums lietā Nr. 2006-38-03 [Judgement of the Constitutional Court of 26 April 2007 in case No. 2006-38-03]. *Latvijas Vēstnesis*, 2007. gada 28. aprīlis, Nr. 70. Sprieduma 14. punkts.

[29] Amery L.S. Thoughts on the Constitution. London: Oxford University Press, 1964, p. 31-32.

[30] Forlenders H. Iztulkotājs kā suverēns ar neierobežotu varu. *Likums un Tiesības,* 3. sējums, 2001, Nr. 10, 300. lpp.

[31] Plakane I. Pamattiesību ierobežošana Satversmē. *Jurista Vārds,* 2003. gada 15. aprīlis, Nr. 15, 10. lpp.

The European Court of Human Rights has elaborated quality requirements for law in its judicature. For example, it has stated that "a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[32] The Constitutional Court has also concluded that the legal provision must be sufficiently clear, allowing a person to predict the consequences of its application.[33]

To a large extent these quality criteria relate to the Lon Fuller's requirements for good legislation, mentioned above.[34] In the case of Latvia they are defined *expressis verbis* in Article 90 of the Satversme.

The principle of good legislation comprises also certain technical legal requirements. Legal technique is a set of rules and methods for drafting legal acts. These requirements can be subdivided into requirements regarding the clarity of the text and the structure (architecture) of the legal act.[35] A number of textbooks,[36] dedicated to issues of legal technique have been published in Latvia; a special Cabinet Regulation has been adopted.[37]

Legal technical requirements are predominantly guidelines with recommendations to the elaborators of draft law and on admissible deviations from them. Para 4 of the aforementioned Cabinet Regulation point to that: "In exceptional cases, if the application of the provisions of this Regulation burdens the comprehensibility and clarity of the draft legal act, it is possible not to apply the respective provision."[38] At the same time the elaborators of draft laws must abide by the uniform style of Latvian laws, based upon numerous generally recognised technical requirements on drafting and presenting laws, as well as the traditions of Latvian legal system. "The style of laws should be one among the stable and unchangeable factors, allowing to understand the law. [..] A uniform style makes it easier to detect various errors and also is helpful to the users of the law."[39]

The fact that a codified system of law exists in Latvia should be taken into consideration. Second part of Article 111 of the Saeima Rules of Procedure sets

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[32] Judgement of the European Court of Human Rights "Rekvényi v. Hungary", 20 May 1999. Available: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Rekv%E9nyi%20%7C%20v.%20%7C%20Hungary&sessionid=99418605&skin=hudoc-en Para. 34.

[33] Satversmes tiesas 2005. gada 7. marta spriedums lietā Nr. 2004-15-0106 [Judgement of the Constitutional Court of 7 March 2005 in case No. 2004-15-0106]. *Latvijas Vēstnesis*, 2005. gada 9. marts, Nr. 40. Sprieduma 22. punkts.

[34] Fuller L. The Morality of Law. Revised edition. Yale: Yale University Press, 1969, p. 33-94.

[35] Kusiņš G. Normatīvo aktu jaunrade. In: Mūsdienu tiesību teorijas atziņas. Rakstu krājums. Meļķisis E. (red.) Rīga: Tiesu Namu Aģentūra, 1999, 122. lpp.

[36] Metodiskie norādījumi likumu izstrādāšanā un noformēšanā. Otrais izdevums. Rīga: Saeimas Juridiskais birojs, 1997; Krūmiņa V., Skujiņa V. Normatīvo aktu izstrādes rokasgrāmata. Rīga: Valsts kanceleja, 2002.

[37] Ministru kabineta 2010. gada 2. marta noteikumi Nr. 108 "Normatīvo aktu projektu sagatavošanas noteikumi" [The Cabinet of Ministers Regulation No. 108 of 2 March 2010 "Regulation on Drafting Legal Acts"]. *Latvijas Vēstnesis*, 2010. gada 5. marts, Nr. 37.

[38] Ibid.

[39] Metodiskie norādījumi likumu izstrādāšanā un noformēšanā. Otrais izdevums. Rīga: Saeimas Juridiskais birojs, 1997, 7.-8. lpp.

out: "If, upon passing a draft law, contradictions arise between this law and the laws already in force, the Saeima shall rule that the new law or its separate parts take effect simultaneously with the amendments to the laws already in force."

Gunārs Kusiņš, the head of the Legal Bureau of the Saeima, pointed out during a Constitutional Court sitting that: "historically Article 111 of the Saeima Rules of Procedure was placed into Latvia's system of law, when the Saeima Rules of Procedure were adopted in 1994. This was the moment, when Latvia's affiliation to one or another system of law was decided. With this Section of the Rules of Procedure Latvia placed itself in the circle of continental Romano-Germanic system of law, with the aim to integrate into the system of codified law as a state."[40]

An essential element of the principle of good legislation is linked with the due preparation of the draft law. First of all it includes the assessment of the necessity for the draft law, the possible version of the draft law text and impact analysis, as well as discussions of the initial text of the draft law.[41]

The Constitutional Court in its jurisprudence has paid attention to discussions about the draft law with stakeholders. First of all the Constitutional Court has recognised that in a democratic, law-governed state the legislator has to involve the possible addressees of the provision in the discussion of it.

When analysing the minority school reform, the Constitutional Court noted: "In a democratic state the most favourable conditions should be created for effective participation of minority representatives and their institutions in the drafting and implementation of such policy and programs that affect minority education. Participation is the basic concept, which ensures the legitimacy and effectiveness of democracy. The applicant notes with good reason that in the process of drafting and adopting the contested provision minority representatives should have been heard and their proposals – evaluated."[42] However, the Constitutional Court has also emphasized that "to hear and evaluate – it does not mean that all proposals must be accepted. The meaning of participation is not that the opinion of any group of persons should be binding to the legislator, but that an unbiased decision is adopted and a balance between various interests achieved. One of the aims of participation is to ensure that the addressees of the decision support the chosen solution and, consequently, feel motivated to implement it. However, it cannot be asserted that participation has not been effective only because the addressees of the adopted decision do not accept it. Their negative opinions as such does not make the adopted decision invalid or impossible to implement."[43]

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[40] Satversmes tiesas 2011. gada 6. septembra sēdes lietā Nr. 2010-71-01 stenogramma [Transcript of the sitting of the Constitutional Court on 6 September 2011 in case No. 2010-71-01]. Available: http://www.satv.tiesa.gov.lv/upload/06.09.2011%20Tiesas%20sēdes%20stenogramma.htm

[41] Kusiņš G. Normatīvo aktu jaunrade. In: Mūsdienu tiesību teorijas atziņas. Rakstu krājums. Meļķisis E. (red.) Rīga: Tiesu Namu Aģentūra, 1999, 119.-124. lpp.

[42] Satversmes tiesas 2005. gada 13. maija spriedums lietā Nr. 2004-18-0106 [Judgement of the Constitutional Court of 13 May 2005 in case No. 2004-18-0106]. *Latvijas Vēstnesis*, 2005. gada 17. maijs, Nr. 77. Sprieduma secinājumu daļas 7. punkts.

[43] Satversmes tiesas 2005. gada 13. maija spriedums lietā Nr. 2004-18-0106 [Judgement of the Constitutional Court of 13 May 2005 in case No. 2004-18-0106]. *Latvijas Vēstnesis*, 2005. gada 17. maijs, Nr. 77. Sprieduma secinājumu daļas 7. punkts.

On several occasions, however, the Constitutional Court has set a mandatory obligation of consultations, and in case it is violated, the provision must be recognised as being invalid.

If the law adopted by the Saeima affects a concrete private person, it must hear this person. The Constitutional Court has concluded that "the duty of the legislator, before adopting a legal act, to hear the person whose property would be expropriated follows from the requirement of a specific law included in the fourth sentence of Article 105 of the Satversme. [..]The Constitutional Court admits that justification does not have to be a part of the law; however the Constitutional Court should be able to obtain, from the materials of elaboration of the draft law, evidence for the fact that the objections presented by a private person are assessed and there exist reasonable grounds for the non-observance of these."[44]

Likewise, when taking decisions on issues affecting the judicial power, the Saeima has to hear and assess the opinion of the judicial power or an independent institution representing it. In such cases "the legislator would have the duty to: 1) substantiate the need for the new system in such a scope that in case, if the court had to assess its compliance with the Satversme, this substantiation would provide all information necessary for assessment; 2) to listen to the opinion of an independent institution representing the judiciary (in the absence of such, the opinion of the judiciary itself), respecting it in accordance with the principle of the division of power; 3) if this opinion is not taken into consideration or is only partially taken into consideration, provide a substantiation for one's actions in such a scope that in case if the court had to assess its compliance with the Satversme, this substantiation would provide all information necessary for examination of proportionality."[45]

The legislator must ensure a similar duty of hearing also in cases when draft laws might affect the interests of other constitutional institutions [46] or local governments[47].

Limits to judicial control

The constitutional law traditionally allows the parliament to reserve the right to organise its own work (Article 21 of the Satversme). In exercising this right the principle of parliamentary sovereignty is at work, i.e., the parliament elaborates its

[44] Satversmes tiesas 2009. gada 21. oktobra spriedums lietā Nr. 2009-01-01 [Judgement of the Constitutional Court of 21 October 2009 in case No. 2009-01-01]. *Latvijas Vēstnesis*, 2009. gada 27. oktobris, Nr. 170. Sprieduma 11.3. punkts.

[45] Satversmes tiesas 2010. gada 18. janvāra spriedums lietā Nr. 2009-11-01 [Judgement of the Constitutional Court of 18 January 2010 in case No. 2009-11-01]. *Latvijas Vēstnesis*, 2010. gada 20. janvāris, Nr. 10. Sprieduma 11.5. punkts.

[46] Satversmes tiesas 2010. gada 25. novembra spriedums lietā Nr. 2010-06-01 [Judgement of the Constitutional Court of 25 November 2010 in case No. 2010-06-01]. *Latvijas Vēstnesis*, 2010. gada 30. novembris, Nr. 189. Sprieduma 17.3. punkts.

[47] Satversmes tiesas 2009. gada 30. oktobra spriedums lietā Nr. 2009-04-06 [Judgement of the Constitutional Court of 30 October 2009 in case No. 2009-04-06]. *Latvijas Vēstnesis*, 2009. gada 3. novembris, Nr. 174. Sprieduma 11. punkts.

rules of procedure autonomously and no other body of state power may set the agenda for the parliament.[48]

The Constitutional Court has also underlined that "the Satversme does not grant to the Constitutional Court the right to intervene in the legislation process. In accordance with Section 85 of Constitutional Court Law the Constitutional Court may only verify the constitutionality of the laws adopted by the Saeima, but not decree what kind of laws should be heard by the Saeima and when these should be adopted."[49]

And yet, in practice the Constitutional Court has intervened more in the process of legislation, not only verifying the compliance with the constitutional requirements regarding legislation, but setting conditions on the necessary consultations and substantiation of the adopted decisions. Likewise, the Constitutional Court has publicly expressed its opinion on the legislator's practice on several occasions.

When the government was preparing a draft law on decreasing state pensions in the summer of 2009, the Constitutional Court announced in mass media that such a solution would be inadmissible, reminding of a previous judgement of the Constitutional Court, which recognised a similar solution as being incompatible with the Satversme.[50] The Court also did not refrain from criticising the quality of the prepared draft laws, haste in their elaboration ands also criticised the professional skills of those who elaborated the relevant draft laws.[51]

The trend to introduce reforms via packages of draft budget laws has earned special criticism of the Constitutional Court. Gunārs Kūtris, the President of the Constitutional Court, has pointed out that quite often the package of budget draft laws comprises issues that do not pertain to the state budget, which has a significant impact upon justice, deciding on issues important for society in the procedure of discussing the budget, which requires swift decisions by the legislator.[52]

However, it must be noted that in general the Constitutional Court has accepted the legislator's practice of introducing reforms via urgent procedure with the help of package of draft budget laws.[53] Likewise, the Constitutional Court has not objected against examining draft laws in urgent procedure. For example, the Constitutional

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[48] Satversmes tiesas 1998. gada 13. jūlija spriedums lietā Nr. 03-04(98) [Judgement of the Constitutional Court of 13 July 1998 in case No. 03-04(98)]. *Latvijas Vēstnesis*, 1998. gada 14. jūlijs, Nr. 208/210. Secinājumu daļas 2. punkts.

[49] Satversmes tiesas 2007. gada 10. maija lēmums par pieteikuma iesniedzēja lūgumu lietā Nr. 2007-10-0102 [Decision of the Constitutional Court of 10 May 2007 on applicant's request in case No. 2007-10-0102]. Lēmuma 10. punkts. Available: http://www.satv.tiesa.gov.lv/upload/2007_10_0102_lasijums.htm

[50] Šupstika K., Tropiņa K. Kūtris: pensija ir personas īpašums, uz kuru tiesības jāsaglabā. Available: www.diena.lv/sabiedriba/politika/kutris-pensija-ir-personas-ipasums-uz-kuru-tiesibas-jasaglaba-673497.

[51] Kūtris G. Jurista īpašais pienākums pret valsti. Jurista ētika un rīcība valstisku satricinājumu laikā. *Jurista Vārds,* 2010. gada 19. janvāris, Nr. 3, 4.-6. lpp.

[52] Kūtris G. Budžeta likumu paketē pieņemot likumus, kuri neattiecas uz valsts budžetu, tiek sajauktas likumu pieņemšanas procedūras. Nacionālā ziņu aģentūra LETA, 2011. gada 17. janvāris, 15:07.

[53] Satversmes tiesas 2011. gada 19. decembra spriedums lietā Nr. 2011-03-01 [Judgement of the Constitutional Court of 19 December 2011 in case No. 2011-03-01]. *Latvijas Vēstnesis*, 2011. gada 21. decembris, Nr. 200. Sprieduma 18. punkts.

Court stated that the term of 15 minutes in-between the readings, for submitting proposals, was compatible with the Satversme.[54]

The legal doctrine, assessing the impact that the establishment of constitutional courts had had upon the legislation process, concludes with good reason: "The permission to verify the constitutionality of a law simultaneously means intervention into the matters of the one passing the law."[55] Currently attempts to define the limits to the judicial control can be identified in the Constitutional Court jurisprudence, in order to, on the one hand, respect the principle of the separation of state power and the principle of parliamentary sovereignty, and, on the other hand, ensure compliance with the constitutional requirements for adopting laws.

The limits of judicial control over the legislative process should be defined as part of the principle of good legislation. There is not doubt that the constitutional court may verify the compliance with legally binding procedural and quality requirements in the legislation process. It would be impossible to ensure evaluation whether a law has been adopted in due procedure without effective control in this field. In issues related to legal technique and proper consultations of the legislator with the addressees of the legal provisions, as well as the procedure of debating the draft law probably the principle of parliamentary sovereignty should surely be respected.

Conclusion

1. A new general principle of law has become established in Latvian legal system – the principle of good legislation, which defines the procedural and quality requirements for the drafting and adoption of draft laws.
2. The principle of good legislation comprises constitutional requirements for the legislative procedure, quality requirements for the law, requirements of legal technique and requirements of due preparation of the law. The elements of the principle of good legislation are *expressis verbis* enshrined in the text of the Satversme, its Articles 64 and 90.
3. The foundation of the principle of good legislation is the regulation included in the Satversme and the Saeima Rules of Procedure on the legislation procedure, which sets the order for adopting and promulgating laws. For a law to be recognised as incompatible with the Satversme, substantial violations of the procedure should be present during its adoption.
4. The most important requirements regarding the quality of law stipulate that legal provisions must be published or be otherwise accessible, they must be clear, comprehensible, accurately defined and harmonised.
5. The limits to judicial control over the legislative process should be defined as part of the principle of good legislation. The constitutional court may verify the compliance with procedural and quality requirements in the legislation process.

[54] Satversmes tiesas 2009. gada 26. novembra spriedums lietā Nr. 2009-08-01 [Judgement of the Constitutional Court of 26 November 2009 in case No. 2009-08-01]]. *Latvijas Vēstnesis*, 2009. gada 27. novembris, Nr. 187. Sprieduma 17.1. punkts.

[55] Žilys J. Konstitucinis teismas – teisinės ir istorinės prielaidos. Vilnius: Teisinės informacijos centras, 2001, p. 132.

In issues related to legal technique and proper consultations of the legislator with the addressees of the legal provisions, as well as the procedure of debating the draft law the principle of parliamentary sovereignty should surely be respected.

6. In some cases the Constitutional Court has envisaged mandatory duty of hearing of a party and substantiating the decision, if the legislator's decisions affect the interests of concrete private persons, judicial power, constitutional institutions or local governments.

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A FUNDAMENTAL RIGHT TO RATIONAL LAW MAKING? AN EXPLORATION OF THE EUROPEAN COURT OF HUMAN RIGHTS' CASE LAW

Keywords: Fundamental Rights, Procedural Rationality, Legislative Framework, Accessibility, Evidence-based Law-making, Self-Regulation.

Regulatory management schemes have emerged Europe wide under the influence of OECD reports on regulatory reform.[1] Regulatory reform programs, advanced in countries such as the UK and Ireland but also in the EU, focus on instruments such as impact assessment, consultation and regulatory alternatives. These programs, fitted in a competitive market strategy, serve an economic goal and are not intended to become the object of judicialisation. Hence, the core of research on better regulation is positioned within the field of public administration and in so far as it is of a legal nature, tends to focus on substantive aspects of financial or company law. Nevertheless, apart from the elaboration of better regulation policies, judges – in particular constitutional courts – have developed legal criteria in order to judge the quality of laws. Process review is well known in most legal systems as a principle of administrative law. In those legal systems where Parliamentary Acts are submitted to constitutional review, a similar development to process review takes place, through vague legal principles such as the equality principle, the principle of legal certainty and the proportionality principle. Most noticed is the German Constitutional Court,[2] but other constitutional courts have followed in its wake.

These tests ultimately come down to a marginal control of the 'reasonableness' or rationality of an act. Often the reasonable quality of the act is assessed in terms of procedural requirements which converge with the tools and instruments developed in better regulation programs. From this perspective, better regulation is not merely a tool in a competitive market strategy, but also an instrument to strengthen the legitimacy of decisions. Evidence thereof is in the European Commission's White Paper

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1 See especially: OECD, *Recommendation of the Council of the OECD on improving the quality of government regulation*, 9 March 1995, OCDE/GD (95)95; OECD, *The OECD Report on Regulatory Reform. Synthesis* (OECD, Paris 1997); OECD, *OECD Guiding principles for regulatory quality and performance* (OECD, Paris 2005).

2 See, e.g.: Gusy Ch. Das Grundgesetz als normative Gesetzgebungslehre? Zeitschrift für Rechtspolitik, 1985, p. 292; Meßerschmidt, K. *Gesetzgebungsermessen*. Berlin: Berlin Verlag, 2000, 817 p.; Morand, CH.-A. Les exigences de la méthode législative et du droit constitutionnel portent sur la formation de la législation. Droit et Société, 1988, No. 10, p. 394.

on European Governance, which lies at the origin of the EU Better Regulation (now: Smart Regulation) program, where the Commission seeks legitimacy by turning to ideas of input and output legitimacy, implying both 'involvement and participation' and 'efficiency and effectiveness'.[3] The link between procedural requirements, rationality and legitimacy has, from a political theory perspective, been taken up by deliberative theorists, where they put central participation of every person affected in rational deliberation and public debate.[4] From a legal perspective, the question then rises whether rational law making in this sense can be formulated as a legal duty. Or, taking the matter even further: considering the link with democratic values, is there a fundamental right to rational law making?

In order to answer this question, this paper analyzes the case law of the European Court of Human Rights in order to shape the quality requirements imposed by the Court upon primary and delegated law makers. These requirements concern a) the duty to shape a regulatory framework, b) the accessibility and foreseeability of law, c) the legislative procedure and d) self-regulation and co-regulation. It will stress the importance of procedural rationality, in two ways. Firstly, the law has to provide for procedures in order to produce fair decisions, create legal certainty and protect individuals against arbitrary government interference. Secondly, the law in itself has to be the result of a rational lawmaking procedure, enabling a sound balance of rights and interests.

The duty to shape a regulatory framework

The ECtHR regularly requires a legislative framework to ensure the effective protection and exercise of conventional rights. Regulation is often required in order to provide certainty and avoid arbitrary government interference. According to established case law, Art. 2 ECHR requires a positive obligation for the national authorities to provide for a regulatory and administrative framework in order to effectively deter from threats and violations of the right to life. This applies in particular to risk regulation, implying, for example, that the government regulates dangerous activities, including i) the licensing and supervision of the activity, ii) the imposition of an obligation for all those concerned to take practical measures to protect citizens whose lives might be endangered by the inherent risks and iii) a monitoring process, enabling the identification of shortcomings in processes and persons responsible for errors.[5] Positive obligations to provide for a regulatory framework may also flow from other clauses. For example, according to the Court Art. 8 ECHR includes the right to give birth at home and therefore the State should provide adequate legal protection to this

[3] Commission (EC) "European Governance" (White Paper) COM(2001) 428 final. See Popelier, P. Governance and Better Regulation: Dealing with the Legitimacy Paradox. European Public Law, 2011, No. 3, p. 558-559.

[4] Cohen, J. Deliberation and democratic legitimacy. In: Hamlin, A. and Petit, Ph. (eds.), The good polity. Oxford: B. Blackwell, 1989, p. 21; Dryzek, J. Deliberative democracy and beyond. New York: Oxford University Press, 2000, p. 1 and 85.

[5] Judgment of European Court of Human Rights, Case: 15339/02 Budayeva v Russia.

right in a regulatory scheme, allowing health professionals to assist home births.[6] The ECtHR may even require the imposition of punitive measures on the basis of Article 2[7], 4[8] or 8[9] of the Convention, in order to prevent persons from willfully putting at risk the lives or physical or moral integrity of others. Here again, this applies in particular to risk regulation, because often public authorities are the only entities with sufficient knowledge to "establish the complex phenomena that might have caused an incident".[10]

Accessibility and foreseeability of the law

The ECtHR reads the principle of legal certainty into the Convention clauses, in particular where they require that government interference is foreseen by law. The 'law' must be formulated with sufficient precision to enable the person concerned – if need be with appropriate advice – to foresee, to a degree which is reasonable in the circumstances, the consequences a given action may entail.[11] Moreover, the Court refers to the principle of legal certainty to test the proportionality of a law which harms a person's legitimate expectations.[12] As for the accessibility of the law, the Court balances the individual's interests against capacities of the legislator and the need to keep pace with evolving circumstances or new European or international obligations. Criteria imply, amongst others, the professional capacity of the individual and the efforts taken to learn the legal consequences of an intended action. Organisations with legal advisors[13] or advocates and judges with legal expertise[14] are sooner expected to understand the legal consequences of a law. Extra efforts to ask for legal advice are expected from professionals dealing with laws in the domain of their professional activities.[15]

The ECtHR does not only expect an individual act to be clear and accessible. Instead, the entire set of laws should be coherent. In *de Geouffre de la Pradelle* the ECtHR ruled that the French law concerning the protection of landscapes denied access to justice, in violation of Article 6 of the Convention, because the rules were so complex that they brought uncertainty as to classification and terms to appeal.[16] Also, the

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6 Case: 67545/09 Ternovszky v Hungary. See also, regarding regulatory abortion schemes, Case: 5410/03 Tysiac v Poland.

7 E.g., Case: 23872/04 Fadime and Turan Karabulut v Turkey.

8 E.g., Case: 25965/04 Rantsev v Cyprus and Russia.

9 E.g., Case: 2872/02 K.U. v Finland.

10 Case: 15339/02 Budayeva v Russia.

11 Established Case Law. See for the first time Case: 6538/74 Sunday Times v the UK.

12 E.g., Case: 60669/00 Kjartan Asmundsson v Iceland. See also Case : 23960/02 Zeman v Austria.

13 E.g., Case: 41340/98 Refah Partisi v Turkey.

14 E.g., Case: 42758/98 K.A. and A.D. v Belgium.

15 E.g., Case: 64915/01 Chauvy v France; Case: 21279/02 Lindon, Otchakovsky-Laurens and July v France; Case: 40403/02 Pessino v France; Case: 64772/01 Leempoel & s.a. Ed. Cine Revue v Belgium.

16 Case: 12964/87 de Geouffre de la Pradelle v France.

Court regularly criticizes the absence of clear indications on how contradictory acts relate to one another. [17]

In the end, however, the ECtHR, considerate of the limited capacities of the legislator, is not very strict. In emphasizing the function of courts to elucidate the laws,[18] the Court shifts the burden from the legislator to the courts, responsible for the creation of accessible, coherent and foreseeable case law.[19] The ECtHR is more strict in the case of penal law[20] and in particular in the case of deprivation of liberty,[21] but even then there is room for judicial interpretation and law creation.[22]

The foreseeability of the law is at stake in particular if the lawmaker, in consigning the application of the law to the executive, gives broad discretionary powers to the latter. In order to protect persons against arbitrary interference, the law must, according to established case law, indicate the scope of any such discretion and the manner of its exercise with sufficient clarity.[23] This implies for the lawmaker to act as a director, laying down administrative procedures and enabling judicial control. These procedures imply aspects of the right to good administration, such as the right to be heard, reasonable terms, motivation of decisions. [24] Procedural requirements are paramount in particular in the case of secret measures of surveillance, where the lawmaker must provide for detailed rules, governing the scope and application of measures, minimum safeguards regarding the storage of data, procedures for preserving the integrity and confidentiality of these data as well as procedures for their destruction.[25] Also, the lawmaker must provide for either judicial control or control by an independent body over the executive's interference.[26]

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[17] E.g., Case: 35083/97 Goussev en Marenk v Finland.

[18] Established case law, E.g., Case: 44158/98 Gorzelik v Poland; Grand Chamber, Case: 4474/98 Leyla Sahin v Turkey; Case: 19348/04 Sorvisto v Finland.

[19] E.g., Case: 30658/05 Beian v Romania; Case: 53984/00 Radio France v France; Case: 4474/98 Leyla Sahin v Turkey; Case: 57785/00 Zlinsat, Spol S RO v Bulgaria; Case: 40403/02 Pessino v France; Case: 34478/97 Fener Rum Erkek Lisesi Vakfi v Turkey.

[20] E.g., Case: 74613/01 Jorgic v Germany; Case: 12157/05, Liivik v Estonia.

[21] E.g., Case: 29787/03 Riad and Idiab v Belgium; Case: 75522/01 Mikhaniv v Ukraine.

[22] E.g., Case: 34044/96 Streletz, Kessler and Krenz v. Germany [GC]; Case: 74613/01 Jorgic v Germany; Case: 36376/03 Kononov v Latvia [GC]; Case: 9174/02 Korbely v Hungary [GC]; Case: 12157/05, Liivik v Estonia.

[23] E.g., Case: 10337/04, Lupsa v Romania; Case: 78146/01 Vlasov v Russia.

[24] E.g., Case: 44363/02 Ramazanova v Azerbaijan; Case: 14134/02 Glas Nadezhda EOOD and Elenkov v Bulgaria.

[25] Established case law. See, amongst others, Case: 25198/02 Iordachi v Moldavia; Case: 30562/04 S. and Marper v the UK.

[26] E.g., Case: 71525/01 Dumitru Popescu v. Romania (No. 2); Case: 14134/02 Glas Nadezhda EOOD and Elenkov v Bulgaria; Case: 25198/02 Iordachi v Moldavia.

The legislative procedure

Not only has the legislator to provide for administrative procedures for the executive, but also his laws should be the result of a rational law-making procedure.[27] The leading cases in this regard are the well-known *Hatton* judgments.[28] In these cases regarding aircraft noise pollution, the ECtHR noted that "*a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project*."[29] The Grand Chamber, while reaching a different conclusion, confirmed that, on the procedural aspect of the case, a governmental decision making process must "*necessarily involve appropriate investigations and studies*".[30] Further case law reveals how the ECtHR appreciates the use of consultation procedures, evidence based law making and *ex post* evaluations.

The Court is interested in consultation procedures in particular as a tool to open up the debate, allowing for a fruitful discussion which takes the interests of all concerned parties into consideration, and hence guaranteeing a careful balancing of interests.[31] In turn, the Court expects that interest groups and interested individuals take advantage of consultation opportunities. For example, in *Zammit Maempel*, concerning fireworks regulations, the Court noted that the applicants had been given access to the decision-making process as they were given "*an opportunity to make their views heard*", even if the outcome of the proceedings was not favorable to them.[32] In *Hatton*, the Grand Chamber, made clear that a Consultation Paper had announced the measures and that the applicants, members of an interest association, had been expected "to make any representations they felt appropriate".[33]

Next, the Court expects that a measure is based upon a rational and informed balancing of rights and interests. Therefore, it requires evidence of arguments, e.g. through expert studies or statistics, to support the legislator's general assumptions about the necessity or the effects of government interference. For example, in *Lecarpentier*, the Court noted that the assertion according to which non-intervention would have an impact on the financial sector and endanger economic activities, was not supported by reliable evaluations and figures. [34] Likewise, in *Konstantin Markin*, the government's claim according to which the law could not confer the right to parental leave to military servicemen (in contrast to military servicewomen and to civil servicemen) for reasons of national security, was dismissed for lack of concrete

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[27] For a more comprehensive overview, see Popelier P. The Court as regulatory watchdog: the procedural approach in the case law of the European Court of Human Rights. In: The Role of Constitutional Courts in a Context of Multilevel Governance. Cambridge: Intersentia. Forthcoming.

[28] Case: 36022/97 Hatton v the UK and Case: 36022/97 Hatton v the UK [GC].

[29] Case: 36022/97 Hatton v the UK, r.o. 98.

[30] Case: 36022/97 Hatton v the UK [GC], r.o. 128.

[31] See, e.g., Case: 6339/05 Evans v the UK and Case: 6339/05 Evans v the UK [GC]; Case: 25579/05 A., B. and C. v Ireland [GC].

[32] Case: 24202/10 Zammit Maempel v Malta.

[33] Case: 36022/97 Hatton v the UK [GC].

[34] Case: 67847/01 Lecarpentier v France.

evidence, consisting of expert studies or statistical research, to support this assertion.[35] In particular when the government's assumption departs from unanimous expert findings, the government must produce sound scientific evidence. Hence, in *Kiyutin*, the ECtHR stated that the assertion that national travel restrictions on people living with HIV were necessary for reasons of public health, contradicted the unanimous view of international experts and should therefore be based upon expert opinions or scientific analysis capable of gainsaying the existing expert consensus.[36] Here again, the Court does not discuss the quality of studies and methodology,[37] except in the case of a manifest error.[38]

Finally, when no comprehensive or measurable data are available, monitoring, leading to evaluation and adjustment, is an important factor in the proportionality assessment.[39] While monitoring can lead the Court to accept the proportionality of a measure, conversely, the absence of *ex post* assessments and consequently the absence of adjustments, may result in the finding of a violation of the Convention. In particular in areas subjected to a dynamic development in science and law, the Court expects the national authorities to regularly assess existing rules in the light of new developments.[40]

Self-regulation and co-regulation

Better regulation programs search for alternative regulatory strategies, including self-regulation and co-regulation schemes. These schemes build upon a long tradition in the domain of social law, conferring the social partners with the power to conclude collective labor agreements. The ECtHR has drawn the attention of national governments to their responsibility in this regard. In *Evaldsson* the Court emphasized that private organisations empowered to regulate important collective labour agreements, should act in a responsible and transparent manner. Government should see to it that the interests of all people concerned have been taken into account, including the interests of employees who are not member of a labour union.[41] This was repeated in *Aizpurua Ortiz*,[42] although Judge Myer, in his dissenting opinion, rightly points out that this judgment does not sufficiently take into consideration the interests of persons not represented in the course of the conclusion of the collective agreements.

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35 Case: 30078/06 Konstantin Markin v Russia.

36 Case: 2700/10 Kiyutin v. Russia.

37 See, e.g., Case: 30562/04 S. and Marper v the UK; Case: 31965/07 Hardy & Maile v the UK.

38 Case: 33985/96 Smith and Grady v the UK.

39 Case: 36022/97 Hatton v the UK and Case: 36022/97 Hatton v the UK [GC]; Case: 37703/97 Mastromatteo v Italy.

40 Case: 28957/95 Christine Goodwin v the UK; Case: 57813/00 S.H. v [GC].

41 Case: 75252/01 Evaldsson v Sweden.

42 Case: 42430/05 Aizparua Ortiz v Spain.

Conclusion

Four conclusions can be drawn from the ECtHR case law analysis. The first conclusion is that there is a right to rational or evidence-based law making, ancillary to substantial fundamental rights. When fundamental rights are at stake, the lawmaker has the duty to ensure that measures are embedded in a regulatory framework, that they are accessible, foreseeable and based upon a careful balance of rights and interests, hereby protecting persons against arbitrary government interference. Where national authorities enjoy a wide margin of appreciation, restraining the Court's scrutiny of the substantive merits of the case, procedural rationality requirements help the Court to ensure that a careful balancing process was exercised. When the power to take measures is delegated to the executive or non-state actors, the lawmaker has to guarantee that these agents as well, base their decisions upon a careful balancing of rights and interests. Therefore, the law must provide for procedural safeguards to ensure accountability and the balance of all interests at stake.

Secondly, modern-day instruments of regulatory programs help to give legitimacy to government decisions. Consultation procedures, impact assessments, monitoring schemes and *ex post* evaluation are considered as instruments safeguarding the operation of an inclusive and informed balance of interests.

Thirdly, the Court takes into consideration the autonomy, needs and capacities of the legislator. Hence, it is not prescriptive in terms of methodology and, in principle, avoids scrutinizing the quality of studies and consultation procedures. Also, it accepts that laws are vague, leaving further clarification to the courts, or, in the absence of clear evidence, that they are based upon general assumptions, provided that they are submitted to a monitoring process. The burden is not left to rest on the legislator alone. Instead, it may shift to administration and courts, or even to individuals. The latter are expected to ask for advice regarding the legal consequences of their actions or to take advantage of consultation procedures.

The final conclusion is that the duty to act rationally also applies to the primary legislator.[43] As parliamentary sovereignty claims rely on the superiority of representative parliament to organize public debate, a law which seriously interferes with fundamental rights is considered as democratically flawed if parliament has not at least engaged in a public debate, considering the matter in the light of the various rights and interests, or if it does not allow the administrative or judicial authorities to operate a concrete proportionality assessment when applying the law in an individual case. [44]

[43] See also: Foster, S. Reluctantly restoring rights: responding to the prisoner's right to vote. Human Rights Law Review, 2009, p. 498.

[44] See Case: 74025/01 Hirst (No 2) v the UK and Case: 74025/01 Hirst (No 2) v the UK [GC]; Case: 38832/06 Alajos Kiss v Hungary.

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THE CONTENT OF THE GENERAL PRINCIPLES OF LAW AND NORMATIVE LEGAL ACTS

Keywords: general principles of law, written and unwritten legal norms, real content of general principles of law, concretization of the content of general principles of law, the development of the principle of proportionality.

Introduction

The understanding of the concept of general principles of law has been developed during past twenty years dramatically. Still there are some confusing questions concerning their unwritten form, concretization, the role of judges in the describing their true and real content as well as their relationship with the written normative legal acts. These are the core issues addressed by this paper.

The aim of this paper is to use inductive and deductive legal methods to analyze the particular contents of the general principles of law, as well as to use systemic method analyzing the content of the principle of proportionality in a contemporary democratic Rule of law state's legal arrangement.

General Principles of Law as Unwritten Legal Norms

There are two ways how to prove that the general principles of law are legal norms: more complicated and less complicated way. The more complicated way of proving the above mentioned statement involves understanding and description of the whole legal arrangement of democratic Rule of Law based state. It starts with the will of sovereign which is expressed in a basic norm[1] from which accordingly the general principles of law are derived. These general principles then determine the content of particular legal arrangement including the content of legal system.[2]

General principles of law derived from the basic norm of particular country exist independently and before the legislature, and serves as a criterion of legitimacy of the

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[1] On the notion of basic norm see: Kelsen H. Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechstlehre or Pure Theory of Law. Oxford: Clarendon Press, 2002.

[2] See more detailed on this: Rezevska D. Legal Methods in Latvia's Legal Arrangement and European Integration. In: European Integration and Baltic Sea Region: Diversity and Perspectives. Collection of Papers of International Conference held by the University of Latvia. Riga: The University of Latvia Press, 2011, pp. 222-234.

written law, namely, the legislative action. Thus, legislative action must comply with the general principles of law, but it means that general principles of law have priority or precedence over the provisions created by the legislature.[3]

General principles of law have all the elements of a legal norm which are: 1) they have general force, which is ensured by the fact that – 2) they are applied via the power of the courts or the executive branch of government, and they are coercive in nature; 3) they can be applied repeatedly and in relation to an unspecified range of individuals and the same type cases. And as any legal norm general principles of law create specific legal consequences, and structurally consist of legal preconditions (If… ,) and legal consequences which appear in case the legal preconditions are fulfilled (then…), which means that they are real, directly applicable legal norms.[4]

The less complicated way of proving that the general principles of law are legal norms is to refer to Article 1 Section 4 of the Administrative Procedure Law[5] which states: "Legal norms are comprised of regulatory enactments (parts thereof) and general principles of law."

The next question is why general principles of law are unwritten legal norms and what does this term "unwritten" means if we can find the written legal norms adopted by the legislature which include these principles.

Thus the legal system is deductively derived system[6] (derived from the general principles of law) and as such it is objectively complete[7]. It contains all of the necessary prescriptions for regulating existing legal relationships within the legal arrangement.[8] This is confirmed by a general principle such as a ban on any legal obstruction by institutions and courts, meaning that those who apply the legal norms cannot refuse to hear a case if there is no written norm in place which actually gives the legal basis for judge made law. This principle is positivised by the legislature as well; it is enshrined in Article 15 of the Administrative Procedure Law, Article 4 of the Civil Law,[9] and Article 1 of the Civil Procedure Law.[10]

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[3] Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana [Meaning and application of the general principles of law]. Rīga: Ratio iuris, 2005.

[4] More and in details on the general principles of law as real legal norms see: Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana [Meaning and application of the general principles of law]. Rīga: Ratio iuris, 2005.

[5] Administrative Procedure Law. Available: http://www.likumi.lv/doc.php?id=55567 [viewed 4 June 2012].

[6] Vīnzarājs N. Jēdzienu jurisprudence [Jurisprudence of Concepts]. *Tieslietu Ministrijas Vēstnesis,* Nr. 1, 1937.

[7] Kalniņš E. Tiesību tālākveidošana" [Further Creation of Law]. In: Juridiskās metodes pamati: 11 soļi tiesību normu piemērošanā [Fundamentals of Legal Method: 11 Steps in Applying Legal Norms]. Rīga: Ratio iuris, 2003, pp. 126-205.

[8] Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana [Meaning and application of the general principles of law]. Rīga: Ratio iuris, 2005.

[9] Civil Law. Available: http://www.likumi.lv [viewed 4 June 2012].

[10] Civil Procedure Law. Available: http://www.likumi.lv/doc.php?id=50500 [viewed 5 June 2012].

A law, by contrast, is objectively incomplete. In accordance with sovereign's will, a legislature must define those legal norms which exist in the relevant legal system and use these to regulate things that can happen in the legal arrangement. These norms must be written down so that the sovereign that has authorized the legislature to do this work might find it easier to organize its operations and the relationships which exist amongst its individuals.[11] However it is by objective considerations impossible for legislature to determine all and every relationship arising amongst the members of sovereign.

Legal norm is a prescription with respect to which legal systems that are based on sovereign will regulates legal relationships on the basis of general principles of law in a specific country, irrespective of whether the legislature has managed to verbalize the norm to an adequate degree. A legal norm is more than just its written presentation, and in terms of its scope it can coincide with the written text or not coincide with it. This is clearly seen in the general understanding and application of general principles of law in democratic countries in where the Rule of Law prevails.[12] The interrelationship between articles of the law and legal norms can be manifested in three ways: 1) the article of the law can include only part of the norm; 2) the article of the law can include several norms; 3) in the ideal situation, the article of the law includes the entire norm.

Thus the content of a complete legal norm is found not just in written law alone. Because written legal norms are a manifestation of higher and general norms of law that are not written down. The entire principle cannot be described and written down because it is constantly changing along with shifts in the circumstances of the entire legal arrangement; the fact is that part of a legal norm will always exist at the unwritten normative level – in the form of a general principle of law.

General Principles of Law Positivised (Included) in Normative Legal Acts

Notwithstanding that the entire general principle of law cannot be described and written down because it is constantly changing along with shifts in the circumstances of the entire legal arrangement, the legislature quite often includes them in the texts of the laws. Several laws of Latvia contain the lists and descriptions of the general principles of laws. One of the most often used of them is Administrative Procedure Law which in Article 4 lists the principles of administrative procedure such as the principle of observance of the rights of private persons, of equality, of the rule of law, of reasonable application of the norms of law, of not allowing arbitrariness and etc. The following Articles describe these principles – give the textual content what one or

[11] Rezevska D. Legal Methods in Latvia's Legal Arrangement and European Integration. In: European Integration and Baltic Sea Region: Diversity and Perspectives. Collection of Papers of International Conference held by the University of Latvia. Riga: The University of Latvia Press, 2011, pp. 222-234.

[12] For more on this see Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana [Meaning and application of the general principles of law]. Rīga: Ratio iuris, 2005.

another principle means that is – describe the legal preconditions (If … ,) and legal consequences (then …) which appear in case the legal preconditions are fulfilled.

But is this text describing the general principle of law is the true and real content of it? And the obvious answer is – of course not.

The legislator's role in the legal arrangement of democratic Rule of Law based state according to the principle of separation of powers is to write down the rules which are determined by the standards deriving from general principles of law and that there is a legal system to resolve any possible conflicts that may arise between the sovereign's members. However, such a task for a legislature is objectively impossible because of many reasons such as the legislature can just make a mistake in writing down the text of a legal norm, or as the written law consists of the text, which consists of words having several meanings, then different thoughts can be expressed by so many words and connections. And at the same time the relationship between sovereign members are so numerous and dynamic, that constantly brings new relations, which the legislature has not yet had time to regulate by the positive law.[13]

Here the role of judicial power, with responsibilities under the sovereign's authority, using the legal methods, which are also the general legal principles of a democratic Rule of Law state, to correct the legislature's mistakes and find the true and real content of the general principles of law appears. As well as the role of legal doctrine where the case law is analyzed and systematized in connection with the applied general principles of law and their content in the particular stage of the development of the legal arrangement is undeniable.[14]

Thus the two sources of law where the true and real content of the general principles of law can be found have come to the surface and namely – case law and legal doctrine.[15] These sources are stated and approved also by the legislature which in Article 4 Section 2 of the Law on Administrative Procedure determines that the courts and authorities shall apply general principles of law not referred to in this law, which have been discovered, derived or developed within institutional practice, or within jurisprudence, as well as legal science.

The texts of the normative legal acts thus can be considered only as guidance on the content of the general principle of law as they still remain unwritten legal norms, which means that they exist before the legislature and their validity is not connected with the actions of legislature but their validity is derived from the basic norm which expresses the will of the sovereign. So the sovereign in the democratic Rule of Law state empowers the general principles of law and gives them legal force to precede over the written legal norms of the legislature. At the same time it should be taken into account that even this text of guidance for the content of the general principle of

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[13] Rezevska D. Legal Methods in Latvia's Legal Arrangement and European Integration. In: European Integration and Baltic Sea Region: Diversity and Perspectives. Collection of Papers of International Conference held by the University of Latvia. Riga: The University of Latvia Press, 2011, pp. 222-234.

[14] See more on this Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana [Meaning and application of the general principles of law]. Rīga: Ratio iuris, 2005.

[15] Compare with Rezevska D. Judikatūra kā tiesību avots: izpratne un pielietošana [Case Law as a Source of Law]. Latvijas Republikas Augstākās Tiesas Biļetens, 2010. novembris, Nr. 1, 28.-31. lpp.

law could be written down by the legislature mistakenly! Examples on such mistakes will be reviewed: in the next chapter of the article.

The Methodology how to Discover the Real Content of the General Principles of Law

The method used to discover the true and real content of the general principles of law in the legal science is referred to as concretization in contrary to the method of interpretation which is applied to determine the true and real content of written legal norms.[16] If in the case of interpretation the method is highly analyzed by legal scholars and described as consisting of several criterions such as for example literal, systematic, historical and teleological, then in case with the concretization no such clear criterion to use as a toolbox could be found. Instead the process of concretization is described as based on judge's knowledge, experience and intuition. This process is accompanied with the weighing of conflicting interests and balancing them taking into account the specific period of time the case occurs in the legal arrangement as the content of the general principle of law is concretized considering legal, social, political, economic etc. circumstances of the given time and country.

So in fact in conclusion it should be said that the personality of judge, the level of knowledge, experience and the common understanding of the legal arrangement is the crucial point in concretization of general principles of law as the true source of the content lies in the reason of a judge or scholar. At the same time it should be stressed that the process of concretization should not be regarded as something uncertain or subjective as it should and is in practice accompanied by the wide and extensive legal reasoning showing arguments for and against given decision.

One of the examples where the legislature's text of the general principle of law positivised in the law was incorrect was the Law on the Procedure How the Acts of the Saeima, State President and the Cabinet of Ministers Get Adopted, Promulgated, Published, Take Effect and Being Valid.[17] This Law among other things included several general principles of law which belong to the third group[18] of the principles namely – those which define to the institutions which apply the legal norms how the norm is to be identified, tested, interpreted, etc. Here we find the general principles which speak to the application of the legal norms in the democratic country – the legal methods, prerequisites for their application, and their content in terms of

[16] Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana [Meaning and application of the general principles of law]. Rīga: Ratio iuris, 2005.

[17] Law On the Procedure How the Acts of the Saeima, State President and the Cabinet of Ministers Get Adopted, Promulgated, Published, Take Effect and Being Valid. Available: http://www.likumi.lv/doc.php?id=57317 [viewed 6 May 2012].

[18] General principles of law by their content are divided into three groups. See more on this Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana [Meaning and application of the general principles of law]. Rīga: Ratio iuris, 2005.

interpretation methods, norms on settling conflicts, methods of argumentation, etc.[19] Article 8 Section 3 of the Law stated that if there was a contradiction between more general and less general legal norms, the more general legal norm was in force as far as the less general legal norm limited it. The legislature used the term "being in force", which means that the other legal norm loses its validity and is no longer in force in the case of contradiction. However it is wrong from the true and real content of the general principles of law determining the priority order between colliding legal norms, as in this described situation one legal norm is not applicable – which means that it is still valid and in force, while judge applies the other norm which prevails. Legal system consists of more and less general legal norms and it is only normal situation if they are colliding.[20]

Next case when the legislature has used inappropriate wording to describe the content of the general principle of law is the Administrative Procedure Law which in Article 6 states the guideline for the principle of equality: "In matters where there are identical factual and legal circumstances, institutions and courts shall adopt identical decisions (in matters where there are different factual or legal circumstances – different decisions) irrespective of the gender, age, race, skin colour, language, religious beliefs, political or other views, social origin, nationality, education, social and financial status, type of occupation or other circumstances of participants in the administrative proceedings." Judge would never be able to apply the principle of equality following the wording of the written legal norm proposed by the legislature as there are no two cases with "identical factual and legal circumstances". The factual and legal circumstances of the cases could be similar, but never identical!

Though in this paper the author would like to focus on the principle of proportionality – on how it is described in the normative legal acts, analyzed in doctrine and applied by the courts as the recent developments in the true and real content of this general principle of law are of great importance.

The principle of proportionality is considered by the legal scholars as the most important principle of public law in the democratic Rule of Law based state.[21] It states that the individual's interests and rights serve as a landmark for the state's objectives and actions if such actions adversely affect an individual's interests or rights. Public law in a democratic society is to balance individual and public interests, while providing individuals against unwarranted state interference by the principle of proportionality.[22]

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[19] General principles of law by their content are divided into three groups. See more on this Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana [Meaning and application of the general principles of law]. Rīga: Ratio iuris, 2005, pp. 23-24.

[20] This law is no longer in force as the legislature has adopted new law On Official Publications and Legal Information (Available: http://www.likumi.lv/doc.php?id=249322&from=off [viewed 6 May 2012] which uses the term "applicable" instead of the term "valid".

[21] Levits E. Samērīguma princips publiskajās tiesībās – *jus commune europaeum* un *Satversmē* ietvertais konstitucionāla ranga princips [The Principle of Proportionality in Public Law]. *Likums un Tiesības,* 2000, 2. sēj., Nr. 9 (13), 262. lpp.

[22] Briede J. Publiskās un privātās tiesības [Public and Private Law]. In: Meļķisis E. (zin. red.) Mūsdienu tiesību teorijas atziņas. Rīga: TNA, 1999, 42. lpp.

The principle of proportionality is widely used by the courts and especially by the Constitutional Court. The Court uses this principle to determine that in case, if the public power limits the rights and legitimate interests of a person, then a reasonable balance between the interests of the society and those of an individual shall be observed. To establish, whether the principle of proportionality has been observed, one has to ascertain whether the measures, chosen by the legislator are appropriate for reaching the legitimate aims, whether more lenient measures might not have been used for reaching the above aims and whether the activity of the legislator is adequate or proportionate. If, when assessing the legal norm, it is recognized that it is unconformable with at least one of the above criteria, then it is unconformable with the principle of proportionality and unlawful.[23]

The "three-pronged" approach of the principle of proportionality finds its origin in German law. It is well established now and well documented in the Constitutional Courts' case law, that the principle contains three elements: suitability, necessity and proportionality *sensu stricto*, according to which the state measure concerned must be suitable for the purpose of facilitating or achieving the pursued objective; it must also be necessary in that no other instrument may be at the authority's disposal which is less restrictive of freedom, and it may not be disproportionate to the restrictions which it involves.[24]

The classical and significant judgment[25] of the Supreme Court regarding the mandatory administrative act and as well as the decision of the Constitutional Court showed very important aspects on the concretization of the general principles of law and on the relationship between the text of the principle given by the legislature and its true and real content.

In this case it was directly recognized by the legislature[26] that in defining the principle of proportionality in Article 13 of the Administrative Procedure Law was a mistake, because the definition has been linked with Article 66. Thus was created the false impression that the principle of proportionality is still judged solely under considerations of usefulness.

Article 13 of the Administrative Procedure Law defined the principle of proportionality as follows: "The benefits which society derives from the restrictions imposed on an addressee must be greater than the restrictions on the rights or legal interests of the addressee (Article 66). Significant restrictions on the rights or legal interests of a private person are only justified by a significant benefit to society."

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[23] Compare, for instance: Judgment of the Constitutional Court of the Republic of Latvia, Case: 2004-18-0106, para 17. Available: http://www.satv.tiesa.gov.lv/?lang=2&mid=19 [viewed 4 April 2012].

[24] Compare with Gerven Van W. The Effect of Proportionality on the Actions of Member States of the European Union: National Viewpoints from Continental Europe. In: The Principle of Proportionality in the Laws of Europe. Oxford/Portland: Hart Publishing, 1999, pp. 44-45.

[25] Judgment of the Supreme Court, Case: SKA-89/2007. Available: www.at.gov.lv/files/archive/department3/2007/ad080307_1.doc [viewed 6 June 2012].

[26] Decision of the Constitutional Court on the Termination of the Proceedings, Case: 2006-41-01. Available: http://www.satv.tiesa.gov.lv [viewed 4 April 2012].

Article 66 of the Law is referred to the substance of considerations of usefulness which should be applied in a case the institution is using its discretionary powers allowed by the Law. No considerations of usefulness shall be applied in cases where the Law clearly provides that the administrative act has to be issued or what in the sense of content administrative act has to be issued.

In a given case the plaintiff had violated the Immigration Act and the provision of the law in this case was imperative that the person is expelled from the country, but in that case the applicant's right to family life would have been violated. The question arose regarding the scope of the application of the principle of proportionality as the written text of the Administrative Procedure Law connected the application of the principle only with cases where discretionary power of the institution could be used and not in the mandatory administrative acts' cases.

Nevertheless the Constitutional Court to whom the Supreme Court addressed the question of the constitutionality of the written legal norms and later Supreme Court in its judgment concluded that Latvian state has to ensure a fair balance between an individual's right to family life and society in the field of immigration control. Such a balance cannot always reach the legislature for adopting the rules, because the obligation of the balance lies in the appliers of the law, to examine each case individually. Consequently, the authority by any type of administrative action, including mandatory administrative action, is to ask whether it unreasonably restrict the fundamental rights that is – to apply principle of proportionality.[27] As well the reference to Article 66 in the written text of the legal norm describing the principle of proportionality in Administrative Procedure Law was removed by the legislator.

This case was doubtlessly a very important example in concretization of the true and real content of the general principles of law and how they appear as unwritten legal norms, and how they are not dependent on the legislature's will and expressions used in the law, and how in contrary the legislature has to correct its mistakes in written texts of the law. However this case was still not as surprising as the next one the author is going to analyze further. The case on the contradiction of the written text of Administrative Procedure Law with the true and real content of the general principle of law which exists in an unwritten form still concerns public law and as it was mentioned above the principle of proportionality is regarded as general principle of law which functions in the public law branch of the democratic Rule of Law state. The next case proved how the content of the general principle had developed in a course of time and transformed from the principle solely used in a public law to the principle applied in a private law situations as well.

As it was analyzed above the principle of proportionality generally provides that the state government actions that restrict individual rights and legitimate interests, and objectives, which the public authorities with this action seeks to achieve, should be in a reasonable relationship.[28] The Supreme Court was dealing with the private

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[27] Judgment of the Supreme Court, Case: SKA-89/2007. Available: www.at.gov.lv/files/archive/department3/2007/ad080307_1.doc [viewed 6 June 2012].

[28] Levits E. Samērīguma princips publiskajās tiesībās – *jus commune europaeum* un *Satversmē* ietvertais konstitucionāla ranga princips [The Principle of Proportionality in Public Law]. *Likums un Tiesības,* 2000, 2. sēj., Nr. 9 (13), 262.-263. lpp.

law case concerning the excessive contractual penalties and applied the principle of proportionality to reduce them. The Court decided that the written rules for assessing a penalty should be observed in conjunction with the principle of proportionality and fairness. The question of fairness and proportionality of the penalty due to the lack of direct instruction is to be decided by the court's discretion in accordance with sense of justice and the general principles of law.[29] Of course the question arises whether it is legitimate and appropriate to use the principle of proportionality regarded as a public law principle to regulate a private contractual relationship between two private parties and how it goes together with the general principle of the private law – private autonomy?

It is suggested among legal professionals that the application of the proportionality test to private law situations is controversial because it raises the question to what extent courts are allowed to control the substance of contracts in private law and to set limits on private autonomy. It has been even asserted that it appears that the identification of the appropriate level of judicial scrutiny in such cases is surrounded by considerable legal uncertainty and judicial subjectivism.[30]

Obviously the application of the principle of proportionality to private law situations is already known phenomena in the legal arrangements of different countries. The private law balancing situation is one in which the plaintiff argues for the adoption of or interpretation of a rule of contract, property or tort law that restricts the defendant's legal authorization to injure him. The conflict may be cast in terms of interests or rights, or both, with the plaintiff typically alleging a right to protection and the defendant a right to freedom of action. The idea is that the adjudicator should assess the effects of adopting a more or less restricted view of the defendant's authorization to harm the plaintiff in terms of the relative weight of principles involved,[31] of rights in conflict and of social interests in the outcome, while keeping in mind the conflict between rules and principles, and between judicial activism and judicial passivism.[32]

The conclusion has to be made that lawyers have abstracted and then re-specified public law proportionality so that it now reaches far beyond the administrative law formulation. In a judicial review aspect now the proportionality describes the

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[29] Judgment of the Supreme Court, Case: SKC-212/2008. Available: http://www.at.gov.lv/info/archive/department1/2008/ [viewed 15 June 2012].

[30] Hos N. The Principle of Proportionality in the Viking and Laval Cases: An Appropriate Standard of Judicial Review? EUI Working Paper Law 2009/06, p. 21.

[31] The classical weighing and balancing of contradicting general principles of law choosing one of them which prevails over other as arguments for the application of this principle are more now is replaced in some legal arrangements (especially in Germany) with the principle of practical concordance. This principle means that in the case of conflicting constitutionally protected fundamental rights a practical balance must be sought between them, so that both values are ensured as much as possible and that no more limits are imposed on either of them than is needed to reconcile both. See more on this Gerven Van W. The Effect of Proportionality on the Actions of Member States of the European Union: National Viewpoints from Continental Europe. In: The Principle of Proportionality in the Laws of Europe. Oxford/Portland: Hart Publishing, 1999, pp. 45-46.

[32] Kennedy D. A Transnational Genealogy of Proportionality in Private Law. In: The Foundations of European Private Law. Oxford/Portland: Hart Publishing, 2011, p. 218.

procedure used in judicial review of national legislation under national constitutions that both guarantee rights and distribute powers, European judicial review of national legislation under the European conventions guaranteeing human rights, judicial review of norms adopted by the European legislative institutions or national legislatures under the provisions of the treaties allocating powers between the Union and the Member States and also – judicial review of provisions of national civil codes whose application arguably infringes constitutionally guaranteed individual rights.[33]

Supreme Court in the case regarding the contractual penalties concretized the unwritten legal norm – general principle of law and speaking in terminology of legal method used further creation of law. If in a case of the principle of proportionality in public law, the construction of the norm is as follows: If court or institution imposes on an addressee restriction, then benefits which society derives from the restrictions must be greater than the restrictions on the rights or legal interests of the addressee. In private law situation court concretized the principle of proportionality as: If parties impose on themselves a restriction, they must be fair and proportionate. This once more approves that the content of the general principles of law is developing constantly and that the role of a judge in concretization of this content according to the actual circumstances of the particular legal arrangement is extremely significant, much more significant than the legislator's role.

Conclusion

1. General principles of law are unwritten legal norms. Normative legal acts are written legal norms or the written part of legal norms.
2. Full legal norm consists of written and unwritten part where the written part of the legal norm is subject to the unwritten part, which is determined by the basic norm of the legal arrangement.
3. The content of general principles of law changes with the legal system development and relationship immediately, while the written legal norms are not suitable for such rapid change. Consequently, the legislature's adopted written legal norms are always objectively incomplete opposite to the unwritten legal norms, the content of which does not depend on the durability of the legislative process.
4. The texts of the normative legal acts which describe the content of the general principles of law are not complete – these are only the guidelines to their content.
5. As written legal norms, the guidelines to the content of general principles of law included in the texts of normative legal acts can not to correspond to the true and real content of the particular general principle of law, which corresponds to the basic norm of the democratic Rule of Law state in particular stage of the development of the legal arrangement and which is unwritten.

[33] Kennedy D. A Transnational Genealogy of Proportionality in Private Law. In: The Foundations of European Private Law. Oxford/Portland: Hart Publishing, 2011, p. 218.

6. The content of general principles of law should be concretized from such sources of law as case law and legal doctrine. Legislature is not obliged to record all the textual provision of the general principle of the written legal norm, and according to the objective circumstances it is even impossible. Judge has to find the true and real content of the general principle of law in a specific time and place where the dispute is resolved.
7. In a case of collision, unwritten general principles of law which derive their legal force from the basic norm of the democratic Rule of Law state, prevail over the written legal norms which are not able, compared to the unwritten rules, to develop fast enough with relationship dynamics of the society.

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Section of Public Law

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LEGISLATION AND FINANCIAL ISSUES IN THE STATE[1]

Keywords*:* Constitution of the Republic of Latvia; national budget; national packet of budget laws; content-based and procedural requirements.

Introduction

Section 5 of the Latvian Constitution[2] regulates legislative procedures. This refers to the approval of obligatory normative laws which refer to the freedom of individuals in terms of achieving specific social goals.[3] Section 5 of the Constitution states that legislative procedures help to achieve goals that are of importance to society, making use of instruments such as the national budget. The Latvian Constitutional Court has expressed the view that the adoption of the annual national budget law is one of the most important decisions taken by the state.[4]

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[*] All statements made in this paper represent the author's personal views and beliefs. They do not relate to any institution or organisation for which she works.

[1] This paper is based on research done by the author as part of her doctoral studies and the master's thesis that she defended. See: Amoliņa D. "The Legal Status of the National Budget and Control Over the Rule of Law," master's thesis. Rīga: University of Latvia, Faculty of Law, Department of Constitutional Law. University of Latvia library.

[2] See: *Likumu un valdības rīkojumu krājums* [Compendium of Laws and Government Regulations], No. 12, 7 August 1922.

[3] Braun J. Einfuhrung in die Rechtswissenschaft [Introduction to Jurisprudence], 2nd ed. Tubingen: Mohr Siebeck (2001), p. 355.

[4] Ruling of the Constitutional Court on Case No. 2010-06-01, 25 November 2010, *Latvijas Vēstnesis*, No. 18, 30 November 2010, Paragraph 13.

Section 66 of the Constitution regulates the procedure whereby the national budget is adopted. This is part of the separation of powers that is enshrined in the Constitution, and it speaks to the competences of constitutional institutions. Of importance here is the fact that the Constitution speaks to specific content-based and procedural requirements when it comes to each decision that applies to issues which are of importance to the state and to society. This means that decisions related to national financial issues (something which mostly involves the adoption of the national budget) must, in procedural terms, ensure the implementation of the principle of separation of powers, while in content-based terms they must ensure public welfare.

This paper analyses the content-based and procedural requirements that are enshrined in the Constitution in relation to the national budget. When it comes to the requirements that must be observed in order to make sure that the national budget satisfies the legal norms related to the highest judicial process, of importance is the content of the concept of the "budget" that is enshrined in Section 66 of the Constitution.

The legal nature of the national budget

The doctrine of continuity is the foundation of Latvian statehood.[5] This means that the practices of the interwar period in Latvia and the doctrine of law must be used as a resource to interpret and make more concrete the content of legal norms related to the highest legal process. The point is that if the Constitution includes a concept or set of words, then that means that the Constitutional Council which wrote the document awarded it specific content which must be taken into account when discussing the content of the relative norm.[6] This means that it is necessary to determine the understanding of the concept of the "budget" insofar as the debates and working materials of the Constitutional council are concerned.

During the debates in which the Constitutional Council engaged, it was stated that the national budget represents an economic plan for the state.[7] This means that the national budget has always been considered from the material perspective of this concept – the national budget was seen as an economic policy planning document which reflects the sources of financial revenues and the planned expenditures. Materials related to the drafting of the Constitution confirm that the concept of the "budget" that is used in Section 66 of the document must be seen from the material perspective as a system of a financial nature – a balanced and closely linked process

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[5] Ruling of the Constitutional Court on Case No. 2007-10-0102, 29 November 2007, *Latvijas Vēstnesis*, No. 193, 30 November 2007.

[6] Ruling of the Constitutional Court on Case No. 2005-12-0103, 16 December 2005, *Latvijas Vēstnesis*, No. 203, 20 December 2005, Paragraph 17.

[7] Reports filed with the Constitutional Commission on Chapter I of the Constitution, 4th session, first meeting, 20 September 1921. See Latvijas Satversmes Sapulces stenogrammu izvilkums (1920-1922) (Excerpts From the Minutes of the Latvian Constitutional Council (1920-1922). Rīga: Courthouse Agency, p. 14.

which obliges constitutional institutions to ensure a certain balance between national revenues and expenditures.[8]

When it comes to the national budget, the Constitutional Council emphasised the importance of parliamentary procedure. On April 26, 1921, the council approved the law on the national budget,[9] identifying rights related to the budget and specifying the procedures related to such rights. Section 17 of the law said that the Cabinet of Ministers must submit the annual draft budget to the legislature, and Section 19 said that the legislature must examine the budget and approve it in relation to general legislative procedure. This means that since the very beginning, the Latvian national budget law has been adopted in the specific legal format of a law. By awarding the all-encompassing right to spend financial resources, the law establishes the principle of superiority for the rule of law in the sense that every state and local government institution is obliged to implement the law on the national budget.

During the interwar period, legal specialists expressed various views about the legal nature of the national budget. The literature speaks to those who felt that the national budget is a law only in formal terms,[10] while others believed that the national budget is a law not just from the formal, but also from the material perspective, because it contained legal norms.[11] It was also argued, however, that "a certain amount of agreement has been reached in modern times in relation to theory – the content of the budget is seen as an administrative act, because it does not include abstract norms which would, in legal terms, transform existing legal terms."[12] In this context it must be noted that there are people even today who argue that "the activities of institutions of public power in relation to the spending of budget resources are an administrative act."[13]

In legal theory, there is the concept of a "law" is kept separate from the concept of a "normative act." The concept of a "law" is used in two senses. In formal terms, it refers to each act that has been issued by the legislature in accordance with legislative procedures, even if it is essentially an administrative act.[14] In material terms, however, a law is a normative act related to the government.[15] In the judicial system, it is

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[8] Protocol of the meeting of the Constitutional Council on 19 January 1922, No. 61, Latvian State Historical Archive, Fund 5486, File 1111, p. 23.

[9] See *Valdības Vēstnesis,* No. 103, 11 May 1921.

[10] See, e.g.: Dišlers K. Latvijas valsts varas orgāni un viņu funkcijas [The Organs of Latvian State Power and Their Functions]. Rīga: Courthouse Agency (2004), p. 100.

[11] Būmanis A., Dišlers K. and Švābe A. (eds.). Latviešu konversācijas vārdnīca [Latvian Conversational Dictionary], Vol. 12. Rīga: A. Gulbis (1928-1929), Col. 23487-23491.

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[13] Muciņš L. "Budžets kā valdības akts" [The Budget as a Government Act], *Diena*, 14 November 2008. See: http://www.diena.lv/lat/politics/viedokli/budzets-ka-valdibas-akts?comments=-pos_value [viewed 4 June 2012].

[14] Dišlers K. Demokrātiskās valsts iekārtas pamati (Ievads konstitucionālās tiesībās) [The Foundations of a Democratic System of State (Introduction to Constitutional Law)], 2nd ed. Rīga (1931), p. 28.

[15] Jelāgins J. Tiesību pamatavoti. Mūsdienu tiesību teorijas atziņas [Fundamental Sources of Law: Modern Ideas in Legal Theory]. Rīga: Courthouse Agency (1999), pp. 63-64.

recognised that the main criterion in differentiating between a normative act and a law is content, not form, characteristics or names.[16] Professor Kārlis Dišlers, too, has argued that not all laws approved by Parliament are normative acts.[17]

If we look at national budget laws that were passed during the period of parliamentary democracy between the two world wars, then we can say that Dišlers' viewpoint was correct. The budget laws that were approved between 1922 and 1933 really did not include any abstract instructions as to what must be done. The law on the 1992/1923 budget[18] and the law on the 1924/1925 national budget[19] contained just two articles. Article 1 defined the sum of the budget, and Article 2 said that the law would take effect upon the date of its proclamation.

Understandings about legal norms and administrative acts have changed over the course of time. National budget laws speak to financial resources for government institutions so that they can carry out the duties that are enshrined in the relevant normative acts. The financing applies only to a specific period of time. The goal is to regulate specific, as opposed to general situations, and in this sense the laws are similar to general administrative acts.[20] Modern legal specialists, however, say that the acts that are approved by government institutions in relation to internal organisational issues are not administrative acts.[21] This means that the section of national budget laws which speaks to budget expenditures is of an administrative nature, but it is not seen as an administrative act.

The content and structure of national budget laws have changed since the restoration of Latvia's independence. The law on the 1991 national budget[22] is similar to the 1929/1930 national budget law in terms of its form, but the law on the 1994 budget[23] is more extensive in terms of containing regulations related to several budgetary issues. The specific thing about this law is that it includes transitional regulations. According to legal requirements, transitional regulations are included in laws if, at the time when the law is adopted, it is necessary to regulate a transfer from existing legal regulations to new ones.[24] As practices related to the drafting of national budgets have changed, the relevant laws have become similar to other laws that are approved by Parliament. It must be added that this similarity is based on requirements related to legal techniques and is visual in nature.

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[16] Ruling of the Constitutional Court on Case No. 2001-06-03, 22 February 2002. See: *Latvijas Vēstnesis*, No. 31, 26 January 2002, Paragraph 1.1 of the conclusions of the court.

[17] Dišlers K. Demokrātiskās valsts..., *op. cit.*, p. 128.

[18] See: *Valdības Vēstnesis,* No. 163, 26 July 1922.

[19] See: *Valdības Vēstnesis,* No. 139, 25 June 1924.

[20] Briede J. "Vispārīgais administratīvais akts", *Likums un Tiesības,* No. 4, 2009.

[21] See the unpublished minutes of a meeting held on June 5-6, 1997, by a working group which drafted the Law on Administrative Procedure, as chaired by Egils Levits, pp. 5-6. Available the Ministry of Justice.

[22] See: *Saeimas un Ministru Kabineta Ziņotājs*, No. 15, 25 April 1991.

[23] See: *Latvijas Vēstnesis*, No. 22, 19 February 1994.

[24] Metodiskie norādījumi likumu izstrādāšanā un noformēšanā [Methodological Instructions on Drafting and Formatting Laws]. Rīga: Parliamentary Legal Bureau (1997), p. 27.

At the same time, rules in national budget laws must be evaluated on the basis of their correspondence to the content and structural elements of legal norms. Section 3 of the transitional regulations of the 1994 budget, for instance, said that the "Finance Ministry shall be given the right to finance budget institutions and events proportionally to national budget revenues, but without exceeding sums in the budget and ensuring that the priority is the coverage of expenditures related to pensions, subsidies, wages, and purchase of food and medications."[25] This basically means that the legislature has given authorisation to the executive branch. During the past 10 years, national budget laws have included very diverse issues that are formulated as legal norms. Section 11 of the law on the 2005 national budget,[26] for instance, contained regulations concerning the rate of social insurance contributions to the state-funded pension scheme, while Section 52 of the law on the 2011 national budget[27] regulated the wages of employees of the State Revenue Service.

Traditions related to the codification of the national budget must also regulate the issues which relate to regulations that are necessary for the implementation of the law. The goals and purpose of the national budget indicate that in essence, the national budget law can only regulate issues which require regulations for the implementation of the plan during the relevant fiscal year. The Constitutional Court, too, has emphasised the fact that legal norms help to regulate those issues which are important in implementing the national budget and managing the state's financial resources.[28] It must be noted, however, that present-day practices show that that the national budget law includes legal norms which, in terms of their content, should not be part of the relevant law.[29]

Historical analysis shows that the national budget can be adopted as a law in the formal sense of the concept or as a normative act. The decisive criterion in determining the classification of the budget relates to the issue of whether legal norms are included in the law on the budget.

The legal nature and content of the national budget law are of essential importance, because these elements determine the framework of constitutional control in this regard. The point is that if the national budget is seen as a law and a normative act, then the Constitutional Court evaluates whether it is in line with higher-ranking legal norms.[30] If it is declared that the Constitutional Court can evaluate whether an act which is a law only in a formal sense is in line with the Constitution, then this interpretation would endanger the constitutional guarantee related to the priorities of constitutional norms, and it would also narrow the competence of the Constitutional

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[25] See: *Latvijas Vēstnesis*, No. 22, 19 February 1994.

[26] See: *Latvijas Vēstnesis*, No. 206, 24 December 2004.

[27] See: *Latvijas Vēstnesis*, No. 206, 30 December 2010.

[28] Ruling of the Constitutional Court on Case No. 2011-0101, 3 March 2011. See: *Latvijas Vēstnesis*, No. 21, 7 March 2012, Paragraph 10.

[29] See, e.g.: the 2011 national budget, *Latvijas Vēstnesis*, No. 206, 30 December 2010, Section 55.

[30] The law on the Constitutional Court, *Latvijas Vēstnesis*, No. 103, 14 June 1996, Section 16.

Court in an unjustified way. In some cases, this would cancel the right of individuals to defend the fundamental rights which are guaranteed for them by the Constitution.[31]

The national budget as a set of normative acts

The national budget is a policy planning document of an economic nature, and it includes not just a calculation of expenditures and revenues in relation to the financial resources that are available, but also a set of steps that are to be taken in terms of distributing benefits among the various groups in society. When approving the national budget, the legislature also amends other normative acts so as to harmonise the state's financial capabilities with the duties of the state which require certain spending of resources.[32] Section 87[1] of the Latvian Saeima's Rules of Order states that the packet of budget laws consists of draft laws which determine or amend the budget, as well as ones which relate to the budget.[33] This means that in drafting the national budget, the government must establish plans for the spending of financial resources, and it must also approve the relevant normative regulations. This also makes it possible to claim that the national budget can also be adopted as a set of normative acts.

The principle of constitutional unity[34] means that when it is necessary to determine the essence of a constitutional issue, deduction must be utilised, and each institute of law must be reviewed: under the auspices of the legal norms of the Constitution. This interpretation of the Constitution, in other words, must be applied not just to the content of constitutional norms, but also to the procedures that are regulated by the Constitution.

The concept of the national budget is expressed *expressis verbis* in Sections 66 and 73 of the Constitution. The text of Section 66 has been reviewed: already, but it is of key importance to determine the content of Section 73 in relation to the concept of the budget, doing so in accordance with the principle of constitutional unity.

Section 73 states that the national budget cannot be subject to a national referendum.[35] If we systemically interpret the words used in that section and do so in the context of Section 66 of the Constitution, then we can conclude that a referendum cannot be held on the subject of the national budget law, which speaks to the calculation of state revenues and expenditures for a specific period of time. This, however, creates the question of whether Section 73 of the Constitution does apply to other laws that

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[31] Ruling of the Constitutional Court on Case No. 2011-0101, 3 March 2012. See: *Latvijas Vēstnesis*, 7 March 2012, Paragraph 11.

[32] Ruling of the Constitutional Court on Case No. 2011-03-01, 20 December 2011. See: *Latvijas Vēstnesis*, No. 200, 21 December 2011, Paragraph 18.

[33] Rules of Order of Parliament, *Latvijas Vēstnesis*, No. 96, 18 August 1994.

[34] Ruling of the Constitutional Court on Case No. 2002-04-03, 22 October 2012. See: *Latvijas Vēstnesis*, No. 50, 3 April 2002, Paragraph 2 of conclusions.

[35] See: *Likumu un valdības rīkojumu krājums* [Compendium of Laws and Government Regulations], No. 12, 7 August 1922.

are a part of the national budget packet. From the perspective of the constitutional system, this issue also has to do with the procedure that is referred to in Section 72 of the Constitution – halting the publication of a law.

The national budget law and all related laws, when taken together, speak to the state's annual revenues and expenditures, thus creating the consolidated national budget. Laws that are part of the packet have a direct effect on the budget in that it is on their basis that the state's calculations of revenues and expenditures have been made. This means that the ban on organising a referendum must also be applied to those laws which are part of the packet, and the same applies to the right of the president of Latvia to halt the publication of those laws. This author believes that the close linkage among laws that are part of national budget laws is specifically that which must be utilised in determining the content of the word "budget," as referred to in Section 73 of the Constitution.

Constitutional practices in this regard have been ambiguous. In 2011, for instance, President Valdis Zatlers announced that he would suspend, for two months, the publication of laws which spoke to limits on the payment of social subsidies, as adopted as part of a unified packet of laws aimed at amending the 2011 national budget.[36] The director of the Saeima's Legal Office, Gunārs Kusiņš, when asked about this, said that the laws could not be classified as a set of annual budget laws or as laws which relate to taxes, and so "at first glance" there was no reason to question the idea that the law on "subsidy ceilings" could be subject to a referendum.[37]

This author believes that there can be no halting of the publication of a law which has been adopted in the context of the national budget so as to harmonise state budget expenditures and revenues, because Section 73 of the Constitution bans national referendums on budget issues. In this specific case, it must be concluded that the laws which the president suspended did not apply to the 2011 national budget, instead regulating issues which exceeded the scope of the relevant fiscal year. In that case, the author would argue, the basic problem is that the specific laws should not have been included in the packet of national budget law.

There have also been *obiter dictum* conclusions from the Constitutional Court to suggest that laws which accompany the national budget cannot regulate any issue and that the court has the right to evaluate whether the inclusion of such laws in the national budget packet has been justified.[38] It is specifically because the concept of the national budget is related to other constitutional norms that there is reason to have a procedural barrier in this regard – a set of criteria and content-based requirements which apply to draft laws that can or cannot be included in a packet of national budget laws and approved simultaneously with the draft law on the national budget itself.

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[36] For the text of the president's decision, See: *Latvijas Vēstnesis*, No. 61, 19 April 2011.

[37] See: http://www.delfi.lv/news/national/politics/eksperts-pirmskietami-nav-pamata-apsaubit-pabalstu-griestu-likumu-nodosanu-referendumam.d?id=38036193 [viewed 15 April 2012].

[38] Ruling of the Constitutional Court on Case No. 2011-03-01, 20 December 2011. See: *Latvijas Vēstnesis*, No. 200, 21 December 2011, Paragraph 18.

In proclaiming the law on the 2012 national budget, President Andris Bērziņš considered recent rulings by the Constitutional Court and called on the Cabinet of Ministers to be very careful about deciding on which draft laws should be included in the national budget packet so as to avoid a situation in which a necessary law is declared unconstitutional because formal constitutional procedures have not been observed in regard to it. In a letter to Prime Minister Valdis Dombrovskis, the president wrote that "the inclusion of a draft law in the packet of national budget laws is no longer just an issue of political utility, and the legal consequences of such activities must carefully be examined."[39] The letter from the president confirms that national budget laws are being utilised in a manner similar to the past use of the since-repealed Section 81 of the Constitution in the past – handling politically sensitive issues in a manner which differs from accustomed procedure and which involves particularly brief periods of time to discuss them and to receive and evaluate proposals about them.[40]

This author believes that the principle of constitutional unity, the *obiter dictum* conclusions of the Constitutional Court, and the way in which national budget laws are prepared at this time all mean that the legislature must establish a set of criteria to determine those issues which can and must be regulated in the budget and its accompanying laws. According to Latvia's constitutional traditions, these criteria can exist as conventional norms.[41]

Conclusion

The adoption of Latvia's national budget has shown that it can be adopted both as a law in the formal sense and as a normative act. Traditions of codification mean that the national budget law must include regulations which are necessary for the implementation of the law. This essentially means that the national budget must be accepted as a normative act. The Constitution, in turn, indicates that the content of the national budget may only regulate issues which relate to the specific fiscal year and are necessary for the administration of the state's financial resources. The procedural requirement that is based on the principle of constitutional unity does not make it possible to use the packet of national budget laws to regulate issues which do not relate directly to the administration of the state's financial resources during the relevant fiscal year. In this context, this author would propose that the legislature draft a set of criteria to differentiate between those issues which can be regulated in the national budget and its accompanying laws and those that which cannot.

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[39] For the text of the letter, see: http://www.president.lv/images/modules/items/PDF/vestule-mp-291 22011.pdf [viewed 15 June 2012].

[40] For the president's statement, see: http://www.president.lv/pk/content/?cat_id=605&art_id=19348 [viewed 15 June 2012].

[41] Dišlers K. "Konvencionālās normas valststiesību novadā" [Conventional Norms in the Field of Constitutional Law], *Tieslietu Ministrijas Vēstnesis*, No. 11/12, 1933, p. 251.

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THE INFLUENCE OF SUBSIDIARY SOURCES OF LAW ON THE QUALITY OF LEGAL ACTS IN THE LEGISLATIVE PROCESS AND THE SYSTEM OF NATIONAL GOVERNANCE

Keywords: subsidiary sources of law, casuistry, dissenting opinion of judges.

A multitude of laws in a country is like a great number of physicians, a sign of weakness and malady.
(Voltaire)

A state is better governed which has few laws, and those laws strictly observed.
(Descartes)

Introduction

Latvia is a democratic country in which the rule of law prevails, and in the interests of its development, there must be a periodic review of the work which the legislature and the government do in creating legal regulations. The aim is to determine whether this process is in line with growth and a sustainable model. Sustainable growth in Latvia will require a proper and stable legal foundations.[1] The purpose of this paper is to examine various subsidiary sources of law, the messages which these send to the legislature, the need for casuistry in national governance, and the sensible application of legal norms in terms of improving legal regulations. The author has made use of several research methods. The comparative method has been used to analyse the views of legal specialists, conclusions from the judicial system, and ways of comparing the meaning of words that are used in legal norms to the interpretation of same in court rulings. The author has also used the historical method to examine the emergence and development of the concept of casuistry, as well as prerequisites for its existence. The inductive method, in turn, has been used to study legal norms and court rulings so as to generalise the theses and conclusions therein.

Parliaments and governments change, but ministries and their subordinate institutions and representatives (ministers) continue to battle amongst themselves when it comes to budget resources for their sectors, as opposed to correct procedures for the taking

[1] Torgāns, K. Tiesību un juridiskās prakses ilgstspējīga attīstība [Sustainable Development of the Law and Legal Practice]. Rīga: University of Latvia (2012), p. 5.

of decisions, the quality of political administration in relation to public interests, the true implementation of the state's functions of governance, and the assurance of justice in all of this. If there is too great an attempt to create casuistic norms in this regard,[2] then it is forgotten that government decisions must create reliance on the idea that they have been adopted on the basis of the principle of justice, thus reducing the possibility of conflicts of interest.

The transfer of European Union requirements in a manner that has often been unnecessarily speedy has also reduced the proportion of detailed regulations, but that has not been in line with the skills and habits of those to whom legal norms are addressed and those who implement them. The implementation of legal norms which, in terms of their content, were in line with the requirements of countries with long-lasting understanding of democracy and the rule of law were often implemented mistakenly because of a lack of adequate experience and understanding in Latvia about the relevant concepts and the way in which these have been interpreted by the European Union's Court of Justice.

Capacity-related problems[3] in all branches of government have hindered the creation and implementation of laws, as well as the consolidation of the laws at all levels. Jurisdiction has developed interpretation practices and has, in part, sent the assignments back to Parliament. If shortcomings are identified, then the legislature must react with relevant legislative supplements, and eventually these are also interpreted by the courts.

National governance in a democratic country where the rule of law prevails must handle the functions that have been entrusted to the system by the population in an honest, effective and just way, and the things that are done must correspond to the

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[2] The broad concept of casuistry is explained as thinking which focuses on specific things and conditions, as opposed to abstract or universally accepted claims. Casuistry is opposite to absolutism. As a theory, it opposes unbending, literary or lawful interpretations of moral rules. The concept is based on the Latin work "casus" (an event or a thing). A dictionary of foreign terminology in Latvia explains that it applies to the use of legal norms in response to specific cases, the application of general dogmatic theses to specific incidents in scholastic theology and Medieval jurisprudence, the use of cunning techniques in disputes, and cleverness in proving questionable theses. See: Baldunčiks J. (ed). Svešvārdu vārdnīca [Dictionary of Foreign Terminology]. Rīga: Jumava (1999), p. 350. See also: Baldunčiks J. and Poktrotniece K. (ed.). Svešvārdu vārdnīca, 3rd ed. Rīga: Jumava (2007), p. 350. The Latvian Conversational Dictionary defines it as follows: "In jurisprudence, casuistry relates to the resolution of specific cases. Casuistry is of great importance in legislation, where it describes the efforts of the legislature to handle all imaginable legal issues with individual legal terms, pushing general principles to the back burner; on the contrary, casuistry particularly seeks to find exceptions to general principles, and that means that in casuistic codes, it is often impossible to differentiate between exceptions and principles." See Latviešu konversācijas vārdnīca, Vol. 9. Rīga: A. Gulba Publishing House (1933), Col. 16402-16405. The demand for casuistry is closely linked to the level of understanding in society and the real lives of those who apply norms and of those to whom they are addressed. See: Apse D. "Kazuistikas nozīme Latvijas tiesību teorijā un vēsturē" [The Role of Casuistry in Latvian Legal Theory and History], *Likums un Tiesības,* Vol. 10, No. 6 (106), June 2008, pp. 184 and 186.

[3] Balodis R. and Kārkliņa A. Valsts tiesību attīstība Latvijā: otrais neatkarības laiks [The Development of National Law in Latvia: The Second Period of Independence]. *Juridiskā Zinātne*, LU journal, 2012, p. 38.

law. The job for a system in which the distribution of power is based on the principle of balance is to avoid any trend of usurping power by any of the three branches of governance so as to ensure the stability of the state's legal institutions, as well as the uninterrupted nature of the functions of the governing system.[4]

Subsidiary sources of law and the desire for a casuistic system of national governance

When existing legal norms seem hard to understand, there is the desire to supplement them. Before that, however, it is necessary to seek out their origins in the more distant or recent past, discovering the intentions of the legislature that are enshrined in the normative regulations. If necessary, further development of the law must be ensured so as to help people to find laws that are as correct and proper as possible.

We must also remember, however, that parliaments have functions which go beyond legislative prerogative, and this means that we must respect the fact that the legislature represents the people of Latvia and also reflects their will.[5]

New norms relate to an evaluation of individual cases and court practices, as described most precisely in subsidiary sources of law which reveal abstract legal concepts in judicature. These, in turn, are examined by lawyers who tell the legislature that it is time to implement new legal regulations or o amend existing ones. For that reason, subsidiary sources of law and messages therein should be perceived by the legislature as a factor which encourages the creation of laws.

It must also be remembered, however, that the desire for casuistic regulations messes up the balance between legal certainty and justice (inflexible laws).

A 2007 study about the importance of casuistry in Latvian law and a later publication about this subject pointed to several reasons why excessive concretisation of normative regulations is usually demanded in the system of governance and why there is an attempt to avoid the interpretation of legal norms via existing methods, including the use of the diversity of subsidiary sources of law.[6] The basic reasons why casuistic legal norms are implemented and demanded include the ongoing historical traditions of legal positivism in Latvia, as well as the desire among many bureaucrats to compensate for their incompetence. The result is that there are unskilful and selectively argued decisions, avoidance of the taking of decisions as such, and violation of the principle of legal certainty. For that reason, Latvia's government institutions should try to

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[4] Ruling by the Constitutional Court on Case No. 04-7(99), 24 March 2000, Paragraph 3 of conclusions. Cited in Latvijas Republikas Satversmes tiesas spriedumi 1999-2000 [Rulings of the Constitutional Court of the Republic of Latvia: 1999-2000]. Rīga: Courthouse Agency (2002), p. 69.

[5] Gerloch A., Kysela J., Tryzna J., Wintr J., Beran K., Maršalek P. and Z. Kuhn. Teorie a praxe vroby prava, p. 35. Available: http://www.uloz.to/xB29cmJ/teorie-prava-gerloch-rtf [viewed 17 April 2012].

[6] For more on this, see: Apse, D. Kazuistikas nozīme..., *op. cit.*, pp. 177-189.

create more abstract norms in those areas which it is possible whilst also facilitating the training and professional growth of civil servants.

The demand for increasingly casuistic normative regulations relates to the phenomenon of a cyclical approach to the creation of new laws. In any society, legislative processes correspond to the understanding of the society or the legislature of laws which, when developed, also develop the legislative process. These are cyclical changes which include four phases in the legislative process: 1) The initial phase, which typically has abstract laws; 2) The consolidation phase, which involves highly development practices of interpretation and corresponding reactions by the legislature in supplementing the laws; 3) The degradation phase, in which laws become excessively concrete; 4) The return to the beginning, which demands systems to evaluate draft laws detailed prognoses, and a return to the first phase.[7]

The findings in 2007 pointed to the manifestation of centrifugal forces in terms of "floods" of new norms. This showed that there was a lack of a strategy in relation to those areas which should be regulated on a casuistic basis and those which should involved abstract norms. Unnecessary elements in this can "poison" the everyday lives of residents, the quality of national governance, and the work of the legislature to the point where the state may run out of the resources that are needed to approve truly important normative regulations, thus opening the door to administrative shamelessness and an imitation of legal innovations.

The doctoral student Anda Smiltēna has written that legislative processes in the 19th century were long-lasting, but they also involved the extensive participation of scientists. Later the system was replaced by a "flood" of norms, with the largest burden resting on the shoulders of the executive branch and the government becoming the most important preparer of new draft laws. The "old" model of the separation of powers in the legislative area does not fit in with rapid legislative processes, because norms are subject to tyrannical creation and implementation. Technical and editorial amendments dominate. On the basis of statistics, Smiltēna argues that in 2009, when Latvian underwent a flood of norms aimed at fiscal consolidation and an avoidance of national bankruptcy, a crippled approach to the separation of powers created a different model – 70% of draft laws and regulations came from civil servants in the executive branch of the government (476 draft laws and 1,680 Cabinet of Ministers regulations, as compared to 415 and 1,259 in 2010, and 255 and 1,062 in 2011).[8]

The study also showed that staff turnover in the system of national governance led to a lack of succession. The same is true today. People in the system of governance do not share their knowledge, and there is much staff turnover, thus diminishing the process of succession in the system of governance as such.

Problems with the separation of powers in the area of legislation also has a negative effect on other principles related to the rule of law. This refers to the *ultra vires* principle, the ongoing nature of the Civil Service, and violation of other principles

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[7] For more on this, see: Apse, D. Kazuistikas nozīme..., *op. cit.*, pp. 180-181 and 188.

[8] Smiltēna A. Varas dalīšanas princips un mūsdienu likumdošanas tendences [The Principle of the Separation of Powers and Contemporary Legislative Trends]. Paper delivered at a conference on the history of legal theory, 16 April 2012, unpublished.

such as a dangerously excessive burden related to the principle of legal reliance. This is because legal norms (particularly those that are drafted in a big hurry) differ from general legal principles, and they are not appropriate for rapid change.[9]

More extensive understanding of the purpose and goals of a newly created legal act and of the concepts that are included in the relevant norms can be ensured by the annotation of draft normative acts. The importance of annotations as part of the drafting of legal acts is emphasised in Sections 79 and 85 of the Saeima's Rules of Order,[10] in Cabinet of Ministers Regulation No. 300 of April 7, 2009 on the rules of order of the Cabinet,[11] and in Cabinet of Ministers Instruction No. 19 of December 15, 2009, on the evaluation of the initial influence of draft legal acts.[12] When documents related to the preparation of laws are used as a source for interpretation, the process must be cautious in the name of legal specificity and stability, because the final text of the legal norm must be clearer and more comprehensible than is the case with preparatory materials for it.[13] The only exception relates to those cases in with unspecific legal concepts must be filled with content and value-based arguments must be found in the preambles of international documents or in the process of weighting and balancing out principles.

In reality, the speed at which legislative procedures occur leads to questions about whether utility is taken into account when drafting new norms and whether economic effectiveness will be evaluated in terms of the extent to which the new norm will help in pursuing the stated goals.

Normative acts which are drafted and approved outside of the principles of the rule of law cripple their own application and hinder the attraction of resources for the drafting of truly necessary draft laws. Examples include amendments to the law on operative activities,[14] which were discussed extensively during the Lawyer Days event

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[9] According to Professor Daiga Rezevska: "The latest concretisation of the principle (of legal reliance) in the EST judicature shows that the general principle of legal reliance opposes the implementation of a legal act before it is published, but if this is based on the goals of general interests, then it is possible so as to avoid extensive financial combinations which are to be combated with laws about amendments to other normative acts which regulate taxes, granting this law retroactive effect. See: Rezevska, D. Tiesiskās paļāvības principa satura konkretizācija un attīstība judikatūrā: Tiesību un juridiskās prakses ilgtspējīga attīstība [Concretisation and Development of the Content of the Principle of Legal Reliance in Judicature: Sustainable Development of the Law and Legal Practice]. Rīga: LU Academic Publishing House (2012), pp. 10 and 18.

[10] *Latvijas Vēstnesis*, No. 96, 18 August 1994 (with amendments in *Latvijas Vēstnesis*, No. 87, 21 May 1996; No. 297, 20 October 1998; No. 19, 2 February 2011).

[11] *Latvijas Vēstnesis*, No. 58, 16 April 2009 (with amendments in *Latvijas Vēstnesis*, No. 121, 31 July 2009; No. 121, 26 February 2010; No. 143, 9 February 2011; No. 74, 15 May 2012).

[12] *Latvijas Vēstnesis*, No. 205, 30 December 2009 (with amendments in *Latvijas Vēstnesis*, No. 204, 28 December 2010).

[13] Peczenik A. On Law and Reason. Dordrecht, Boston and London: Kluwer Academic Publisher (1989), p. 283.

[14] *Latvijas Vēstnesis*, No. 131, 30 December 1993 (with amendments in *Latvijas Vēstnesis*, No. 121, 15 August 1995; No. 167/168, 1 July 1997; No. 104, 10 July 2007; No. 101, 30 June 2005; No. 170, 26 October 2005; No. 172, 25 October 2007; No. 55, 8 April 2009; No. 205, 30 December 2009; No. 46, 21 March 2012).

in 2012, as well as amendments to the law on citizenship,[15] the law on construction,[16] and norms which speak to the preservation of institutional forms related to the preservation of minority cultures and languages.[17] The World Congress of Latvian Scientists in October 2011 also discussed the urgent need for improving legal regulations in various areas. The congress recommended that the Justice Ministry and the Saeima speed u consideration of laws on mediation and arbitration courts. It also suggested supplementation of the "Strategy 2030" document, which was based on wishful thinking, with specific indicators as to the laws or Cabinet regulations which must be adopted, amended or supplemented so as to ensure the achievement of these goals in legal terms.[18]

It may be that the only real achievements in recent times which (albeit in a delayed way) strengthened the rule of law were a law on the declaration of the property status and undeclared income of physical persons,[19] as well as amendments to the Saeima's Rules of Order on open votes.[20]

Initiatives from legal specialists have been based on the principle of general laws as unwritten laws – something which makes it possible to understand the guidelines which relate to requirements for the legal system that are under development. "The content of general legal principles must be made more concrete on the basis of legal sources such as the judicature and its doctrine, but the fact is that guidelines about the general content of legal principles are often found in normative acts, as well."[21]

This means that subsidiary sources and resources of law must be seen as the resources which send the first message to the legislature about changes to the legal system and legal relations which require improved legal regulations.

Messages sent to legislatures by subsidiary sources of law

The interaction of a diverse set of subsidiary sources of law in administrative law, the practices of the Latvian Constitutional Court, and the practices of the European

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[15] *Latvijas Vēstnesis*, No. 93, 11 August 1994 (with amendments in *Latvijas Vēstnesis*, No. 44, 22 March 1995; No. 52/53, 20 February 1997; No. 315/316, 27 October 1998).

[16] *Latvijas Vēstnesis*, No. 131, 30 August 1995 (with amendments in *Latvijas Vēstnesis*, No. 69/70, 11 March 1997; No. 274/276, 21 October 1997; No. 44, 20 March 2002; No. 37, 7 March 2003; No. 47, 26 March 2003; No. 61, 20 April 2004, No. 49, 24 March 2005; No. 44, 16 March 2006; No. 92, 14 June 2006; No. 4, 9 January 2008; No. 97, 26 June 2009; No. 205, 29 December 2010).

[17] Ziemele I. Satversmes 114. panta komentārs [Commentary on Section 114 of the Constitution]. In Balodis, R. (ed.). Latvijas Republikas Satversmes komentāri [Commentary on the Constitution of the Republic of Latvia], Chapter VIII, Fundamental Human Rights. Rīga: *Latvijas Vēstnesis* (2011), p. 714. ISBN 978-9984-840-19-2.

[18] Torgāns K. Tiesību un juridiskās prakses ilgtspējīga attīstība [Sustainable Development of the Law and Legal Practice]. Rīga: LU Academic Publishing House (2012), p. 7. ISBN 978-9984-45-444-3.

[19] *Latvijas Vēstnesis*, No. 196, 14 December 2011.

[20] *Latvijas Vēstnesis*, No. 18, 1 December 2012.

[21] Rezevska D. Tiesiskās paļāvības..., *op. cit*.

Court of Human Rights (particularly in terms of the dissenting opinion of judges) "lift" this sector of the law up to the aforementioned phase of consolidation in legislative processes. The fact that national governance is subject to the control of the courts means that the governing system must make use not only of the ideas of the judicature, but also the results of attempts by the courts to continue the development of the law.[22]

The influence of other subsidiary sources and resources of the law can also be seen in the system of national governance and in the application of administrative law. Professor Jautrīte Briede has pointed to several ways in which instruments from the judicature and elsewhere such as generalisations of court practice, ancillary decisions which point to shortcomings in national governance (most of those which were handed down between 2007 and 2009 have not been published), etc., can influence the development of administrative law in Latvia, not least in terms of the responsibilities of the legislature in supplementing legal regulations.[23] This refers to rulings in which a court has expressed its views about the need for an effective control mechanism in relation to the legality of election procedures, petitions before the Constitutional Court in more than 10 cases (in some cases the legislature reacted as soon as the petition was filed), as well as derived and developed legal principles in administrative courts, among which one must mention a ban on the worsening of justifications or administrative acts when they are being challenged.

An example here is the decision of the Constitutional Court to accept Case No. 2011-21-01.[24] The case related to whether Section 8.2 of a law on compensation caused by the institutions of national governance was in line with the third sentence of Section 92 of the Latvian Constitution. The petition was filed by the Department of Administrative Cases of the Latvian Supreme Court, and this perhaps sent a message to the legislature to say that the norm did not satisfy the requirements of Section 92, adding that the legislature should react even before the Constitutional Court handed down its ruling on the matter.

The more extensive use of subsidiary sources of law has improved the content and justification of administrative acts that are issued by various institutions. Ancillary decisions have been used to deal with cases in which normative regulations have been ignored in national governance and when governance practices have been incorrect.

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[22] "When applying legal norms, the system of governance has the right to fill holes in the law. This means that administrative law must involve the concept of analogy in filling discovered holes in the law, as well as a teleological reduction of the hidden holes in the law. What is more, the system of national governance itself utilises the results of the development of the law by the judicature, because it itself is subject to the court's control." Neimanis J. Tiesību tālākveidošana [Further Development of the Law]. Rīga: *Latvijas Vēstnesis* (2006), p. 150. See also: Stelkens B., Bonk H. J. and Sachs M. Verwaltungsverfahrensgesetz [Acts of Administrative Procedure]. München: Beck (2001), p. 1509.

[23] Briede J. "Judikatūras ietekme uz administratīvo tiesību attīstību Latvijā" [The Influence of the Judicature on the Development of Administrative Law in Latvia]. *Latvijas Republikas Augstākās Tiesas Biļetens*, No. 1/2010, pp. 57-59.

[24] Available: http://www.satv.tiesa.gov.lv/upload/2014_41_ieros_Senaats_ZAL_17_pants.pdf [viewed 15 May 2012].

Petitions before the Constitutional Court have proven to be a particularly effective way of getting the legislature to act.

Briede's arguments suggest that administrative court practices and science in this area utilise two different manifestations of legal practices (from the perspective of classification) – available court practice and recommended internal use practices (as found via the TIS system) which are of limited access and cannot, therefore, be seen as part of the judicature. Access to a broader range of these court practices would be desirable.

The legislature should listen to and react responsibly to arguments that were presented at a hearing before the Supreme Court Senate on May 11, 2012, to consider the more careful determination of how legal norms are drafted, approved and applied. The Senate argued that it is essentially important to ensure an ongoing and broader examination of circumstances which influence the concretisation of legal principles, norms and consequences, because several similar cases were on the docket, with legal proceedings being halted until such time as the final ruling on each matter taxes effect. The appellate court ruled that the legislature determined only one criterion (one which this author believes to create additional difficulties for those who implement the norm) which the legislature had established in terms of the taxation of revenues earned from the sale of real estate – the amount of time that the real estate was owned by the relevant person. Ombudsman Juris Jansons was asked to appear before the Supreme Court Senate, because it was at his initiative that the issue was brought up in the first place.[25]

A self-respecting country must have foundations for legal regulations which relate to a responsible society, ensuring socially secure lives and favourable circumstances for local residents, not least in the area of taxes. "Fees" related to excessive legal positivism may cause people to forget about values such as human dignity and the fact that the estate exists to serve the public, not vice-versa.

The European Union's fiscal discipline agreement[26] sends a message to "irresponsible countries" and their residents – one which could create new "floods" of national legal norms, as well as endless editorial amendments to normative acts which relate to the agreement. Governing systems must count on this possible legal burden, however, if they lived beyond their means in the past, including the establishment of tax systems which are not in line with real revenues. It goes without saying that countries cannot spend money beyond their means without setting money aside (an economic approach).

Descartes wrote that an excessive number of laws "justifies immorality" – something that is typical in the degradation phase of the legislative process. An important subsidiary resources in the application of laws in this case is always honesty and a sense of justice which help those who are implementing the law to interpret it sensibly or to fill its holes in practice. Answers from other countries or international jurisdiction are

[25] For more see: http://www.at.gov.lv/information/about-trials/2012/201205/20120509 [viewed 15 May 2012].

[26] *Latvijas Vēstnesis*, No. 92, 13 June 2012.

not always enough in dealing with problems in the area of national law. It must also be remembered that the level of development in terms of legal regulations in various areas of the law will differ. That is why historical interpretation remains important in the present day. "Initially (..) there is often an absence of understanding of [abstract] concepts (particularly in the area of law is completely new). The method of historical interpretation is the only one that can help here, but the fact is that annotations to draft laws are often very laconic, and minutes from parliamentary sessions also do not always provide unambiguous answers to questions."[27]

The most vivid case heard by the European Court of Human Rights against Latvia in relation to unclear normative regulations was the case "L.M. vs. Latvia." The focus was on shortcomings in Section 68 of the law on medical treatment (in the 1999 version of the law).[28] The National Human Rights Bureau filed a petition on this matter before the Latvian Constitutional Court, and this led to the legislature to define clear procedures for involuntary hospital treatment after a decision on the matter by a council of psychiatrists.[29]

The legislature and the dissenting opinion of judges

The individual views of judges are seen as an ongoing subsidiary source of law. A judge who disagrees with or criticises the views of a majority of judges invites the legislature to listen to what is being said. An example is a justice on the European Court of Human Rights, Egbert Myjer, joined in the court's ruling on the case "Longa Yonkeu vs. Latvia," but stated separately that a person must not be allowed to extend residency in Latvia in a malicious way by constantly filing new requests for refuge.[30]

The views of individual justices on the Constitutional Court are deeply rooted in legal practices which the court has developed in the past. There have been 14 cases in which justices have filed separate opinions in which opposing thoughts are included.

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[27] Apse D. Kazuistikas nozīme..., *op. cit.*, p. 180.

[28] See: *Latvijas Vēstnesis*, No. 113, 21 July 2011. In the ruling, the ECHT pointed out that regulations in Section 8 of the law on medical treatment were so unclear that there could be very broad interpretation of circumstances under which a person can be involuntarily hospitalised. The disputed norm did not offer patients sufficient guarantees against arbitrary and forced medical treatment, because in terms of the law and of practice, doctors were not obliged to provide information about reasons for forced treatment or to set a deadline for such treatment. Neither were they obliged to take into account the views of the relevant patient as to whether the forced treatment is or is not needed.

[29] The National Human Rights Bureau filed the petition with the Constitutional Court on December 29, 2006, arguing that Section 68 of the law on medical treatment violated the terms of Section 91 and 92 of the Latvian Constitution. On April 3, 2007, the Constitutional Court dismissed the case because on March 1 of that year, the law had been amended to ensure control by the courts in cases when patients are subject to involuntary hospitalisation. The amendments took effect on March 29, 2007, and spoke to a detailed procedure in determining the legality of limitations on the freedom of patients in those cases when a council of psychiatrists has determined that the patient must be subject to involuntary and forced treatment.

[30] For the ruling, see: http://cmiskp.echr.in/tkp197/viewhbkm.asp?sessionId [viewed 15 April 2012].

In one case the justice partly disagreed with the ruling, and in three cases three judges filed dissenting opinions. These usually include significant objections to the ruling of the majority, as well as innovative ideas which must be viewed: in interaction with doctrinal ideas and can, in comparison to the selected examples of appropriate judicature, help the to fix the mistakes of the legislature or have an effect on the quality of legal acts.

Of particular importance in explaining the content of the rule of law and the principle of legal stability were ideas published by three justices after the handing down of the court's ruling on Case No. 2011-03-01. In these, the justices pointed out that the courts must observe the ideas which are expressed in their rulings in relation to the stability and continuity of the legal system, as well as requirements related to the rule of law and the principle of equality.[31] The justices argued that the disputed legal norms were not focused on the battle against the shadow economy, because they would not reduce illegal employment and under-the-table payment of wages, as had been found in the Constitutional Court's ruling. The judges also disagreed with the conclusion in the ruling that the state had established sufficiently effective mechanisms for ensuring that an employees can make sure that employers make adequate social security contributions on their behalf.

The most important contribution made by the publication of individual views by justices is that this leads to debates about other subsidiary sources of the law while also crystallising the ideas that have been expressed in the legal world. These separate views also point to the need to change the level of thinking when creating new legal acts so that the legislature (and institutions of national governance) do not create legal acts outside of their area of competence – ones which are useless for the specific circumstances and location and, thus, endanger the essence of the principle of subsidiarity.[32]

An analysis of major ECHR rulings against Latvia and the dissenting opinion which justices have expressed in their regard, as well as of the individual opinions of justices on the Latvian Constitutional Court, shows that the thinking of the legislature is changing. This also calls for a paradigm change – the need for reforms at all levels and in all branches of government, particularly in terms of understandings, consideration and formulation of human rights in accordance with the realities of life. This was also indicated in a debate about whether the competence of the Constitutional Court should be expanded,[33] also looking at future prospects for the European Court of Human Rights in terms of an excessive burden for the court and of cases in which the court finds that the petitioner has not been placed into a fundamentally disadvantageous situation.[34]

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[31] Available: http://www.satv.tiesa.gov.lv/upload/2011_03_01_Kutris_Kinis_Osipova_ats [viewed 13 April 2012].

[32] For more on this, see: Apse D. Vērtības, tiesību efektivitātes traucējumi un palīgavoti [Values and Hindrances and Subsidiary sources in the Effectiveness of the Law]. *Juridiskā Zinātne*, No. 2, 2011, pp. 5-18.

[33] Available: http://www.latvijasradio.lv/zinas/raksts.php?id=38433&gr=0 [viewed 15 May 2012].

[34] Available: http://www.juristvards.lv/body_print.php?id+208162 [viewed 15 May 2012].

Conclusion

1. Subsidiary sources and resources of the law must be seen as sources which reflect changes in society and legal relations and send an initial message to the legislature about the need to improve existing legal regulations.
2. Normative acts which are drafted and approved in ignorance of or in relation to an avoidance of the principle of the rule of law cripple their application and hinder the attraction of resources for the drafting of truly necessary draft laws.
3. The desire of the public sector for casuistic legal regulations should not be justified on the basis of saving public resources or attracting additional resources. Unnecessary casuistry does not facilitate a systemic understanding of the law or the sensible implementation of legal norms. It also reduces the professionalism and creativity of those who create and apply the norms.
4. The creation of truly necessary legal norms requires people with the appropriate knowledge and experience. Knowledgeable people from among those who will implement the law must also be involved, and they must be encouraged to remain in the system of governance via constant opportunities to develop their careers. This could be achieved by facilitating sustainability in the Civil Service so as to ensure useful and effective utilisation of existing human resources by creating truly necessary legal norms.
5. The existence and development of a society in a country is only possible if there is mutual trust between the governing system and the public. This means that legal acts must explain why the specific territory needs the state and the law if legal acts enshrine unchanging values, and if the legislature listens to public opinion and explains the areas of legal relations which require improvement, as opposed to a lickspittle and uncritical approach to legal norms which are based on short-term interests alone.
6. When creating legal norms, the influence of the process of globalisation on this process must be examined carefully. Laws must not have aggressive or haughty attitudes toward the people, because this slaughters democracy and freedom.
7. Thought must be given to the need for legislative reforms so as to ensure an effective transfer toward the phase of consolidation of new legal norms as part of the cyclical framework of legislative procedures. The end to the period of degradation will also point to the need for reforms in the system of governance.

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QUALITY OF NORMATIVE ACTS AS A BASIS FOR A QUALITATIVE COURT DECISION

Keywords: efficiency of court procedures; duty of argumentation of judges; legal system; legislation.

Quality of trial in Latvia is a widely discussed issue, but most of the debates are related to the length of the trial. Much discussion about the postponement of trials have taken place[1], some procedural laws have been altered[2] or changes are planned[3] aimed at reducing administrative barriers to achieve an acceleration of hearing and the trial process. A small number of discussion is also related to the quality of judicial decisions, primarily focusing on improving it, but generally poor quality of judicial decisions is associated with the lack of judge's qualifications or improper diligence. Less attention has been paid to the relation between the quality of court decision and the quality of normative act, which is significant enough, given that any court decision in continental European legal system should be based on law, but the most important source of law in this system is a normative legal act.

A legal act containing the general behavior of the commandments, which can be repeatedly applied, is called a normative legal act[4]. It is a legal act containing statutory provisions[5]. Statutory provisions, in turn, are binding prescriptions of general behavior expressed in the form of language, which are aimed at establishing the legal consequences. Applicable statutory provision is a legal framework for establishing the legal consequences, since such legal consequences can not arise merely from the facts[6].

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1 See, e.g.: conference materials "Taisnīga tiesa ir savlaicīga tiesa: kā novērst tiesu sēžu atlikšanu". http://www.saeima.lv/lv/aktualitates/saeimas-zinas/19740-konference-taisniga-tiesa-ir-savlaiciga-tiesa-ka-noverst-tiesu-sezu-atliksanu [viewed 25 June 2012].

2 See: Grozījumi Civilprocesa likumā: LR likums. *Latvijas Vēstnesis*, 2012, 28. marts, Nr. 50; Grozījumi Krimināprocesa likumā: LR likums. *Latvijas Vēstnesis*, 2012, 13. jūnijs, Nr. 92.

3 Draft law "Grozījumi Administratīvā procesa likumā. Available: http://titania.saeima.lv/LIVS11/saeimalivs11.nsf/webAll?SearchView&Query=([Title]=*Administrat%C4%ABv%C4%81+procesa*)&SearchMax=0&SearchOrder=4 [viewed 25 June 2012].

4 Neimanis J. Ievads tiesībās. Riga: zvērināts advokāts Jānis Neimanis, 2004, p. 79.

5 Jelāgins J. Tiesību pamatavoti. Mūsdienu tiesību teorijas atziņas. Riga: Tiesu namu aģentūra, 1999, p. 65.

6 Kalniņš E. Tiesību normu piemērošanas loģiskā shēma. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Riga: Ratio iuris, 2003, p. 18-19.

Even two institutions in Latvia are dealing with creation of laws and regulations – Parliament[7], with responsibility of issuing law, and Cabinet of Ministers[8], which issues normative legal acts, based on the mandate given by the Parliament. Changes in public relations, or formation of new public relations results in need for new regulation of these relations. Therefore, number of statutory provisions continuously increases in every country[9]. However, while the number of statutory provisions is increasing, it is important to prevent the increase in complexity of laws, to maintain the possibility to understand and apply the laws in everyday situations by each individual. Therefore, creation of normative legal acts needs to follow several basic principles that encourage and help to ensure the quality of certain normative acts[10].

According to Jānis Neimanis, the Senator of the Administrative Affairs Department of the Supreme Court of Latvia, there are two fundamental principles for creation and quality of statutory provisions – transparency and professionalism. He believes that high quality result of the creation of statutory provision can be achieved only by meeting the following criteria – normative legal act must be well-considered, precise, appropriate for processes of latest social life, and non-contradictory to currently valid statutory provisions[11].

Only judicial normative act can be considered qualitative normative act, however most important criteria of the judicial normative act are consideration for the minority (consensus), and ensured access to justice[12]. Fragmentary, rushed, and ill-considered creation of statutory provision, which adapts to each and every social development, is not able to provide uniform and consistent application of the law[13]. But only vuniform and consistent application of the law can be enough to raise public trust for rights and justice system. Possibility to count on specific and clear outcome of solving a matter in any institution would reduce the number of potential offenders and potential misinterpretations of statutory provisions.

Countries belonging to judicial circle of Continental Europe are characterized by judicial authority, procedural culture (settlement of disputes through court), and public confidence in laws, public administration and court. Court is not only deciding the dispute, but also enforcing law and controlling the legal rights. The prevailing rule of law in Mentioned range of countries does not only mean rights to justice, but also the right to prompt judicial protection – the trial must take place in appropriate amount of time[14]. Only sources of law containing universally binding laws can serve as the main legal basis for the adjudication of a case in Continental

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[7] See: Latvijas Republikas Satversme: LR likums. *Latvijas Vēstnesis*, 1993, 1. jūlijs, Nr. 43; Saeimas kārtības rullis: LR likums. *Latvijas Vēstnesis*, 1994. 18. augusts, Nr. 96.

[8] See: Ministru kabineta iekārtas likums: LR likums. *Latvijas Vēstnesis*, 2008, 28. maijs, Nr. 82.

[9] Neimanis J. Ievads tiesībās. Riga: zvērināts advokāts Jānis Neimanis, 2004, p. 90.

[10] Kusiņš G. Normatīvo aktu jaunrade. Mūsdienu tiesību teorijas atziņas. Riga: Tiesu namu aģentūra, 1999, p. 117.

[11] Neimanis J. Ievads tiesībās. Riga: zvērināts advokāts Jānis Neimanis, 2004, p. 90-91.

[12] Japiņa G. Tiesību normas likumības un tiesiskuma pārbaude. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Riga: Ratio iuris, 2003, p. 50-51.

[13] Ibid., p. 55.

[14] Neimanis J. Ievads tiesībās. Riga: zvērināts advokāts Jānis Neimanis, 2004, p. 118.

Europe[15]. However, also auxiliary sources do matter in quality decision-making, because they are used to back up the reasoning for the decision[16].

Fundamental matter of theory of law is consideration whether to obey a piece of legislation, which is contrary to human rights and freedoms[17]. Yet it is more efficient to create laws which should not be circumvented by roundabout routes. Any consensus in law-governed state is based on general principles of law and respect of natural rights[18]. Public confidence in the correctness of state power may exist only if this power meets the public's expectations [19].

Impartial legal system deals with all the necessary written and unwritten ordinances that are necessary to resolve the dispute. The legislator's task is to find the objective standards that exist in the corresponding legal system and to govern the system in actual cases under way[20]. The result, and the complexity of work, depends on how successfully the legislature carries out these tasks. Clearly defined general rules promote consistency in decision making and, consequently, fairness and legal certainty[21]. If a separate statutory provision is contrary to the general principles of law due to failure of legislature – this provision goes beyond the particular legal system, in which case the rule should be declared void[22].

Legal norms are applied in successive operations of state institutions, leading to a particular event being arranged according to the norms formulated in the general rule[23]. Public administration is not involved in laws only within administrative proceedings. It can be done also by judges and officials during any other application of statutory provision[24]. Statutory provisions are applied by, firstly, translating them according to certain methods of interpretation of legal rules. Result of translation can be either literary appropriate, expanding, narrating, or even different approach is required. If literal compliance has been generally accepted as standard position, other three cases must be accordingly motivated by adopter of the norm[25].

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[15] Neimanis J. Ievads tiesībās. Riga: zvērināts advokāts Jānis Neimanis, 2004, p. 111-112.

[16] Levits E. Starp tiesību normu un tiesisko realitāti. Vispārīgās tiesību teorijas un valstszinātnes atziņas. Riga: Latvijas Universitāte, 1997, p. 16.

[17] See, e.g.: Par likuma "Par valsts pensijām" pārejas noteikumu 32. punkta atbilstību Latvijas Republikas Satversmes 1. un 109. Pantam. Satversmes tiesas spriedums lietā Nr. 2004-21-01, Rīgā, 2005. gada 6. aprīlī. Available: http://www.satv.tiesa.gov.lv/?lang=1&mid=19 [viewed 21.06.2012].

[18] Japiņa G. Tiesību normas likumības un tiesiskuma pārbaude. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Riga: Ratio iuris, 2003, p. 45.

[19] Ibid., p. 48.

[20] Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana. Riga: Ratio iuris, 2005, p. 117.

[21] Hartmane L. Juridiskā argumentācija tiesu nolēmumos. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Riga: Ratio iuris, 2003, p. 211.

[22] Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana. Riga: Ratio iuris, 2005, p. 119.

[23] Plotnieks A. Tiesību teorija & juridiskā metode. Riga: SIA "Izglītības soļi", 2009, p. 159.

[24] Japiņa G. Tiesību normas likumības un tiesiskuma pārbaude. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Riga: Ratio iuris, 2003, p. 45.

[25] Meļķisis E. Tiesību normu iztulkošana. Riga: Latvijas Universitāte, 1999, p. 47. Quoted from: Hartmane L. Juridiskā argumentācija tiesu nolēmumos. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Riga: Ratio iuris, 2003, p. 213.

As the number of statutory provisions increase, likelihood of them conflicting or colliding increases as well. Conflicts of law arise in cases where the rules are logically, empirically or evaluative incompatible[26]. Logical incompatibility violates the requirement of rationality. Empirical incompatibility violates the requirement of efficiency, but evaluative incompatibility means that by respecting the two norms, a third norm is being violated[27]. If it is impossible to achieve the desired result (apply specific rules for a particular occasion) by literal compliance, it might be necessary to use methods which are increasingly distancing the results of the statutory provisions from the grammatical text.

Conflict resolution, as well as teleological reduction and creation of legal analogies of general provisions, is one of the corrective methods of interpretation [28]. This means that the legislator has failed to fulfill its mission of sufficient quality, and it is necessary to be corrected or adjusted by applying the law qualitatively, which is difficult and time consuming, and it leads to possibility that the result might be questioned. Both the loopholes in laws, and existence of completely unregulated fields, compel judges to focus on further creation of rights[29].

Court's role in Enlightenment era was very simple – the court had to examine all the facts and evidence and accordingly apply a statutory provision, which was clearly finalized by the legislature. But the view of the judicial function has changed in the twentieth century. Legislature could not cover all situations of life and all possible public and economical changes with statutory provisions, therefore, the adoption of laws was forced to use more general wording, which has to be translated accordingly in future[30].

It should be noted that the simplest situation for adopter of the statutory provision is applying the provision using only the literal method of interpretation, by making it as clear and explicit as possible. This method also takes least time to apply. But even so, the process of applying the provision is not limited to mechanical transfer to a separate legal entity. Even when the choice of provision does not create any doubt, the legal consequences, intended by the provision, must be specified to the extent required or permitted by the provision. By applying the provision, it turns from general commandment of behavior into an individual (casual) provision, which

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[26] Peczenik A. On Law and Reason. Dordrecht, Boston, London: Kluwer Academic Publishers, 1989, pp. 418-425. Quoted from: Iļjanova D. Tiesību normu un principu kolīzija. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Riga: Ratio iuris, 2003, p. 98.

[27] Iļjanova D. Tiesību normu un principu kolīzija. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Riga: Ratio iuris, 2003, p. 98.

[28] Ibid., p. 96.

[29] Langenbuhere K. Tiesnešu tiesību attīstība un iztulkošana. Metodoloģisks pētījums par tiesnešu tiesību tālākveidošanu vācu civiltiesībās. Riga: Tiesu namu aģentūra, 2005, p. 19.

[30] Лисанюк Е. Н. Аргументация в нормативных контекстах: подходы и проблемы, коммуникация и образование. Сборник статей – под ред. С. И. Дудника, Санкт-Петербург: Санкт-Петербургское философскоеп общество, 2004, p. 216-233. Quoted from: Matjušina R. Tiesas sprieduma argumentu veidi un plašums kā tiesas objektivitātes kritēriji. Aktuālas tiesību realizācijas problēmas. Latvijas Universitātes 69. konferences rakstu krājums, Riga: Latvijas Universitāte, 2011, p. 227.

addresses one or more specific subjects[31]. If a provision is supported as positive rule of law, it must be proven that it meets the current legal policy criteria, hence this particular rule of law is in effect[32].

In case of mistake by legislature, applicant of law is obliged to make adjustments of statutory provisions using corresponding legal methods, such as teleological interpretation, analogy of law, or teleological reduction, thus extending or curtailing the provisions composition according to the will of the legislature and In case of mistake by legislature, applicant of law is obliged to make adjustments of statutory provisions using corresponding legal methods, such as teleological interpretation, analogy of law, or teleological reduction, thus extending or curtailing the provisions composition according to the will of the legislature and *ratio legis*[33]. There are two interacting objectives for the ability to balance the formal and non-formal side of provision: 1) to ensure the operational character or efficiency; 2) to ensure that those who enter into legal relations, accept the applicable provision willingly, rather than involuntary[34].

Application process of statutory provision is completed by the act of application. Law requires a written presentation of act in absolute majority of cases[35]. A court order is one of such acts of application for statutory provision. It is a result of judge applying the statutory provision. When it comes to the historical development of judges role, Mg.iur. Dace Šulmane offers following historical changes in relations between judge and law: the first period represents judge to be a subject to the law (the judge under the law), second – the judge as a full competitor of the law (the judge to the law), while the third period, which is most difficult to comprehend, requires judge to work under unprecedented circumstances, by subjecting the law to comply with human rights and transnational legal requirements (the judge above the law)[36]. Both the written laws, and even more general principles of law, are integral part of argumentation of juridical decision[37]. Court order must be lawful, and efficiency of court order depends on acceptance in society[38].

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[31] Koller P. Theorie des Rechts. 2 Aufl. Wien-Koln-Weimar, 1997, S. 69. Quoted from: Plotnieks A. Tiesību teorija &juridiskā metode. Riga: SIA "Izglītības soļi", 2009, p. 240.

[32] Hartmane L. Juridiskā argumentācija tiesu nolēmumos. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Riga: Ratio iuris, 2003, p. 212.

[33] Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana. Riga: Ratio iuris, 2005, p. 118.

[34] Japiņa G. Tiesību normas likumības un tiesiskuma pārbaude. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Riga: Ratio iuris, 2003, p. 45.

[35] Plotnieks A. Tiesību teorija &juridiskā metode. Riga: SIA "Izglītības soļi", 2009, p. 181.

[36] Remy Ph. La Part Faite au Juge. Pouvoirs, revue francaise d'etudes constitutionelles et politiques, 2003, No. 107, p. 22, 23. Available: http://www.revue-pouvoirs.fr/La-part-faite-au-juge.html. Quoted from: Šulmane D. Trīs tiesnešu arhetipi mūsdienu tiesību filozofijā. Aktuālas tiesību realizācijas problēmas. Latvijas Universitātes 69. konferences rakstu krājums, Riga: Latvijas Universitāte, 2011, p. 265.

[37] Iļjanova D. Vispārējo tiesību principu nozīme un piemērošana. Riga: Ratio iuris, 2005, p. 110.

[38] Matjušina R. Tiesas sprieduma argumentu veidi un plašums kā tiesas objektivitātes kritēriji. Aktuālas tiesību realizācijas problēmas. Latvijas Universitātes 69. konferences rakstu krājums, Riga: Latvijas Universitāte, 2011, p. 227.

In accordance with the established practice of the European Court of Human Rights, a duty of the judiciary to give motivation of its decisions is also required by Article 6 of the European Convention on Human Rights[39]. Reasoned judgment, although not specifically identified in the European Human Rights Convention, Article 6, is an integral part of individual's right to a fair trial[40]. Grounds of the judgment must prove that the court indeed did examine the case, thus – was available to the parties[41].

The right to a fair trial also obliges court to motivate their order, so that process participants and other parties from the public are able to understand how the court arrived at just that, and no other result[42]. The right to a reasoned judgment is closely linked to the right on the facts of the case being thoroughly and objectively assessed, right of public judgment, and the right of appealing the court decision[43]. By motivating its decision, the court shows that it has reviewed: the case objectively[44]. The right to a reasoned judgment may be restricted in terms of court orders by higher-instance courts[45]. Similarly, the right to a reasoned court ruling does not mean that the court is obliged to respond to any participant in the process, but only to those relating and important to the case[46].

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[39] Opinion of the Attorney General Kokott, EU Court case No. C-619/10, Trade Agency, April 26, 2012, point 82. Available: http://curia.europa.eu/juris/celex.jsf?celex=62010CC0619&lang1=lv&type=NOT&ancre= [viewed 23.06.2012].

[40] Ovey C., White R. The European Convention on Human Rights. Fourth Edition. Oxford: Oxford University Press, 2006, p. 179.

[41] Cuniberti G. The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance, and Eficiency. International and Comparative Law Quarterly, Vol. 57, Part I (2008), p. 30.

[42] Matscher F. The Right to a Fair Trial in the case-law of the organs of the European convention on human rights. The right to a fair trial. Strasbourge: Council of Europe Publishing, 2000, p. 19. Quoted from: Autoru kolektīvs, Latvijas Republikas Satversmes komentāri, VIII nodaļa Cilvēka pamattiesības. 92. panta komentārs. Riga: Latvijas Vēstnesis, 2011, p. 140.

[43] Reid K. A Practitioner's guide to the European Convention on Human Rights. 3rd ed. London: Sweet&Maxwell, 2008, p. 185-190; ANO Cilvēktiesību komiteja. Vispārējais komentārs (General Comment). Nr. 32. 2-7. gada 23. augusts. 49. punkts. Available: http://www2.ohchr.org/english/bodies/hrc/comments.htm [viewed 25 June 2012]; ECHR judgment, case No. 12945/87 Hadjianastassiou v. Greece, December 16, 1992. Available: http://cmiskp. echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hadjianastassiou%20%7C%20Greece&sessionid=100561329&skin=hudoc-en [viewed 25 June 2012]; ECHR judgment, case No. 8950/80 H. v. Belgium, November 30, 1987. Available: http://cmiskp. echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=H%20%7C%20Belgium&sessionid=100561329&skin=hudoc-en [viewed 25 June 2012].

[44] Autoru kolektīvs. Latvijas Republikas Satversmes komentāri. VIII nodaļa Cilvēka pamattiesības. 92. panta komentārs. Riga: Latvijas Vēstnesis, 2011, p. 140.

[45] Reid K. A Practitioner's guide to the European Convention on Human Rights. 3rd ed. London: Sweet&Maxwell, 2008, p. 187. Quoted from: Autoru kolektīvs, Latvijas Republikas Satversmes komentāri, VIII nodaļa Cilvēka pamattiesības. 92. panta komentārs. Riga: *Latvijas Vēstnesis*, 2011, p. 140.

[46] ECHR judgment, case No. 16034/90 Van de Hurk v. The Netherlands, April 19, 1994. Available: http://cmiskp. echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hurk%20%7C%20Netherlands&sessionid=100561329&skin=hudoc-en [viewed 25 June 2012].

Legal theorist Aleksander Peczenik indicates that the longer the chain of the corresponding arguments is, the clearer and more coherent is this opinion. To support a claim, it must be justified by as long chain of argument as possible[47]. So one should not avoid long justifications during reasoning process – the clearer and more detailed the justification, the more reasonable the resulting conclusion or statement. The chain must not miss any sections for it to be sequential and understandable[48].

Accordingly, the higher quality of legal act, the simpler for the judges to justify their decision, and the less confusion, debate and doubt will be caused by this decision, so it will be considered satisfactory. At the same time, although such decisions are necessary to be justified, the underlying reasoning will not be overcomplicated, therefore, easier to understand, which will improve the productivity of the judge and the judges' perception in society.

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[48] Hartmane L. Juridiskā argumentācija tiesu nolēmumos. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Rīga: Ratio iuris, 2003, 210. lpp.

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THOSE, WHO CHANGE, WILL PREVAIL![1] ANALYSIS OF THE CONSTRUCTION OF CONSTITUENT ELEMENTS OF THE CRIMINAL OFFENCE AND THE SANCTION INCLUDED IN PART THREE OF THE CRIMINAL LAW ARTICLE 125

Keywords: Part Three of the Criminal Law Article 125; qualification; *mens rea*; impossible construction; penal sanction.

Introduction

The subject of the paper is an analysis of constituent elements of the criminal offence of inflicting intentional serious bodily injury, which due to the offender's negligence has been the cause of death of the victim, as stipulated in Part Three of the Criminal Law Article 125 (*hereinafter also CL*). In the paper, the most emphasis will be attributed to setting Part Three of the Criminal Law Article 125 apart from similar cases, for instance, murder (Article 116 of the Criminal Law) and homicide through negligence (Article 123 of the Criminal Law); to analysis of the construction of Part Three of the CL Article 125, as well as attention will be paid to the penal sanction, by studying theoretical materials and opinions voiced in doctrine and case-law, regulatory enactments, as well as case law with respect to the aforementioned Articles of the Criminal Law.

Only by performing a proper analysis of theoretical materials, one can arrive at a proper solution for correct qualification of a criminal offence,[2] which quite often causes problems in practice, when applying Part Three of the Criminal Law Article 125 and determining the final punishment.

Firstly, the author will express an opinion regarding the aspects of practical application of Part Three of the Criminal Law Article 125 and the place and need of the provision as such in the Criminal Law. In continuation, the author will analyse the practice of imposing the penal sanction, and in conclusion, even though constituent elements analogous to the provisions in Part Three of the Criminal Law Article 125 have existed in the Republic of Latvia already since 1845,[3] the author will consider excluding this provision from the current version of the Criminal Law.

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[1] Rainis. Zelta zirgs. Saulgriežu pasaka piecos cēlienos. 1909, p. 131. Available: http://www.ppf.lu.lv/v.3/eduinf/skoleniem/Rainis/zelta_zirgs.pdf [viewed 15 June 2012].

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[3] Sodu likumi par krimināliem un pārmācīšanas sodiem. 1885. gada izdevums ar turpinājumiem līdz 1885. gada beigām. Rīga: Dienas Lapas apgāds, 1894. Sodu likumu par krimināliem un

Qualification of criminal offences under Part Three of the Criminal Law Article 125

"Fatal injury" takes place in between killing and bodily injury,[4] according to the prominent Latvian pre-war criminal law specialist Professor P. Mincs. However, the Supreme Court Plenum of the Republic of Latvia in a 2004 summary "On criminal offences related to inflicting intentional serious bodily injuries" clearly has pointed out that "in the constituent elements of the criminal offence at hand, the legislator has included two types of injury inflicted upon a person – inflicting serious bodily injury and the resulting death of the victim"[5]. The constituent elements of the criminal offence are complex, as they combine the elements of two separate criminal offences – the signs of infliction of serious bodily injury (Article 125 of the Criminal Law) and homicide through negligence (Article 123 of the Criminal Law).[6]

When applying Part Three of the Criminal Law Article 125, it must be established that a person has had the intent to inflict serious bodily injury on the victim, however negligence is applicable with respect to death, which is also directly included in the disposition of the respective section. The offender's attitude towards the victim's death is the key criterion, which allows delimiting this crime from murder, attempted murder, or from homicide through negligence.[7]

A. Rarog draws attention to the legal importance of *mens rea* as an independent element, because being a constituent element of a criminal offence, it lays at the base of criminal liability, as well as it helps setting apart certain criminal offences, namely, it has importance at qualification.[8] However, V. Luneev believes that "nearly a half of errors committed in court judgments are linked to simplified, unambiguous, and straight-lined (*прямолинейной* – in Russian) interpretation of *mens rea* of a criminal offence"[9].

Peculiarity of the constituent elements of the criminal offence to be analysed – negligence towards death resulting from the inflicted serious bodily injury excludes specified intention with respect to threats to life caused by the serious bodily injury

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pārmācīšanas sodiem 1464. pants noteic: "Ja caur dabūtiem sitieniem vai varas darbībām, kuri notika ne aiz neuzmanības, bet ar nolūku, kaut arī bez slepkavības nodoma, kāds dabū galu, tad vainīgais notiesājams, ievērojot lietas apstākļus".

4 Mincs P. Krimināltiesību kurss. Sevišķā daļa ar V. Liholajas komentāriem. Rīga: Tiesu namu aģentūra, 2005, 235. lpp.

5 Tiesu prakse kriminālllietas par noziedzīgiem nodarījumiem, kas saistīti ar tīšu smagu miesas bojājumu izdarīšanu; LR Augtākās tiesas Plēnuma un tiesu prakses vispārināšanas daļa, 2003, 10. lpp. Available: http://www.at.gov.lv/files/docs/summaries/2004/Apkopojums_Miesas-_bojajumi.doc [viewed 15 June 2012].

6 Krastiņš U. Vaina komplicētos noziedzīgos nodarījumos: *Jurista Vārds*, 2010. gada 11. maijs, Nr. 19 (614). Available: http://www.juristavards.lv/index.php?menu=DOC&id=209385 [viewed 14 June 2012].

7 Krastiņš U., Liholaja V., Niedre A. Krimināllikuma zinātniski praktiskais komentārs 2. Sevišķā daļa. Rīga: Firma "AFS", 2007, 242. lpp.

8 Рарог А.И. Квалификация преступления по субьективным признакам. Санкт-Петербург: Юридический центр Пресс, 2003, p. 52-62.

9 Лунеев В. В. Субьективное вменение. Москва: Спарк 2000, С. 4.

to be inflicted, namely, the offender expects that as a result of their conduct, serious bodily injury will be inflicted upon the victim, however the offender does not expect it to be life-threatening, namely, that such actions can lead to the victim's death, or such expectations are of abstract nature.

Criminal offences, that feature two forms of offence, in which, moreover, the type of offence with respect to the secondary consequences must be merely of negligence type, it is important to establish the existence or non-existence of both types of offence also in order to prevent incorrect qualification of the offences.[10]

One must agree with the opinion that the accused with his conduct must be held accountable for the actual consequences, furthermore, for the consequences, the occurrence of which he could or at least should have predicted by means of reason of a rational mind.[11]

In his publications, the author K. Rudzītis reasonably points out that normally the offender has neither legal nor medical education, therefore it is difficult to fathom how a person, for instance, by beating up the victim for a longer time or by stabbing the victim in stomach with a knife, could expect that serious bodily injury (in a case of explicit intent) or serious bodily injuries (in a case of implicit intent) would be inflicted, while not foreseeing the possibility of death of the victim. It is more likely that the person's consciousness will firstly "ponder upon" the issue of a better known criterion – whether death can occur as a result of the action.[12]

If the accused has not had explicit intent, then he must be held accountable for the consequences that have actually occurred, however, if the offender has inflicted serious bodily injury with explicit intent, it must be automatically assumed that the person's consciousness has realised the possibility of victims death. Moreover, from an analysis of case law and legal writings, it can be conclude that as the offender's consciousness in intentional infliction of harm on the victim's body must expect the possibility of lethal consequences, thereby, upon careful analysis of the features of *mens rea*, one can reach a conclusion with respect to the type of offence wherewith the crime has been committed – intentionally or through negligence. It must be recognised that often the criminal offence is qualified under Part Three of the CL Article 125, even though from the case materials, the offender's intent derives clearly, namely, the expectation of consequences and willingness to see those consequences.

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[10] Rudzītis K. Par divām vainas formām vienā nodarījumā: *Latvijas Vēstnesis*, pielikums *Jurista Vārds,* 2001. gada 30. janvāris, Nr. 1 (194). Available: http://juristavards.lv/index.php?menu=DOC&id=2450 [viewed 9 June 2012].

[11] Deficiencies in proper analysis of *mens rea* are observed in several court judgments, for instance, in the judgment of June 1, 2010 of the Criminal Case Court Collegial of Riga Regional Court in the case No. 1088265207, judgment of June 21, 2009 of the Criminal Case Court Collegial of Latgale Regional Court in the case No. 11290020508, and the judgment of October 6, 2009 of the Criminal Case Department of the Senate in the case No. SKK-546/09, No. 11330041308.

[12] Rudzītis K. Par divām vainas formām vienā nodarījumā: *Latvijas Vēstnesis*, pielikums "*Jurista Vārds*", 2001. gada 30. janvāris, Nr. 1 (194). Available: http://www.juristavards.lv/index.php?menu=DOC&id=2450 [viewed 9 June 2012].

Analysis of Sanction of Part Three of the Criminal Law Article 125

The author J. Horder points out that "legally, the main function of distinction is to provide the theoretical basis for distinguishing between offences".[13] This is confirmed also by E. Ashworth, who claims that "criminal liability is the most powerful official condemnation that the society can impose."[14] Meanwhile, the Professor P. Mincs back in the day emphasized that "the threat of a criminal punishment, if not qualitatively, then by intensity – and most certainly by its procedure of application – takes the *highest position* among all means of legal protection in a state subject to the rule of law."[15] The meaning of a punishment in the modern-day criminal law and its essence is manifested as a warning for criminal offences.[16]

"One of the manifestations of the principle of justice[17] in criminal law is the requirement that similar criminal offences are qualified equally, namely, the same provision of the Criminal Law must apply; such requirement serves as the grounds for adequate and just determination of a punishment for an offence"[18] – this is what Professor U. Krastiņš considers about the qualification of criminal offences.

According to S. Rastropov, "qualified or privileged features of a body of crime in essence and qualitatively, according to the legislator's evaluation, increase, or quite the contrary, decrease the level of threat to the society concerning one type of criminal offences".[19]

Part Three of the Criminal Law Article 125 includes qualified constituent elements with respect to the first and second part of the Article, by prescribing a more severe sanction, namely, for committing this criminal offence, the sanction is deprivation of liberty from three to fifteen years and police supervision for a time period of up to three years or without it.

There are several strategies of punishments, of which the legally established model[20] refers to the sanction included in Part Three of the Criminal Law Article 125, namely, the legislator has determined the range for the imprisonment sanction for the specific

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[13] Defining Crimes. Essays on the Special Part of the Criminal Law. Edited by R. A. Duff and Stuart P. Green. New York: Oxford University Press, 2005, p. 22.

[14] Ashworth A. Principles of Criminal Law. Fifth edition. New York: Oxford University Press, 2006, p. 2.

[15] Mincs P. Krimināltiesību kurss. Vispārējā daļa ar U. Krastiņa komentāriem. Rīga: Tiesu namu aģentūra, 2005, 17. lpp.

[16] Zahars V. Krimināsodu izpildes tiesības. Vispārīgā daļa. CIKLS "Tiesību zinības" Rīga: Apgāds Zvaigzne ABC, 2003, 5. lpp.

[17] See more on the principle of justice: Krastiņš U. Taisnīgums un nodarījumu kvalifikācija. *Jurista Vārds.* 2005. gada 25. oktobris, Nr. 40 (395). Available: http://juristavards.lv/index.php?menu=DOC&id=119610 [viewed 4 June 2012].

[18] Krastiņš U. Tiesību zinātnes loma tiesu prakses veidošanā. Līdzziņojums konferencē 2005. gada 7. oktobrī. Available: www.at.gov.lv/files/docs/conferences/U[1].Krastins.doc [viewed 4 June 2012].

[19] Растропов С.В. Уголовно-правоя охрана здоровъя человека от преступленых посягателъств. Санкт-Петербург: Издателъство Р. Асланова, юридический центр "Пресс", 2006, С. 335.

[20] Senna J. J., Siegel L. J. Introduction to Criminal Justice. Sixth Edition. USA: West Publishing Company, 1993, p. 491.

criminal offence, and only the judge then determines the final punishment within the framework of the sanction.

As a result, the applier of the applicable sanction (the court) has obtained an extensive freedom to act with regard to the applicable sanction. The institution's freedom to act[21] is a mechanism integrated in the law (regulatory enactment), the aim of which is to achieve that in the specific case, standard consequences that are not envisaged in law set in, but rather that the institution can by itself choose the consequences that are most suitable for the specific case. Thereby, a mechanism is established – a sort of provision of competence – which authorises the institution (the court) to choose legal consequences within the determined framework of the law.[22]

By applying Part Three of the Criminal Law Article 125, it can be concluded that the applier of law, when determining the sanction, is given a wide range of choice of punishments – from three to fifteen years – moreover, there are no legal obstacles to choose in favour of a different duration of imprisonment in each specific case.

It must be pointed out that the punishment is imposed rather chaotically, without keeping to specific guidelines or criteria, however, taking into account the broad scope of the sanction, such criticism of practice of imposing punishment is groundless, because deciding on the matter is in the competence of the legislator instead of the court. In imposing the punishment, the courts are guided by specific conditions of the case and by their inner beliefs, which in each individual case differ. However, it must be recognised that the level of severity (in compliance with Part Five of the Criminal Law Article 7, the criminal offence covered under Part Three of the Criminal Law Article 125 is to be recognised as a particularly serious offence) of the criminal offence already underlines its weight with regard to interests protected by law.[23]

An analysis of the policy of punishments imposed by courts revealed that still in cases of committing serious and especially serious crimes, the verdict oftentimes without reasonable motivation is suspended sentence, moreover, the courts practically never employ the option prescribed by the legislator to impose the duties stipulated in Section 55(6) of the Criminal Law. It could increase the effectiveness of imposing the suspended sentence, which, as shown by researches, is rather low, because suspended sentence is not perceived as a punishment.

It is stated in a case law summary on the practice of imposing punishment by courts: "Regardless of how fine a law is, its effectiveness, ability to guarantee such principles of criminal law as lawfulness, individualisation of punishment, humanism, observing justice, to a great extent depend on the imposition of these legal provisions in practice, when determining a punishment, which is one of the most important and

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[21] Levits E. Ģenerālklauzulas un iestādes (tiesas) rīcības brīvība. Funkcijas likumā, piemērošana konkrētā gadījumā, kontrole augstākā iestādē un tiesā. *Likums un Tiesības,* 2003, Nr. 7, pp. 194-202.

[22] Ibid.

[23] AT Apgabaltiesu kā pirmās instances tiesas un augstākās tiesas krimināllietu tiesu palātas kā apelācijas instances tiesas sodu piemērošanas prakse. 2007/2008. Available: http://www.at.gov.lv/lv/info/summary/2008/ [viewed 12 June 2012].

relevant parts of the operations of the court, but, since the prosecutor's injunction on punishment was introduced, also of the prosecution."[24]

To outline the problem of enjoying the court's freedom to act and of the wide scope of sanctions, an example can be given of two criminal offences, which have been qualified under Part Three of the CL Article 125, where, the court has imposed drastically different punishments. Thus, for instance, the judgment of January 27, 2011 of the Criminal Case Court Collegial of Riga Regional Court,[25] whereby the final punishment was imprisonment for two years without police supervision. This sentence was given in a situation, in which the offender with the blunt part of an axe hit his father in head several times, thereby inflicting serious bodily injury, as a result of which the victim died 17 days later. For comparison, another example – judgment of March 11, 2010 of the Criminal Case Court Collegial of Vidzeme Regional Court,[26] in which the offender intentionally with a knife stabbed the victim in the left side of the chest, thereby causing immediate death of the victim, and was sentenced with imprisonment for seven years and six months, with police supervision for one year and six months.

It would be absurd to assume that by intentionally inflicting physical harm the victim's body, the person did not foresee the fact of death, as killing is possibly only if serious bodily injury is inflicted, namely, only serious bodily injury will be the reason (causation) of the victim's death.

An interesting fact to mention is that in none of the criminal cases examined by the author covering the period of last few years, the court has imposed the maximum punishment stipulated in the Article, therefore the extensive punishment scope included in the sanction of Part Three of the CL Article 125 is to be perceived with criticism.

Practical Impossibility of Constituent Elements included in Part Three of the Criminal Law Article 125

The author V. Kolosovskiy writes: "It is known that it is possible to intentionally kill somebody, but likewise to intentionally inflict serious bodily injury both intentionally and unintentionally. Those applying the law, sometimes confuse the latter with an offence in a form of negligence, most specifically as one of its types – carelessness or self-reliance (*легкомыслие* – in Russian)"[27].

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[24] AT Apgabaltiesu kā pirmās instances tiesas un augstākās tiesas krimināllietu tiesu palātas kā apelācijas instances tiesas sodu piemērošanas prakse. 2007/2008. Available: http://www.at.gov.lv/lv/info/summary/2008/ [viewed 12 June 2012].

[25] Judgment of January 27, 2011 of the Criminal Case Court Collegial of Riga Regional Court in the case No. 11089149204.

[26] Judgment of March 11, 2010 of the Criminal Case Court Collegial of Vidzeme Regional Court in the case No. 11400116608.

[27] Колосовский В. В. Квалификационные ошибки. Санкт-Петербург: издательство Р. Асланова "Юридический центр Пресс", 2006, С. 64.

This is the error that is most frequently committed by the prosecuting party and the courts in differentiation of Part Three of the Criminal Law Article 125 from murder. Since the form of offence with regard to consequences can be manifested only in negligence, it must be elucidated whether in case of each offence, the type of negligence is necessary to be determined – either criminal self-reliance or criminal neglect – or whether in criminal offences committed under Part Three of the CL Article 125 with regard to the primary consequences, only one type of negligence can be established – criminal self-reliance.

To admit a possibility of that the guilty person, by deliberately inflicting serious bodily injury, i.e. life-threatening bodily harm, could not have predicted the victim's death, would be rather absurd. If the contrary were to be assumed, a question should be asked – in which cases, then, it is possible to predict the victim's death, if not in a case, when serious bodily injuries are intentionally inflicted? Taking into account that serious bodily injuries are inflicted intentionally, the person is clearly aware of the conditions causing threats to life, thereby the person also expects the possibility of consequences setting in.

It is typical in the case of criminal neglect that a person does not expect also the possibility of injurious consequences setting in,[28] and to refer that to infliction of serious bodily injury, as a result of which the victim's death sets in, would be incorrect. The author believes that the only question to be decided on for reasonable and adequate application of Part Three of the CL Article 125 is whether the crime has been committed as a form of criminal self-reliance or with implicit intent?

In foreign legal writings, J. Herring has expressed an opinion that "*mens rea* of a murder is manifested also in the intention to inflict serious bodily injury".[29] The author agrees to this idea because it is difficult to find assurance that a person of sound mind, by deliberately inflicting serious bodily injury, has not expected the possibility of lethal consequences setting in, therefore a criminal offence is to be recognised as committed with implicit intent, as a result, features of *mens rea* typical for the constituent elements under Article 116 of the Criminal Law (form of guilt) are found.

As pointed out by the philosopher of criminal law, Professor R. A. Duff, "a murder firstly must feature at least the intention to inflict serious bodily injury, and the person, who causes death of another person due to recklessness, is to be held accountable for manslaughter without prior intent".[30] It derives from the aforementioned that the mind of a person inflicting deliberate threat to health of another person, namely, deliberately inflicts bodily injuries, realises that as a result of that conduct, harm can be inflicted upon a person's life. There is no significance as to the intellectual signs and signs of will, because a person could have and should have realised that as a result of inflicting intentional harm on the victim's body, the victim can die.

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[28] Krastiņš U., Liholaja V., Niedre A. Krimināllikuma zinātniski – praktiskais komentārs. 1. Vispārīgā daļa. Rīga: Firma "AFS", 2007, 61. lpp.

[29] Herring J. Criminal Law. Text, Cases and Materials. Second edition. New York: Oxford University Press, 2006, p. 247.

[30] Defining Crimes. Essays on the Special Part of the Criminal Law. Edited by R. A. Duff and Stuart P. Green. New York: Oxford University Press, 2005, p. 56.

The crime under Part Three of the Criminal Law Article 125 in essence is an artificial construction, because unlike other criminal offences with two types of consequences, in this crime, the primary consequences are so closely linked to the secondary that it is often impossible do delimit the consequences of both types. Thus, the legislator has imposed an impressive duty to the courts – "to get into the mind of the offender", namely, to determine the psychological attitude of the offender, moreover, the attitude is different with respect to both of these offences (serious bodily injury and death).

Therefore, in the opinion of the author, the construction examined in this paper is legally infeasible, hence, the author suggests excluding Part Three of the Criminal Law Article 125, as such, even though it has taken place in the regulations of the Criminal Law of Latvia since the year 1845, because of its legal inadequacy.

When analysing case law where crimes are qualified under Part Three of the CL Article 125, often a question emerged – how could the offender expect that only serious bodily injury would set in, all the while not realising that the consequences could be graver – that death of a person could set in as a result of the offender's actions? It must be concluded, that the mind of the offender, most likely, had been solving a more familiar case – "can the victim die as a result of my actions?"

Hence, the author concludes that the construction included in Part Three of the Criminal Law Article 125 is legally incorrect because a person, by deliberately inflicting serious bodily injury (physically affecting a person's body), realised (explicit intention) or at least it should have realised (implicit intention) that as a result of this action, death of the victim can set in. Otherwise, one must ask – when, if not at the time of inflicting serious bodily injury, can the offender expect the victim's death?

The construction included in Part Three of the Criminal Law Article 125 is artificially structured because it determines two different sets of constituent elements, moreover, each of them have differing consequences and a different form of offence exists with respect to each of them. From the viewpoint of logic, the first consequences are so closely linked to the second consequences that in practice oftentimes they can not be set apart, therefore, there still is inconsistency and chaos with regard to application of the examined legal provision and to determination of the correct qualification.

Conclusion

1. When analysing the criminal cases, the author draws a conclusion that even though legal theory provides sufficient guidelines for differentiating,[31] in practice, there still are errors made in qualification and crimes are unjustifiably qualified under Part Three of the CL Article 125 or under Article 123 of the Criminal

[31] LR AT Plēnuma 1992. gada 24. februāra lēmums Nr. 1. "Par Krimināllikumu piemērošanu lietās par tīšām slepkavībām"; LR AT Plēnuma 1993. gada 1. marta lēmums Nr. 1 "Par Krimināllikuma piemērošanu lietās par tīšu miesas bojājumu nodarīšanu"; LR AT Plēnuma un tiesu prakses vispārināšanas daļas 2003. gada apkopojums "Tiesu prakse krimināllietas par noziedzīgiem nodarījumiem, kas saistīti ar tīšu smagu miesas bojājumu izdarīšanu"; LR AT 2009./2010. gada apkopojums "Tiesu prakse krimināllietās par slepkavībām (Krimināllikuma 116.-118. pants)".

Law, instead of Article 116 of the Criminal Law. In a major part of case law examined by the author, incorrect qualification has occurred in particular due to insufficient analysis of *mens rea*. A sizeable number of criminal offences are qualified without paying due attention, as a result, the low number of murders in Latvia, mentioned by the Prosecutor General Ē. Kalnmeiers during the assembly of Latvian chief prosecutors of 2012, becomes rather controversial.[32] Errors in qualification allow assuming that the actual number of murders might be greater even by a half.

The offence under Part Three of the CL Article 125 in point of fact is an artificial construction, because unlike other criminal offences, it carries two types of consequences, and the first consequences in this offence are very closely linked to the second consequences, and often they can not be set apart.

2. Sanction prescribed in Part Three of the CL Article 125 is very broad, and in the author's opinion, even incorrect, because for this crime, even though the conditions and consequences of the crime are often equivalent to a murder, "the punishment is deprivation of liberty for a term of not less than three years and not exceeding fifteen years, with or without police supervision for a term not exceeding three years".

   As the sanction of the Article considered is very suspensive, also the courts, guided by the factual conditions of the relevant criminal offence and by their inner convictions, can give the final punishment within the scope of the sanction, therefore, inconsistency found in cases, in which the offender is sentenced under Part Three of the CL Article 125, possibly, is too significant to leave the provision without notice.

3. The author concludes that such construction included in Part Three of the CL Article 125 is absurd, because the borderline between deliberately inflicted serious bodily injuries and implicit intention to kill is very fine and controversial. The mind of a person, who deliberately inflicts serious bodily injuries, can not realise that as a result of the particular conduct, the victim might die. Otherwise, a question must be asked – when, if not while inflicting serious bodily injuries, can the offender expect the victim's death? The construction included in Part Three of the Criminal Law Article 125 is artificially created and is practically impossible, therefore, based on the aforementioned, the author proposes to exclude Part Three of the CL Article 125.

[32] 82 murders have been registered in 2010, however the number of murders in 2011 has slightly increased – 91 cases. See: Gailīte D. Būtiski sarūk noziedzība, prokuratūra turpina strādāt. *Jurista Vārds,* 2011. gada 22. februāris, Nr. 8 (655). Available: http://juristavards.lv/index.php?menu=DOC&id=226053 [viewed 2 June 2012]; Gailīte D. Par noziedzības stāvokli valstī un prokuroru darbu. *Jurista Vārds,* 2012. gada 6. marts, Nr. 10 (709). Available: http://juristavards.lv/index.php?menu=DOC&id=244811 [viewed 2 June 2012].

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PROGRESSIVE DEVELOPMENT IN THE ILC'S WORK ON INTERNATIONAL RESPONSIBILITY: REFLECTIONS ON THE FUNCTION OF THE ILC

Keywords: International Law Commission, codification, progressive development, state responsibility, responsibility of international organizations.

Introduction

As the International Law Commission (ILC) in 2011 finalized its Articles on Responsibility of International Organizations (ARIO)[1], thus finishing the epic work on international responsibility, it seems appropriate to reflect on the merits of the ILC's exercise. The ILC has been engaged with the topic of international responsibility for most of its working life.[2] Thus the study of the ILC's work on the topic offers a valuable opportunity to trace the changing perceptions on the ILC's function – what is it that the ILC is supposed to do. In particular one may reflect on how the views on what is progressive development and whether it implies creation of new law have changed over the years.

This article examines the issue of progressive development in the ILC's work on international responsibility.[3] It briefly discusses some of the most significant ILC's attempts to progressively develop the law, most notably its attempted shift towards public order notions, such as objective responsibility and state crimes as well as ideas that eventually were not included in the 2001 Articles on Responsibility of

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1 International Law Commission, Draft articles on the responsibility of international organizations, 2011 (A/66/10), *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two.

2 The topic was one of the 25 fundamental topics initially suggested by Hersh Lauterpacht, see Lauterpacht H., Survey of International Law in Relation to the Work of Codification of the International Law Commission, UN Doc A/CN.4/1/Rev.1 (1949).

3 Since there is limited practice on the responsibility of international organizations, many of the articles in the ARIO are indeed instances of the ILC developing new norms. However, as the ARIO are modeled on the basis of Articles on Responsibility of States most of the conceptual choices as to the content of the rules were made before the ILC began to work on the ARIO. Due to this reason and also due to limitations on the permissible length required by the publisher, this article will focus predominantly on the ILC's work on responsibility of states. For discussion of substantive innovations in the ARIO see Nollkaemper A., Nadeski N. Responsibility of international organizations 'in connection with acts of states', SHARES Research Paper 08 (2012), ACIL 2012-05, finalized April 2012, available: sharesproject.nl [viewed June 26 2012].

States (ASR)[4]. These issues have been thoroughly addressed before.[5] This article in turn attempts to build on the existing discussion by reflecting whether the ILC has been actually able to fulfil its function, namely, to progressively develop and codify international law. Has the notion of progressive development changed over the years becoming somewhat less progressive? And finally – is it possible for the ILC to find some useful application to its talents in the present day changing international society?

A Brief history of ILC's work on international responsibility

The story of the ILC begins with a rather upbeat note.[6] International lawyer in late 1940s is sort of a hero on the ruins of the Second World War. It's the international lawyer who brings to justice both Nazi and Japanese war criminals (better some than none at all); and it's the international lawyer who proposes a new system for managing the world's nations with a promise of human rights, dignity and 'equal rights of men and women and of nations large and small'.[7] Natural law is no longer a bad word, whereas positivism and unlimited sovereignty of states are on a defense. In this climate some of the most highly regarded international lawyers like Hersh Lauterpacht are blunt radicals (judging by today's standards) seriously proposing the creation of world government with powers of international legislation.[8] Indeed, late 1940s were a remarkable time for international law.

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[4] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001 (A/56/10) (ASR), *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 26.

[5] Spinedi M. From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Law of Treaties and the Law of State Responsibility, *European Journal of International Law*, 2002, Vol 13, No. 5, p. 1100; Nolte G. From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations, *European Journal of International Law*, 2002, Vol. 13, No. 5, p. 1084; Pellet A. The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts. In: The Law of International Responsibility, Crawford et al (eds), Oxford: OUP, 2010, p. 75; Dupuy P. M. A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility, *European Journal of International Law*, 2002, Vol. 13, No. 5, p. 1053; Crawford J. International Crimes of States, In: The Law of International Responsibility, Crawford et al (eds), Oxford: OUP, 2010, p. 405.

[6] The ILC was created by the UN General Assembly in 1947 with the objective of 'promotion of the progressive development of international law and its codification', see UN General Assembly Resolution 174(II) adopted on November 21, 1947, U.N. Doc. A/519.

[7] Preamble to the Charter of the United Nations, 1945. Available: http://www.un.org/en/documents/charter/ [viewed 2012, June 30].

[8] See: Koskenniemi M. Hersh Lauterpacht (1897-1960). In: Jurists Uprooted: German-Speaking Emigre Lawyers in Twentieth-Century Britain, Beatson J. et al (eds), Oxford: OUP, 2004, p. 601.

A. The work of Garcia Amador

It is in this atmosphere that the ILC started its work on international responsibility of states. By 1949 when the topic was formally selected for codification[9], it already had a considerable background.[10] However as noted by Ago due to 'exceptional difficulties inherent in the subject, the uncertainties with which it has always been fraught, and the divergences of opinion and interests in the matter, previous codification efforts have not proved successful, their resumption having been postponed until a more propitious moment'.[11] In 1955 a Cuban member of the ILC – Garcia Amador was appointed as the first special rapporteur on state responsibility and the ILC actually began its work on the topic.

Amador's first report was as brave as radical.[12] He starts by expounding his views on what it is that the ILC is called upon to do.[13] Amador makes an argument that with the Second World War international law has undergone a profound transformation and in these new circumstances ILC's task is not merely to compile outdated rules and doctrines. He seems to suggest that the task of the ILC is to propose rules that are suitable to the changing paradigm of international society. In other words, its purpose is to propose rules not as they were (or are) but rather as they ought to be.

Several of his groundbreaking proposals must be mentioned. Firstly, he envisaged that the duty to make reparation is by far not the only consequence of a breach. Responsibility would also entail criminal law type consequences of sanctions or punishment.[14] Secondly, invocation of responsibility would not depend only on states; also individuals would be entitled to make international claims.[15] Thirdly, the rules to be codified and developed would concern only responsibility of states for damage

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[9] ILC Report to the General Assembly on the Work of the First Session, UN Doc. A/925, *Yearbook of the International Law Commission*, 1949, p. 227. Available: http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm [viewed June 26 2012].

[10] Attempts to codify law of state responsibility were made as early as 1889 by the International Conference of American States. Also various private bodies (American Institute of International Law in 1925, International Law Association of Japan in 1926, Institute of International Law in 1927, Harvard Law School in 1929, German International Law Society in 1930) as well as League of Nations and the 1930 Hague Conference all had attempted to make some sense of the topic; for a detailed discussion see Ago R., First Report on State Responsibility, UN Doc. A/CN.4/217, *Yearbook of the International Law Commission*, 1969, p. 225. Available: http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm [viewed June 26 2012].

[11] Ibid., p. 126.

[12] Amador G. Report on State Responsibility, UN Doc. A/CN.4/96, *Yearbook of the International Law Commission*, 1956, Vol. II, p. 173. Available: http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm [viewed June 26 2012].

[13] Amador refers to writings of Jessup noting 'the growing tendency to accept the individual as a subject of international rights and obligations, and the increasing acknowledgement of a community interest in breaches of the law' see Jessup P, Responsibility of States for Injuries to Individuals, Columbia Law Review, Vol. XLVI (November, 1946), p. 904.

[14] Amador, *supra* note 12, p. 182.

[15] Diplomatic protection was to have only a subsidiary role, see Amador *supra* note 12, p. 197 and 215.

caused to the person or property aliens.[16] It would provide not only for principles governing the law of responsibility (attribution, invocation, etc.), but would also codify substantive obligations of states.[17]

Unsurprisingly Amador's proposals were met with harsh criticism. States as well as fellow ILC members were not keen on the idea that individuals would be recognized as subjects of international law entitled to bring international claims.[18] There was scepticism about Amador's insistence that state responsibility would result specifically from breaches of fundamental human rights.[19] Also Amador's approach to limit the project to responsibility for injuries caused to foreigners was controversial as socialist states saw it as part of a capitalist agenda.[20] Many were unhappy that the project did not deal with responsibility in a way that would include breaches of other areas of international law, such as law of treaties. After the initial feedback, the special rapporteur softened his stance considerably.[21] However, his proposals were still considered to be radical and beyond ILC's mandate. The Commission opted to ignore Amador's subsequent reports on a pretext that it was busy with other issues.[22]

B. Robero Ago and an attempted shift to public order

In 1963 when Amador's membership of the ILC ended Robero Ago of Italy was appointed as special rapporteur on state responsibility. There were several lessons that he could learn from Amador's experience. The ILC was not a forum to discuss reinvention of international law. It was clear that the predominant view on what the ILC is supposed to do under its mandate to 'progressively develop' international law was considerably narrower than what Amador had attempted. It was also clear that to succeed with the project it was necessary to stay away from issues which were perceived as being markedly in the interests of either one of the cold war blocks. Given the highly unsympathetic welcome that Amador's ideas had received, Ago opted to start from a clean slate.

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[16] Thus the project as envisaged by Amador would have a rather specific scope – it would be centered on the protection of human rights and fundamental freedoms of individuals and in particular foreigners who find themselves wronged in a foreign country. See Amador, *supra* note 12, p. 199.

[17] Ibid.

[18] State Responsibility, *Yearbook of the International Law Commission*, 1956, Vol. I, p. 228-251. Available: http://untreaty.un.org/ilc/publications/yearbooks/yearbooks.htm [viewed June 26 2012].

[19] In 1956 human rights treaties were far from universally proliferated; constructing state responsibility on the basis of human rights would attempt to bring human rights into general international law through the back door.

[20] Nationals of capitalist countries were investing and travelling far and wide and therefore capitalist countries were keenly interested in protecting their nationals and their economic interests.

[21] Amador G. Second Report by F. V. Garcia, *Yearbook of the International Law Commission*, 1957, Vol. II, p. 104.

[22] International Law Commission, Report of the Commission to the General Assembly, A/7610/REV.1, *Yearbook of the International Law Commission*, 1969, Vol. II, p. 229.

Ago presented his first report to the ILC in 1969.[23] He devised two skilful solutions to the problems that had stalled Amador's progress. First, he proposed that the ILC would deal only with 'the general rules governing the international responsibility of states'.[24] Ago labelled these as secondary rules – rules that provide for general conditions under which the state is considered responsible and legal consequences which flow from responsibility. Thus Ago steered away from having to deal with substantive international obligations – the primary rules, which were bound to be notoriously hard to agree on. The advantage of secondary rules is that they are wonderfully neutral (for the most part). They would apply to any breach of international law, whatever the content of a particular obligation. Thus the ILC would avoid proposing rules that would be markedly in favour of any of the cold war antagonists.

The second skilful solution of Ago was the idea that injury is not a requirement of responsibility. In other words the responsibility would be objective – it is not necessary that any particular state suffers some detriment for the wrongdoer to incur responsibility. The very fact of breach is considered detrimental to the system of international law and therefore results in responsibility. The consequence of giving up injury as a requirement of responsibility is that the wrongdoer incurs responsibility (with resulting duty of continued performance, cessation, non-repetition and reparation) even if no state has invoked it. This small nuance is of great significance, as it shifts (at least conceptually) the law of international responsibility from a bilateral relation between the wrongdoer and the wronged towards a system based on public order.[25]

The skilfulness of Ago is that he managed to introduce this fundamental paradigm shift in a way that hardly anyone minded. There were no objections from the ILC members and only France and Argentina voiced some objections.[26] It is possible that governments perceived the question as a doctrinal detail – hardly anything that could threaten national (or government) interests, something that officials tend to protect vigorously. Had Ago come out in his report announcing a new dawn for international society and calling on states to embrace public order, it is likely that the response

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[23] Ago R. Special Rapporteur, First report on State responsibility, A/CN.4/217 and Add. l, *Yearbook of the International Law Commission*, 1969, Vol. II, p. 125.

[24] Ago R. Special Rapporteur, First report on State responsibility, A/CN.4/217 and Add. l, *Yearbook of the International Law Commission*, 1969, Vol. II, p. 139.

[25] See: Nollkaemper A. Constitutionalization and the Unity of the Law of International Responsibility, Indiana Journal of Global Legal Studies Vol. 16, 2 (Summer 2009), p. 546. Nollkaemper points out that this approach 'may redress one of the largest weaknesses of the traditional law of international responsibility [...]: the fact that the absence of invocation (for political or other reasons) rendered the law of responsibility non-operational regarding acts that upset the international legal order'.

[26] France, fully aware of implications of giving up injury as a precondition of responsibility, noted that 'draft article 1 is not acceptable because it reflects the intention to set up a kind of "international public order" and to defend objective legality, instead of safeguarding the subjective rights of the State, which we see as the purpose of international responsibility', see ILC, 'Comments and Observations Received from Governments', A/CN.4/488. Available: http://untreaty.un.org/ilc/sessions/50/50docs.htm [viewed June 26 2012].

would have been similar to that which was given to his predecessor. Ago clearly was mindful of how important perceptions are.

Introduction of public order into international law was not attempted solely by Ago. International lawyers as early as Grotius were endeavouring to do this.[27] However, by late 19th century a notion of unchecked sovereignty was gaining ground.[28] According to the prevailing opinion of the time state responsibility was strictly a matter between the injured state and the state that had committed the breach.[29] However, attitudes began to change in 1930s with Lauterpacht challenging the commonly-held sovereignist view that states (being sovereign) may not be subject to punishment. For him to limit state responsibility only to a duty of reparation between the wrongdoer and the injured and to deny a criminal law type of consequence would be illogical, unjust and contrary to existing practice.[30] Thus he clearly perceived state responsibility also in terms of multilateral obligations between the wrongdoer and the international society. These same ideas of public order proliferated in the ILC in the 1950s. Lauterpacht, being the special rapporteur on the law of treaties, proposed that a treaty be void if it violates 'such overriding principles of international law which may be regarded as constituting principles of international public policy'.[31] These overriding principles were later labelled as *jus cogens* and were retained by subsequent law of treaties rapporteurs Fitzmaurice[32] and Waldock[33] and eventually found their way into Vienna Convention on the Law of Treaties. As Spinedi notes 'the same people were dealing with codification of the law of treaties and of state responsibility'.[34] Hence the proposal to give up injury as a precondition of responsibility and thus to perceive responsibility in terms of multilateral obligations was part of a larger attempt by the ILC to introduce public order notions into international law. Given that sovereignist views were generally prevailing prior to the Second World War, these proposals indeed may be regarded as progressive development of international law.

However, discarding injury as a condition of responsibility was not the only idea that signalled a shift to a public-order-based system. Likewise Ago proposed to introduce the notion of state crime.[35] This no longer was perceived as a nitty-gritty doctrinal issue. This type of strong language was bound to alarm governments. And it did. The ILC subsequently conceded to disapproving positions of states and the

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[27] Grotius H. De Jure Belli ac Pacis, Oxford: OUP, 1925, Book II, Vol. II Chapter 20, sec. 40, p. 503.

[28] See: Nolte G. *supra* note 5, p. 1084.

[29] Anzilotti D. Cours de droit international, Premier volume, Paris, Sirey, 1929, p. 468.

[30] Lauterpacht H. Régles générales du droit de la paix, 62 Recueil des Cours (1937-IV) p. 99.

[31] Lauterpacht H. Special Rapporteur, A/CN.4/63, *Yearbook of the International Law Commission*, 1953, Vol. II, p. 154.

[32] Fitzmaurice G. Special Rapporteur, Third report on law of treaties, A/CN A/115, *Yearbook of the International Law Commission*, 1958, Vol. II, p. 20.

[33] Waldock H. Special Rapporteur, Second report on the law of treaties, A/CN.4/156 and Add.1-3, *Yearbook of the International Law Commission*, 1963, Vol. II, p. 36.

[34] Spinedi M. *supra* note 5 p. 1100.

[35] Weiler J. et al (eds) International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility, Berlin: De Gruyter, 1989.

term 'crime' disappeared from the ASR. It did however retain the notion that there are breaches which concern the whole international community. The ILC dropped the strong language – instead of international crimes, this category was labelled as serious breaches. And more importantly, nearly all practically relevant consequences that would distinguish serious breaches from all other breaches were removed (with the exception of Article 48 providing for invocation of responsibility by a state other than an injured state). Considering the fact that the 2001 ARS were adopted more than 30 years since *jus cogens* entered the mainstream of international legal thought the ILC may not, in terms of developing the law, claim any great success on this issue.

The conceptual foundations laid by Ago were retained by subsequent rapporteurs – Riphagen (1980-1986), Arangio-Ruiz (1986-1996) and Crawford (1997-2001) and eventfully also found their way also into ARIO. These rapporteurs did however come up with novelties of their own that could be regarded as progressive development. In particular Arangio-Ruiz proposed mandatory conciliation procedures for all disputes involving state responsibility as well as mandatory arbitration for disputes involving countermeasures.[36] States generally disapproved of this idea and it was dropped. Crawford, whose foremost achievement is that he managed to persuade everyone to agree at least on something, also must be credited with rescuing (at least partially) the distinction between delicts and crimes. His idea of what is currently Article 48 in the ASR allows invocation of responsibility by a state other than the injured state, if the obligation breached is owed to international community as a whole.

Finally progressive development may be assessed also on the basis of regressive ideas that found their way into the ASR. Among these countermeasures probably stand out most prominently. Another unfortunate conception is the notion of effective control in the rules of attribution (or rather its interpretation in the commentary).[37] The ILC opted to limit attribution of conduct of non-state actors controlled by the state only to those rare cases when the state is exercising effective control.[38] Thus the ILC chose to propagate the idea expressed by the International Court of Justice in the Nicaragua case[39] which effectively allows states to engage in most blatant breaches of international law and to avoid responsibility.[40]

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[36] Arangio-Ruiz G. Special Rapporteur, Fifth report on state responsibility, A/CN.4/453 and Add. 1-3, *Yearbook of the International Law Commission*, 1993, Vol. II, p. 1.

[37] Article 8 of the ASR, *supra* note 4. 2001 (A/56/10) (ASR), *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 26. para. 115.

[38] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, A/56/10, 2001. Available: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [viewed June 26 2012].

[39] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits) [1986] ICJ Reports p. 14.

[40] See: Cassese A. The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, *European Journal of International Law*, 2007, Vol. 18, p. 653.

The Function of the ILC

After examining the actual accomplishments of the ILC in the field, let us now turn to more theoretical considerations and in light of the foregoing discussion enquire: what is the proper function of the ILC? The obvious answer seems to be 'the progressive development and codification of international law'. But what does it really mean? Has the ILC progressively developed and codified law of international responsibility? An explanation of the meaning of these terms may be found in Article 15 of the ILC's Statute.[41] Although the conceptual difference between codification and progressive development appears obvious, scholars and in particular ILC members have maintained that in practice the two are hard to separate.[42] In 1947 Jennings concludes that 'codification properly conceived is itself a method for the progressive development of the law'.[43] Current day ILC members seem to conceive the matter along the same lines. Pellet notes that all topics imply an aspect of progressive development, since customary rules always comprise some elements of uncertainty.[44] He concludes that: 'pure codification constantly interferes with progressive development; there is certainly no clear threshold'.[45]

A. Is the ILC supposed to develop new law?

Having concluded that distinction between 'progressive development' and 'codification' is hard (and perhaps not even necessary) to draw, we come back to the initial question of the ILC's function. In particular, regardless whether we call it progressive development or codification, is the ILC supposed to develop new law at all? Here opinions differ starkly. For Jennings codification 'does not necessarily imply a process which leaves the main substance of the law unchanged'.[46] Similarly when describing the task of a drafter of a multilateral treaty (which is the task of the ILC)

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[41] Statute of the International Law Commission, Art. 15: 'In the following articles the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'.

[42] Brigs H. The International Law Commission, Cornel, 1965, p. 129; Liang Y. The General Assembly and the Progressive Development and Codification of International Law, *American Journal of International Law*, Vol. 42, 1948, p. 66.

[43] Jennings R. The Progressive Development of International Law and Its Codification, 24 *British Yearbook of International Law* (1947), p. 301.

[44] Pellet A. Between Codification and Progressive Development of the Law: Some Reflections from the ILC, *International law forum 6(1)* Leiden, 2004, p. 16. Jennings makes a similar observation: 'After being reduced to written form the rule is almost bound to take on a rather different color. The change of source from custom to treaty may seem to be purely formal and adjectival, but it has inevitable repercussions on substance' see Jennings R. *supra* note 43, p. 305.

[45] Pellet A. Ibid.

[46] Jennings R. *supra* note 43, p. 301.

he concludes that 'existing customary law [...] falls into its proper place as valuable raw material for the construction of his [drafter's] edifice; but he need not regard his draft as being necessarily a statement of what the law is, but can and should regard it as a statement of what the law ought to be'.[47] Likewise, as we saw earlier, creation of new law was very much something that Garcia Amador in his capacity as a special rapporteur had in mind.[48] Similarly the whole push by the ILC to introduce public order ideas, such as *jus cogens*, international crimes and obligations *erga omnes* all border closely with the creation of new law.[49]

Modern opinions take a rather different outlook. For instance, Pellet is most critical about 'utopian', 'unrealistic', 'moralist' and 'absurd' approach to progressive development, which in his opinion, although intellectually attractive is practically impossible.[50] For Pellet the ILC:

> 'cannot change the whole system of the law of nations. Its duty is to try to understand the logic of existing rules and to develop them in the framework of this logic, not to change the underlying logic. [...]. Commission is (or should be) concerned with collecting and analysing precedents [...] and doctrinal views, assembling them with a view to ascertaining evidence of practice generally accepted as being the law and to deduce the existence of new trends, and elaborating drafts with concern for reasonableness, consistency and acceptability'.[51]

Whatever it may be that Pellet perceives as reasonable, the interesting point is that his opinion comes remarkably close to what Jennings in 1947 referred to as 'narrow or pessimistic' school of thought, which would 'confine the art of codification' to restating existing rules of customary law.[52] Tomuschat, along somewhat similar lines as Pellet, observes the fact that 'states accept only balanced solutions which reflect the practices as they are observed in day-to-day transactions' and emphasizes that

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[47] Similarly Rosenne notes with regard to the early years of the General Assembly that it 'was to take in hand the complete refashioning of the classic notions of customary international law with the general objective of making the law more effective as an instrument for assisting in the maintenance of international peace'. See Rosenne S. The Role of the International Law Commission, 64 Am.Soc'y Int'l L. Proc. 1970, p. 26.

[48] Amador notes: 'A pure or strict codification of the legal principles which have traditionally governed the various cases of responsibility would not accomplish at all satisfactorily what is invariably the object of a request for codification', see Amador *supra* note 12, p. 176.

[49] Consider the opinion of Lauterpacht, who states that 'whenever the absence of an agreed rule is due to a divergence of interest, the function of codification is, in a distant sense, no less political than that of legislation generally' see Lauterpacht H. Codification and Development of International Law. In *International Law, Collected Papers, 2. The Law of Peace,* Elihu Laurepacht ed., Cambridge: CUP, 1975, p. 280.

[50] Pellet A. *supra* note 5, p. 81, s*upra* note 44, p. 17.

[51] Pellet A. *supra* note 44 p. 17 and 19.

[52] See Jennings R. *supra* note 44, p. 304; The scholars of this strand held that codification essentially means writing down of existing rules of law. In their view codification may include some changes to the existing law, but only if these are minor and insignificant. See Baker P.J. Codification of International Law. In: *British Yearbook of International Law* (1924), 5, p. 38.

the ILC's texts must be such that states would find them acceptable.[53] One can not help but to remember Lauterpacht's reflection that one of the main problems of international law is the low level of ambition in the doctrine.[54]

However, lack of ambition of ILC members is hardly the reason for the decline in progressiveness of the ILC. As we saw earlier, all of the special rapporteurs on state responsibility (including those after Ago) at least to some extent made genuine attempts to develop the law. Likewise, the doctrine, although generally considerably more conservative now than in 1940s until 1960s, has proposed new ideas.[55] The real reasons behind a change of heart in the ILC lie rather in the wider developments of international society that have taken place in the second half of the 20th century and especially after 1990s.

Concluding remarks: Reinventing the ILC?

To understand what is the proper function of the ILC and what it ought to be in future, one needs to enquire what are the wider developments that have taken place in international society. To say that the ILC should have more progressive development is a statement that may be disconnected from the reality of actual needs; a statement which assumes that more international law is good and necessary in itself.[56] It may be more appropriate to ask what is the useful purpose that the ILC can serve under present conditions? A purpose that is adequate to what is actually happening.

In the early days of the United Nations there was a broad agreement that general rules need to be codified and perhaps new ones developed. During and after decolonization there was another practical necessity – to create confidence in newly independent countries that international law (in the development of which they had no part) is not merely a tool of ex-colonial powers. There was an obvious need to have the new states to sign up to the codifying treaties, or else, it was feared the very fabric of international law would have undergone an unpredictable transformation.

These necessities are no longer relevant. Much of the general international law is already codified. Newly established countries have (although reluctantly) embraced the system. The initial work plan of the ILC is largely accomplished.[57] However, there

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[53] Tomuschat C. The International Law Commission – An Outdated Institution? *German Yearbook of International Law,* 2006, Vol. 49, p. 77.

[54] Lauterpacht H, Spinoza and International Law, *British Yearbook of International Law* (1927) 8, p. 89.

[55] Consider: Allott P. State Responsibility and the Unmaking of International Law, Vol. 29 *Harvard International Law Journal*, 1988, p. 1; Koskenniemi M. Solidarity Measures: State Responsibility as a New International Order? *British Yearbook of International Law*, 2002, Vol. 2, 1, p. 337; Nollkaemper *supra* note 26, p. 535.

[56] Koskenniemi M. International Legislation Today: Limits and Possibilities, *Wisconsin International Law Journal* 2005, Vol. 23, No. 1, pp. 64-65.

[57] International Law Commission, *The Work of the International Law Commission, 7th ed.,* 2007, UN Publications No. E.07.V.9), see Analytical Guide to the Work of the International Law Commission, Available: http://www.un.org/law/ilc/index.htm [viewed June 26 2012].

are new winds blowing that may provide the ILC an opportunity to prove its worth. As Koskenniemi has pointed out, international law is experiencing certain trends, such as deformalization, fragmentation and empire.[58] In the world of deformalization of international law, which in essence means prevalence of procedural standards, soft law and non-compliance procedures over strict binding rules and legal dispute settlement, the ILC in its present form (being a specialist in formulating legal rules) would find itself mostly out of work. In the world of fragmentation of international law the general international law expert would be equally redundant. Finally, for the empire (which tends to hold its views as an uncontestable truth) law has value only to the extent that it serves the empire's purpose. In the world where the empire's hegemony is not absolute and where law serves common rather than the empire's purpose, the empire often disregards such law altogether (US intervention in Iraq or its 'war on terrorism' being good examples). Thus empire has little need for the ILC, unless it can have the ILC working exclusively for the empire.

Another important trend manifesting in international law is that of constitutionalization.[59] This implies a gradual emergence of public order of some sort as well as organization of political activity and workable means to enforce the law.[60] This seems a true realm of general international law – precisely what the ILC is good at. However, the peculiarity of constitutionalization as it is manifesting presently is that it is not taking a form of one grand constitutional treaty (a kind of new charter of international society), but rather it is happening through developments in specific fields of international law, like human rights and trade law. Thus constitutionalization circumvents general international law, again leaving the ILC on the periphery of new developments.

If the ILC is to play a meaningful role it must adopt to the conditions that it finds itself in. The fundamental need for the development of international law advocated by Lauterpacht in order for the international society to come out of its present 'presocietal' phase (with its basic misconception that states rather than peoples of the world are the true subjects of international law)[61] is as relevant as ever. At the same time it is also obvious that states have very little appetite for binding general international law treaties (deformalization and fragmentation at work) that could further this high-minded objective.[62] In these circumstances two options seem available for the ILC. First, it can adapt to fragmentation by taking on topics of various specialized fields. The disadvantage of this option is that specialist bodies in these fields would probably not welcome such an intrusion (not to mention that

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[58] Koskenniemi M. *supra* note 57, p. 78

[59] Peters A. Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, Leiden Journal of International Law, 2006, 19, p. 579.

[60] See: Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*, Oxford: OUP, 2009.

[61] Allott P. *supra* note 55, p. 26; Lauterpacht H. The Function of Law in the International Community, Oxford University Press, 2011 (first edition 1933), p. 407.

[62] The ILC has adjusted to this reality by completing its work with adoption of 'Articles' of which the General Assembly simply 'takes note'. For implications of this practice with regard to state responsibility see Caron D. The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority, *American Journal of International Law,* 2002, 86, pp. 862-864.

the ILC members themselves are not specialists of specialized fields). If, however, the ILC would be able to find some mode of cooperation with the specialist bodies it could lend them the tremendous weight of its authority. The second option is for the ILC simply to tread along as it has treaded for the past 50 years turning from a visionary into a technocrat legal adviser (who might still eventually rediscover its true potential).

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VERTICAL DIMENSIONS IN THE QUALITY OF LAW

Keywords: ACTA, civil liberties, civil society, comparative law, cyberspace, democratic legitimacy, file-sharing, holistic perspective, human rights, intellectual property, international law of coexistence, international law of cooperation, jus cogens, legislation, positivism, rights-holders, sovereignty, transparency, treaties, vague terms.

Introduction and Thesis

Concern for the quality of law is not a new idea but it is increasingly relevant today as law emanates from national, international and regional sources. The Roman orator and statesman Cicero built upon the ideas of the Greek Stoic philosophers when he stated that "human legislation" should be evaluated for its consistency with fundamental precepts of natural justice.[1] Thomas Jefferson wrote that life, liberty and the pursuit of happiness are God-given unalienable rights, and that the purpose of governments is to secure these rights on behalf of the governed.[2] The success of a state in this task depends upon the quality of its law.

There are many different standards for evaluating the quality of law, but some are almost self-evident. In The Spirit of Laws the French writer Montesquieu formulated his criteria for quality legislation. Quite sensibly, he proposed that legislation should be concise, written in plain, simple and unambiguous language, and have few if any special exceptions.[3]

And of course focus upon the quality of law falls squarely within the tradition of legal reform pioneered by Jeremy Bentham. Bentham rejected the soaring rhetoric of

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[1] "There is in fact a true law – namely, right reason – which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible." Cicero, *The Republic*, II, 22.

[2] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.–That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." The Declaration of Independence, In Congress. July 4, 1776.

[3] See: Montesquieu C. The Spirit of Laws, (1748), Book XXIX. Of the Manner of Composing Laws, Chapter 16. Things to be observed in the composing of Laws.

natural law and natural rights.[4] He was concerned about real law, man-made positive law, and how to make it better.[5]

If certain policies or approaches can improve the quality of law in one national system, this experience can become the basis for similar success in other national systems. The "horizontal" borrowing by states of legal concepts and approaches is a principal focus of comparative law.[6] The "vertical" dimension is in play when insights, approaches and ideas embraced at the national level are adapted and applied at the international level or vice-versa.

Due to the vast changes in the international legal system anticipated by the late Wolfgang Friedmann,[7] concern about the quality of law must, increasingly, focus not only upon national legislation, but also upon the formulation of rules and standards of international law as well. We are accustomed to hearing that "transparency" is essential to the rule of law, that fundamental human rights should in all cases be respected, and that civil society has an essential role to play in government, including international governance. Nonetheless, and as will be discussed below, these values were somehow set aside in preparing the text of the Anti-Counterfeiting Trade Agreement (ACTA).[8]

The thesis of this paper is twofold. It observes the various criteria used to assess and improve the quality of national law apply *mutatis mutandis* when addressing the quality of a multilateral treaty. It argues that the specific nature of the international legal system suggests that some additional, and special, "vertical" criteria should also apply. These revolve around three general pillars of legitimacy under contemporary international law. The first requires respect for the sovereignty-based notion of **positivism** as the basis of state obligations. The second requires respect for fundamental **principle**, which must be a characteristic of any true system of law purporting to promote justice, and the third in turn requires some reasonable accommodation of the **practical** policy-based necessities of cooperation in an interdependent world.

The latter part of this paper will present a brief case study on the drafting of the Anti-Counterfeiting Trade Agreement (ACTA) in a first effort to apply this analytical framework.

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[4] As part of his scathing critique of natural rights discourse Bentham wrote: *"Natural rights* is simple *nonsense*: natural and imprescriptible rights, rhetorical *nonsense*,–*nonsense* upon stilts." – Bentham J. A *Critical Examination of the Declaration of Rights*. The Works of Jeremy Bentham, Vol. 2 [1843], Article 2.

[5] As one prominent writer noted in 1908, Bentham "demanded that all statute law, whatever the form of government, should be based on scientific and philosophical principles, for the benefit of mankind." Judson, F. A Modern View of the Law Reforms of Jeremy Bentham. *Columbia Law Review*, Vol. 10, No. 1 (Jan. 1910) pp. 41-54, at p. 49. Available http://www.jstor.org/stable/1110951.

[6] Watson A. Comparative Law and Legal Change, 37. *Cambridge L. J.* Vol. 37, p. 313-314 (1978)

[7] Friedmann W. The Changing Structure of International Law. New York, Columbia University Press, 1964.

[8] ACTA Negotiating Parties, Anti-Counterfeiting Trade Agreement (ACTA), Signed Tokyo, Japan: 2011.

The Vertical Dimension and its Specificities

In the first instance quality of law analysis is focused upon the law produced by national legal systems. At a recent conference in Italy on the quality of law the principal paper on international law focused only on "The Impact of International Law Instruments on National Legislation."[9] The quality of law lens, so to speak, was focused on national law, not international law. But quality of law analysis does apply to international law, not only indirectly, when that law affects the quality of national law, but also more directly when international legal standards are set by multilateral "law-making" treaties.[10]

The nature of the international legal system

The International Law of Coexistence

According to the prevailing positivist conception of international law, that law derives its binding force from the consent of sovereign states. That consent may be expressed explicitly, as it is in treaties, or implicitly through the practices of states which give rise to rules of customary international law.[11]

To the extent that international law is based on the consent of states, its form and effectiveness tend to be determined by the traditional pre-occupations of states. Foremost of these has generally been their desire to advance the "national interest" usually defined in terms of the preservation of sovereignty and national security through the management of international conflict. This minimalist version of international law is what Wolfgang Friedmann labeled the "international law of coexistence"[12] But is that law enough, and what standards could we legitimately apply to reach that conclusion?

Friedmann answered that it was not enough, because international law changes. Indeed, it must be capable of changing and adapting to the realities of the international system, just as it has adapted to such changes in the past.[13] This change has accelerated

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[9] See: Ehrenkrona C. The Impact of International Law Instruments on National Legislation, Report, Seminar, "The Quality of Law", Trieste, Italy, 14-17 June 2010, European Commission For Democracy Through Law (Venice Commission), Doc. CDL-UDT(2010)021, Strasbourg, 7 July 2010, available http://www.venice.coe.int/docs/2010/CDL-UDT%282010%29021-e.asp.

[10] "The distinction between 'law-making treaties' and 'contract treaties' is a frequently used analytical tool in treaty practice and doctrine. At the same time, little trace of it is found in the positive law of treaties." Brölmann, C.M. Law-Making Treaties: Form and Function in International Law (January, 28 2009). *Nordic Journal of International Law*, No. 74, 2005, p. 1.

[11] See: Article 38 of the Statute of the International Court of Justice.

[12] Friedmann, Changing Structure, *supra* note 8, p. 5.

[13] See, Bartram S. Brown, The Protection of Human Rights in Disintegrating States: A New Challenge, *Chicago-Kent Law Review*. Vol. 68, p. 204 (1992).

since the Second World War with the establishment of the United Nations and the transformation of its membership after decolonization.[14]

The International Law of Co-operation

Based on the changes he saw coming in the international system Friedmann proposed that we view international law, not as one body of principles, but on different levels including:

> (a) **The international law of coexistence**, i.e. the classical system of international law regulating diplomatic interstate relations, orders the coexistence of states regardless of their social and economic structure.
>
> (b) **The universal international law of co-operation**, i.e. the body of legal rules regulating universal human concerns, the range of which is constantly expanding, extends from matters of international security to questions of international communication, health and welfare.[15] (Bold emphasis added)

Friedmann saw that, in a world of growing interdependence, international law needed to do more than help states to coexist and to stay out of each other's way. International law would also need to be effective in bringing states together in a cooperative way to address and advance universal human concerns. His clarion call for an international law of co-operation highlighted the **practical** need for international law to transcend its focus on simple coexistence.

Positivism, principle and the practical imperative of co-operation: "Vertical" criteria for the quality of international law

The limits of positivism

The international law of coexistence is all about respect for the sovereignty and the sovereign prerogatives of states. It is defined and limited by the extreme **positivism** which sovereignty has traditionally been thought to entail. While sovereignty is no longer the supreme value in international law today,[16] positivism remains relevant as the basis of state obligations. It must therefore be one of the primary–but not the only–criteria of quality of law analysis applicable to treaties.

The demands of principle

At times even sovereignty and positivism must yield to the dictates of justice.[17] Thus although the Permanent Court of International Justice ruled in 1923 that "the

[14] Friedmann, *Changing Structure*, *supra* note 8, p. 5.

[15] Ibid, p. 367.

[16] Cf. the doctrine of *jus cogens* discussed below.

[17] Cf. the quote from Cicero, *supra* note 2.

right to enter into international engagements is an attribute of State sovereignty,"[18] international law now formally recognizes that a treaty that conflicts with a peremptory norm of international law is null and void.[19] This doctrine of *jus cogens* acts as a limit upon the freedom of contract of sovereign states and is strong evidence of a renewed commitment to **principle** even within the still generally positivistic framework International law. Consistency with principle must be an important criterion for evaluating the quality of all positive law.[20] As applied to international law, however, the task is even more complex, since the language of a treaty, for example, should be consistent with principle in the dualist perspective of both international law and national legal systems.

The practical imperative of cooperation

In the interdependent world of the 21st century, the "universal international law of co-operation" first described by Wolfgang Friedmann 50 years ago is more indispensable than ever. Both the sovereignty of states and the understanding and realization of international principle must, at times, accommodate the **practical** requirements of international cooperation.

Focus on the drafting of ACTA as a Case Study

The following case study will not attempt to assess the text of the Anti-Counterfeiting Trade Agreement (ACTA). Instead, the principal focus will be upon the process of drafting and negotiating ACTA.

Background on ACTA

ACTA is a proposed treaty on standards for the enforcement of intellectual property rights. The chronology of ACTA negotiations is long and complicated. Suffice it to say here that following preliminary discussions beginning in 2007, the treaty text emerged from formal negotiations between June 2008 and May 2011 among several leading industrialized countries plus Morocco and Mexico.[21] Six rounds of closed negotiations were held before a draft of the agreement was first released to the public in April of 2010. In addition to the negotiating states a limited number of individuals representing corporations, NGOs, and cleared advisors were permitted to view the developing texts before that first public disclosure. All were required to sign

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[18] Permanent Court of International Justice, The Case of the S. S. Wimbledon 1923 (P.C.I.J.) (ser. A) No. 1, at 25.

[19] The doctrine of *jus cogens*, long believed to be a necessary principle of justice, has achieved status as part of positive international law. See, Article 53 of the Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

[20] See: Cicero, as quoted *op. cit*, note 1.

[21] The negotiating states included Australia, Canada, the European Union (EU), represented by the European Commission and the EU Presidency and the EU Member States, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States of America.

a very strong nondisclosure agreement prohibiting them from making any of these documents public.[22] An earlier "discussion paper" and another draft identifying the negotiating positions of individual countries[23] were leaked to the public by Wikileaks before the April 2010 draft. These, even more than the final text of the treaty, raised serious concerns about the nature and scope of the state obligations it would establish. Many academics, practitioners and public interest organizations concluded that the terms of the publicly released draft of ACTA were unacceptable.[24] Some modifications were made to the draft before the final text of ACTA was publicly released in November of 2010, but the basic thrust and structure of ACTA, as established during years of closed negotiations, remained unaltered. A large part of that basic thrust is to replicate the rules and enforcement approaches used to combat trade in physical counterfeit goods and to extend them, without significant modification to electronic file-sharing.

Representatives of several ACTA negotiating parties signed the treaty on October 1, 2011, and the others confirmed at that time their continuing intention to sign the Agreement as soon as practicable.[25]

The Outcry Against ACTA

ACTA was largely a US initiative, reflecting the fact that powerful US interests such as the Motion Picture Association of America and the Recording Industry Association of America have long demanded greater protections for their intellectual property rights, under both national and international law. Within US domestic law, some issues raised by ACTA would have been addressed by two proposed legislative bills known as the Stop Internet Piracy Act (SOPA)[26] and the Protect Intellectual Property Act (PIPA).[27] There were rumors that the bill would lead to Internet censorship, to policing of internet communications and electronic media and even to searches of computers and smartphones at border crossings to detect illegally copied media. These concerns provoked an unprecedented Internet blackout protest by Internet companies such as Google and Wikipedia followed by mass protests in a number of US cities. In response to the protests the vote on SOPA /PIPA was indefinitely delayed.[28]

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[22] Letter of October 9, 2009, from the Office of the US Trade Representative in response to a US Freedom of Information Act request for the names of all persons not employed by the US government who have been given access to documents relating to the position of the U.S. government for the Internet provisions of the Anti-Counterfeiting Trade Agreement including copies of those agreements.

[23] See: ACTA Informal Predecisional/Deliberative Draft: January 18, 2010.

[24] Letter from Law Professors to President Barak Obama Calling for the Halt of ACTA, October 28, 2010.

[25] Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties, October 1, 2011.

[26] Stop Online Piracy Act, H.R.3261, Sponsored by Rep. Lamar Smith, introduced 10/26/2011.

[27] PROTECT IP Act, Introduced in the Senate as S. 968 by Patrick Leahy on May 12, 2011.

[28] Jolly D. Intellectual Property Pact Draws Fire in Europe. *The New York Times*, February 6, 2012, Section B; Column 0; Business/Financial Desk; p. 5.

Inspired in part by the success of the earlier US protests regarding SOPA, in February of 2012 thousands of protestors marched in the streets of Budapest, Paris, Prague, Vilnius, Transylvania and other parts of Europe to protest ACTA.[29] Once again, concern about Internet freedoms was the principal cause of public opposition to the treaty. European support for ACTA quickly began to erode.

Some of the most damning critiques of the ACTA negotiating process, and of the text of ACTA itself, have emanated from the European Parliament. When the European Parliament's special rapporteur for ACTA resigned, he was scathing in his critique of the treaty.[30] He stated that that ACTA was ''wrong in both form and substance" and that the European officials, who began negotiating the agreement in 2007, kept EU legislators in the dark for years and ignored their concerns, ultimately presenting them with a finished deal for ratification with no real possibility of modifying it. ''Voila, that's the masquerade that I denounce," he said.[31] Other committees of the European Parliament reacted similarly.[32]

Analysis: Evaluating the Quality of ACTA as Law

Most of the potential problems with the quality of ACTA reflect, at least in part, the failure to follow basic principles of legislation and legislative drafting. These principles are essentially the same whether applied to national legislation, or with minor adjustments to international treaty drafting. The most relevant of these recognizes that high quality legislation should be clear, succinct, readable, understandable and effective at achieving a clearly defined goal.[33] Process-wise this requires the gathering of information necessary to the drafting effort, consideration of alternative approaches or mechanisms to accomplish the identified goals, and most importantly, a careful pre-assessment of the likely effects of the law. The need for transparency is an over-arching consideration generally applicable to decision-making in a democratic context. Other requirements may apply as well, [34] but these go beyond the scope of this paper. As will be discussed immediately below, ACTA fares poorly as measured by most of the above criteria.

What of the additional "vertical criteria" mentioned earlier? Viewed holistically, however, the ACTA process created the impression that a small number of ACTA

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[29] Jolly D. Intellectual Property Pact Draws Fire in Europe. *The New York Times*, February 6, 2012, Section B; Column 0; Business/Financial Desk; p. 5.

[30] ACTA: une mascarade à laquelle je ne participerai pas – Kader Arif blog. Available: http://www.kader-arif.fr/actualites.php?actualite_id=147

[31] Jolly D. Intellectual Property Pact Draws Fire in Europe, *supra* note 28, p. 5.

[32] See: Droutsas D. Rapporteur, Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs, for the Committee on International Trade (European Parliament) on the compatibility of ACTA with the rights enshrined in the Charter of Fundamental Rights of the European Union, (COM(2011)0380 – C7-0027/2012 – 2011/0167(NLE), PA\889383EN.doc, PE480.574v01-00, 07.05.2012.

[33] Thomas E. The Center For Quality of Law – A New ABA Service, ABA Journal, Vol. 72 (1986), p. 6, essentially restating the criteria of Montesquieu, discussed *supra* note 3 and the associated text.

[34] Tala J., Korhonen J. & Ervasti K. Government Perspective: Improving The Quality Of Law Drafting In Finland. *Columbia Journal of European Law*, Vol. 4, (1998) p. 633.

negotiating states were attempting to legislate for the broader international community. Of course, as a formal matter, no treaty can create obligations for non-party states, but even false impressions can become a source of problems. Thus the ACTA experience could eventually have the unintended consequence of making it more difficult for the negotiating parties to achieve their goal of stronger multilateral cooperation and coordination in IP rights enforcement.

Principal Problems with the Negotiating Process

Secrecy and Lack of Transparency

Transparency and the participation of broad sectors of civil society in the identification of key societal interests, objectives, and priorities are essential to the process of drafting quality legislation. Without an open, inclusive public debate between the relevant stakeholders on what is to be accomplished and how, the drafters of legislation are simply not in a position to know what really needs to be done and what problems need to be avoided. The resulting legislation will therefore lack both balance and democratic legitimacy. This is even more true when the negotiation of a multilateral treaty is concerned.

Defenders of ACTA have argued that the closed and secret nature of negotiations on the treaty were justified by its supposed status as a trade agreement. The problem with this argument is that ACTA is not, fundamentally, a trade agreement. It does not deal with tariffs, trade barriers or subsidies. ACTA is fundamentally an intellectual property enforcement treaty, and it is precisely the provisions of the treaty on intellectual property enforcement that are problematic.

Shockingly, a formal request to the US government for the ACTA negotiating texts was denied on the grounds of national security.[35] The extreme measures taken to maintain the secrecy of ACTA negotiations deprived the ACTA debate of many needed voices and perspectives. As one European Parliament official noted:

… what we absolutely need is that every expert we have, every affected organisation or institution we can spare, every citizen that desires to voice an opinion participates, from the beginning, in the creation of a modern social pact, a modern regime of protecting intellectual property rights. ACTA is not, and was not conceived to be, this.[36]

When an official draft text of ACTA was finally released in April 2010 and critical comments began to multiply, the negotiating states decided to finalize the text and move to quick adoption. That decision was clearly premature. When several countries signed ACTA in October of 2010 the public debate on it had barely begun.

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[35] "Please be advised that the documents you seek are being withheld in full pursuant to 5 U.S.C. §552(b)(1), which pertains to information that is properly classified in the interest of national security pursuant to Executive Order 12958." Letter of March 10, 2009, from the Office of the US Trade Representative in response to a US Freedom of Information Act request for electronic copies of documents relating to ACTA trade negotiations.

[36] See: Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs on ACTA, *supra* note 30.

Precipitous Action on Issues of Great Importance

Supporters of ACTA argue is that a lot is at stake because it is so vitally important to protect intellectual property rights.[37] It is undoubtedly true that a lot is at stake, but this is all the more reason to get the process right. Much is at stake not only in economic terms related to intellectual property rights, but also in terms of the potential human rights implications of the treaty.

The draft report of another European Parliament Committee on ACTA stresses that too much is at stake to rush prematurely into an unbalanced approach to these complex issues as ACTA does:

… your Rapporteur believes that ACTA comes at a very premature stage and a possible adoption of the Treaty would essentially freeze the possibility of having a public deliberation that is worthy of our democratic heritage.[38]

The active participation of representatives of key sectors of civil society on both sides of this issue was needed. The delegations representing the negotiating states were simply not in a position to recognize and address the potential human rights implications of the stronger intellectual property protections they clearly favored.

Inadequate Precaution Regarding the Possible Negative Effect on Human Rights Worldwide

ACTA cannot be properly evaluated in isolation from the broader context of the global struggle for human rights. The potential effects of any legislative text should be considered in "holistic context."[39] Under international environmental law[40] a precautionary principle applies to actions which may have severe detrimental effects upon the environment. A similar precautionary approach should arguably apply to actions which may endanger human rights. Although ACTA itself may not require actions in violation of fundamental human rights, it could provide states with a pretext for violating them. ACTA would require states to protect admittedly difficult-to-protect intellectual property rights in cyberspace as in the physical world. Were ACTA to be adopted by governments around the world, some might invoke it as justification for repressive enforcement measures that the US and EU states themselves would never tolerate.

The ACTA negotiating states are among the world's leaders in promoting international human rights. Their efforts in this regard have been critically important. In

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[37] "Ron Kirk, the U.S. Trade Representative, said in October that protecting intellectual property was 'essential to American jobs in innovative and creative industries' and that the treaty 'provides a platform for the Obama administration to work cooperatively with other governments to advance the fight against counterfeiting and piracy.'" Jolly D. Intellectual Property Pact Draws Fire in Europe, *supra* note 28.

[38] See: Draft Opinion of the Committee on Civil Liberties, Justice and Home Affairs on ACTA, *supra* note 30.

[39] See: Improving the Quality of Law Factor in Finland, *supra* note 32 at p. 634.

[40] On the Precautionary principle as applied to detrimental effects upon public health, *see*, for example, European Court of Human Rights. *Tatar C. Roumanie*. App. No. 67021/01, January 27, 2009.

negotiating ACTA, they did not set out to undermine international human rights, yet such a result could be an unintended consequence of the treaty. It would be a sad and perverse development if efforts to promote human rights world-wide were to be inadvertently undermined by the ACTA treaty.

The Future of ACTA

On July 4, 2012 the European Parliament voted overwhelmingly to reject ACTA[41]. Without European participation, it is doubtful whether the treaty will ever receive the six ratifications it needs to enter into effect[42] even for those states (if any) which may finally decide to ratify it.

Conclusion

The entertainment industry has every right to seek better international standards and enforcement procedures on digital counterfeiting, but these must first be agreed to, preferably after an open, transparent and global debate about the values concerned. Instead, the process and approach taken in negotiating ACTA violated basic principles of legislation, and could scarcely have been expected to produce law of an acceptable quality. This problem would be serious indeed even if the law concerned were national legislation. Since ACTA purports to set standards at a "plurilateral" level, it could be doubly dangerous

ACTA attempts to replicate the rules and enforcement approaches used to combat trade in physical counterfeit goods and to extend them, essentially unmodified, to electronic file-sharing.[43] It may well be both necessary and appropriate to apply these standards to the new domain of cyberspace, but not without carefully adapting them to the unique circumstances which prevail there.

The fundamental lesson of ACTA on the quality of law is that some proposed international standards are simply not ripe for vertical integration into national, or even regional, legal orders.

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[41] See: Charles A. European parliament rejects anti-piracy deal: Non-EU countries could still implement treaty Opponents hail result as victory for online freedom, *The Guardian* (London) – Final Edition, July 5, 2012, Guardian International Pages; p. 18.

[42] Article 40 of ACTA states that it will come into effect thirty days after it has received six ratifications.

[43] See: Article 23 of ACTA on criminal offences which requires states to provide criminal procedures and penalties to be applied to what it refers to as "rights related piracy on a commercial scale" without offering any definition of what "on a commercial scale means." ACTA, *supra* note 8.

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THE IMPACT AND SIGNIFICANCE OF THE AMENDMENT OF THE MEANS OF APPEAL ON CIVIL PROCEDURE IN POLAND

Keywords: Civil proceeding, the means of appeal in civil proceedings, appeal, complaint, changes in the means of appeal.

Introduction

The existence of the myriad of rules and regulations concerning civil proceedings can be explained by the fact that this procedure encompasses an extensive group of issues, which in turn results in the multiplicity of norms. Such a situation can cause difficulties in fully resolving any particular case, and as a result, the decision itself may be erroneous. Moreover, the party may live with a belief that the proceedings were unjust, did not fulfil their expectations and are not a reflection of the true application of the provisions of the law. We know from experience that the errors in the proceedings that result from an improper understanding of the existing provisions of the substantive and procedural law, cannot be completely eliminated. This effect is further enhanced by lack of clarity within the laws themselves, and the legislative errors often brought about by the rush connected with the necessity of keeping up with the progressing juridical dominance in social life[1].

Among the reasons inducing erroneous decisions are mistakes in argumentation. These occur mostly on the legal or factual plains, with the addition of defects in the proceedings themselves. A special case of wrong argumentation are violations of law which involve the application of non-existent provisions or non-application of existing provisions by the court[2]. In order to avoid the above-mentioned situations, there is a possibility to review the correctness of all decisions by the court of the second instance, in appellate or complaint proceedings. The appeal of any decision is initiated by a review, to which each authorised person is entitled, and the function of appeal itself is closely connected with the legal proceedings of the court. Its purpose is the verification of the decisions issued by the court of the first instance, which should lead to the confirmation of their correctness, or the issuing of fault-free and error-free decisions. The appeal of a decision can be also be important in providing the uniformity of the application and interpretation of the law, which constitutes one

[1] Ereciński T. Apelacja w postępowaniu cywilnym. Warszawa: Lexis Nexis, 2009, p. 13.
[2] Aklejak A. Apelacja w procesie cywilnym. Kraków: Platan, 1994, p. 3.

of the pillars of a properly functioning justice system in a democratic state that is run under the rule of law[3].

Appeal in civil procedure

The parties of the proceedings are granted the possibility to demand a change or reversal of the issued decisions (if they were perceived as being erroneous), in order to reach the truth and just resolution. The admissibility (possibility) of such a claim is part of the contestability of the decision. The means by which this possibility is realised, is called the means of appeal[4].

The location of the appeal and complaint in the same section of the Code of Civil Procedure[5] is not accidental. They constitute the basic means of appeal of judicial decisions. The difference between these two means lies in the criteria of the ruling of the court.

According to a Polish Dictionary of Foreign Terms[6], the word "apelacja" (appeal) comes from the Latin appellatio, and means 'to refer to the court of a higher instance for a judicial review, in order to change the decision'. The word refers to the most important means of contestability of judicial decisions in the Roman law, which was the appellatio[7]. Moreover, it corresponds to derivative homonyms in foreign civil proceedings, for example French (appel), Italian (apello), Spanish (apelaciôn), Portuguese and Brazilian (apelação) and English (appeal)[8]. The provisions concerning appeals (Art. 367–391 of the Code of Civil Procedure) and complaints (Art. 394–398 of the Code of Civil Procedure) were placed by the legislators in the same section – the means of appeal.

By performing an analysis of the provisions concerning appeals and complaints, the basic conditions for their lodging can be distinguished. The first and foremost condition is the existence of a decision of the court of the first instance which is encumbered with errors. The lack of such a decision means the inadmissibility of the means of appeal, as there is no basis to contest, therefore there is no decision which would be the subject of the review and could be changed or repealed[9]. Polish jurisprudence contains the term of the so-called non-existent decisions (sententia non existens), which were issued, but contain errors that deprive them of their legal

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3 Ereciński T. Apelacja w postępowaniu cywilnym. Warszawa: Lexis Nexis, 2009, p. 16.

4 Bladowski B. Metodyka pracy sędziego. Kraków: Zakamycze, 1999, p. 250.

5 Code of Civil Procedure, Act of 17 November 1964. *Journal of Laws*, 1964, No. 43, item 296, as amended.

6 Latusek A., Puchalska I. Praktyczny Słownik Wyrazów Obcych. Kraków: Cyklada, 2003, p. 44.

7 Litewski W. Rzymski proces cywilny. Warszawa – Kraków: PWN, 1988, p. 96.

8 Broniewicz W. Apelacja, kasacja i skarga kasacyjna w postępowaniu cywilnym (Problematyka terminologiczna). Państwo i Prawo, 1999, No. 3, p. 55.

9 Jodłowski J., Resich Z., Lapierre J., Misiuk-Jodłowska T., Weitz K. Postępowanie cywilne. Warszawa: PWN, 2009, p. 474.

existence, while the term of the non-existence of a decision is applied to situations when a decision has not been issued at all[10].

Then, there has to be a legally ascertained possibility to lodge a means of appeal. The legally ascertained possibility can be understood as the grounds for the means of appeal in the legislation. The subject lodging the appeal must show legal interest in the contestability of the decision, as this will constitute an entitlement to being a party in the given proceedings. The legal interest is a result of the connection between a given factual state and a norm of the substantive law, which grants the entitlement to demand a substantive resolution of the case. The doctrine features a rather controversial matter concerning the impact of the existence of a grievance (the so-called gravamen) of the appellant on the admissibility of the means of appeal. The legal interest and grievance are closely connected, as the realisation of the legal interest is conducted through the contestation of the existing decision, which the entitled person deems as unjust. An important formal condition of the means of appeal is their lodging in a legally assigned form – in this case, a court letter. In principle, the legislator specifies that the court letter concerning the appeal should meet not only the general formal conditions specified for every court letter (Art. 126 § 1 of the Code of Civil Procedure), but also specific conditions established for every appeal[11].

The condition for admissibility of the means of appeal, resulting from the provisions of the code, is also their lodging within a period specified in the Act. The lodging of an appeal or complaint is a procedural step. This can only be performed by a legally authorised person. It constitutes an authorisation to lodge a means of appeal, in accordance with the provisions of the law, allowing the participation in the given proceedings or the performance of a specific procedural step. The indicated conditions are common to both appeals and complaints, however, failure to meet one of them, means the rejection of a given means of appeal. Moreover, they are identical for both legal and non-litigation proceedings. No discrepancies have been observed concerning the conditions of lodging and resolution of the means of appeal in both of these proceedings[12].

The purpose of the appeal is to contest the substantive decision of the court of the first instance. This will essentially lead to another review of the case by the court of the second instance, as an effect and in the scope of the complaint of the party. The Supreme Court very accurately commented on the existence of the review function, that the appeal proceedings, despite being substantive proceedings, are actually of a review nature[13]. The court of the second instance, thanks to its review capabilities, is supposed to, not only verify the correctness of the issued decision as to the substance

[10] Miączyński M. Faktyczne i prawne istnienie orzeczenia w sądowym postępowaniu cywilnym. Zeszyty Naukowe Uniwersytetu Jagiellońskiego, 1972, No. 55, p. 103.

[11] Jodłowski J., Resich Z., Lapierre J., Misiuk-Jodłowska T., Weitz K. Postępowanie cywilne. Warszawa: PWN, 2009, p. 475.

[12] Zieliński A. Zwyczajne środki zaskarżenia w postępowaniu nieprocesowym. Monitor Prawniczy, 2001, No. 2, p. 48.

[13] Supreme Court Decision of 16 May 2006, I PK 2010/05. Monitor Prawniczy, 2006, No. 11, p. 593.

and legal terms, but also to strive to reach their own factual conclusions. This should result in a just judgment, free from errors and circumstances for appeal. The Supreme Court, in one of their decisions, showed that the appeal proceedings, despite being a review and countermand procedure, maintains the nature of the initial examination proceedings. Therefore, the court of the second instance has complete jurisdictional freedom, limited only by the scope of the appeal[14].

Devolution and suspension are characteristic traits of appeals. The devolution of a means of appeal (appeal) indicates that its lodging will transfer the examination of the case to the court of higher instance. This concept is closely connected to the existence of higher instances in the civil proceedings, and it constitutes an obligatory trait of the concept of appeals. This cannot be said about complaints, as specified in Art. 395 § 2 of the Code of Civil Procedure. Suspension, on the other hand, works by delaying the issued decision's becoming final after the lodging of an appeal[15].

An appeal is a means of contesting a ruling present not only in Polish law. A similar means of appeal is also present in the Austrian structure of the civil proceedings, under the name of Berefung. An appeal can be lodged there against any decision of the court of first instance. The Austrian jurisprudence specifies groups forming the basis of an appeal: the basis of invalidity (Nichtigkeitsgründe), substantial procedural defects (wesentliche Verfahrensmängel), invalid factual examination (unrichtige Sachverhaltsfeststellung), as well as invalid interpretation of the law (unrichtige rechtliche Beurteilung)[16].

The role of an appeal in light of the Polish regulations is very important for the correctness and reliability of the justice system. Through another review of the factual findings, an appeal should lead to a just ruling based on the facts of the case, therefore eliminating the unjust decision, and consolidating a feeling of justice, independence and stability of the judicature.

The development of the modern appeal system

During the interwar period, as well as the post-World War II period, Poland had a system consisting of three instances of the courts of common law. In it, appeal and complaint were the common means of contesting a decision. The situation changed drastically with the introduction of the amendment to the Code of Civil Procedure of 20 July 1950, changing the regulations of civil proceedings[17]. It introduced three types of courts: district, voivodeship and the Supreme Court, which were territorially accommodated to the administrative division of the country. What is more, a change to the system of appeals in civil proceedings was introduced and, at the same time,

[14] Supreme Court Decision of 15 February 2006, IV CK 384/05. Not published.

[15] Hanausek S. Orzeczenie sądu rewizyjnego w procesie cywilnym. Warszawa: PWN, 1966, p. 12.

[16] Rechberger W. H., Simotta D.-A. Grundriss des österreichtsen Zivilprozessrechts. Erkenntnisverfahren. Wien: Iuris, 2009, p. 534.

[17] Act of 20 July 1950, on the change of regulations in civil proceedings. *Journal of Laws*, 1950, No. 38, item 439.

a uniform two instance system was implemented. As a result of these changes, the system of appeals was transformed, through the ex novo codification. Moreover, the idea of revision was introduced to replace appeal as the basic means of appeal to contest the decision on the merits of the case.

Revision, as practiced, was a mixed, cassation-revision means with a hint of appeal and an element of formality. In the Polish system, it constituted a new means of appeal, serving as a repressive countermeasure for the errors in judicial decisions, by way of repeal or change of those decisions in the proceedings before the court of second instance. The court of appeal was, therefore, a review and supervisory institution with the ability to issue a reformatory ruling[18].

In the 1960s work was undertaken towards creating a new Code of Civil Procedure. This came into force as of 1 January 1965, and resulted in a novelisation of the instance system. The Codification Committee discussed "(…) the issues of the means of appeal, as the regulation of the system of appeals has a profound significance for the whole civil procedure. Maintaining two basic means of appeal – revision and complaint – they were divided in such a way that the revision was applicable in regard to substantive decisions, while complaint was applicable in cases of specific judicial decisions and orders of the Presiding Judge"[19] [quotation originally in the Polish language].

Revision was, thus, a limited means of appeal against substantive decisions, and was enacted only in the specific circumstances resulting from Art. 368 of the Code of Civil Procedure, in force at that time. The basis for the lodging for revision could also be the violation of the substantive law through its improper application or invalid interpretation. Additional reasons for the application of revision could be the invalidity of the proceedings, improper examination of the factual circumstances relevant to the case, as well as contradiction of the material findings of the court with the content of gathered evidence. Revision could also be applied in other procedural infringements which could have had influence on the final outcome of the case. Moreover, the revising party could base his demand for revision on new facts and evidence which he could not use during the proceedings before the court of first instance. However, the revision court was not allowed to investigate beyond the scope of the review, which was set by the legislative basis of the revision.

An important tenet of the revision system was the limitation of the possibility of the court making its own factual findings. The Code of Civil Procedure of 1964 implemented the rule of the material truth in the civil proceedings through the possibility of basing the appeal on new facts and evidence. According to Art. 385 of the Code of Civil Procedure, in its former wording, the revision court examined the case on the basis of factual findings used in the proceedings before the court of first instance, however it also took into account generally known and stated known facts, as well as the circumstances justifying the invalidity of the proceedings[20].

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[18] Bladowski B. Środki odwoławcze w postępowaniu cywilnym. Warszawa: PWN, 2008, p. 19.

[19] Ibid.

[20] Ereciński T. Apelacja w postępowaniu cywilnym. Warszawa: Lexis Nexis, 2009, p. 47.

When, as a result of the witness testimonies and the hearing during the revision proceedings, there were contradictions in the factual findings, the revision court repealed the judgment appealed against and transferred the case to the court of the first instance for a second examination. The revision court could, however, change the issued judgment and proclaim a decision as to the case, if a violation of the substantive law was observed, or in relation to other infringements, if there were sufficient grounds for the resolution of the case in the findings of the revision proceedings[21].

The development of the new legal and political system of the Republic of Poland after 1989 and the start of negotiations with the European Union brought about new changes in the Code of Civil Procedure. The work undertaken by the Codification Committee resulted in the amendment of the Code of Civil Procedure of 1 March 1996[22]. This stipulated a reform of the system of appeals, transforming it into a three instance system[23].

The amendment introduced appeal, in place of revision, as a basic, renovative means of appeal. It was the so-called 'full appeal' (cum beneficio novorum). It was modified by the limitation of new facts and evidence which the party could present in the proceedings before the court of first instance, unless the need to present those arose at a later time. Such a means of appeal was less formal and had a more reformative character[24].

The introduction of appeal as a means of contesting a court's ruling to the second instance, corresponds to the change in the structure of the courts of common law introduced in 1990, which created the courts of appeals. Through the elimination of potential errors in the decisions of the lower courts, the judgments of the courts of appeals allowed, simultaneously, limits to be placed upon the scope of the cassation review, performed in the third instance by the Supreme Court[25].

The structure of appeals prevented the proceedings from being excessively long, did not allow the parties to unnecessarily prolong the proceedings and forbade both parties from lodging new claims. The purpose of the appeal was to examine the case in the same scope as it was supposed to be examined before the court of first instance. The court of second instance, through a second substantive examination, was to fix the errors and mistakes committed by the court of first instance, as well as any faults resulting from the actions of the parties of the proceedings. Therefore, it can be said that the appeal proceedings constituted an extension of the proceedings conducted by the court of first instance. However, the appeal proceedings may examine the totality of the case, not only what has been established as part of the proceedings before the

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[21] Ereciński T. Apelacja w postępowaniu cywilnym. Warszawa: Lexis Nexis, 2009, p. 48.

[22] Act of 1 March 1996, on the amendments of the acts – Code of civil procedure, regulations of the President of the Republic of Poland, Bankruptcy Law and Composition Law, Code of administrative procedure, Act on court fees in civil proceedings and other Acts. *Journal of Laws*, 1996, No. 43, item 189.

[23] Bladowski B. Nowy system odwoławczy w postępowaniu cywilnym. Warszawa: PWN, 1996, p. 31.

[24] Bladowski B. Środki odwoławcze w postępowaniu cywilnym. Warszawa: PWN, 2008, p. 20.

[25] Ereciński T. Apelacja i kasacja w procesie cywilnym. Warszawa: PWN, 1996, p. 15.

first instance. The court of appeals, as with the court of first instance, is entitled to decide upon the facts and apply the legal norms, while at the same time, it serves to ensure the correctness of the proceedings conducted in the lower court[26].

The purpose of the appeal was to mobilise the parties of the proceedings in the first instance to present all gathered evidence, through enabling the court of the second instance to ignore new facts and evidence, if the party could present them in the proceedings before the court of first instance. The rule was to concentrate all evidence before the court of first instance, which in the system of a full appeal, leads to the limitation of the "novelty law" (Art. 381 of the Code of Civil Procedure)[27].

The Act of 24 May 2000[28] introduced a significant amendment, as along with the addition of small claim proceedings, an institution of "small claim appeal"[29] appeared. In cases examined in the new separate proceedings (small claim proceedings), a contradiction has been introduced, on one hand formalising the appeal proceedings, and on the other, simplifying the proceedings (for example, the examination of an appeal by one judge, mostly during a closed door session and the waiving of the right to lodge an appeal) [30].

The changes to the appeal concerned, inter alia, Art. 368 of the Code of Civil Procedure and were aimed at the specification of its formal and structural requirements and the manner of determining the value of the subject of the appeal. Art. 378 § 1 of the Code of Civil Procedure in its new reading, stated that the decision pertaining to the uncontested part remains legally valid. Furthermore, the court of the second instance had the capability of determining the proceedings as invalid, but only within the scope of the appeal. The findings of the appeal, however, did not apply to determining the scope of the examination by the court of second instance (Art. 378 § 1 of the Code of Civil Procedure). Hence, an amendment was introduced, the purpose of which was to prevent unnecessary repeals issued by the court of the second instance, therefore, forcing them to issue substantive decisions in accordance with the purpose of the appeal.

Amendments were also applied to the regulations concerning the withdrawal of an appeal. If an appeal has been withdrawn, the appeal proceedings were discontinued. The scope of the court's jurisdiction is expressed by the maxim tantum devolutum, quantum appelatum[31] – "The appeal must be examined in respect to the same questions examined in the first instance."

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[26] Ereciński T. Apelacja w postępowaniu cywilnym. Warszawa: Lexis Nexis, 2009, p. 50.

[27] Ibid, p. 51.

[28] Act of 24 May 2000, on the amendments to the acts – Code of civil procedure, act on registered pledge and registry of pledges, act on court fees in civil proceedings and act on court enforcement officers and enforcement. *Journal of Laws*, 2000, No. 48, item 554.

[29] Ereciński T. Kodeks postępowania cywilnego po nowelizacji z maja 2000 r., Wprowadzenie do ustawy z dnia 24 maja 2000 r. Warszawa: PWN, 2000, p. 1.

[30] Bladowski B. Środki odwoławcze w postępowaniu cywilnym. Warszawa: PWN, 2008, p. 21.

[31] http://prawo.wieszjak.pl/paremie-lacinskie/839,Tantum-devolutum--quantum-appellatum.html [viewed 26 May 2012].

Another flurry of amendments to the Code of Civil Procedure came about during the years 2004-2005. For the most part, changes made at that time did not have any significant impact and mostly maintained the previous form of the appeal. However, the Act of 2 July 2004[32] contained a new Art. 3701 of the Code of Civil Procedure, which gave the courts the ability to reject appeals, without requiring any corrections to be made[33]. Additionally, changes concerning the routine argumentation of an appeal decision were made around this time.

The amendment of 22 December 2004[34] restored the two instance system. The scope of the admissibility of the appeals and the requirements for the professional litigation attorneys has been increased and the duty to provide the court's argument for any decision was limited. The possibility of staying the execution of a legally valid judgment issued by the court of second instance, for which a cassation appeal has been lodged, was taken into account[35].

Complaint in civil procedure

The main purpose of civil proceedings is the substantive examination and resolution of a civil case. During the proceedings, a court resolves a series of incidental matters concerning the course of the proceedings themselves. While they may not directly impact the form of the decision on the merits of the case, their implementation ensures a formally proper course of civil proceedings. The discussed interlocutory proceedings are independent in relation to the main proceedings in that they end with the issuing of a separate judgment in the form of a resolution or an order of a Presiding Judge. The judgment falls under the review of the court of higher instance in those cases, in which the legislator anticipates its susceptibility to complaints[36].

Complaint is the second, next to the appeal, basic means of contesting a court ruling[37]. Complaint is applicable to the court's decision pertaining to the proceedings, that is the orders of the Presiding Judge mentioned in Art. 394 § 1 and Art. 3941,2 of the Code of Civil Procedure as to the final decisions of the court of first instance. The legislative control of complaints has been limited to the determination of necessary discrepancies, with the assumption that the regulations of appeal proceedings apply to the rest.

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[32] Act of 2 July 2004, on the amendments to the acts – Code of civil procedure and other Acts. *Journal of Laws*, 2004, No. 172, item 1804.

[33] This regulation was deemed in discord with the Constitution of the Republic of Poland by the decision of the Constitutional Tribunal of 20 May 2008, file ref. No. P 18/17. *Journal of Laws*, 2008, No. 96, item 619.

[34] The Act of 22 December 2004, on the amendments to the acts – Code of civil procedure and Law on the system of common courts. *Journal of Laws*, 2005, No. 13, item 98.

[35] Broniewicz W. Apelacja, kasacja i skarga kasacyjna w postępowaniu cywilnym (Problematyka terminologiczna). Państwo i Prawo, 1999, No. 3, p. 56; Bladowski B. Środki odwoławcze w postępowaniu cywilnym. Warszawa: PWN, 2008, p. 22.

[36] Marszałkowska-Krześ E. Postępowanie cywilne. Warszawa: PWN, 2008, p. 404.

[37] Broniewicz W. Zażalenia w postępowaniu cywilnym. Przegląd Sądowy, 2001, No. 1, pp. 18-25.

In Polish law, the purpose of the appeal and complaint is similar. The parties are entitled to both of these means of appeal for the purpose of the protection of their interest in the scope it was violated or endangered. Furthermore, a common trait of both of these means is the applicability of suspension. This prevents the becoming final of the issued judgment until such time as the last means of appeal is examined.

Complaint is a relatively devolutive means of appeal. This means that its lodging will not always result in the examination of the case by the court of higher instance than the one that issued the judgment. According to Art. 395 § 2 of the Code of Civil Procedure, if a complaint stipulates the invalidity of the proceedings or is clearly justified, the court that issued the judgment may, during a closed door session, without handing over the acts to the court of second instance, repeal the contested judgment and re-examine the case as needed[38].

The development of the modern complaint system

Since 1 July 1996, a complaint can appertain to the Supreme Court. This could happen, at first only by the decision of the court of second instance to repeal the cassation, but ever since 1 July 2000, can also come about due to other final decisions that this court has made in regard to certain case proceedings. The complaint is, however, a special non-devolutive means of appeal, examined by the institution of first instance[39].

Since 3 May 2012, a significant novum has been introduced into the Code of Civil Procedure. This is in the form of an incorporated possibility to appeal against the decision of the court of second instance in repealing the judgment of the court of first instance and referring the case for re-examination. Therefore, the new Art. 3941 § 11 of the Code of Civil Procedure stipulates, that the case will be referred to, and the complaint will be examined by the Supreme Court, if the court of second instance repealed the judgment of the court of first instance. The Act does not, however, stipulate the kind of cassation decision of the court of second instance which should be issued if the case has been referred for re-examination. The lodging of a complaint against the decision referring the case for re-examination is a special kind of means of appeal. The introduction of a possibility to verify the decisions referring the case for re-examination should be viewed as a positive step, as this system was used excessively in practical application.

The amended[40] Art. 3942 of the Code of Civil Procedure, in effect as of 3 May 2012, allows the complaint to be applied in a much bigger scope than before. This amendment is primarily connected with the unfortunate and raising many doubts implementation of the decision of the Constitutional Tribunal of 27 March 2007, file ref. No. SK 3/05 (OTK-A 2007, No. 3, item 32), into the Code of Civil Procedure,

[38] Marszałkowska-Krześ E. Postępowanie cywilne. Warszawa: PWN, 2008, pp. 404-405.

[39] Broniewicz W. Istota i rodzaje zażalenia w postępowaniu cywilnym. Warszawa: PWN, 2008, p. 18.

[40] Act of 16 September 2001 on the amendment of the acts – Code of civil procedure. *Journal of Laws*, 2001, No. 233, item 1381.

introduced in the Act of 19 March 2009, on the amendments to the Code of Civil Procedure (*Journal of Laws* No. 69, item 592). In place of the complaint to the Supreme Court, restricted to the decision of the court of the second instance, "on the costs of the proceedings, which were not included in the decision of the court of first instance" [original quotation in the Polish language], a solution has been implemented into the Code of Civil Procedure allowing lodging a complaint against some of the decisions of the court of second instance, to a different panel of judges of that court (horizontal appeal). This kind of appeal encompasses decisions specified in Art. 3942 § 1 of the Code of Civil Procedure concerning the conviction to a fine or the adjudgment of a compulsory appearance and arrest, with the exclusion of decisions issued as part of the examination of the complaint.

It was decided that the nature of these decisions, which directly concern the civil rights and liberties, requires the implementation of a possibility to appeal against them beyond the constitutional standard specified in Art. 78, sentence 1, of the Constitution of the Republic of Poland[41]. At the same time, it was decided that these decisions do not require the engagement of the Supreme Court. In accordance with the above-mentioned decision of the Constitutional Tribunal, file ref. No. SK 3/05, and a decision of the Constitutional Tribunal of 2 June 2010, file ref. No. SK 38/09 (*Journal of Laws* No. 109, item 724), Polish law implemented the possibility to appeal against the decision of the court of second instance, in relation to the reimbursement of the costs of the proceedings and the decisions of the court of second instance on the dismissal of the claim to disqualify a judge. However, this is applicable only if the parties of the case are entitled to a cassation appeal[42].

Conclusion

The main tenet of civil proceedings is the examination of a civil case by an independent court and the issuing of a judgment based on factual findings consistent with the truth and existing provisions of the substantive law. Therefore, the legislator grants the individual a legal cover and guarantees a reliable examination of the case. The aim of the court of first instance is the pursuit of careful and inquisitive examination of factual findings, and, as a consequence, the resolution of an existing dispute between the parties. According to the basic rules of civil proceedings, each citizen is entitled to a public examination of a case by the court.

The legislative regulation of the means of appeal (appeal and complaint) in the Polish civil procedure underlies their significance in the context of the realisation of the right to a fair trial by a reliable and just examination of the case by an independent

[41] The Constitution of the Republic of Poland of 2 April 1997. *Journal of Laws*, 1997, No. 78, item 483, amendment of 2001, No. 28, item 319 in art. 78 sentence 1 states: "Both parties have the right to appeal the judgements and decisions issued by the first instance" [original quotation in the Polish language].

[42] Marszałkowska-Krześ E., Gil I., Gil P. Zasadnicze kierunki zmian w kpc wprowadzone przez przepisy ustawy z 16.9.2011 r. Edukacja Prawnicza, 2012, No. 3, p. XII.

court. A detailed analysis of the formal and substantive requirements of the means of appeal allows for the belief that they constitute a successful antidote for errors and mistakes which may arise in the proceedings before the court of first instance.

The appeal, for many years, was subject to many amendments and alterations, so that today it has now become a basic means of appeal,– purpose of which is to renew and complete the examination of the proceedings in the scope necessary to review the correctness and legitimacy of the appeal by an authorised entity[43]. The changes concerning complaints are connected mainly with the extension of the catalogue of cases against the decisions of which, a complaint can be lodged, especially in relation to the court of second instance[44].

The implementation of amendments concerning appeals and complaints is fully justified in every democratic state under the rule of law, the political and economic system of which undergoes changes. What is more, those changes are a result of an assumption that a mistake of the court of first instance is "human", while the possibility for its amendment must be realistic and available.

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Broniewicz W. Zażalenia w postępowaniu cywilnym. Przegląd Sądowy, 2001, No. 1.

[43] Ereciński T. Apelacja i kasacja w procesie cywilnym. Warszawa: PWN, 1996, p. 14.

[44] Marszałkowska – Krześ E., Gil I., Gil P. Zasadnicze kierunki zmian w kpc wprowadzone przez przepisy ustawy z 16.9.2011 r. Edukacja Prawnicza, 2012, No. 3, p. XII.

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TYPOLOGY OF LEGAL ACTS IN THE EUROPEAN UNION LAW AFTER THE LISBON TREATY

Keywords: European Union, Lisbon treaty, legal acts, primary and secondary law, legislative and non-legislative acts, implementing and delegated acts, regulatory acts, comitology.

The issue of legal sources within the law of the European Union (EU) always has been a complicated one. If in the legal system of one particular state legal acts usually can be arranged in a more or less strict hierarchical system, then in the EU law such system is much more vague and harder to outline. Reasons for this are rooted in the specific nature of the EU itself, balancing between the international organization and the federative state, as well as in the necesity to merge diferent legal traditions of 27 diferent Member States into the single legal system. And the Lisbon treaty, although made some changes here, didn't add much clarity either. Therefore the aim of the paper is to summarize and briefly analyze the system of legal acts within the EU and to evaluate impact of the Lisbon treaty on that system.

The paper consists of three parts. First part provides an overview on the traditional system of legal acts as it was before the Lisbon treaty. Second part focuses on the changes the Lisbon treaty added to that system, in particular, on the concepts of legistlative and non-legislative acts and delegated and implementing acts as they are laid down in the Art. 289-291 of the Treaty on the Functioning of the European Union (TFEU). Finally, third part briefly touches on other related problems in the Lisbon treaty – on the concept of the "regulatory act" in the Art. 263 of the TFEU.

Pre-Lisbon system of legal acts in the EU

Traditionally distinction all legal acts in the EU are divided in two distinctive groups – acts of the primary law and secondary law.

Acts of primary law

Formally the EU doesn't have single legal act called "constitution". Instead there are several international treaties, concluded between the Member States of the EU, that function as a legal foundation of the EU. Those international treaties usually are referred to as a "primary law" of the EU and they include three treaties: TFEU, Treaty on European Union and the Treaty Establishing a European Atomic Energy Community (which is still in force as a separate treaty). Also part of the primary law are protocols, annexes and declarations that are attached to the treaties to elaborate

details, often in connection with a single country, without being in the full legal text. Those acts of primary law, similarly to the constitutions in the traditional sense of the word, include general political aims of the EU and describe main competences of the EU and its institutions. Also the legal force of those acts is higher than those of the secondary law since the acts of the primary law carry the direct will of the Member States and serves as a legal foundation of the EU.

Acts of secondary law

Secondary laws are adopted by the European institutions in order to exercise the Union's competences on the basis of the acts of primary law. Their main forms of those acts are listed in the Art. 288 of the TFEU. These are regulations, directives, decisions, recommendations and opinions.

Regulations have general application, are binding in their entirety and are directly applicable in all Member States. The regulations must be complied with fully by those to whom they apply (private persons, Member States, EU institutions). Regulations apply directly in all Member States, without requiring a national act to transpose them. Even more, Member States are precluded from adopting measures that would somehow modify rights and duties provided in the regulation.[1]

Directives are binding as to the result to be achieved upon the Member States to whom they are addressed. In order to ensure that the objectives of the directives are achieved, an act of national implementing measure by national legislators is required by which national law is adapted to the objective laid down in the directives. Since the Member State is bound only by the objectives laid down in the directive, it has some discretion in transposing directive into the national law and can take into account specific national circumstances. Directive must be transposed in the form of binding national law which fulfils the requirements of legal certainty and legal clarity and establishes a position whereby individuals can rely on the rights derived from the directive.[2]

Decisions are binding in their entirety. Adresees of the decions may be Member States or natural or legal persons. Decisions serve to regulate actual circumstances between specific entities addressed in the decision.[3]

Recommendations and opinions have no binding force, which means that they function as a "soft law" and do not establish any rights or obligations for those to whom they are addressed, but do provide guidance as to the interpretation and

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[1] Judgment of the Court of Justice of the European Union (CJEU) in the case 50/76 Amsterdam Bulb [1977] ECR p. 137.

[2] On directives in more details See, e.g.: Prechal S. Directives in EC Law. 2nd ed. Oxford: Oxford University Press, 2006.

[3] Craig P., Burca G. EU Law. Text Cases and Materials. 5th ed. Oxford: Oxford University Press, 2011, p. 105.

content of the EU law.[4] Additional forms of soft-law are used in the EU institution`s practice, too.[5]

Previously, before the Lisbon treaty amendments, there were more forms of the secondary law because of the three pillars stucture of the EU law. Since the Treaty of Lisbon abolished three pillar structure, the legal instruments of the old 'third pillar' (police and judicial cooperation in criminal affairs), namely the framework decision and the conventions, were removed from the classification of EU legal acts. After the Lisbon treaty in all areas covered by the EU competence the EU institutions will only adopt the legal instruments listed in the Art. 288 TFEU. The only exceptions are common foreign, security and defence policies (former second pillar), which will continue to be subject to intergovernmental procedures. Instruments which may be adopted to achieve these policies shall retain their political nature but have a new classification: pre-Lisbon common strategies, common actions and common positions will be replaced with "general guidelines" and by "decisions defining" actions to be undertaken and positions to be taken by the EU and arrangements for the implementation thereof.[6]

Finally, the EU may, within the sphere of its competence, conclude international treaties with other actors of the international law. More specifically, the Art. 216 of the TFEU provides that "the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope". The treaties thus concluded by the Union are binding on the Union institutions and the Member States pursuant to the Art. 216(2) of the TFEU and are an integral part of the EU law. International treaties, concluded by the EU, have higher legal force then other forms of the secondary law.[7]

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[4] Trubek D., Trubek L. Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination. European Law Journal, Vol. 11, 2005, No. 3, p. 344.

[5] On that See, e.g.: Wyrozumska A. Informal Instruments in European Community Law. Law and Justice. Special edition, 2005; pp. 43-50; Lefevre, S. Interpretative communications and the implementation of Community law at national level. European Law Review. Vol. 29, 2004, pp. 809-10; Klabbers J. Informal instruments before the European Court of Justice. Common Market Law Review, 1994, Vol. 31, pp. 997-1009.

[6] Piris J. C. The Lisbon treaty. Alegal and political analysis. Cambridge: Cambridge University Press, 2010, pp. 420-423. See also generally: Keukeleire S., MacNaughtan J. The foreign policy of the European Union. Hampshire: Palgrave Macmillian, 2008.

[7] Generally on the statuss of the international law in the EU law See, e.g.: Burca, G. The EU, the European Court of Justice and the International Legal Order after Kadi. Harvard International Law Journal, Vol. 1, No. 51, 2009.

New typology of legal acts in the EU: Art. 289-291 of the TFEU

Prior to the Lisbon treaty, there was certain ambiguity regarding hierarchy of norms amongst the acts of the secondary law, because the above mentioned acts like regulations or directives might have been adopted directly by the EU legislative bodies (i.e., European Parliament and Council of Ministers) as well as by the EU Commision. The Lisbon treaty and its authors "felt that it was desirable in terms of simplicity, democratic legitimacy, and separation of powers to have a more definite hierarchy of norms"[8] and therefore introduced concepts of legislative acts, delegated acts and implementing acts.

Legislative and non-legislative acts

Firsty, clear distinction between legislative and non-legislative acts has been made in the Art. 289(3) of the TFEU, which states that "legal acts adopted by legislative procedure shall constitute legislative acts". Therefore all above mentioned acts of secondary law, if they are adopted in the legislative procedure, as prescribed by the Art.289 of the TFEU, are to be considered as legislative acts, irrespectively of their content or form.[9] Therefore the main purpose of the statement "legal acts adopted by legislative procedure shall constitute legislative acts" is to separate acts of the European Parliament and the Council of Ministers, which are acting as main legislators in the EU, from the acts of the EU Commission.

Delegated and implementing acts

Furthermore, as regards law-making activities of the EU Commission, the Lisbon treaty establishes two separate ideas and separate procedures, distinguishing between delegated acts and implementing measures. The Art. 290 of the TFEU describes what is meant by delegated acts: "A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power." Next article in the TFEU, Art. 291, explains implementing acts: "Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission". Thus the new system makes a clear separation between tasks delegated to the EU Commission that only require pure implementation, implementing acts, and those that allow the Commission to amend, supplement or delete non-essential elements of the legislative act, delegated acts.[10]

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[8] Craig P., Burca G. EU Law. Text Cases and Materials. 5th ed. Oxford: Oxford University Press, 2011, p. 103.

[9] Craig P., Burca G. EU Law. Text Cases and Materials. 5th ed. Oxford: Oxford University Press, 2011, p. 104.

[10] Hardacre A., Kaeding M. Delegated and Implementing Acts: The New Comitology. EIPA Essential Guide. 4th ed., 2011, p. 29.

The new clasification of the acts of secondary EU law, as provided by the Lisbon treaty amendments, quite resembles practice of many national systems. In these systems, we have three different legal situations:

- cases in which the legislator acts in his own field of competence: these are the laws;
- cases in which the executive acts in his own field of competence: these are executives acts *stricto sensu* or ministerial decrees;
- cases in which the executive acts in the field of competence of the legislator (either following an explicit delegation of powers or on its own initiative (in French, these acts are named "ordonnances" and in Italian "decreti-legge o decreti legislativi").[11]

Applying that analogy to the EU law after Lisbon, we have legislative acts, delegated acts and implementing acts.

On procedural level those changes are quite revolutionary, since in relation to delegated acts, Lisbon treaty abolished commitology system. Those changes are a sharp deviation from past practice – the EU Commission now presents its delegated act directly to both legislators at the same time without first passing via a committee. The legislators will then both have a time determined by the basic act to oppose the act on any grounds. Compared to the pre-Lisbon situation a number of innovations need to be highlighted:

- No horizontal framework: The first major innovation is that there is no horizontal framework to cover delegated acts so the legislators will be free to set the objectives, scope, duration and the conditions to which the delegation is subject in each and every legislative act.
- Absence of the committee: The next noticeable innovation is the absence of comitology committees and the requirement of the Commission to get the approval of Member State representatives.
- Right of opposition on any grounds: In addition, Council or Parliament now has the power to oppose an individual delegated act on any grounds.
- Right of revocation: The legislators are also granted the ultimate control mechanism for delegated acts – the right to revoke the delegation altogether. Again if either legislator became so dissatisfied with how the Commission was using its power to adopt delegated acts it could vote to revoke the delegation.[12]

In respect to implementing acts the procedural changes are less drastic and comitology procedure is still in force, although in slightly modified version, if compared with

[11] Ponzano P. Executive and delegated acts: situation after the Lisbon Treaty. In: The Lisbon Treaty. Schriftenreihe der Österreichischen Gesellschaft für Europaforschung (ECSA Austria), Vol. 11, 2008, p. 137.

[12] Hardacre A., Kaeding M. Delegated and Implementing Acts: The New Comitology. EIPA Essential Guide. 4th ed. 2011, p. 31.

pre-Lisbon situation.[13] Also recently the new comitology regulation has been adopted. This regulation simplifies the whole comitology process by replacing all various previous comitology procedures with two new procedures for controlling the EU Commission's exercise of implementing powers: an advisory and an examination procedure.[14]

Some scholars have criticised this new system of legislative, delated and implementing acts as being unclear and source of confusion.[15] In practice, it might be hard to make a clear separation between delegated acts and implementing acts and basically the only ultimate separator will be the procedure under which particular act of the EU Commission was adopted. Also so called "time problem" might be an issue – it is not possible to decide conclusively whether an act, which the EU Commission is preparing, will fall into the category of delegated acts or implementing acts until it is made. However the choice between delegated and implementing act should be made at the very early stage, since the adoption procedure differs.[16]

The conclusion here is that the idea of distinction between situations when the EU Commission is acting as a "true" legislator and situations when the actions are of purely implementing nature, is well-intended. Yet in practice the new system, introduced by the Lisbon treaty, where delegated and implementing acts are strictly separated, creates some doubts regarding its efficiency and clarity.

Other types of acts mentioned in the TFEU after the Lisbon treaty

In addition to new terms of legislative, delegated and implementing acts, additional confution is caused by the term "regulatory act", which is used in the Art. 263 of the TFEU. This article provides that any natural or legal person may challange, inter alia, "regulatory act which is of direct concern to the applicant and which does not entail implementing measures". No article in the Lisbon treaty contains a definition of a regulatory act or uses this wording leaving a wide margin of appreciation for the CJEU. To address this issue it is necessary to deal with the respective *travaux preparatoire* and classification of legal acts under the Lisbon Treaty. Whereas the present wording of Art. 263 TFEU originates from its predecessor in the Treaty Establishing a Constitution for Europe, it is the *travaux preparatoire* of this Treaty, which is relevant for interpretation and which referred to the distinction between

[13] In details see: Hardacre A., Kaeding M. Delegated and Implementing Acts: The New Comitology. EIPA Essential Guide. 4th ed. 2011.

[14] Regulation No 182/2011 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. OJ L 55, 28.2.2011, p. 13.

[15] Bergstrom C. F. Comitology: Delegation of Powers in the European Union and the Committee System. Oxford, Oxford University Press, 2005, p. 245.

[16] Craig P., Burca G. EU Law. Text Cases and Materials. 5th ed. Oxford: Oxford University Press, 2011, p. 117.

legislative and non-legislative acts.[17] Therefore it could be concluded that using the term regulatory acts, the *travaux preparatoire* referred to non-legislative acts of general application as opposed to acts of individual application, which would lead to the conclusion that regulatory acts could be defined as all non-legislative acts (delegated and implementing acts).[18] At the same time in legal literature it has been pointed out that regulatory act can not be cleary defined as something which is opposite to the legislative act and thus the term might include every generally applicable EU law secondary act.[19] Recent case-law of the General Court indicates that the General Court is willing to use narrower interpretation of the term, covering only implementing acts of general application, although even those jugdements do not create clear and simple points of reference, how the term "regulatory act" relates to the system of acts in Art. 289-291 of the TFEU.[20]

Conclusion

If one evaluates changes that the Lisbon treaty has made to the typology of legal acts of the EU, certainly positive aspect is cancelation of three pillar`s system and unification of form of acts from pre-Lisbon first and third pillars.

Yet more arguable is used solution in respect of the EU Commission`s law-making activities and created distinction between delegated and implementing acts. The idea, why such distinction is needed, is clear and acceptable. However the solution used leaves some doubts, whether it was the best possible method how to do it.

Even more doubts on the quality of Lisbon treaty amendments in the sense of good law-drafting arise if one takes into account term "regulatory act", which is used in the Art.263 of the TFEU and which deviates from the system of the EU law acts as they are explained in the Art. 289-291 of the TFEU.

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[17] Limante A. Actions For Annulment Before Ecj After The Lisbon Treaty: Has The Access To Justice Improved?, p. 9. Available: http://egpa-conference2011.org/documents/PSG10/LIMANTE.pdf [accessed 21.06.2012].

[18] Limante A. Actions For Annulment Before Ecj After The Lisbon Treaty: Has The Access To Justice Improved?, p. 10. Available: http://egpa-conference2011.org/documents/PSG10/LIMANTE.pdf [accessed 21.06.2012].

[19] Balthasar S. Locus Standi Rules for Challeneges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU. European Law Review. 2010, Vol. 35, No. 4, p. 545. See also Dougan M. The Treaty of Lisbon 2007: Winning minds, not hearts. Common Market Law Review, 2008, Vol. 45, No. 3, pp. 675-679.

[20] Judgments of the General Court in case Case T-262/10 Microban v Comission and in case T-18/10 Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union (not published yet).

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USE OF DISTINCTION BETWEEN PUBLIC AND PRIVATE LAW IN LEGISLATION

Keywords: distinction between public and private law, public legal relations, private law relations, two-step theory.

Introduction

Day after day, a multitude of opinions are voiced regarding laws. Laws are referred to as complex, unclear, contradictory, stringent, avoidable, among other things. However, law can also be beautiful. The beauty of a law is formed not merely of conciseness and conformity to legal canons, but mainly – of proper, clear, and stable legal constructions. A law that is beautiful in itself and contributes to harmony with other laws is the source of inspiration for a jurist-aesthetician. The beauty of law can be quickly spoilt if provisions, which have not been thoroughly considered, and borrowings from other countries, which are alien to the local law community, make their way into the law. One of the legal constructions, which has earned a specific use in regulatory enactments is what is known as the distinction between the public and private law.[1] In Latvia, the division of legal relations is understood with this distinction.[2] The objective of this article is to elucidate the legislator's possibilities, by means of regulatory provisions, to determine the nature of a certain legal relation (public legal or private legal relation), as well as to justify why Latvia should give up what is known as the two-step theory. Hopefully, the article and the conclusions formulated at the end will serve as at least a minor stimulus for drafting more beautiful laws!

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[1] For more detailed contemplations on this aspect, see: Danovskis E. Publisko un privāto tiesību dalījuma nozīme un ieviešana Latvijā pēc neatkarības atjaunošanas. Latvijas Universitātes Žurnāls. Juridiskā zinātne. No. 2, 2011, pp. 27-40, Briede J. Publiskās un privātās tiesības. Monograph: Mūsdienu tiesību teorijas atziņas. Rakstu krājums. Ed. by E. Meļķišs. Riga: Tiesu namu aģentūra, 1999, pp. 41-58, Danovskis E. Publisko un privāto tiesību nošķiršanas veidi un nozīme Latvijā. Monograph: Starptautiskās zinātniskās konferences "Valsts un tiesību aktuālās problēmas" zinātnisko rakstu krājums. Daugavpils: Daugavpils Universitātes Akadēmiskais apgāds "Saule", 2011, pp. 27-34.

[2] Danovskis E. Publisko un privāto tiesību nošķiršanas veidi un nozīme Latvijā. Monograph: Starptautiskās zinātniskās konferences "Valsts un tiesību aktuālās problēmas" zinātnisko rakstu krājums. Daugavpils: Daugavpils Universitātes Akadēmiskais apgāds "Saule", 2011, p. 30.

Legislator's Freedom of Conduct in Determining the Nature of Legal Relations

Even though the legal doctrine can develop universal criteria for distinguishing between public legal and private legal relations, the use of these criteria due to various reasons may be cumbersome for the entity applying the law. In order to ensure legal certainty about the nature of certain legal relations, the legislator can directly define that a specific legal relation is a public legal or private legal relation. The legislator's indications to the nature of the legal relation are very much necessary, however the legislator's freedom to act, when determining the character of the legal relation is not absolute. For instance, under the modern-day conditions, it might appear bizarre if a law were to determine that the decision of a telecommunications service provider to discontinue telecommunications services is an administrative act or that every contract concluded in a public procurement procedure is a contract governed by public law. At times, the legislator's decision to determine the nature of a certain legal relation is the response to a controversial or, in the legislator's opinion, incorrect case-law. For instance, in 2008, amendments were introduced into the Electricity Market Law,[3] by expanding Section 5(3) and determining that "disputes regarding the bills issued by system participants and electricity traders shall be examined in accordance with the procedures specified in the Civil Procedure Law. Documents, which are developed in order to prepare or justify payment documents, shall not be appealed separately." In the draft law annotation, it is pointed out that "over the course of last two years, such judicial practice has taken shape, whereby a legal proceeding is commenced also through an administrative procedure, and in such cases, legal proceedings are held separately through administrative and civil procedure. The courts analyse which of the documents issued to prepare or justify a bill (a deed on establishing a violation, specialist opinion, initial estimate) is subject to considering in an administrative or civil procedure, is not subject to considering at a court at all, or is to be evaluated only as evidence in a civil procedure."[4] This and similar examples call for the need to establish the legislator's possibilities to determine the nature of legal relations.

The reference to the distinction between public and private law included in the Administrative Procedure Law[5] (hereinafter – also APL) and in other laws means that this distinction has a certain content and distinction criteria. If the legislator has provided for such a distinction, then its specification in regulatory enactments and in the practice of applying the law must be consistent. The Constitutional Court has recognized that "the principle of the rule of law, which is one of the fundamental principles of a judicial state, inter alia, establishes that laws should be predictable and clear, as well as sufficiently stable and constant. Therefore, the legal regulation

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[3] Amendments to the Electricity Market Law: LV law. *Latvijas Vēstnesis*. 2008. 24 April, No. 64 (3848).

[4] Annotation of the draft law "Amendments to the Electricity Market Law". Available: http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/2F42E1584B68098AC22573470044ACEA?OpenDocument [viewed 02.05.2012]

[5] Administrative Procedure Law: LV law. *Latvijas Vēstnesis*. 2001. 14 November, No. 164 (2551).

stipulated in legal provisions may not be amended unjustifiably frequently, because unjustifiably frequent amendments encumber the compliance with laws. Moreover, legal regulation must be sufficiently stable in order to ensure that an individual, guided by legal provisions, could make not merely temporary decisions, but instead could plan the future in a long-term. The legal certainty principle also imposes the duty for the state to ensure certainty and stability of legal relations [..]."[6] As the legal certainty principle prohibits the legislator to adopt such provisions, which do not correspond to fundamental principles of legal regulation previously created by the legislator itself, then the legislator's order, when determining the nature of a specific legal relation, may not be arbitrary. When deciding, whether a decision of a specific institution should be an administrative act or a decision in the field of private law, the legislator must consider the criteria of distinguishing the public legal and private legal relations deriving from legal doctrine and case-law.

Nevertheless, the elucidation of the nature of legal relations is at times problematic. For instance, the exercise of pre-emptive rights prescribed for local governments in the Law on Local Governments[7] entails public legal relations.[8] However, in essence, from the perspective of the caused legal consequences, these rights do not differ from pre-emptive rights envisaged in other laws. As the act of exercising pre-emptive rights always affects private legal relations, which have formed between the seller and the initial buyer, then it is practically more convenient that a decision adopted by a local government on the exercise of pre-emptive rights is examined within the framework of a civil procedure at a court of general jurisdiction. In such case, the legislator can determine that the decision of a local government on the use of pre-emptive rights is a decision subject to private law; hence the procedural duties of the institution as established in APL (such as, finding out an individual's opinion) do not apply to issuing that decision. The local government in such case should observe only the pre-requisites and the procedure for the exercise of pre-emptive rights as established in the law. Hence, derogation from the criteria of distinction between public legal and private legal relations can be justified with rational considerations, which are linked to the peculiarities of the specific legal relation and procedural efficiency.

Up to now, the jurisprudence of Latvia has not studied the state administration possibilities to determine the nature of legal relations. In Germany's administrative law, it is established that the state administration can choose the form, in which it acts, if the legal provisions do not govern it: either in private legal or in public legal form.[9] The Supreme Court Senate, by making a reference to the Germany's legal

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[6] On compliance of the Law on State Funded Pensions, Section 30(5) and (6) with Article 1 and 91 of the Constitution of the Republic of Latvia: Judgment of 25 October 2004 adopted by the Constitutional Court of the Republic of Latvia in the case No. 2004-03-01, Paragraph 9.2. *Latvijas Vēstnesis*. 2004. 26 October, No. 169(3117).

[7] Law on Local Governments: LR law. *Latvijas Vēstnesis*. 1994. 24 May. No. 61 (192).

[8] Decision of 3 March 2011 by the Administrative Case Department of the Supreme Court Senate in the case No. SKA-70/2011, Paragraph 9. Available: http://www.at.gov.lv/files/archive/department3/2011/70.pdf [viewed 06.06.2012].

[9] Paine F. J. Vācijas vispārīgās administratīvās tiesības (ceturtais pārstrādātais izdevums). Vācijas Administratīvā procesa likums. Riga: Tiesu namu aģentūra, 2002, p. 56.

doctrine, has indicated that legal relations originating after a decision has been made on rendering public services, can be both public legal and private legal relations.[10] In the specific case, the local government by itself, without involving private entities, provided heat supply service, and concluded a contract with consumers on rendition of heat supply services, as it considered this agreement as subject to private law. The law does not stipulate the form, in which a local government regulates legal relations with recipients of public services. However, in that case, it cannot be assumed that a local government has the freedom of conduct to determine, whether legal relations with the consumer are public legal (regulated unilaterally, with an administrative act, or with a contract subject to public law) or private legal (regulated with a contract subject to private law). State administration may not decide by itself, whether APL is to be applied or not applied to specific legal relations, and therefore, may not determine how disputes originating through legal relations are to be solved. Decision-making of issues that are of such importance may be at the sole competence of the legislator. If the legislator has not provided for a more detailed regulation, then it must be assumed that all legal relations feature uniform nature, i.e. they are only public legal or private legal relations. The nature of these legal relations is to be determined, having regard to the nature of the initial decision (whether a person has subjective public rights to request that a service is rendered).

Since Latvia recognises contracts subject to public laws as a special form of state administration activity, the issue on legal regulation of these contracts in regulatory enactments has become topical. Section 12(1) of the State Administration Structure Law[11] determines four basic types of contracts subject to public law (which can be used to conclude a delegation, participation, and administrative contract with a private entity), but Section 12(3) stipulates that other types of contracts subject to public law may be established by law. The law does not provide universal criteria, according to which the contracts governed by public law can be distinguished from private law contracts, therefore identification of contracts subject to public law in practice can be problematic, even more so, if the regulatory enactment does not determine, whether a certain contract is to be regarded as a contract governed by public law. The legislator's references on the nature of a specific contract, concluded with a public entity, mentioned in a regulatory enactment are preferable. Such references are given, for instance, in the Law on Management of the European Union Structural Funds and Cohesion Fund[12], in Clause 1 of Section 15(2), where it is explicitly determined that the beneficiary of the European Union financing has a duty to "ensure implementation of a European Union fund project in compliance with the provisions of a civil contract". Furthermore, Section 60(1) and (2) of the Law on

[10] Decision of 16 February 2009 adopted by the Administrative Case Department of the Supreme Court Senate in the case No. SKA-16/2009, Section 13. Available: http://www.at.gov.lv/files/archive/department3/2009/09_ska_016.doc [viewed 08.06.2012].

[11] Law on State Administration Structure: LV law. *Latvijas Vēstnesis*. Y. 2002. 21 June, No. 94 (2669)

[12] Law on the Management of the European Union Structural Funds and Cohesion Fund: LV law. *Latvijas Vēstnesis*. 2007. 23 February, No. 33 (3609).

Public-Private Partnership[13] establishes that a partnership procurement contract and a concession contract is a civil contract.[14]

The legislator's freedom of conduct in determining the legal nature of such a contract is not unlimited either. Firstly, the legislator should not declare such contracts as civil contracts, which have the features of a delegation, co-operation, and participation contract prescribed in the State Administrative Structure Law. That, as indicated before, would not correspond to the principle of legal certainty. Secondly, the legislator should not declare a contract, which by means of contents has the features of a contract subject to public law, as a civil law contract merely to encumber the procedural rights of private entities (a claim application on a civil contract normally requires a much higher stamp duty to be paid than an application concerning a contract of public law, for which the stamp duty rate does not depend on the sum of material issues covered in the contract). The legislator's intent when determining the legal nature of a contract can be justified merely with considerations of procedural efficiency.

The opinion voiced up to now has it that "if a contract on granting financing to a private entity under the [..] law were to be recognised as a contract governed by public law, then the legislator, most likely, could not subject the disputes deriving from the said agreements to the Civil Procedure Law. Therefore, the court in each case, before considering the case on its merits, must determine whether the respective dispute is subject to a court of general jurisdiction or to an administrative court, based on the contract status."[15] Even though the legislator may not arbitrarily manipulate with the legal nature of a contract, the principle of lawfulness forces the courts to observe this choice of the legislator. Therefore, the courts may not, contrary to the legislator's explicitly indicated intent, "re-qualify" the contract.

Limiting the use of Two-step Theory

In the preceding subchapter, the principle of unity of legal relations is justified – the legislator, when developing regulatory provisions, must avoid artificial legal constructions, which dogmatically divides legal relations into public legal and private legal relations. The two-step theory justifies exactly such dogmatic construction. The idea of the two-step theory is as follows: if the state administration must make a decision on whether to start legal relations with a private entity, then this decision normally is an administrative act (the first or "whether?" step). However, the form,

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[13] Law on Public-Private Partnership: LV law. *Latvijas Vēstnesis*. 2009. 9 July, No. 107 (4093).

[14] Regarding the opinion that these contracts should theoretically be regarded as contracts subject to public law, please, see Muižnieks I. Publiskā un privātā sektora partnerību veidošanas starptautiski tiesiskie aspekti ilgtermiņa strukturālo pārmaiņu procesā. Doctoral Thesis. Riga: 2011, p. 186; regarding the contrary opinion, please, see Indāne D. Publiskā un privātā partnerība Latvijā Eiropas Savienības kontekstā. *Jurista Vārds*. 2011. 11 January, No. 2(649).

[15] Brizgo M. Līgumi par finansējuma piešķiršanu no struktūrfondiem: tiesiskais statuss. *Jurista Vārds*. 2012, 27 March. No. 13(712).

in which such legal relations (usually – implementation of a task imposed on the state administration) are implemented, can be both private legal and public legal. If legal relations established on the grounds of an administrative act are regarded as the second or "how?" step.[16]

The two-step theory is not a product of the Latvian law system; it was borrowed from the German law nearly ten years ago. The two-step theory in legal writings of Latvia was first analysed in the monograph by Jautrīte Briede "Administratīvais akts" ("Administrative act").[17] The two-step theory analysis in this study was necessary to examine the concept of an administrative act and to provide a solution for those cases, when before concluding a contract, the state administration makes a decision. The mention and analysis of the two-step theory, therefore, at this time was justified, because this theory traditionally was described in legal literature dedicated to Germany's administrative law.[18] The fact that the two-step legal construction developed in Latvia is a borrowing from the German law has been recognised also by the Supreme Court Senate.[19] However, uncritical takeover of this theory in regulatory enactments causes many complications already encoded into the essence of the two-step theory and much criticised in German legal writings.

The two-step theory in Germany was developed by the lawyer H. P. Ipsen, and it was initially intended as an instrument for "publification" of state support. At that time, it supposedly appeared to be the only way of how state administration decisions in the field of state support could be linked to fundamental rights. Since a contract subject to public law as a form of state administration activity was not yet known and the state support was granted in a form of a private law contract, before this contract, an administrative act was "pushed in".[20] The two-step theory in Germany gained ground only in some fields of regulation – in allocation of what are known as subventions (state support in a form of a loan) and in the law governing rendition of services of public institutions. However, the two-step theory has not consolidated its positions in public procurement law or in privatisation law; it has been rejected also in cases, when legal relations with state employees are established.[21] Since the 1970-ties, the dominant opinion in Germany's legal science criticises the two-step theory. This theory does not claim to be a special private law solution, which guarantees special fulfilment of public legal commitments, or a universal role of the concept

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[16] See, for example: Briede J. Administratīvais akts. Riga: *Latvijas Vēstnesis*, 2003, p. 102; Paine F. J. Vācijas vispārīgās administratīvās tiesības (ceturtais pārstrādātais izdevums). Vācijas Administratīvā procesa likums. Riga: Tiesu namu aģentūra, 2002, p. 266. Maurer H. Allgemeines Verwaltungsrecht. 17. Auflage. Munich: Verlag C.H.Beck, 2009, p. 195.

[17] Briede J. Administratīvais akts. Riga: *Latvijas Vēstnesis*, 2003, pp. 101-106.

[18] The term for two-step theory in the German language – Zwei-Stufen-Theorie.

[19] Decision of 29 October 2010 adopted by the Administrative Case Department of the Supreme Court Senate in the case No. SKA-862/2010, Paragraph 10. Available: http://www.at.gov.lv/files/archive/department3/2010/ska-862.doc [viewed 01.06.2012].

[20] Stelkens U. Verwaltungsprivatrecht. Zur Privatrechtsbindung der Verwaltung, deren Reichweite un Konsequenzen. Berlin: Duncker&Humblot, 2005, pp. 968-969.

[21] Ibid., p. 970.

for the fulfilment of public legal commitments.[22] The Federal Administrative Court of Germany in 2007 also rejected the application of the two-step theory in a public procurement procedure, ruling that the selection of tenderers and fulfilment of the procurement is a joint process, the consideration of which is in the competence of civil courts.[23]

The key problems caused by application of the two-step theory is the "splitting" of control of legal relations, originating as a result of a joint procedure, into two legal proceedings (administrative proceedings and civil proceedings, and accordingly administrative court and court of general jurisdiction), as well as problems posed by the impact of unlawfulness of an administrative act on the "private law step".[24] Therefore, it is necessary to assess the abilities to withhold from the two-step legal relations construction in regulatory enactments.

The construction of two-step legal relations in Latvia is used in several spheres of legal regulation. In the public procurement sphere, a procurement commission adopts a decision (an administrative act), on the grounds of which a procurement contract is concluded, which usually[25] is a contract subject to private law. The Supreme Court Senate has recognised that the step of public legal relations ends at the point of concluding the procurement contract.[26] The two-step construction is used also in fields that are related to the public procurement procedure – in public and private partnership, as well as in public service provider procurements and in absorption of financing of the European Union structural funds. The two-step legal construction is used also in other cases, when before the conclusion of a contract, an administrative act is issued – here particular mention is due to the legal relations, which are created when the local government rents out residential space within the framework of social assistance, as well as privatisation. Likewise, the use of the two-step theory in court practice is recognised also when it is the local government's duty to guarantee availability of a specific public service (for instance, heat supply).[27]

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[22] Stelkens U. Verwaltungsprivatrecht. Zur Privatrechtsbindung der Verwaltung, deren Reichweite un Konsequenzen. Berlin: Duncker&Humblot, 2005, p. 967.

[23] Beschluss des 6 Senats vom 2 Mai 2007. BVerwG 6 B 10.07. Pieejams: http://dejure.org/dienste/internet2?www.bverwg.de/enid/9d.html?search_displayContainer=8823.

[24] Comp. Paine F. J. Vācijas vispārīgās administratīvās tiesības (ceturtais pārstrādātais izdevums). Vācijas Administratīvā procesa likums. Riga: Tiesu namu aģentūra, 2002, p. 267.

[25] It is possible that in compliance with regulatory enactments, the public procurement procedure must be applied also for concluding such contracts, which are contracts subject to public law. See the decision of 24 March 2010 adopted by the Administrative Case Department of the Supreme Court Senate in the case No. SKA-293. Available: http://www.at.gov.lv/files/archive/department3/2010/10_ska_293.doc [viewed 07.06.2012].

[26] Decision of 29 October 2010 of the Administrative Case Department of the Supreme Court Senate in the case No. SKA-862/2010, Paragraph 13. Available: http://www.at.gov.lv/files/archive/department3/2010/ska-862.doc [viewed 01.06.2012].

[27] Decision of 16 February 2009 of the Administrative Case Department of the Supreme Court Senate in the case No. SKA-16/2009, Paragraph 13. Available: http://www.at.gov.lv/files/archive/department3/2009/09_ska_016.doc [viewed 08.06.2012].

Before analysing whether in the aforementioned cases, it is possible to refrain from the use of the two-step legal construction, it is necessary to point to a certain prejudice that exists in the Latvian legal space but which has not been described up to now: as soon as certain legal relations resemble any of the contract types regulated in the Civil Law, then it appears that the only form of individualising these relations is a contract. However, if a contract is to be concluded on the respective issue, then it is a contract subject to private law. For example, the Law on Assistance in Solving Apartment Matters[28] regulates the implementation of a state administration duty – rendering social assistance – in providing a living space for inhabitants. If a person is granted rights to receive assistance rendered by the local government, then the law determines that a rental contract must be concluded with the person (Section 19 of the law). Having regard to the fact that the conveyance of the apartment for the tenant's use and the tenant's duty to pay the rent complies with the legal relations regulated in the Civil Law and in the Law on Residential Tenancy[29], it appears only logical that the only form of regulation of these legal relations is a contract governed by private law. However, these legal relations exist only as a form of implementing the aforementioned state administration duty. Hence, the public legal relation is of primary importance – the person's subjective rights to social assistance. The exercising of these rights in a form of a private law contract is solely the legislator's prejudice to consider that these legal relations cannot be realised in another form. The grounds for such a prejudice is the fact that the same provisions of material law can be applied to the relations of use originating between the local government and the tenant (Civil Law, Law on Residential Tenancy), regulating standard private law relations. Naturally, many of the tenant's duties (regular payment of rent, taking care of the rented property, etc.) are regulated in the relevant provisions of material law and their copying into the Law on Assistance in Solving Apartment Matters would be unnecessary. However, the mere fact that a certain legal relationship established between a public entity and a private entity is subject to provisions of the Civil Law or another law governing private law relations does not mean that these relations are subject to private law. A convincing example is the public service relations, in which the provisions of the Labour Law must be applied in many instances, however it does not change the nature of public law of these legal relations.[30] Thus, the provisions of material law applicable to certain legal relations, or the similarity of these relations to typical private legal relations as such do not determine the nature of these legal relations.

Further on, it is necessary to determine the cases, in which the two-step legal construction can be replaced with one-step legal relations. Due to the restricted scope

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[28] Law on Assistance in Solving Apartment Matters: LV law. *Latvijas Vēstnesis*. 2001, 6 December, No. 187 (2574).

[29] Law on Residential Tenancy: LV law. *Latvijas Vēstnesis*. 1993, 29 April, No. 19.

[30] See, for example: Section 2(4) of the State Civil Service Law: "The norms of regulatory enactments regulating legal employment relations that prescribe the principle of equal rights, the prohibition of differential treatment principle, prohibition to cause adverse consequences, working hours and rest time, remuneration, the financial liability of employees and terms shall apply to the legal relations of the State civil service insofar as such are not prescribed by this Law."

of the article, the aforementioned legal relations originating within the framework of social assistance in using the residential space offered by the local government are chosen as an example to demonstrate this.

It has already been mentioned that assistance in solving apartment matters is the state administration task. Therefore, legal relations originating while implementing this administration task are subject to public law. The need of a rent contract as a contract subject to private law can be justified solely with the aforementioned prejudice, namely, that other forms of individualising the relations of use of premises do not exist. However, these legal relations can be organised also in another form: with an administrative act or by means of a contract governed by public law. Legal relations of tenancy can be organised with an administrative act only, by setting forth all the conditions of using the premises in the administrative act. Such administrative act would stipulate the rights and duties of both the local government and the tenant, and pursuant to APL would be qualified as an administrative deed with contingencies.

Even if the law prescribes certain freedom of conduct for the local government and the tenant in specifying the tenancy conditions, then the local government can just as well include these tenant's wishes in an administrative act. For issuing such an administrative act, the procedure of issuing an administrative act must be regulated in the law, and it could include several phases: (1) by determining, whether a private entity has subjective rights to receive the relevant assistance, (2) by hearing the person out, finding out their opinion on the possibility of renting specific premises, and other regulations, (3) by issuing (drafting) an administrative act. The form of this administrative act must be determined by law: an administrative act would contain specific regulation on the conditions of using the premises, however, the administrative act also requires justification, if no consensus has been reached between the local government and the tenant on the content of the administrative act. Possibly, also such regulation that an administrative act contains provisions similar to a contract, however the justification regarding specific items of the provisions would be prepared by the local government upon a separate request of the tenant. Currently, the content of the civil law contract in essence is unilaterally determined by the local government, hence the private entity in fact has no means of legal protection against the contract provisions offered by the local government, insofar as they are not governed by the administrative act. It would be necessary to stipulate in the law that other issues that are not regulated in the administrative act, are governed, for instance, by the Civil Law and the Law on Residential Tenancy. In case of non-fulfilment (violation) of an administrative act, a fine (an alternative to a contractual penalty) could be imposed on the tenant, if it is prescribed by law. Bearing in mind that these legal relations would be subject to public law, then the tenant could not cede the claims arising from these legal relations to other persons. All aforementioned issues can be regulated also in a contract governed by public law, however in both cases legal relations are subject to public law. It means that all disputes arising from these relations may be solved in the same procedure within the framework of one administrative case. Similarly, also other cases in which the two-step theory is used in Latvia can be analysed and the substitution of it with single-step legal relations could be evaluated.

Conclusion

1. The legislator's freedom to act in determining the nature of legal relations (public legal or private legal) is restricted with the principle of legal certainty. The legislator's considerations by normatively determining the nature of legal relations may not be arbitrary. The legislator can take into account procedural efficiency considerations as well as the link of a certain legal relation to the performance of a state administration duty.
2. If the law does not prescribe the form in which a public entity fulfils the state administration duty (by issuing an administrative act/concluding a contract governed by public law or by concluding a civil law), then it can be assumed that all legal relations are of uniform nature – subject to public law. State administration in Latvia itself may not establish the form in which it operates (employing public legal or private legal relations). This issue can be regulated only by law.
3. In regulatory enactments, which include what is known as the two-step theory (public procurements, absorption of European Union structural funds, rental contracts within the framework of social assistance, among others), it can be replaced and should be replaced with a single step legal construction, which ensures unity of the nature of legal relations and prevents problems caused by the two-step legal construction.

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THE ROLE OF THE PRESIDENT IN PROVIDING THE QUALITY OF LEGISLATION

Keywords: the Presidents' rights, the Presidents' duties, legislation, countersignature.

The President of the State as a constitutional organ[1] leads the country by the functions which are declared indirectly in the Constitution.[2] Constitution of the Republic of Latvia notes several rights and duties of the President. Fulfilling these rights and duties, the President takes in force several acts which are different by their nature and character. At the same time the Constitution provides the President's involvement in legislation development, as well as lets him deal with legislation quality control.

The aim of this paper is to examine the ways how the President ensures the quality of legislation, as well as overlook such powers' functioning in practice in the Republic of Latvia. To achieve this goal, the author uses legal analytical method, at the same time mentioning concrete practice occasions.

The Presidents' Constitutional rights commission in its' official view about the Presidents' functions in Latvia's parliamentary democratic system[3] noted that Satversme declares a quite wide President involvement in legislation process, such as legislation initiative rights, law promulgation, Saeima meeting convocation and conduction, as well as Saeima dismissal proposition. Due to the theme of the conference the author pays attention to questions which reveal the Presidents' role in improving and providing the quality of legislation. Therefore the author analizes only those Presidents' actions which are directly connected to the instruments which provide the quality of legislation.

The author has divided this article in two sections. The first section deals with occasions when the Presdient is obliged to take part in legislation process. However, the second section reveals such cases when the President has only rights, but not duties to take part in legislation process.

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1 Muciņš L. Publisko iestāžu klasifikācijas modelis. *Likums un Tiesības,* Nr. 4, 2000, p. 99.

2 Dišlers K. Latvijas Valsts Prezidenta kompetence. *Tieslietu Ministrijas Vēstnesis,* Nr. 3, 1922, p. 439.

3 Valsts prezidenta Konstitucionālo tiesību komisijas viedoklis par Valsts prezidenta funkcijām Latvijas parlamentārās demokrātijas sistēmas ietvaros. Rīga: Latvijas Vēstnesis, 2011, p. 156.-161.

The Presidents' duty to ensure the quality of legislation

The professor of the University of Latvia Kārlis Dišlers has acknowledged that a great deal of the President's role is reflected in his legislative and federal functions which declare his rights and obligations.[4] According to the Constitution, the President has several duties such as: the obligation to promulgate laws passed by Saeima, to declare war on the basis of Saeima decision, as well as suspend a law for two months if the President receives a request from not less than one-third of parliament members.

For a law to get into force, it is mandatory that the President after its' adoption in Saeima promulgates it. However, the requirement to promulgate the law can not deprive the President to exercise his rights to pass laws for the second revision or suspend the publication of a law on his own initiative. These rights of the President will be discussed in the next section of this article.

Another way how the President gets involved in legislation process is by suspending the promulgation of a law for a period of two months at the request of not less than one-third of the members of the Saeima. If such request has been made, the President cannot refuse to suspend the law, he is obliged to do so. According to Satversme Article 72 in two months time not less than one tenth of the electors have the right to request to pass the law to referendum.

Collecting signatures is one of the possibilities how electors in Latvia can take part in decission making process.[5] It could be said that collecting signatures is one of the most complicated parts of Satversme Article 72, because a specific number of signatures have to be collected in two months period of time. Unless the signatures are collected which would lead to a referendum, after the expiry of the two month term – the law shall take in force. Such situation was experienced in May and June, 2011 when thirty seven members of Saeima requested the President to suspend several laws – "Amendments in the law "On state benefits payment during the period from 2009 to 2012"", "Amendments in the law on maternity and sickness insurance" and "Amendments in the law on unempoyment insurance cases". For each of these suspended laws were selected approximately sixty two thousand electors signatures, though this number of signatures were not enough to pass the laws to referendum.

The last year's constitutional practice reveals another widely discussed President's duty – to submit draft laws to Saeima which have been handed in by the people. Satversme Article 64 declares that the right of legislation shall belong to both – Saeima and to the people within the procedure and extent provided in the Constitution. The people rights to take part in legislation process by handing in law projects, as well as Satversme amendment projects, are exercised through the President who is obliged to participate in a direct popular legislation. In a way, he is the element between Saeima and the nation.

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[4] Dišlers K. Latvijas Valsts Prezidenta kompetence. *Tieslietu Ministrijas Vēstnesis,* Nr. 3, 1922, p. 441.

[5] Ozoliņš A. Tautas nobalsošanas Latvijā. Available: http://www.ir.lv/2012/2/23/tautas-nobalsosanas-latvija [viewed 28 June 2012].

Due to this Presidents' duty there are several questions which are still actively discussed. First of all, about the form of the people's law project. This is a question if such law project has to be completely composed before selecting signatures[6] and handing in or it can still be as guidelines of how the law project should look like. The answer to this question may differ, but the author would agree to the first point of view. There is no doubt that the people according to Satversme regulation have the right of legislation and that they should be given an opportunity to exercise their rights. Involving the President in the fulfillment of these rights, it is shown that he links these two powers. The President Andris Bērziņš in his explanatory letter addressed to the Chairperson of the Saeima once mentioned his point of view of the Satversme amendment project, as well as gave the interpretation of Satversme Article 78 saying that "(it) does not give the President a choice to choose whether to pass or not pass the draft law handed in by the people to the Saeima"[7]. At the same time this question can be viewed from another ankle, which points out the Presidents' duty not to pass law projects to the Saeima which are not completely composed[8].

The answer to this question demands a deeper evaluation. Therefore the author notes out that these questions are closely connected with Satversmes tiesa case Nr. 2012-03-01 "Par likuma "Par tautas nobalsošanu un likumu ierosināšanu" 11. panta pirmās daļas un 25. panta pirmās daļas atbilstību Latvijas Republikas Satversmes 1., 77. un 78. pantam"[9] which is still in preparation process and will most likely give answers to unclear questions how wide or broad are thsese Presidents' rights.

The author concludes that in most cases Satversme declares the Presidents' duty to take part in legislative stage after the Saeima has expressed its support on the draft of law and has adopted it. The only exception can be mentioned when the President submits to the Saeima the law project handed in by the people.

The Presidents' right to ensure the quality of legislation

Satversme also reveals several rights of the President which influence the legislation process and its' getting into force. Such rights are as follows: the right to hand in law drafts to Saeima, the right to ask the Saeima to review (reconsider) the adopted law by sending it to the Chairperson of the Saeima with explanatory letter, the right to suspend the promulgation of a law for two months on his own initiative.

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[6] Latvijas valsts kodolu meklējot. Pārskats par diskusiju "Satversme kā Latvijas sabiedriskais līgums". *Jurista Vārds,* 2012. 7 February, Nr. 6; Diskusija "Satversme kā Latvijas sabiedriskais līgums" 2012 31 January. Available: http://www.youtube.com/watch?v=IRnBffLisIM [viewed 28 June 2012].

[7] Valsts Prezidenta motivācijas vēstule likumprojektam "Par tautas nobalsošanu un likumu ierosināšanu".Valsts prezidenta kancelejas mājas lapa. Available: http://www.president.lv/pk/content/cat_id=9292 [viewed 28 June 2012].

[8] Latvijas valsts kodolu meklējot. Pārskats par diskusiju "Satversme kā Latvijas sabiedriskais līgums". *Jurista Vārds,* 2012. 7 February, Nr. 6; Diskusija "Satversme kā Latvijas sabiedriskais līgums" 2012 31 January. Available: http://www.youtube.com/watch?v=IRnBffLisIM [viewed 28 June 2012].

[9] Satversmes tiesas mājaslapa. Available: http://www.satv.tiesa.gov.lv/?lang=1&mid=19 [viewed 28 June 2012].

The meaning of the word "rights" is that the person has a choice – either to use or not to use the right, stay away from such actions. By exercising these rights, the President expresses his will. In such way he draws attention to the issues of national importance not only to Saeima, but also to the society. As well as it shows the President's belief about which questions, in his point of view, it is necessary to expand a discussion.

Under the Presidents' right of legislative initiative, he may hand in a draft of law on a specific question in Saeima, as well as reveal his suggestions to Saeima about other drafts of law.

According to Satversme Article 65 the President may hand in law drafts. The act of suggesting a law is not compared to an order, therefore it does not request countersignature[10]. It shows that the President himself takes an initiative to improve the legislation. In practice the President hands in a fully written dralf of law or he can also send to Saeima only few principal suggestions.[11]

For example, the former President Valdis Zatlers turned to the Saeima to achieve support for amendments in Satversme which would give the people rights to propose the Saeima dismissal.[12] These changes were made and the people now have rights to propose referendum to withdrawal the Saeima. Also former Presidents have widely practiced this right. For example, Vaira Vīķe – Freiberga during her presidency proposed a number of amendments in Criminal Law, Criminal Procedure Law, as well as a law of Latvian state awards and the Ombudsman Act.[13]

After the first presidency year of the President Andris Bērziņš one can find out that these Presidents' rights are quite often used. He has proposed such law projects: 1) "Vidzemes, Latgales, Kurzemes and Zemgales coats of arms law"[14] which defines the legal status of the coat of arms; 2) "Amendments in the law "About Latvia's coat of arms""[15] which declares occasions when the institutions in administrative documents use according to their status appropriate state's coat of arms; 3) two amendments in the law "About preventing interest conflicts in public officials actions"[16] which deals with questions of post connection in the Presidents' comissions and councils, as well as gift acceptance.

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[10] Countersignature (from latin language *contra* "against", *signare* "sign") means the second signature on the Head of the State's act made by the Prime minister or the minister who is responsible for certain sphere. Sk. Būmanis A., Dišlers K., Švābe A. Latviešu Konversācijas vārdnīca. Rīga: A. Gulbja apgādība, Nr. 9, 1933, p. 17514-17516.

[11] Dišlers K. Likumu ierosināšana pēc Latvijas Republikas Satversmes un pēc Saeimas kārtības ruļļa. *Tieslietu Ministrijas Vēstnesis,* 1923, p. 148.

[12] Valsts prezidents – par savu darbu likumdošanā. *Jurista Vārds,* 2011, 3 May, Nr. 18.

[13] Matule S. Tiesībsargs nesola drīzu revolūciju. *Jurista Vārds,* 2007, 6 March, Nr. 10.

[14] Likumprojekts "Vidzemes, Latgales, Kurzemes un Zemgales ģerboņu likums". Valsts prezidenta kancelejas mājas lapa. Available: http://www.president.lv/pk/content/?cat_id=9292 [viewed 28 June 2012].

[15] Likumprojekts "Grozījumi likumā "Par Latvijas valsts ģerboni"". Valsts prezidenta kancelejas mājas lapa. Available: http://www.president.lv/pk/content/?cat_id=9292 [viewed 28 June 2012].

[16] Grozījumi likumā "Par interešu konflikta novēršanu valsts amatpersonu darbībā". Valsts prezidenta kancelejas mājas lapa. Available: http://www.president.lv/pk/content/?cat_id=9292 [viewed 28 June 2012].

Exercising these rights the President uses comissions advices which are consultary institutes. Each comission deals with certain amount and specific questions. For example, for the first two law projects the President took notice of the State' s armory comissions' view. In other cases the Presidents' Constitutional rights commission has given the ideas for introducing some necessary legal changes. Therefore the consultory institutes work in Presidents' favour – to improve the quality of legislation by proposing new legal acts or amendments.

The current President as well as former Presidents of the Republic of Latvia have use in Satversme Article 47 declared rights to propose laws. The former President Vaira Vīķe-Freiberga in 22nd January 2007 introduced the Saeima with a suggestion to declare the Presidents' legal dismissal process instead of political one. Also V. Zatlers had used these rights to hand in the Saeima large amount of proposal pointing out the target – to stengthen the Presidents' as arbitrator role amoung the legislative and executive powers.[17] A.Bērziņš has exercised these rights to suggest changes in the law "On the prevention of the State and Local Government funds and property devastation" and the Law of State and municipal property privatization and the utilization completion of privatization certificates.

The previous mentioned practise shows that the role of the Presidents' rights to hand in law projects, as well as Satversme amendment projects is only rising and has already gained its constant place amoung the Presidents' tools to provide qualitative legislation.

Other forms of providing the quality of legislation

The President's dialogue with the legislators is also possible after the final reading in Saeima. It appears most clearly in the President's right to send the law to Saeima for repeated revision. This means that the President is entitled in ten days time after the law was adopted in Saeima, to write a motivated explanatory letter to the Chairperson of the Saeima in which the President requires to reconsider the law. The aim of using this right is to change the form or content of adopted law in accordance with the instructions of the President which are readable in explanatory letter. In such way the President draws Saeimas attention to specific individual problems, questions or mistakes of the act.

Professor K. Dišlers once pointed out the meaning of these rights: the President has a right to be heard in the process of legislation. Although the Parliament can neglect the Presidents' view and decide not to amend the law, they have to give a word to the President.[18] The author can agree with this statement, because it reveals the Presidents' role in law-making process – it is his right, not obligation to send the law for review and by doing it, the Parliament should respect the Presidents' objections.

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[17] Valsts prezidents piesaka Satversmes reformu. *Jurista Vārds,* 2011, Nr. 18; Valsts prezidenta Satversmes grozījumu ierosinājums. *Jurista Vārds,* 2011, Nr. 12.

[18] Dišlers K. Ievads Latvijas valststiesību zinātnē. Rīga, A. Gulbis, 1930, p. 161.

During several presidencies this right has been widely used which proves its' role in legislation process.[19] The author notes that this is the moment when the President can get acquainted with both side opinions, facts that work in favour or against the adopted law, materials and the most important – he can sort out his own point of view of the adopted law. If there are serious objections to the content or process how the law has been adopted, the President may use his rights and give the Saeima second opportunity to preclude the disadvantages of the adopted law. At the same time this right cannot be connected to the fact that the President receives requests to use his rights and send the law for revision. Although it is a good practice that concerned people, encluding politicians themselves, find it necessary to request the President to exercise his rights declared in Satversme Article 71, the President is not obliged to follow the request.

The practice of this right through the years has grown. For example, the former President Gustavs Zemgals in all his presidency time used suspensive veto right only once when he decided to take part in the conflict between the majority and the minority of the Saeima.[20] The former President Guntis Ulmanis during his two presidency periods has sent seventeen laws to the Saeima for revision. The Saeima did not amend the law only in twho cases, as well as delayed the revision process. As a result the laws were not adopted.[21] Also Vaira Vīķe-Freiberga used this right quite often. For example, on of the discussed cases in practice was in 2002 when the President asked the Saeima to review the law "Amendments in Protection zone law". In this case the President in her explanatory letter mentioned that it is necessary to find consensus between different interests.[22] It shows that the President has to overlook the situation from different perspectives and protect those interests which in his point of view the law assults.

During V. Zatlers presidency this right was used twelve times.[23] By this day the President A. Bērziņš has practiced this right three times: sending for second revision the law "Amendments to the Law "On National Referendums and Legislative Initiatives""[24], "Amendments to the Civil Procedure Law"[25] and "Amendments to the Latvian border of the Republic Law".[26] The author points out that the President

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[19] Zalāna L. Valsts prezidenta tiesības nosūtīt likumu otrreizējai caurlūkošanai. *Jurista Vārds,* 2003, 3 June, Nr. 21.

[20] Pleps J. Parlaments pret tiesu, prezidents pret parlamentu. Deputāta Jāņa Goldmaņa imunitātes lieta. *Jurista Vārds,* 2010, 6 April, Nr. 14.

[21] Zalāna L. Valsts prezidenta tiesības nosūtīt likumu otrreizējai caurlūkošanai. *Jurista Vārds,* 2003. 3 June, Nr. 21.

[22] Valsts prezidentes vēstule Saeimas priekšsēdētājam. *Latvijas Vēstnesis*, 2002, 23 January, Nr. 13.

[23] Valsts prezidents – par savu darbu likumdošanā. *Jurista Vārds,* 2011, 3 May, Nr. 18.

[24] Grozījumi likumā "Par tautas nobalsošanu un likumu ierosināšanu". Valsts prezidenta kancelejas mājas lapa. Available: http://www.president.lv/pk/content/?cat_id=9292&lng=lv [viewed 28 June 2012].

[25] Grozījumi Civilprocesa likumā. Valsts prezidenta kancelejas mājas lapa. Available: http://www.president.lv/pk/content/?cat_id=9292&lng=lv [viewed 28 June 2012].

[26] Grozījumi Latvijas Republikas valsts robežas likumā. Valsts prezidenta kancelejas mājas lapa. Available:http://www.president.lv/pk/content/?cat_id=9292&lng=lv [viewed 28 June 2012].

has expressed his opinion of exercising this right in his letter to Chairperson of the Saeima and the Prime minister. The President wrote: Satversme Article 71 does not only refer to the text of the amended law, because the Saeimas' adopted law includes all legislation process, as well as examined suggestions, although they formally do not appear in the adopted laws' text.[27]

Although Satversme declares the President's right to suspend a law for two months on his own initiative, in practice it is used very rarely. The reason of it can be found in the abiding results that are caused by such action. First of all, this is the Presidents' sole act and his personal decision to draw the question upon the society. Secondly, practice shows that such decisions might be experienced only ir crucial occasions, when the President believes that the law is of great importance to all society.

This right is widely evaluated among lawyers, because it includes different points of view of its practice.

In legal science the question about exercising Satversmes Article 72 has become even more popular after the former President Vaira Vīķe – Freiberga suspended the law "Amendments in the law of State security institutions" and "Amendments in National security law". In press conference the President declared: by using these rights she has opened door for collecting signatures, because she finds it necessary at the moment. By this act she wants to draw the Saeimas' as the people attention so they would act. It indirectly shows that the President's personal initiative cannot be translated only as the rights of the President. It is placed along with the rights of people to decide upon the law which has been adopted by the Saeima. The fulfillment of this right does not mean automatically that there is a conflict among the President and the Saeima. This right lets people to show their attitude towards the suspended law.

The right of the President in Article 72 is not translated as a suspensive veto, bet as a sparing effect.[28] The law "On National Referendums and Legislative Initiatives" Article 6 reflects the method how the President has to declare about the suspended law – not later than on the eleventh day after the law's adoptation in Saeima, the President has to declare the text of the law and the decision to suspend it for two months.[29] The aim of this act is to order Central Election Comission to organize referendum if the request for it is received. Satversme gives an opportunity for President to issue such radical act. By including such right in the Constitution, the President has the right to object the Parliament. As a result it makes an interesting situation in a parlamentary republic where the highest power is given to the Parliament members.[30] At the same time this right is focused on the needs of the society and give them and opportunity

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[27] Valsts prezidenta vēstule Saeimas priekšsēdētājai un Ministru prezidentam par grozījumiem likumā "Par arodbiedrībām". Valsts prezidenta kancelejas mājas lapa. Available: http://www.president.lv/pk/content/?cat_id=9295 [viewed 28 June 2012].

[28] Feldhūne G., Vildbergs H. J. Atsauces Satversmei. Rīga: EuroFaculty, 2003, p. 55.

[29] Likums par tautas nobalsošanu un likumu ierosināšanu: LR likums, *Latvijas Vēstnesis*, 1994, 20 April, Nr. 47.

[30] Latvijas Republikas Satversme [Constitution of the Republic of Latvia]: LR likums, *Latvijas Vēstnesis*, 1993, 1 July, Nr. 43. Saeimas Kārtības Rullis. Saeimas mājaslapa. Available: http://www.saeima.lv/lv/likumdosana/kartibas-rullis [viewed 28 June 2012].

to express their opinion about the act. In this case the President's role is preventative in conflict situations about state politics.

The practice has shown that countersignature is not requested in such cases when he suspends the law publication for two months by his (the Presidents') own initiative. Also many experts of constitutional rights have agreed that such act should not be countersigned, mentioning that it would be useless, it would make the Presidents' right formal, because none of the executive power may want to countersign it. If this Presidents' act should be countersigned, the President might no exercise it.[31] Different opinion has been noted by professor K.Dišlers: in cases when the President suspends the law promulgation for two months on his own initiative, countersignature by the Prime minister or minister is necessary, because it contains order elements.[32] Above all different opinions, the author would like to note that it is Presidents' decision which means that the initiative to suspend the law promulgation must come from the President himself. It shows his interest to involve himself in legislative process and be as an active participant of it.

New forms of the Presidents' rights

At the same time the President has the right to hand in suggestions of law projects in second or third reading of the project. For the first time in the history of the Republic of Latvia this right was exercised in the 30st of November 2011[33] when the President sent his suggestions, according to the Saeima's Procedure law Article 95[34], to the Saeima's Committee of Legal affairs. Since then this right has been used for several times[35]. Although this right has been declared in the regulation for some time, practice shows that this Presidents' right has gained a new perspective and what's more important – its' usage in practice.

Another way of making a dialogue with legislative, as well as executive power, in order to inform about the Presidents' concers, as well as his vision of necessary improvements in legislative process – is the Presidents' letters in crucial legislation questions.[36] Such dialogue process is of great value, because the President may give advises how to improve the legislation process, name spheres and questions which most likely would be of a need of new or better regulation.

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[31] Juristi analizē Valsts prezidentes rīcību un Satversmes 81. pantu, *Jurista Vārds*, 2007. 20 March, Nr. 12.

[32] Dišlers K. Latvijas Valsts prezidenta kompetence. *Tieslietu Ministrijas Vēstnesis,* Nr. 3, 1922, p. 448; Dišlers K. Ievads Latvijas valststiesību zinātnē. Rīga: A.Gulbis, 1930, p. 167.

[33] Valsts prezidenta motivācijas vēstule Oficiālo publikāciju likuma projektam. Valsts prezidenta kancelejas mājas lapa. Available: http://www.president.lv/pk/content/?cat_id=9292 [viewed 28 June 2012].

[34] Saeimas Kārtības Rullis. LR likums, *Latvijas Vēstnesi*s, 1994.18 August, Nr. 96 (227).

[35] Grozījumi likumā "Par Latvijas valsts ģerboni" (Nr. 213/Lp11). Valsts prezidenta kancelejas mājas lapa. Available: http://www.president.lv/pk/content/?cat_id=9413 [viewed 28 June 2012].

[36] Valsts prezidenta kancelejas mājaslapa. Available: http://www.president.lv/pk/content/?cat_id=9295 [viewed 28 June 2012].

Although the author finds such letter system as a good improvement to provide better quality of legislation. At the same time such letters should not include too detailed lessons of how other state powers must exercise their powers. It is necessary that the President does not neglect negative practice amoung other powers and by informal methods inform of his concerns. At the same time there should be found the right balance of informing and pressuring certain amount of questions to other state powers.

In the end the author concludes that the Constitution provides the President already has a wide range of rights in legislation process, like handing in law drafts and amendments. In practice these rights are quite frequently used, in such way ensuring and providing better quality of legislation. The practice has shown also new forms of the Presidents' rights, such as handing in suggestions of law drafts on second or third reading in the Saeimas' Committee. As well as a new form of expressing the Presidents' point of view to legislative and executive power. At the same time the rights of the President in legislative sphere have recomendative character. It depends on the President's personality and activities in political sphere. The President of Latvia does not include in any of three state powers. Therefore he can critize other state powers, evaluate their work and their results. If the President is active in the fulfillment of his rights, he can notice more mistakes and details which should be prevented for making the legislation qualitative.

Conclusion

1. Satversme proves that the President has an essential role in providing the quality of legislation. The President is involved in the development of legislation, as well as lets him deal with its' quality control.
2. Satversme separates the Presidents' duties and rights in developing the legislation. The President has a duty to proclaim laws which have been adopted by the Saeima, he declares war on the basis of the Saeima decision. The president is also obliged to suspend the promulgation of the law for two months if he receives a request by at least one third of the Saeima members. He also has to pass the law draft handed in by the people.

   It shows that in most cases Satversme declares the President's duty to take part in legislation after Saeima has already stated its' consent and adopted it.
3. As to the President's rights to ensure the quality of legislation, he may suggest a law draft to Saeima, hand in suggestions, pass the law to the Saeima for review, as well as suspend the law promulgation for two months by his own initiative. By fulfilling these rights, the President draws attention to the issues of national importance which are crucial to the society.

   The dialogue between the President and the legislative power is also possible after the law is adopted in Saeima in final reading. It can be vividly noticed by the Presidents' right to pass the law to the Saeima for review. Although the Parliament is not obliged to amend the law according to the Presidents' objections, it must evaluate them.

4. The rights of the President in legislative sphere have recomendative character. It depends on the President's personality and activities in political sphere. If the President is active in the fulfillment of his rights, he can notice more mistakes and details which should be prevented for making the legislation qualitative.

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THE LEGISLATIVE PROCEDURE IN THE REPUBLIC OF POLAND

Keywords: legislative procedure, bill, constitution, the Sejm, the Senate, Poland.

Introduction

One of the most important functions of any Parliament is legislation. The Parliament as a body which represents the will of the Nation performs the legislative role. The scope of the limitation of rights and freedoms of individuals is determined by means of acts. The quality of acts is conditioned by the appropriate stipulation of the legislative process. It is to ensure the influence of extra parliamentary factors on the shape of statutory law. The reform of legislative process, conducted in Poland a few years ago, enabled different social circles to participate in the process in the form of so-called public hearing.

Legislative process is stipulated by the provisions of the Constitution of the Republic of Poland of 2nd April 1997[1] and the rules of the parliamentary chambers[2]. The legislative process is comprised of several stages, however the execution of a particular stage results in the possibility to proceed to the consecutive stage. The legislative initiative is determined relatively widely. It can be instigated by the members of Parliament, the executive authorities or the group of 100,000 citizens (so-called the people's initiative). The legislative process was shaped on the grounds of the principle of asymmetric bicameralism. The bill is first examined by the Sejm (the first chamber) and then the Senate (the second chamber). The Sejm may reject the Senate's standpoint on the act (amendments and veto). The last stage of the legislative process is the promulgation of the act by the President.

Legislative initiative

The instituting the legislative process requires undertaking certain actions by authorised subjects[3]. The legislative process commences with the execution of

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[1] Journal of Laws, No. 78, item 483 with amendments.

[2] The Resolution of the Sejm of the Republic of Poland of 30 July 1992 *Rules of the Sejm of the Republic of Poland* (M.P. of 2012, item 32); The Resolution of the Senate of the Republic of Poland of 23 November 1990 *Rules of the Senate of the Republic of Poland* (M.P. of 2010, No. 39, item 542 with amendments).

[3] Kudej M. Postępowanie ustawodawcze w Sejmie RP. Warszawa: Wydawnictwo Sejmowe, 2002, p. 10.

legislative initiative. According to Art. 118 of the Constitution, the right to introduce legislation belongs to deputies, the Senate, the President of the Republic, the Council of Ministers and to the group of 100,000 citizens. The submission of the bill by the authorised subjects obliges the Sejm to consider that[4].

The Constitution does not stipulate the way the legislative initiative should be executed by the members of the Parliament, stating only that "the right to legislation belongs to deputies". The provisions of the Rules of the Sejm specify that bills may be introduced by the group of 15 deputies[5]. The adoption of this solution means that the bill may be introduced by a parliamentary club (the club must be composed of at least 15 deputies)[6]. The bill however cannot be introduced by a parliamentary group which according to the Rules of the Sejm must be composed of at least 3 deputies[7]. Moreover, the legislation may be initiated by a Sejm committee[8], except for the investigative committee[9].

The Senate adopts a resolution to undertake the legislative initiative by simple majority of votes on the motion of a Senate committee or of a group of at least of 10 senators[10]. A consideration of bills is held in three readings[11]. The author of the bill, by the end of the second reading, may withdraw his proposal. A legislative initiative motion proposed by at least 10 senators is considered as withdrawn if the number of senators supporting the bill is less than 10[12]. A resolution on the introduction of a legislative initiative is submitted to the Marshal of the Sejm by the Marshal of the Senate[13].

The President of the Republic of Poland has had a right to legislative initiative since the restitution of his office under the April Novelization of 1989 adopted as a result of the Polish Round Table Talks. The President's right to legislation, additionally without the counter-signature [art. 144 (3) point 4 of the Constitution], is a kind of peculiarity[14]. Regardless of the fact that it is hardly ever met in other states[15], that

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4 Ibid., p. 11.

5 Art. 32 (2) of the Rules of the Sejm.

6 Art. 8 (2) of the Rules of the Sejm. The groups which contain fewer than 15 deputies may form parliamentary groups. Parliamentary clubs and groups are formed on the political principle. Deputies may form teams in the Sejm which are organised under different principles.

7 Jaskiernia J. Zasady demokratycznego państwa prawnego w sejmowym postępowaniu ustawodawczym. Warszawa: Wydawnictwo Sejmowe, 1999, p. 133.

8 Art. 32 (2) of the Rules of the Sejm.

9 Art. 136e of the Rules of the Sejm.

10 Art. 76 (1) of the Rules of the Senate.

11 Art. 78 (1) of the Rules of the Senate.

12 Art. 78 (2) of the Rules of the Senate.

13 Art. 83 (1) of the Rules of the Senate.

14 See: Patrzałek A., Szmyt A. Prawo inicjatywy ustawodawczej. In: J. Trzciński, ed. Postępowanie ustawodawcze w polskim prawie konstytucyjnym, Warszawa: Wydawnictwo Sejmowe, 1994, p. 126.

15 See: Balicki R. Udział Prezydenta Rzeczypospolitej Polskiej w postępowaniu ustawodawczym. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2001, pp. 57-59; Mojak R. Instytucja Prezydenta RP w okresie przekształceń ustrojowych. Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 1995, p. 217.

situation had never occurred in the Polish constitutions before 1989[16]. It poses a risk that competitive bills may be submitted within executive power[17]. In practice the President uses the right to legislation relatively seldom.

The legislative initiative is most often undertaken by the Council of Ministers[18], which is a natural thing. The Council of Ministers is the body which conducts the internal affairs and foreign policy of the Republic of Poland [Art.146 (1)], and submitting bills to the Sejm is one of the most important instruments of conducting this policy[19]. Only governmental bills may be classified as urgent (Art. 123). Moreover, the Council of Ministers has an exclusive right to introduce a draft budget and other bills concerning public finances (Art. 221).

The course in which the bill is introduced by the group of 100,000 citizens [Art. 118 (2)] is stipulated by the provisions of the Act of 24th June 1999 on Performing the Legislative Initiative by Citizens[20]. Firstly, a group of at least of 15 citizens must set up a committee of civic initiative. Then 100,000 signatures need to be collected within three months. The civic bill is considered under a similar procedure as the bills submitted by other subjects of legislative initiative, taking into consideration their dissimilarities resulting from the Act on Civic Legislative Initiative and the provisions of the Rules of the Sejm. The Sejm may reject the bill already in the first reading. If the bill is not considered by the Sejm due to the expiration of its term of office, it is considered by the Sejm of the consecutive term of office (the exception of the principle of discontinuation of the Parliament's works).

Works on passing bills in the Sejm

Instituting legislative process

The bill is submitted by the authorised subject to the Marshal of the Sejm[21]. The legislative process, according to the principle of asymmetric bicameralism indicating the dominant role of the first chamber, always commences in the Sejm, even if the legislation is initiated by the Senate.

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[16] The April Constitution (1935) conferred the President a right to legislation merely in the scope of the amendment of the Constitution. Despite the fact that the Constitution instituted an extensive catalogue of prerogatives, the initiative of the President in the scope of the amendment of the Constitution was conditioned by the counter–signature of the Prime Minister and a respective minister.

[17] Compare: Kruk M. Prawo inicjatywy ustawodawczej w nowej Konstytucji RP. Przegląd Sejmowy, 1998, No. 2, p. 21.

[18] During the sixth term of office of the Sejm (2007-2011) the government submitted 671 bills, which constituted 44.6% of all initiatives.

[19] See: Patyra S. Mechanizmy racjonalizacji procesu ustawodawczego w Polsce w zakresie rządowych projektów ustaw. Toruń: Adam Marszałek, 2012, p. 109 and subsequent.

[20] Journal of Laws, No. 62, item 688.

[21] Art. 34 (1) of the Rules of the Sejm.

Submitting the bill the sponsor nominates a person who will be authorised to represent him in works on the bill. A bill should be accompanied by an explanatory statement which must meet formal requirements stipulated in Art. 34 (2) of the Rules of the Sejm. If this explanatory statement enclosed to the bill does not meet these requirements, the Marshal of the Sejm may return a bill or draft resolution to the sponsor[22]. Any bills which raise doubts as to their compliance with law, including European Union law or basic principles of legislative drafting[23] may be referred to the Legislative Committee for its opinion by the Marshal of the Sejm, after seeking the opinion of the Presidium of the Sejm. The Legislative Committee may, by a 3/5 majority of votes, find the bill inadmissible. In this case the Marshal of the Sejm may not accept such a bill to proceed[24]. The Marshal of the Sejm orders printing of bills (if necessary also the required opinions) and their delivery to the deputies[25].

The first reading of a bill

According to the constitutional provisions, the bill is considered in the course of three readings [Art. 119 (1)]. This principle has no exceptions even if the bill is classified as urgent. By the time of the first reading the sponsor may amend the submitted bill. The amendment to the bill must satisfy the requirements of a bill and is introduced to the submitted bill without necessity of its voting[26].

The first reading is usually held at a sitting of the Sejm's committee[27]. Only the most important bills are considered in the course of first reading at a plenary sitting of the Sejm. These are the bills on amendments to the Constitution, draft budgets, tax bills, bills governing the election of the President of the Republic and elections to the Sejm, to the Senate and to local government organs, bills governing the structure and jurisdiction of public authorities, as well as drafts of law codes. The bills which are submitted in the form of civic initiatives are also considered at a plenary sitting of the Sejm. Moreover, the Marshal of the Sejm may also refer other bills and draft resolutions of the Sejm for a first reading at a sitting of the Sejm when this is justified by important reasons[28]. The selectivity of bill consideration at a plenary sitting of the Sejm stipulated by the Rules of the Sejm results from the limited working time of the chamber[29].

The first reading may be held no sooner than the seventh day following the delivery of a copy of the draft to the deputies, unless the Sejm or a committee decides otherwise[30]. All deputies are notified about the sitting of a committee at which a first read-

[22] Art. 34 (7) of the Rules of the Sejm.

[23] The Ordinance on Principles of Legislative Drafting.

[24] Art. 34 (8) of the Rules of the Sejm.

[25] Art. 35 (1) of the Rules of the Sejm.

[26] Art. 36 (1a) of the Rules of the Sejm.

[27] Art. 37 (1) of the Rules of the Sejm.

[28] Art. 37 (2-3) of the Rules of the Sejm.

[29] Jaskiernia J. Zasady demokratycznego państwa prawnego w sejmowym postępowaniu ustawodawczym. Warszawa: Wydawnictwo Sejmowe, 1999, p. 145.

[30] Art. 37 (4) of the Rules of the Sejm.

ing is to be held. Each deputy may take part in that sitting or submit his comments or proposed amendments in writing[31]. The first reading of a bill consists of its justification by its sponsor, a debate on general principles of the bill, as well as deputies' questions and answers of the sponsor[32]. If the first reading is held at a sitting of the Sejm it ends with the referral of the bill to the committees unless the Sejm, pursuant to a relevant motion, rejects the bill as a whole[33].

A public hearing may be held on a bill[34]. It is a form of consultations and passing opinions on bills by interested societies and circles[35]. A resolution on holding a public hearing is passed by the committee to which the bill has been referred for consideration[36]. This resolution is passed upon a written request made by a deputy to the committee[37]. A resolution to hold a public hearing may be passed after the conclusion of the first reading of a bill and before the commencement of its detailed consideration[38].

The right to participate in a public hearing concerning a bill belongs to subjects, which after the publishing of the bill in the form of a paper, have declared to the Sejm an interest in working on the bill at least on the 10th day before the day of a public hearing[39]. The right to participate in a public hearing on a bill also belongs to subjects which have declared an interest in working on the bill[40] under the procedure prescribed in the Act of 7 July 2005 on Lobbying Activity in the Lawmaking[41].

The committee after having considered the bill submits a report to the Sejm in which either suggests passing the bill without amendments, passing the bill with particular amendments, in the form of its consolidated text or rejecting the bill as a whole. If the bill was referred to more than one committee, the committees present a joint report on the bill[42]. So-called minority motions are included in the report. These are motions and proposals of amendments submitted by deputies which were rejected by the committee. The minority motions are included in the committee report on the request of a sponsor[43]. The Marshal of the Sejm orders printing the committee reports and their delivery to deputies[44].

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31 Art. 38 of the Rules of the Sejm.

32 Art. 39 (1) of the Rules of the Sejm.

33 Art. 39 (2) of the Rules of the Sejm.

34 Art. 70a (1) of the Rules of the Sejm.

35 See: Jaskiernia J. Zasady demokratycznego państwa prawnego w sejmowym postępowaniu ustawodawczym. Warszawa: Wydawnictwo Sejmowe, 1999, p. 149 and subsequent

36 Art. 70a (2) of the Rules of the Sejm.

37 Art. 70a (3) of the Rules of the Sejm.

38 Art. 70a (4) of the Rules of the Sejm.

39 Art. 70b (1) of the Rules of the Sejm.

40 Art. 70b (2) of the Rules of the Sejm.

41 Dz. U. of 2005 No. 169, poz. 1414 with amendments.

42 Art. 43 (1-2) of the Rules of the Sejm.

43 Art. 43 (4) of the Rules of the Sejm.

44 Art. 43 (5) of the Rules of the Sejm.

The second reading of a bill

The second reading is held at a plenary sitting of the Sejm no sooner than the seventh day following the delivery of a committee report to deputies, unless the Sejm decides otherwise[45]. It consists of the presentation to the Sejm of a committee report by a deputy – rapporteur, the debate and the introduction of amendments and motions[46]. During the sitting the sponsor, the group of at least 15 deputies, the chairperson of a parliamentary club or a parliamentary group (on the behalf of the club or the group) and the Council of Ministers may introduce amendments to the bill or move a motion to reject the bill[47]. The amendments after having been introduced orally are to be submitted in writing to the Marshal of the Sejm. They should indicate their consequences for the text of a bill[48].

The Marshal of the Sejm may refuse to put to a vote any amendment which has not previously been submitted to a committee[49]. The sponsor may withdraw a bill during legislative proceedings in the Sejm until the conclusion of its second reading[50] only if the subject who submitted the bill declared that expressively in the form of resolution or decision[51]. A deputies' bill is also deemed to be withdrawn if at any time prior to the conclusion of the second reading, as a result of the withdrawal of the support, is supported by fewer than the 15 deputies who signed the bill before its submission[52].

If new amendments and motions are introduced during the second reading, a bill is returned to the committees which considered it for drawing an additional report[53]. The Committee after having considered the introduced amendments and motions presents to the Sejm an additional report in which proposes either its adoption or rejection, or presents a corrected report in the form of a consolidated text of the bill[54]. The Marshal of the Sejm orders printing of an additional committee report[55]. Consideration by the Sejm of the additional or corrected report occurs after its delivery to the deputies[56].

The third reading and passing a bill

If the bill has not been returned again to committees upon the second reading, the third reading may be held by the Sejm immediately[57]. The Sejm may also decide

[45] Art. 44 (3) of the Rules of the Sejm.
[46] Art. 44 (1) of the Rules of the Sejm.
[47] Art. 45 (1-2) of the Rules of the Sejm.
[48] Art. 44 (2) of the Rules of the Sejm.
[49] Art. 119 (3) of the Constitution.
[50] Art. 119 (4) of the Constitution.
[51] Kudej M. Postępowanie ustawodawcze w Sejmie RP. Warszawa: Wydawnictwo Sejmowe, 2002, p. 20.
[52] Art. 36 (3) of the Rules of the Sejm.
[53] Art. 47 (1) of the Rules of the Sejm.
[54] Art. 47 (2) of the Rules of the Sejm.
[55] Art. 47 (5) of the Rules of the Sejm.
[56] Art. 47 (6) of the Rules of the Sejm.
[57] Art. 48 of the Rules of the Sejm.

upon the third reading despite the introduced amendments and motions without referring the bill to the committee. The third reading consists of the presentation of an additional committee report by a deputy-rapporteur or – if the bill has not been returned to committees – the presentation of amendments and motions introduced during the second reading by a deputy-rapporteur and then voting[58].

Firstly, a motion to reject a bill as a whole is voted on, if such a motion has been brought[59]. Then the Sejm votes on amendments to particular articles, with priority given to those amendments, adoption or rejection of which affects other amendments[60]. The Marshal of the Sejm may refuse, on his own initiative, to put to a vote any amendment which has not previously been submitted to a committee in writing[61]. In the last voting the Sejm passes a bill according to the wording proposed by the committees, including any modifications resulting from adopted amendments[62]. The Sejm passes a bill in the third reading by a simple majority of votes, in the presence of at least half of the statutory number of deputies (Art.120 of the Constitution). It means that there should be more votes "for" than the votes "against" as abstaining votes are not taken into consideration.

Works on the bill in the Senate and considering the standpoint of the Senate by the Sejm

After a bill is passed by the Sejm in the third reading the Marshal of the Sejm immediately delivers the text of the bill validated by his/her signature to the Marshal of the Senate and to the President. The text of the bill is also delivered to the deputies[63].

The Marshal of the Senate passes the text of a bill adopted by the Sejm to the relevant Senate committees[64]. The committees prepare within no longer than 18 days a draft Senate resolution on the bill passed by the Sejm. In this resolution the committees recommend either accepting the bill without amendments, introducing amendments into its text, or rejecting the bill[65].

The Senate has to take a standpoint towards the bill within 30 days of its submission. The Senate may adopt it without amendments, introduce amendments to the bill or resolve upon its complete rejection [Art.121 (2)]. If the Senate fails to adopt an appropriate resolution within the 30 days the bill is deemed to be adopted by the Senate without amendments.

The Marshal of the Sejm refers a resolution of the Senate containing a proposal of amendment to a bill adopted by the Sejm or rejecting a bill as a whole to the com-

[58] Art. 49 of the Rules of the Sejm.
[59] Art. 50 (1) 1 of the Rules of the Sejm.
[60] Art. 50 (1) 2 of the Rules of the Sejm.
[61] Art. 50 (3) of the Rules of the Sejm.
[62] Art. 50 (1) 3 of the Rules of the Sejm.
[63] Art. 52 of the Rules of the Sejm.
[64] Art. 68 (1) of the Rules of the Senate.
[65] Art. 68 (2) of the Rules of the Senate.

mittees which considered that bill[66]. The committees after having considered the resolution of the Senate, present a report to the Sejm. In this report the committees move that either all the amendments proposed by the Senate, or some of them, are to be rejected or passed, or that the resolution of the Senate rejecting the bill as a whole should be rejected or passed[67].

The Marshal of the Sejm puts to the vote any motions for the rejection of particular amendments, unless the report of the committee suggests the advisability of a joint vote on parts or entirety of the amendments contained in the Senate's resolution[68]. The resolution of the Senate rejecting a bill, any amendment proposed by the resolution of the Senate is considered accepted, unless the Sejm rejects it by an absolute majority of votes[69] in the presence of at least half of the statutory number of deputies[70].

The promulgation of the act

The Marshal of the Sejm sends the text of the bill, validated by his signature, to the President of the Republic for signature, immediately after establishing the text of a bill, as a result of the consideration of a Senate resolution, or after receiving information about the adoption of the bill by the Senate, or after a failure by the Senate to adopt a resolution within the prescribed time limit[71]. The President of the Republic signs a bill within 21 days of its submission and orders its promulgation in the Journal of Laws of the Republic of Poland (Dziennik Ustaw).

The term "promulgation" itself is a debated issue, particularly taking into consideration the differences which occur in the doctrine and the laws of other states. Nonetheless, in Poland the term "promulgation" refers to the classic French doctrine and means the last stage of legislative procedure, indispensable for the act to come into force[72]. Therefore, sometimes the publication of the act (which is a factual activity and according to Art. 88 (1) of the Constitution a condition of coming into force of the act) is considered a part of the promulgation process.

Preliminary (preventive) control of constitutionality of the act

The President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution (preliminary

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[66] Art. 54 (1) of the Rules of the Sejm. The Sejm may also on the motion of the Marshal of the Sejm consider the amendments included in the resolution of the Senate without its prior referral to committees [Art. 54(8) of the Rules of the Sejm].

[67] Art. 54 (3) of the Rules of the Sejm.

[68] Art. 54 (6) of the Rules of the Sejm.

[69] It is more votes "for" than both "against" and "abstaining"

[70] Art. 121 (3) of the Constitution.

[71] Art. 122 (1) of the Constitution; Art. 56 of the Rules of the Sejm.

[72] See: Duguit L. Traité de droit constitutionnel. Vol. 4. Paris: Ancienne Libr. Fontemoing, 1924, p. 634.

control). If the Tribunal adjudicates upon the conformity of the bill to the Constitution the President of the Republic is obliged to sign the bill[73].

The Constitutional Tribunal may also adjudicate upon partial non-conformity of the act to the Constitution. If, however, the non-conformity to the Constitution relates to particular provisions of the bill, and the Tribunal has not judged that they are inseparably connected with the whole bill, then, the President of the Republic, after seeking the opinion of the Marshal of the Sejm, signs the bill with the omission of those provisions considered as being in non-conformity to the Constitution or returns the bill to the Sejm to remove the non-conformity[74].

If the Constitutional Tribunal questions some provisions of the act the Sejm works on the removal of any non-conformity to the Constitution. This means the adoption of appropriate modifications to the text of those provisions which have been found not to be in conformity to the Constitution by the Constitutional Tribunal whilst maintaining their previous scope of application[75]. The removal of any non-conformity may also concern necessary editorial changes, aimed at adjusting other provisions of the bill to the amended provisions[76].

The Marshal of the Sejm refers a returned bill to the committees which considered it prior to its adoption by the Sejm[77]. The committee report includes proposals of amendments to the text of the returned bill as well as justifying the necessity for their introduction[78]. Firstly, the Sejm votes on individual proposals for amendment and then on the amended text as a whole, taking into account the adopted proposals for amendment[79]. The scope of amendments cannot exceed the subject matter stipulated by the judgement of the Constitutional Tribunal[80]. When the Sejm passes the amendments, the bill is submitted to the Senate. The second chamber takes a stand, which is later considered by the Sejm according the aforementioned procedure[81].

The President's veto against the bill

The President may veto the bill if he did not refer the bill to the Constitutional Tribunal. As a result of the President's veto, the Sejm has to pass the bill again by a 3/5 majority of votes in the presence of at least half of the statutory number of deputies. The possibility to veto the bill is one of the most important mechanisms which makes the system of parliamentary government in Poland rational. It also strengthens the constitutional position of the President against the Parliament. The parliamentary

[73] Art. 122 (3) of the Constitution.
[74] Art. 122 (4) of the Constitution.
[75] Art. 58 (1) of the Rules of the Sejm.
[76] Art. 58 (2) of the Rules of the Sejm.
[77] Art. 59 (1) of the Rules of the Sejm.
[78] Art. 59 (3) of the Rules of the Sejm.
[79] Art. 61 (1) of the Rules of the Sejm.
[80] Art. 61 (2) of the Rules of the Sejm.
[81] Compare: Art. 121 of the Constitution.

majority which does not enjoy the support of 3/5 votes of the statutory number of deputies cannot introduce the act if the President refuses to pass it.

The legislative veto of the President of the Republic of Poland is adjourning and complete. The adjourning character of the veto means that the final decision on passing the bill belongs to the Parliament (precisely to the Sejm). The veto is not absolute i.e. – it does not preclude the bill from coming into force[82]. The veto is complete as the President may refuse to sign the bill as a whole not only some of its provisions. The latter case is referred to as 'selective veto'.

If the bill is vetoed the Marshal of the Sejm sends the bill to the committees which considered the bill prior to its adoption by the Sejm[83]. The committees to which the bill was sent submit a report to the Sejm in which the committees move that the bill should be repassed in its original wording or move a motion to the contrary[84]. As it was mentioned before, the Sejm rejects the President's veto by a three-fifths majority vote in the presence of at least half of the statutory number of deputies[85]. The Senate does not participate in the procedure of rejection of the President's veto against the bill. If the Sejm does not pass the bill again in its original wording, the legislative procedure is closed[86]. If the Sejm passes the bill again, the President has to sign the bill and order its promulgation in the Journal of Laws of the Republic of Poland (Dziennik Ustaw).

Special legislative procedures

Urgent procedure of passing bill

Apart from an ordinary legislative procedure there are extraordinary courses of action over particular bills under Polish law. Some emphasis should be put on urgent procedure of passing bills. According to Art. 123 of the Constitution, the Council of Ministers may classify a bill adopted by itself as urgent, with the exception of tax bills, bills governing elections to the Presidency of the Republic of Poland, to the Sejm, to the Senate and to organs of local government, bills governing the structure and jurisdiction of public authorities, and also drafts of law codes. The Constitution does not stipulate how different urgent procedure is at the stage of the Sejm's works[87]. As it was mentioned above, the principle of three readings should be followed but numerous distinctions of urgent procedure are also grounded in the Rules of the Sejm.

Under the provisions of the Rules of the Sejm, the Marshal of the Sejm, implementing activities in relation to a bill introduced by the Council of Ministers and referred

[82] See: Zaleśny J. Partycypacja głowy państwa w ostatnich etapach procesu legislacyjnego. Warszawa: Dom Wydawniczy "Elipsa", 1999, pp. 19-20.

[83] Art. 64 (1) of the Rules of the Sejm.

[84] Art. 64 (3) of the Rules of the Sejm.

[85] Art. 122 (5) of the Constitution.

[86] Art. 64 (6) of the Rules of the Sejm.

[87] It needs to be underlined that the bill – even classified as urgent – must be considered in three readings.

to as "an urgent bill", at the same time establishes a provisional time-table of work in the Sejm on such a bill[88]. The first reading of an urgent bill is proceeded at the sitting of the Sejm or of the committee. The Marshal of the Sejm, in referring an urgent bill to committees, at the same time sets a time limit for submission of the report, which may not be longer than 30 days[89]. It is the most important procedural distinction stipulated by the Rules of the Sejm for urgent procedure. It guarantees that the governmental bills which the Council of Ministers finds particularly important will not be overlooked in masses of parliamentary works. Nevertheless, this deadline is of instructive character only and the infringement of this term does not result in legal consequences.

An urgent bill is included by the Marshal the of Sejm in the orders of the day for a sitting of the Sejm, which shall be the first sitting following the conclusion of the work of the committee[90]. Another distinction refers to the fact that the Marshal of the Sejm obligatorily refuses to order a vote upon an amendment relating to an urgent bill, which has not been previously referred to the committee in writing[91]. The Council of Ministers may withdraw the designation of a bill as urgent prior to the commencement of its second reading[92].

A bill classified as urgent is considered by the Senate in the term of 14 days after its submission to the Senate[93]. Likewise in an ordinary legislative procedure, the Senate may reject the urgent bill submitted by the Sejm or introduce some amendments to the bill. A resolution of the Senate, containing a proposal to make particular amendments to an urgent bill adopted by the Sejm or to reject it, is considered by the Sejm at the first sitting following its delivery[94].

The President signs the bill passed, which was classified as an urgent, in 7 days[95]. The President may, before signing the bill, refer to the Constitutional Tribunal or apply a legislative veto. In proceedings relating to an urgent bill which the President has refused to sign the Presidium of the Sejm establishes an order of work on the President's motion to reconsider an urgent bill, such that the period of time between the receipt of the President's motion and the day of final conclusion of the matter by the Sejm does not exceed 7 days[96].

The procedure of passing budget act

The procedure of passing the budget act is quite distinctive from an ordinary legislative procedure. The Council of Ministers is granted the exclusive right to introduce

[88] Art. 71 (1) of the Rules of the Sejm.
[89] Art. 73 (2) of the Rules of the Sejm.
[90] Art. 74 of the Rules of the Sejm.
[91] Art. 76 (3) of the Rules of the Sejm.
[92] Art. 75 of the Rules of the Sejm.
[93] Art. 123 (3) of the Constitution.
[94] Art. 78 (1) of the Rules of the Sejm.
[95] Art. 123 (3) of the Constitution.
[96] Art. 80 of the Rules of the Sejm.

legislation concerning a budget[97]. The draft budget for the following year must be submitted to the Sejm no later than 3 months before the commencement of the fiscal year i.e. by 30th September. However, in exceptional instances, the draft may be submitted later[98].

The first reading of the draft budget is held at the plenary sitting of the Sejm[99]. Then the draft budget as a whole is referred to the Public Finances Committee for consideration[100]. Individual parts of the draft are considered by the respective Sejm committees, which deliver statements of their position, including conclusions, opinions or proposals of amendments – with reasons given – to the Public Finances Committee[101]. The representatives of those committees present the submitted positions of the appropriate committees in respect of individual parts of the draft during the sitting of the Public Finances Committee[102].

At the sitting of the Sejm the Public Finances Committee having considered the draft budget and the reports of respective Sejm committees presents a report together with motions either to pass the draft budget, with or without amendments[103]. The Committee may not suggest rejecting the draft budget as a whole.

The amendments introduced by deputies during the second reading of the bill cannot increase the deficit stipulated in the government draft[104]. The stability of budget (public finances) as a constitutional value is protected in this way[105]. The Sejm passes a draft budget by simple majority of votes in the third reading.

The Senate takes a standpoint towards a draft budget within 20 days. The bill is deemed to have been adopted in the version submitted by the Sejm if the Senate does not take a stand within that time. The Senate cannot adopt a resolution rejecting a draft budget as a whole but may introduce amendments to the draft budget[106].

After the proceedings in the Senate, the Senate's amendments are considered by the Sejm. The Sejm may reject the Senate's amendments – similarly as in an ordinary legislative procedure – by an absolute majority of votes[107]. The President signs the budget

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[97] Art. 221 of the Constitution. This article also grants the Council of Ministers an exclusive right to introduce legislation concerning an interim budget, amendments to the Budget, a statute on the contracting of public debt, as well as a statute granting financial guarantees by the State.

[98] Art. 222 of the Constitution.

[99] Art. 37 (2) of the Rules of the Sejm.

[100] Art. 106 (1) of the Rules of the Sejm.

[101] Art. 106 (2) of the Rules of the Sejm.

[102] Art. 107 (1) of the Rules of the Sejm.

[103] Art. 108 (1) of the Rules of the Sejm.

[104] Compare: Art. 220 (1) of the Constitution, according to which the increase in spending or the reduction in revenues from those planned by the Council of Ministers may not lead to the adoption by the Sejm of a budget deficit exceeding the level provided in the draft Budget.

[105] Compare: Patyra S. Mechanizmy racjonalizacji procesu ustawodawczego w Polsce w zakresie rządowych projektów ustaw. Toruń: Adam Marszałek, 2012, p. 210.

[106] Art. 223 of the Constitution.

[107] Art. 121 (3) of the Constitution.

within 7 days of its receipt[108]. He cannot veto it but may refer to the Constitutional Tribunal for an adjudication upon the conformity to the Constitution. The Constitutional Tribunal adjudicates such a matter no later than within a period of 2 months from the day of submission of such a reference to the Tribunal[109]. If, after 4 months from the day of submission of a draft budget to the Sejm, it has not been adopted or presented to the President of the Republic for signature, the President may, within the following of 14 days, order the shortening of the Sejm's term of office[110].

Other special legislative procedures

Procedure of passing a bill implementing European Union law

The integration of Poland with the European Union resulted in the necessity to introduce some procedures into the Rules of the Sejm which would effectively ensure passing bills implementing European Union law. The Council of Ministers introducing legislation declares whether it is the bill implementing European Union law or not[111]. Drafts of implementing acts (when the bill imposes an obligation to issue such acts) and the chart of conformity to the European Union law are enclosed to justify the bill implementing European Union law[112].

In the case of the bills submitted by the subjects other than the Council of Ministers the Marshal of the Sejm resolves, before referring the bill to the first reading, whether a bill is implementing European Union law or not[113]. The Marshal of the Sejm initiating the proceedings in relation to a bill implementing European Union law establishes a schedule of work of the Sejm on that bill, taking into account deadlines for implementing European Union law[114]. Before undertaking a detailed consideration of a bill implementing European Union law, a respective committee establishes a timetable of work on that bill consistent with the schedule of work of the Sejm set up by the Marshal of the Sejm[115].

An amendment to a bill implementing European Union law may be proposed, in written form, at the sitting of the committee by a group of at least three deputies[116]. At the request of at least three deputies proposals of amendments, rejected by the committee, after they have been submitted in writing, are included in the report as minority motions. A minority motion on a particular provision or its part should specify the consequences of this motion for the text of the bill implementing Euro-

[108] Art. 224 (1) of the Constitution.
[109] Art. 224 (2) of the Constitution.
[110] Art. 225 of the Constitution.
[111] Art. 95a (2) of the Rules of the Sejm.
[112] Art. 34 (4a) of the Rules of the Sejm.
[113] Art. 95a (3) of the Rules of the Sejm.
[114] Art. 95b of the Rules of the Sejm.
[115] Art. 95c of the Rules of the Sejm.
[116] Art. 95d (1) of the Rules of the Sejm.

pean Union law[117]. Similar principles apply to the the submission of the motion to reject the bill implementing European Union law. The motion must be adopted by the committee by an absolute majority of votes[118]. The second reading of a bill implementing European Union law is held at the first sitting of the Sejm after the deputies were delivered the committee's report, unless the Marshal of Sejm fixes, after seeking an opinion of the presidium of the committee, longer time limit for the second reading[119].

While considering a bill which implements the law of the European Union, the respective committee of the Senate may ask the European Union Affairs Committee to express an opinion on the whole bill or its part[120]. Consideration of Senate's amendments occurs at the first sitting of the Sejm, after the Committee's report was delivered[121]. The committees prepare a draft resolution of the Senate by the deadline set the Marshal of the Senate[122].

Procedures in relation to draft law codes

The Rules of the Sejm contain also the provisions concerning the procedures in relation to codes. Polish law does not define the notion of 'code' therefore the Marshal of the Sejm initiating the proceedings conclusively decides whether the bill refers to draft law code or its amendment or not[123]. The first reading of a draft law code or introductory provisions to a draft law code may be held not earlier than the thirtieth day following the delivery of a copy of the draft to the deputies[124]. The first reading of a draft of amendments to a law code or a draft of amendments to introductory provisions to a law code may be held not earlier than the 14th day following the delivery of a copy of the draft to the deputies[125]. The Special Committee may be appointed to consider the aforementioned drafts[126]. The Special Committee may, at any time, submit a motion to the Sejm to hold a debate on selected matters relating to the draft of the law code[127]. The Special Committee may also form permanent subcommittees in order to consider a draft in detail, as well as working groups within the framework of subcommittees[128]. The Special Committee appoints a team of permanent experts, a third of whom is proposed by the sponsor of a draft law code[129].

[117] Art. 95d (2) of the Rules of the Sejm.
[118] Art. 95d (3) of the Rules of the Sejm.
[119] Art. 95e of the Rules of the Sejm.
[120] Art. 68 (1a) of the Rules of the Senate.
[121] Art. 95f of the Rules of the Sejm.
[122] Art. 68 (2) of the Rules of the Senate.
[123] Art. 87 (1) of the Rules of the Sejm.
[124] Art. 89 (1) of the Rules of the Sejm.
[125] Art. 89 (2) of the Rules of the Sejm.
[126] Art. 90 (1) of the Rules of the Sejm.
[127] Art. 90 (3) of the Rules of the Sejm.
[128] Art. 91 (1) of the Rules of the Sejm.
[129] Art. 92 (1) of the Rules of the Sejm.

The Special Committee may present a report to the Sejm in the form of a list of amendments, adopted by the Special Committee, on a draft submitted by sponsors[130]. Conclusions and proposals rejected by the Special Committee may be included in the Committee report as minority motions, after their introduction in writing, at the request of at least five deputies being members of the Special Committee[131]. A minority motion should contain reasons which would specify the differences between the Committee report and the proposed modifications, and also their purpose as well as its expected legal and financial consequences[132]. The Special Committee makes a final analysis of minority motions in respect of their interrelations, the consequences indicated by the sponsors and the consequences for the text of a draft of a law code, as well as for other drafts and acts and law codes connected them[133]. The second reading of a draft of amendments to a law code cannot be held earlier than 14th day after deputies were served the report of the Special Committee[134]. In the event of a new amendment or a motion having been introduced during the second reading, the draft is returned to the Special Committee[135].

The procedure of passing bills amending the Constitution

A special emphasis should be put on the procedure of amending the Constitution stipulated in Art. 235. This special procedure is a manifestation of constitutional role of the Sejm and the Senate therefore it is quite different in comparison to the procedure of passing ordinary bills. First and foremost, it shows the equal status of the Sejm and the Senate. Without the consent of the both chambers the bill amending the Constitution cannot enter into force. The scope of subjects who have the right to introduce legislation is also stipulated in a different way. Moreover, the possibility to hold a referendum refers only to passing the amendment of the Constitution not to passing or amending bills in general.

According to Art. 235 (1), the legislative initiative in the scope of amending the Constitution belongs to at least one-fifth of the statutory number of deputies (i.e. 92), the Senate, or the President of the Republic. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm[136]. The Sejm may appoint the Special Committee to consider a draft to amend the Constitution[137]. The composition of the Committee should reflect the representation of parliamentary groups and clubs in the Sejm[138]. The committee that

[130] Art. 93 (1) of the Rules of the Sejm.
[131] Art. 93 (2) of the Rules of the Sejm.
[132] Art. 93 (3) of the Rules of the Sejm.
[133] Art. 93 (4) of the Rules of the Sejm.
[134] Art. 95 (1) of the Rules of the Sejm.
[135] Art. 95 (2) of the Rules of the Sejm.
[136] Art. 235 (3) of the Constitution.
[137] Art. 86b (1) of the Rules of the Sejm.
[138] Art. 86b (2) of the Rules of the Sejm.

considers the bill to amend the Constitution appoints a team of permanent experts, a third of whom is proposed by the sponsor of a bill to amend the Constitution[139].

The committee that considers the bill to amend the Constitution may submit a motion to the Marshal of the Sejm to hold a debate on selected matters relating to the bill amending the Constitution. The Sejm takes a decision on the introduction of the debate on bill amending the Constitution into the orders of the day of the sitting of the Sejm following the submission of the motion[140]. The amendment to the bill amending the Constitution may be introduced in writing at the sitting of the committee by a group of at least 5 deputies[141]. The proposals of the amendments rejected by the committee are included in the committee report as minority motions, after their introduction in writing, at the request of at least 5 deputies[142]. The report is adopted by the Committee which considers the bill amending the Constitution by a two – thirds majority of votes in the presence of at least half of the statutory number of the committee members[143].

The second reading of a bill to amend the Constitution may be held not earlier than 14 days after deputies were served the report of the committee which considers the bill to amend the Constitution[144]. A bill to amend the Constitution is returned to the committee which considered it if new amendments and motions are introduced during the second reading[145]. The amendment or the minority motions to a bill amending the Constitution are adopted by a two – thirds majority of votes in the presence of at least half of the statutory number of deputies[146]. The bill to amend the Constitution may be withdrawn on general principles until the termination of the second reading. The deputies' bill amending the Constitution is deemed to be withdrawn if (as a result of the withdrawal of support) it is supported by fewer than 92 of the deputies who signed the bill before its submission[147].

The bill to amend the Constitution is adopted by the Sejm by a two – thirds majority of votes in the presence of at least half of the statutory number of deputies[148]. The bill amending the Constitution is then submitted to the Senate which within the period of 60 days is obliged to take a stand[149]. The Senate may not introduce the amendments to the bill amending the Constitution but may reject the bill as a whole. If the Senate does not take a stand within the period of 60 days the bill amending the Constitution is deemed to have been rejected. If, however, the Senate adopts the bill

[139] Art. 86c (1) of the Rules of the Sejm.
[140] Art. 86e of the Rules of the Sejm.
[141] Art. 86f (1) of the Rules of the Sejm.
[142] Art. 86f (2) of the Rules of the Sejm.
[143] Art. 86h of the Rules of the Sejm.
[144] Art. 86i of the Rules of the Sejm.
[145] Art. 86j of the Rules of the Sejm.
[146] Art. 86k of the Rules of the Sejm.
[147] Art. 86g of the Rules of the Sejm.
[148] Art. 235 (4) of the Constitution.
[149] Art. 235 (2) of the Constitution.

amending the Constitution by an absolute majority of votes of senators[150], the bill is submitted to the President for a signature who signs it within 21 days of its submission and orders its promulgation in the Journal of Laws of the Republic of Poland (Dziennik Ustaw)[151].

Significant distinctions to the aforementioned procedure refer to the amendments of the provisions of Chapters I, II or XII of the Constitution. As these provisions are of great importance the procedure to amend them is impeded. The third reading may not be held earlier than 60 days after the first reading of the bill[152]. Moreover, within 45 days of the adoption of the bill by the Senate the subjects who have the right to initiate legislation concerning the amendment of the Constitution (i.e. the group of 92 deputies, the Senate or the President) may submit the motion to the Marshal of the Sejm to hold a referendum confirming the bill to amend the Constitution[153]. If such a motion is submitted the Marshal of the Sejm orders the holding of a referendum within 60 days of the day of receipt of the motion. The amendment to the Constitution is adopted if the majority of those voting express support for such an amendment. The presence of at least half of the statutory number of eligible members is not required.

Conclusion

The Parliament of the Republic of Poland performs a legislative function under certain procedures. The procedures are the manifestation of constitutional principles stipulating the structure and the tasks of the Parliament. According to Art. 10 (2) of the Constitution, the Parliament is composed of two chambers: the Sejm and the Senate. The principle of asymmetric bicameralism is grounded in the provisions of Chapter IV. Both chambers enjoy different scope of competences also in the legislative domain.

The Constitution of the Republic of Poland specifies legislative procedure in a quite detailed way (Art. 118-122). Two special procedures – an urgent procedure (Art. 123) and procedure to pass a draft budget (Art. 221-225) – are also provided. The procedure to amend the Constitution (Art. 235) is different from legislative procedure. The Rules of the Parliament also stipulate other special procedures. Their specificity results from the purpose for which they were adopted. It is important to underline that an urgent procedure serves the government to introduce – from the government's point of view – important legislative changes.

[150] Art. 235 (4) of the Constitution.
[151] Art. 235 (7) of the Constitution.
[152] Art. 235 (5) of the Constitution.
[153] Art. 235 (6) of the Constitution.

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THE QUALITY OF IMPLEMENTATION OF THE EU NON-DISCRIMINATION AND GENDER EQUALITY LAW IN LATVIA

Keywords: EU non-discrimination and gender equality law, material and personal scope, topical implementation problems in Latvia, implementation structure, use of fundamental terms, implementation in the field of employment, implementation with regard to access to and supply of goods and services, implementation and application in the field of social security.

Abbreviations

TFEU – the Treaty on Functioning of European Union
TEU – the Treaty on European Union
CJEU – the Court of Justice of European Union
OJ – Official Journal
OG – Official Gazette

Summary

The aim of this article is to provide an analysis of the implementation and application of the EU non-discrimination and gender equality law in Latvia with a view pointing out the most important problematic issues. For such purpose Section II provides an overview of the material and personal scope of the EU non-discrimination and gender equality law to describe obligations of the Member States arising out of it. Section III provide analysis on the effectiveness of the general implementation structure chosen by Latvia with regard to respective branch of the EU law to point out structural implementation problems and elaborates on improper use of term non-discrimination. It is argued that principle of non-discrimination must be provided not only by special laws of a particular field but there is also urgency for adoption of umbrella gender equality and non-discrimination law providing inter alia horizontal obligations of the state powers. Due to the lack of umbrella law the state powers have failed to observe gender mainstreaming obligation provided by the TFEU. Term used by the legislator for the implementation of the EU non-discrimination and gender equality law 'prohibition of differential treatment' does not correspond to the substance of the principle of non-discrimination. Such imprecision may lead and has led already to incorrect application of the law in question. Section IV, V and VI provide analysis on the most topical issues concerned with improper implementation of the EU non-discrimination and gender equality law in particular fields in Latvia. It is argued that in the field of employment most topical problems is lack of explicit protection against discrimination on the ground of ethnic origin, while provision of

calculation of average pay put in discriminatory position female workers in connection with pregnancy, maternity and child-care. There are also problems with correct implementation of the principle of reversed burden of proof in discrimination cases and time limits for bringing a claim. Regarding equal access to goods and services one of the major problem is lack of practical protection against discrimination on the ground of sex with regard to pregnancy and maternity. The same problem concerns statutory social insurance system where rules on the calculation of social insurance allowances fail taking into account obligation of equal treatment irrespective of the use of the rights to pregnancy, maternity and child-care leave.

Introduction

The aim of this article is to provide an analysis of the implementation and application of the EU non-discrimination and gender equality law in Latvia with a view pointing out the most important problematic issues. For such purpose Section II will provide an overview of the material and personal scope of the EU non-discrimination and gender equality law to describe obligations of the Member States arising out of it. Section III will provide analysis on the effectiveness of the general implementation structure chosen by Latvia with regard to respective branch of the EU law to point out structural implementation problems and will elaborate on improper use of term non-discrimination. Section IV, V and VI will provide analysis on the most topical issues concerned with improper implementation of the EU non-discrimination and gender equality law in particular fields in Latvia.

The scope of the EU non-discrimination and gender equality law

The EU law may provide prohibition of discrimination on the basis of sex, race and ethnic origin, religion and belief, disability, age or sexual orientation. However such prohibition is not of general application. The only primary norm providing for material rights is Article 157(1) and (2) of the TFEU.[1] It grants right to equal pay for equal work or work of equal value irrespective of the sex of a worker and defines concept of the pay within the meaning of equal pay. Regarding other issues prohibition of discrimination applies only to the fields where the EU has adopted secondary legal acts – directives.

EU primary law in overall provides for a legal base to adopt secondary EU legal acts in the field, in particular, Article 157(3) of TFEU provides the legal base for adoption of gender equality provisions in employment and Article 19 of TFEU grants the legal base for adoption of secondary legal acts with regard to gender equality in other field than employment and with regard to discrimination based on race and ethnic origin, religion and belief, disability, age and sexual orientation.

[1] OJ C 83, 30 March 2010.

The material scope of secondary law varies according to the discrimination trait and it is following. Prohibition of discrimination on the basis of race and ethnic origin is prohibited under the EU law in more fields of life than the other discrimination traits. Directive 2000/43/EC[2] applies to the field of employment, access to and supply of goods and services, social security, housing and education. The second most protected discrimination trait is sex. Sex discrimination is prohibited with regard to employment, social security and access to and supply of goods and services. Directive 2006/54/EC[3] covers field of employment, Directive 2004/113[4] covers access to goods and services and Directive 79/7/EEC[5] covers social security with regard to sickness, disability, old age, accidents at work and occupational diseases and unemployment protection. Besides Directive 2010/41/EU provides some special rights with regard to the equal treatment irrespective of the sex for those engaged in a self-employed activity.[6] The weakest protection with regard to material scope has the rest of discrimination traits – religion and belief, disability, age and sexual orientation – Directive 2000/78/EC covers only field of employment.[7]

There are some directives which have been adopted on the basis of primary norms allowing the EU institutions to act in the field of employment, but which are directly linked with issues of gender equality. Those are maternity protection Directive 92/85/EEC[8], parental leave Directive 2010/18/EU[9], part-time work Directive 97/81/EC[10]

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2 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, p. 22-26 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV).

3 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.07.2006, p. 23-36.

4 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37-43.

5 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.01.1979, p. 24-25.

6 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.07.2010, p. 1-6.

7 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 02.12.2000, p. 16–22.

8 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, p. 1-7.

9 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), OJ L 68, 18.03.2010, p. 13-20.

10 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, OJ L 14, 20.01.1998, p. 9-14.

and fixed-term work Directive 1999/70/EC.[11] Maternity protection directive provides for certain obligations of an employer with regard to health and safety adjustment of the needs of pregnant workers and worker during maternity period as well as certain employment right obligations, like prohibition of dismissal on account of pregnancy or maternity. Non-provision of such rights or less favourable treatment with regard to obligation to provide respective rights is seen as discrimination on the grounds of sex.[12] Directive on part-time work and fixed-term work requires equal treatment with other employees concerning employment conditions. Rights provided by those directives concerns more female workers than male workers, because majority of workers of those categories are women. Thus issues regarding equal treatment of fixed-term and part-time workers are frequently reviewed under principle of gender equality.[13]

Discrimination in the field of employment applies to self-employed persons with regard to access to employment or profession. Prohibition of discrimination in the field of access to and supply of goods and services applies to all goods and services offered publicly, namely, it applies in situations where goods or services are provided by person acting in professional capacity and person acting outside professional capacity if an offer has been annouced publicly, i.e., to the abstract cycle of persons.

Considerable source of law in the field of gender equality and non-discrimination is case-law of the CJEU. Interpretation of primary and secondary law of the field is provided by more than 200 decisions of the CJEU[14] and is very extensive, including judgements establishing general principles of the EU law.[15]

According to the principle of national procedural autonomy legal mechanisms for the protection of the EU law must be provided by the Member States themselves.[16] At the same time national legal remedies for the protection of the rights provided by the EU law must correspond to the principles of effectiveness and equivalence. It means that under principle of effectiveness national remedies must be such as not making the

[11] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.07.1999, p. 43-48.

[12] Article 2(2)(c) of Directive 2006/54.

[13] See for example: case C-313/02 Nicole Wippel v Peek & Cloppenburg & Co. KG [2005], ECR I-000; case C-77/02 Steinicke v. Bundesanstalt fur Arbeit [2003] ECR I-9027.

[14] See, for example, Compilation of case law on the equality of treatment between women and men and on non-discrimination in the European Union, European Commission, 2009; also data-base of the decisions of the CJEU at http://curia.europa.eu.

[15] See, for example: case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] ECR 723 – there is no direct horizontal effect of directives; case 14/83 Von Colson v Land Nordhein-Westfalen [1984] ECR 1891 – principle of 'indirect effect' of directives; case C144/04 Mangold v Rudiger Helm [2005] ECR I-9981 – general principle of prohibition of discrimination on the grounds of age.

[16] Article 19(1) of TEU.

use of the rights impossible in practice[17] (practical possibility)[18] and under principle of equivalence national remedies for the protection of the rights provided by the EU law must not be less favourable than those provided for the protection of the rights stipulated by the national law.[19] Since non-discrimination law is a special field the EU law however provides for some special obligations with regard to remedies. The most important procedural right is principle of reversed burden of proof. It, unlike under regular civil procedure providing for the competition of the parties, entails an obligation of a claimant just show facts which testify prima facie discrimination and then obligation to prove that the principle of non-discrimination has not been breached switches on respondent.[20]

Apart to mentioned legal obligations EU primary law provides for the mainstreaming obligation. Article 8 of the TFEU provides that 'In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women'. Article 10 provides that 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. It means that the EU is obliged to assess any activity, including legislative proposals, from the gender equality and non-discrimination perspective and it is not allowed to take an action or adopt legislative act which possibly might reinforce inequality. Further Charter of Fundamental Rights of the EU[21] provides for prohibition of discrimination[22] and gender equality[23], thus via Article 51(1) providing an obligation to observe mainstreaming for the Member States too when 'they are implementing Union law'. It means that the Member States are bound by a horizontal obligation not only implement gender equality and non-discrimination law in national laws for the regulation of relationships between private parties, but also provide an analysis on possible impact of any measure or legislative proposal on gender equality and non-discrimination law in the fields where the EU has adopted legal regulation.[24]

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[17] See, for example: case 14/83, Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, [1984] ECR page 01891; case C-326/96, B.S. Levez v T.H. Jennings (Harlow Pools) Ltd., [1998] ECR page I-07835.

[18] Craig P., Burca G., EU Law, Text, Cases and Materials, Oxford University Press, 5th edition, 2011, page 220.

[19] See also: Dupate K. Latvijas tiesu prakse diskriminācijas aizlieguma pārkāpuma lietās darba tiesiskajās attiecībās, Tiesībsargs, 2007, 16.-17. lpp.

[20] See, for example, definitions of direct discrimination provided by Article 2(2)(a) of Directive 2000/78/EC, Article 2(a) of Directive 2004/113/EC; See also, case C-177/88, Elisabeth Johanna Pacifica Dekker v Stichtig Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus, (1990) ECR page I-03941.

[21] OJ C 83, 30 March 2010.

[22] Article 21.

[23] Article 23.

[24] See also: Craig P., Burca G., EU Law, Text, Cases and Materials, Oxford University Press, 5th edition, 2011, page 920.

The general implementation structure in Latvia

Initially and currently Latvia has chosen following EU gender equality and non-discrimination law implementation structure. It was decided to implement respective EU law in special laws rather than having one special law devoted to such implementation. As the result Latvia has faced some problems.

Firstly, the problems arise because structure of Latvian special laws does not always coincide with material and personal scope of the EU gender equality and non-discrimination law. For example, there is no general law regulating rights of self-employment, thus in order implementing prohibition of discrimination of self-employed special law was adopted – Law on Prohibition of Discrimination of Natural Persons Performing Economic Activities.[25] There were problems with the implementation of prohibition of discrimination with regard to access to vocational training, again because there is no special law on vocational training in Latvia. Therefore principle of prohibition of discrimination was inserted into general Education Law[26] which covers whole educational system. Due to similar problem persons in Latvia are not protected against discrimination with regard to access to and supply of goods and services where a good or service is offered publicly by a private person outside his/her professional activities. Principle of prohibition of discrimination is provided only by Law on Protection of Consumer Rights[27] covering only goods and services provided publicly by persons acting within their professional/commercial capacity. The Civil Law[28] governing all civil law system in Latvia remains silent on the prohibition of discrimination in transactions between private persons acting publicly but outside their professional capacity.

It follows that by not having special gender equality and non-discrimination law Latvia frequently faces EU law implementation problems on account of different material and personal scopes of special laws in Latvia and EU gender equality and non-discrimination law.

Secondly, special laws usually regulate legal relationship between private parties while EU gender equality and non-discrimination law entails horizontal and mainstreaming obligations of the state powers. For example, currently obligation to provide equal pay irrespective of employee's sex, race, ethnic origin, age, disability, religious or other belief and sexual orientation is stipulated only by Article 60 of Labour Law[29] which applies to all employees in private sector and employees and officials in public sector.[30] At the same time there is no law providing of an obligation to observe principle of equal pay for the state power when adopting and implementing law or policy

[25] OG No. 89, 9 June 2009.

[26] OG No. 343/344, 17 November 1998.

[27] OG No. 104/105, 1 April 1999.

[28] 28 January 1937.

[29] OG No. 105, 6 July 2001.

[30] Via special laws providing refence to Labour Law norms on prohibition of discrimination. For example, Law on the State Civil Service, OG No. 331/333, 22 September 2000; Law on Service in the System of the Interior and Imprisonment System, OG No. 101, 30 June 2006.

measures. For example, on 2009 the Parliament adopted Law on Remuneration of State Officials and Employees of the State and Municipal Institutions[31] with a view to establish uniform remuneration system in public sector. The law provides not only system on definition of the pay according to objective criteria but also provides for various social benefits. At the same time the law in substance excludes from such favorable system all school teachers.[32] Since absolute majority of school teachers are female employees it leads to indirect discrimination on the grounds of sex with regard to equal pay. According to unofficial information the reason of exclusion was lack of budget resources for the provision of the equally favorable remuneration system and social guarantees, because there is considerable number of school teachers in Latvia. In current case the state, in particular, the Parliament, failed to observe and obligation deriving from Article 157 of TFEU and Directive 2006/54 requiring provision of equal pay not only in private, but also in public sector, and not only in practice by private employers, but also by the law adopted by the state. Although indirect discrimination under the EU law may be justified if there is a legitimate aim and means are proportionate, nevertheless according to the CJEU the legitimate aim – budgetary considerations – is not acceptable in cases of gender discrimination.[33] The same problem applies to services provided by the state and their budgeting. Directive 2004/113 provides that equal access to goods and services must be ensured also with regard to those goods and services provided by the state. Since such services are provided by the financial means coming from the state budget it implies an obligation to provide an analysis on budgeting from gender perspective as well as analysis on type of goods and services provided by the state and their adjustment to different gender social realities and needs arising out of it.

Consequently lack of gender equality and non-discrimination umbrella law does not allow effective implementation of EU gender equality and non-discrimination law because there is no more detailed legal regulation for all three state powers and especially legislator – the Parliament – on horizontal and mainstreaming obligation in the field of non-discrimination.

It follows that in order to comply with obligations arising from the EU gender equality and non-discrimination law Latvia is in need to adopt separate law on gender equality and non-discrimination to provide more detailed mainstreaming obligation to the state power and to cover material and personal scope gaps between Latvian special laws and the EU law.

Another fundamental problem is use of terms in Latvian implementing acts. Latvian legislator has chosen to define prohibition of discrimination as 'prohibition of differential treatment'. Term 'prohibition of differential treatment' is attempt to Latvianize term 'non-discrimination'. 'Prohibition of differential treatment' instead of 'principle of non-discrimination' is, for example, used in Labour Law, Law on Social

[31] OG No. 199, 18 December 2009.

[32] Article 2(3).

[33] Joined cases C-4/02 and C-5/02 Hilde Schönheit v Stadt Frankfurt am Main (C-4/02) and Silvia Becker v Land Hessen (C-5/02), ECR 2003 Page 00000.

Security[34], Law on the Protection of Consumer Rights[35], Law on Insurance Companies and Their Supervision.[36] Use of term 'prohibition of differential treatment' instead of 'non-discrimination' is incorrect not only from the theoretical perspective, but it has also led to improper application of principles of equality and non-discrimination by national court.[37]

Such use of terms is not correct because, first, term 'prohibition of differential treatment' in its substance refers to one only prohibited treatment under principle of non-discrimination – different treatment of persons in similar situations thus omitting prohibition of equal treatment of persons in different situations. Second, term 'prohibition of differential treatment' could be grammatically interpreted in a way of nonsense, namely, as prohibiting differential treatment of persons in different situations. Such construction was actually applied by national court. If found that claim on equal pay in not well founded because persons performed different work, however instead of holding that there was no different treatment, because works were different, national court held that differential treatment is justified by objective reason – persons performed different work.[38] Third, term 'prohibition of differential treatment' has led to improper application of legal doctrine established by the Constitutional Court.[39] Supreme Court mixed sub-principle of equality and sub-principle of non-discrimination. Namely, it applied Labor law norms regulating principle of non-discrimination to situation where principle of equality was breached. Fourth, since under legal doctrine on sub-principles of equality and non-discrimination is crucial distinction between both is different margin of appreciation left for justification of unequal treatment and discrimination, term 'prohibition of differential treatment' could mislead with regard to very restricted space for justification of discrimination.[40]

Employment

Protection against discrimination in general is provided by Labour Law. Labour Law is applicable to all employees in private and public sector. Non-discrimination provisions of Labour Law is also applicable to civil servants and officials. Article 2(4) of

[34] OG No. 144, 21 September 1995, related amendments OG No. 205, 22 December 2005 and OG No. 47, 26 March 2008.

[35] OG No. 104/105, 01 April 1999, related amendments OG No. 104, 9 July 2008.

[36] OG No. 188/189, 30 June 1998.

[37] Dupate K. Latvijas tiesu prakse diskriminācijas pārkāpuma lietās darba tiesiskajās attiecībās. Latvijas Republikas Tiesībsargs, 2007, Rīga; Dupate K. Par atsevišķiem jēdziena "diskriminācija" nozīmes un satura aspektiem un līdztiesības nodrošināšanu, *Likums un Tiesības,* December 2006, No. 12 (88), January 2007 No. 1(89)

[38] Dupate K. Latvijas tiesu prakse diskriminācijas pārkāpuma lietās darba tiesiskajās attiecībās. Latvijas Republikas Tiesībsargs, 2007, Rīga; in particular, decision of Riga City Vidzemes district court 17 July 2006 in case No. C 30-1667/9-2006. g. (not published).

[39] See, for example: decision in case No. 2005-02-0106, available in English on http://www.satv.tiesa.gov.lv/upload/2005-02-0106E.rtf [viewed 27 June 2012].

[40] Levits E. Par tiesiskās vienlīdzības principu, *Latvijas Vēstnesis*, 8 May 2003, No. 68.

the Law on the State Civil Service[41], Article 3(2) of the Law on Service in the System of the Interior and Imprisonment System[42], Article 12(2) of Military Service Law[43], Article 6(8) of Home Guards of Republic of Latvia Law[44] provide that provisions of Labour Law on equal treatment are applicable. At the same time Law on Judicial Power[45] does not contain any provision on equal treatment in occupation or reference to respective provisions of Labour Law. Consequently EU gender equality and non-discrimination provisions are not implemented with regard to judges.

Interesting that due to unclear terms in Latvian language the legislator has not introduced explicitly prohibition of discrimination on the grounds of ethnicity. Labour Law protects against discrimination on the grounds of 'nationality', which both in English and French means citizenship while in Latvian term 'nationality' (in Latvian – nacionalitāte) is frequently misunderstood as ethnicity although explanatory dictionaries refer to concept 'nation' which more corresponds to concept 'nationality' rather than 'ethnic origin'.[46]

Sometimes it is not enough to implement non-discrimination provisions to prevent from discrimination because discrimination may occur in conjunction with other seemingly non-discriminatory norms. Such case arose from provisions of Article 75 of Labour Law providing for the calculation of average pay for different purposes, for example, dismissal allowance, pay during paid annual leave, compensation for unfair dismissal etc. On 15 December 2010 the Grand Chamber of the Supreme Court[47] overruled its previous (incorrect) decision of 3 June 2009 in a case concerning unlawful dismissal after childcare leave and the right to compensation for work stoppage.[48] The Grand Chamber held that the claimant was entitled to compensation for work stoppage calculated on the basis of her normal salary. The problem with the previous judgment lay in the fact that Article 75 of the Labour Law requires calculation of compensation of work stoppage on the basis of the statutory minimum wage, if a person has not received any salary during the previous 12 months. In practice, persons who qualify under this provision are those who were on long-term sick leave or childcare leave, as was true in the current case. The Grand Chamber took into account provisions of the EU Law: Article 157 of the Treaty on the Functioning of the European Union (ex Article 141), Directive 75/117 (now Directive 2006/54/EC and judgment of the CJEU in case Seymour-Smith stating that the concept of

[41] OG No. 331/333, 22 September 2000, with respective amendments on equal treatment, Official Gazette No. 180, 9 November 2006.

[42] OG No. 101, 30 June 2006.

[43] OG No. 91, 18 June 2002.

[44] OG No. 82, 26 May 2010.

[45] OG No. 1, 14 January 1993.

[46] See, for example: Letonikas terminu un svešvārdu skaidrojošā vārdnīca. Available: http://www.letonika.lv/groups/default.aspx?q=nacionalit%C4%81te&s=0&g=1&r=1107 [viewed 27 June 2012].

[47] Decision of the Supreme Court (15 December 2010) in case No. SKC-694/2010, available in Latvian on http://www.at.gov.lv/files/archive/department1/2010/694-10.pdf, [viewed 1 April 2011].

[48] Decision of the Supreme Court (3 July 2009) in case No. SCK-589/2009 (not published).

pay within the meaning of equal pay comprises compensation for unfair dismissal,[49] consequently compensation for work stoppage on account of unfair dismissal also constitutes pay within the meaning of the equal pay principle. Finally, the Supreme Court took into account the aspect of indirect discrimination against women in connection with childcare leave. This case demonstrates that proper implementation requires not only grammatical implementation of the EU norms but also assessment of hypothetical situations in the light of other national provisions.

There are also certain problems regarding procedural provisions.

First issue regards definition of reversed burden of proof implemented by Article 29(3) of Labour Law. It states that 'in case an employee demonstrates facts from which may be presumed direct or indirect discrimination, an employer has to prove that basis for differential treatment was objective factors not concerned with sex of a worker or that sex of a worker is objective precondition for the performance of a work in question'. Such wording does not implement correctly requirements of the EU law which states that 'it shall be for respondent to prove that there has been no breach of the principle of equal treatment'.[50] The problem lies in fact that direct discrimination may not be justified[51] unless two exceptions – non-discrimination ground is objective precondition for the performance of a work in question[52] or accommodation obligation for disabled worker is unreasonable[53] – comes in to play.

Thus Article 29(3) of Labour Law currently may be understood as allowing justification of direct discrimination and not allowing justification connected with unreasonable accommodation of disabled worker.

There are some problems with the time frame for bringing a claim before the courts when the principle of non-discrimination has been breached in an employment relationship. In discrimination cases the Latvian Labour Law allows three months for bringing a claim. Other types of claims under the Labour Law, according to Article 31(1), must be brought within a time-limit of two years, except for claims of unfair dismissal. This is in breach of two principles provided by the EU law – effectiveness and equivalence, which means that national remedies must be such as providing effective mechanisms for the defence of the rights provided by the EU law and that national remedies for the protection of the rights provided by the EU law must not be less favourable than those available for the protection of the rights provided by national law.[54]

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[49] Case C-167/97, Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez, ECR 1998 Page I-05199.

[50] See, for example: Article 19(1) of Directive 2006/54/EC, Article 10(1) of Directive 2000/78/EC.

[51] See, for example: definitions of direct discrimination provided by Article 2(2)(a) of Directive 2000/78/EC, Article 2(a) of Directive 2004/113/EC; See also, case C-177/88, Elisabeth Johanna Pacifica Dekker v Stichtig Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus, (1990) ECR page I-03941.

[52] See, for example: case 222/84, Marguerite Johnston v Chief Constable if the Royal Ulster Constabulary, European Court reports 1986 Page 01651.

[53] Article 2(b)(ii) and 5 of Directive 2000/78/EC.

[54] Case C-326/96 B.S. Levez v T.H. Jennings (Harlow Pools) Ltd. [1998] ECR I-07835, paragraph 44.

It follows that in the field of employment implementing measures still have many fundamental shortcomings which urge to be corrected.

Access to and supply of goods and services

Apart to incomplete implementation of Directive 20004/113/EC discussed in Section I there is one serious problem regarding insurance of the risks related to pregnancy and maternity. Article 5(3) of the said directive provides that 'In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits', which in substance means that risks related to pregnancy and maternity must be covered by any type of insurance, moreover, by not increasing the price on account of coverage of such risks. In practice Latvian insurance companies do not comply with such obligation especially in travel and health insurance.

The problem regarding health insurance lies in the fact that in general health services are provided to all residents of Latvia by the state under statutory health service scheme which is fully financed by the state and no contribution by a natural person – resident of Latvia (except co-payment for a visit to a doctor) is required. State paid medical services are not always accessible on account of insufficient state funding, and state paid medical services do not include all types of medical manipulation necessary. They as well may be provided in much lower quality than private medical services, thus it is important to have private health insurance giving the right to access to private medical services. It is especially important if private health insurance is provided by an employer. The range of medical services included in private health insurance and financial coverage of such services is defined by each separate private health insurance plan offered by an insurance company and depends on financial means which may be allocated (by person his/herself or an employer) for that purpose. It leads to a situation where medical services included in private health insurance plans do not provide equal treatment with regard to sex. Especially it concerns medical services relating to pregnancy and maternity. Usually such services are excluded. The same applies to the travel insurance. Insurance companies justify such situation by relying on the provision of Law on Insurance Companies and Their Supervision[55] stipulating that insurance premiums and benefits may not differ on account of pregnancy and maternity. Namely, they insist on the fact that particular private health or travel insurance plan does not include pregnancy and maternity risks thus aforementioned norm is not breached, because since such risks are not included there are no unequal premiums and benefits on account of pregnancy and maternity.

Consequently Latvian insurance companies in practice fail to comply with Article 5(3) of Directive 2004/113/EC and implementing measures provided by Law on Insurance Companies and Their Supervision by not including in insurance plans risks related to pregnancy and maternity.

[55] OG No. 188/189, 30 June 1998.

Social security

Directive 79/7/EEC requires equal treatment on the grounds of sex in social security matters regarding sickness, disability, old age, accidents at work and occupational diseases and unemployment protection. Article 4(1) of the said directive prohibits any direct or indirect discrimination with regard to access and calculation of such benefits.

Latvia initially implemented Directive 79/7/EEC only formally. On 2005 Law on Social Security[56] was amended by Article 21 providing for prohibition of discrimination on the basis of several traits including sex.[57] Law on Social Security is umbrella law for all social security system of Latvia including statutory social insurance schemes, state and municipal social services and allowances, medical services and education. At the same time detailed legal regulation regarding each sub-field of social security system is provided by various special legal acts – laws and regulations of the Cabinet of Ministers. It leads to the problem that frequently such special legal acts do not take into account principle of prohibition of discrimination on the basis of sex, while institution in charge of application of special laws regarding statutory social insurance schemes – State Social Insurance Agency – takes into account only special laws and ignores general principle provided by umbrella law. Even more by such an approach State Social Insurance Agency ignores obligation arising under the EU law, i.e., obligation to apply provisions of directives directly[58] by setting aside contradictory national provisions by administrative institutions of a state.[59] The consequences are frequent discriminatory access and calculation of respective statutory social insurance allowances on the basis of sex. It especially concerns calculation of unemployment allowance after child-care leave. The problem lies in the fact that during child-care leave a parent is ensured against risks of sickness, disability, old age, accidents at work and occupational diseases and unemployment in minimal amount, i.e., as if income of a parent was LVL 50 (EUR 71) which is below statutory minimum salary – LVL 200 (EUR 285).[60] Consequently amount of allowance of a parent, if period taken into account for the purpose of calculation of such allowance coincides with the period spent on child-care leave, is much lower than it could have been if a parent would have been in active employment. Since majority of parents taking parental leave are women it constitutes indirect discrimination on the basis of sex within the meaning of Directive 79/7/EEC. Even though the state adopted several amendments to special law to coupe such discrimination,[61] nevertheless State Social Insurance Agency apply

[56] OG No. 144, 21 September 1995.

[57] OG No. 205, 22 December 2005.

[58] Article 4(1) of Directive 79/7/EEC is recognized as having direct effect. See case C- Case 71/85, State of the Netherlands v Federatie Nederlands Vakbeweging, European Court reports 1986 Page 0385.

[59] See, for example: case C-188/89 A.Foster and Others v British Gas plc. [1990] ECR I-3313; case C-419/92 Scholz v Opera Univeritaria di Calgari [1994] ECR I-505.

[60] Law on Statutory Social Insurance, Official Gazette No. 274/276, 21 October 1997.

[61] See, for example: Law on Insurance for a Case of Unemployment, OG No. 416/419, 15 December 1999, respective amendments, Official Gazette No. 190, 27 November 2007.

respective provisions restrictively. Namely, particular institution apply respective provision grammatically which leads to exclusion of all non-standard situations. It takes quite a long time for a victim of discrimination to contest administrative acts taken by State Social Insurance Agency before administrative court.[62]

It follows that Directive 79/7/EEC is not implemented completely especially with regard to right to sickness, disability, old-age, accidents at work and occupational diseases and unemployment protection under statutory social insurance schemes especially in connection with child-care leave leading to indirect discrimination against women. State Social Insurance Agency fails fulfilling its obligations under the EU law by not setting aside contradictory national legal norms and by not applying directly effective provisions of Directive 79/7/EEC.

Conclusion

1. It was politically decided to implement respective EU gender equality and non-discrimination law in special laws rather than to have one special law devoted to such implementation. It has led to the several considerable problems. First, there are frequently material and person scope gaps between Latvian special laws and the EU gender equality and non-discrimination laws leading either to incomplete EU law implementation or necessity to adopt new special laws in narrow fields devoted exclusively to non-discrimination. Second, lack of general or umbrella non-discrimination law leads to non-observance of horizontal and mainstreaming EU law obligations in the field by the state powers, especially, the legislator leading to incomplete implementation of the EU law, adoption of discriminatory national legal norms and breach of the EU obligations. It follows that in order to comply with obligations arising from the EU gender equality and non-discrimination law Latvia is in need to adopt separate law on gender equality and non-discrimination to provide more detailed mainstreaming obligation to the state power and to cover material and personal scope gaps between Latvian special laws and the EU law.
2. Another fundamental problem is use of terms in Latvian implementing acts. Latvian legislator has chosen to define prohibition of discrimination as 'prohibition of differential treatment'. Use of term 'prohibition of differential treatment' instead of 'non-discrimination' is incorrect not only from the theoretical perspective, but it has also led to improper application of principles of equality and non-discrimination by national court.
3. Implementation of the EU gender equality and non-discrimination law in the field of employment has quite many shortcomings regarding both – grammatical implementation and practical application. Principle of prohibition of discrimination is not implemented with regard to judges. There is no direct

[62] See, for example: decision of the Supreme Court of Latvia in cases No. SKA-480/2010. Available: http://www.tiesas.lv/files/AL/2010/10_2010/15_10_2010/AL_1510_AT_SKA-0480-2010.pdf [viewed 11 May 2012].

reference to the prohibition of discrimination on the grounds of ethnic origin. Article 75 of Labour Law on calculation of average pay for various purposes may lead to the breach of equal pay irrespective of a sex of a worker especially in connection with absence on account of maternity and child-care leave. Principle of reversed burden of proof is implemented incorrectly. Implementing measures implies possibility of justification of direct discrimination and excludes objective justification on the basis of unreasonable accommodation for disabled workers. Procedural requirements on time limits for bringing a claim on discrimination before national courts do not correspond to the EU law principle of equivalence of remedies under national law.

4. Latvian insurance companies in practice fail to comply with Article 5(3) of Directive 2004/113/EC and implementing measures provided by Law on Insurance Companies and Their Supervision by not including in insurance plans risks related to pregnancy and maternity.
5. Directive 79/7/EEC is not implemented completely especially with regard to right to sickness, disability, old-age, accidents at work and occupational diseases and unemployment protection under statutory social insurance schemes especially in connection with child-care leave leading to indirect discrimination against women. State Social Insurance Agency fails fulfilling its obligations under the EU law by not setting aside contradictory national legal norms and by not applying directly effective provisions of Directive 79/7/EEC.

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THE CONCEPT, ESSENCE AND REALITY OF QUALITY, EFFICIENCY AND EFFECTIVENESS[1]

Keywords: quality, efficiency, effectiveness, legislation, separation of powers, good governance, consumer protection.

The goal of this research is, while using innovative approach, to detect a cause of ineffective and poor quality of laws and other governmental "products" and try to find a solution. Author analyzes state's current declarative attitude towards issues of quality and effectiveness of governmental products, inability to reach defined goals, reveals consumer rights violations, critically evaluates attribution of the principles of good governance to all three branches of power. Qualitative research methods, traditional for jurisprudence as axiological science, with a touch of quantitative calculations, are mainly used. Solutions are spread between areas of quality management, jurisprudence and public administration.

Even though this is not an in-depth study, it will challenge a reader to contemplate and address the issue's deeper and broader analysis.

Defective legislation – from consequences to cause

Although, the term "legal acts" implies not only laws but also acts of the application of law – judicial decisions and administrative acts, the author within the framework of the topic and in order to narrow down the scope, will directly address the legislation and its development.

Latvian legal scholars have heard a lot regarding the poor quality of laws, which contain the legal loopholes/gaps[2] or have built-in bypasses (options to "bypass" the law), rules, that do not work or laws in force for many years, which suddenly appear to be a new discovery to the industry officials[3], laws that are non-functional (applicable) because of being conflicting and/or duplicate laws.

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[2] Meļķisis E. Tiesību normu iztulkošana [Interpretation of legal norms]. Rīga, 1999. 13. lpp.

[3] For instance, Art. 185., 203.1.3., 204. of Civil Law of Latvia, Art. 6. of law On Trade Unions on the right of legislative initiative.

A similar situation is also observed at the international level. It is clear that even reputable subjects of international law at the slightest chance openly and impudently use double standard approach / policy, i.e., openly acting in bad faith. As an example, United Nations and its family organizations – the largest proponent of human rights, way too often are not and probably do not want to be responsible for human rights violations.[4]

Looking just at carried out massacres of civilians[5] and summary executions in Iraq – coalition of civilized countries is not responsible and have no desire for justice, and even the "wonder maker", the European Court of Human Rights, in this respect, have been unusually quiet[6]; and the Latvian state, inviting individuals to be honest and compliant[7], so far has shown no such discipline and fairness in meeting its obligations to the international community as well as to its citizens. Practice shows that the implementation of Europe's secondary legislation in Latvia does not succeed. For example, Audiovisual Media Services Directive is not only one that Latvia has not introduced on a timely basis[8]; the Chairman of National Radio and Television Council pointed out that "The Saeima, itself, can't handle timely preparation of laws." 2009 data shows that there are 15 unenforced directives[9].

Also, the same is seen in government's vertical relationship in regard to quality (e.g., profession classifications, a variety of minimum requirements) and efficiency (e.g.,

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4 The IMF, the World Bank, and Respect of Human Rights. 19.05.2005. Available: http://www.world-governance.org/spip.php?article43 [viewed 28.05.2012.]; U.N. 'peacekeepers' rape women, children. 24.12.2004. Available: http://www.wnd.com/2004/12/28177/ [viewed 28 May 2012]. UN-backed troops 'murdering and raping villagers' in Congo. Available: http://www.guardian.co.uk/world/2010/oct/15/un-backed-troops-accused-rape-congo [viewed 28 May 2012].

5 Collateral murder. Available: http://collateralmurder.com [viewed 28 May 2012].

6 Case of Saddam Hussein 2004 before European Court of Human Rights (application # 23276/04) versus Albania, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom. Saddam Hussein had argued that he had been unlawfully arrested, would receive an unfair trial, would be executed afterwards, and would be subjected to inhuman and degrading treatment. European Court of Human Rights (ECtHR) ruled application inadmissible. Available: http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-pr-en [viewed 28 May 2012]. Risks mentioned in application was backed by following events, which ended on 30.12.2006 with applicants execution using recently reintroduced death penalty measure hanging. Iraqi Special Tribunal was created, operated and financed by Coalition Provisional Authority.

7 Moto of the Latvian State Revenue Service: We are your partners in fair fulfillment of commitments against state. Available: http://www.vid.gov.lv [viewed 28 May 2012].

8 Picture is very sad with the implementation of directives on gender issues because none of the ministries want to recognize these in the scope of its competences and can't agree which laws and regulations to "open" and where to incorporate unwanted provisions.

9 TV3. Nekā personīga [Nothing personal]. 11.04.2010. Available: http://www.tv3.lv/content/view/8538/282/ [viewed 28 May 2012]. LETA. Latvija nav pārņēmusi 18 ES direktīvas [Latvia has not implemented 18 EU directives] 21.07.2006. Available: http://www.apollo.lv/portal/news/articles/78711/0 [viewed 28 May 2012]. Such an attitude is systematically applied since Latvias' accession to EU. For instance, in year 2006 there were 49 enforcement actions started against Latvia for violations of its obligations.

fixed property tax) that usually are requested from individuals, without applying respective principles to themselves.

For example, the question of whether the law "renovation" (repair, modification) 15 times a year (Latvian administrative violations code, 2003) indicates a legislature's diligence, quality, efficiency, coordination, predictability and promotes legal certainty? What about the proposed product warranty period?[10]

Principle of legal certainty requires legislature (government), by changing regulatory framework to observe a reasonable balance between personal expectations and the interests of society, who are beneficiaries of the changes[11]. However, there is no information on issues like clear, in-between balance finding methodology.

Since the restoration of Latvian statehood, mainly, the easiest way is chosen and debate only refers to the consequences, namely, to the one or the other act or law defects / deficiencies, and who and how more efficiently will impose patches – legislature, executive or judiciary. Country's legislatures have become a law "repair shop"; now, is the time for serious discussion, in society and the legal profession community on the issues of concern: the causes and possible solutions.

Three equal branches of power – a basis for the historically true democracy

Before starting the presentation of the issue and to avoid further confusion, it is important to clarify terminology. According to Charles Louis de Montesquieu separation of powers theory, government (all public authorities and institutions) are divided into three equal branches: the legislature, the executive and the judiciary branch. There are opponents of the doctrine, which complemented it with the uncontrolled fourth branch – political power, to break the balance between the first three. The system was further shaped, creating a "checks and balances" model.

As Montesquieu's proposed power-sharing model in the country have been drastically modified and the system of "checks and balances" just does not work, therefore not maintaining a balance between the branches and bringing it closer to the "symbiosis of powers" or "merge of powers" model without clear functional, institutional and

[10] Even a simple alarm clock has at least a two-year warranty. Should it be understood that the legislature evaluates his government product at 30 times less important than the single-user item? And what about a free warranty repair? The legislature should be remembering that the uncertainty, in all respects, to the public is an expensive delight, unaffordable at current state of economy. True cost of strategic chaos and indecision is extremally high and is not compatible with effectiveness and productivity.

[11] Latvian Constitutional Court decision paragraph 4 (case # 2010-25-01, December 6, 2010), states: "From concept of a democratic republic given in the Article 1 of the Latvian Constitution stems governments' duty to observe the rule of law principles, including the principle of legitimate expectations. However, the principle of legitimate expectations does not preclude the possibility of amending the existing legal regulation. When amending the legislation, the State must take into account the rights to whose preservation and implementation person can rely upon. Principle of legitimate expectations requires that when changing legislation, would observe a reasonable balance between personal expectations and the interests, whose safeguarding was cause for changes."

personal separation, its effectiveness is sharply diminished. Branches of Latvian government do not perform effective control of each other's key performance indicators – the quality and efficiency, institutional separation of powers is kind of replaced by functional; moreover, parliament becomes a superpower and uses so called "creative function" to interfere with two others, for instance, appointing / removing judges and high officials of executive branch. On the other hand, judicial and executive branches are performing legislative functions. Conflict of interests of three powers exist as institutional branches execute tasks, including control of themselves. Delta between the quality and effectiveness management is drastic in the private sector and government. The need for creation of new legal system was predicted by former Minister of Justice Egils Levils.[12] This year, the president Andris Bērziņš proposed discussion on the changes to the government's model also suggesting "repairs" to the Constitution[13], which indicates a possible paradigm shift. Changes could be based on ideas proposed by Lon Fuller in "The Morality of Law", Chapter 2 "Eight ways to Fail to Make Law" and there probably would be some improvements, however to authors view, this approach for attaining quality and effectiveness is neither complete, nor exhaustive, systematic and contemporary.

Citizens as states' customers/consumers

Article 17 of the Consumer Protection Law states: "the manufacturer, its authorized representative, reseller's or service provider's responsibility is to provide the consumer with true and complete information about the offered product or service quality, safety, price, warranty and warranty options, terms of use [..]" The aim of this law is to ensure consumer's opportunity to exercise and protect their legitimate rights [..] and explain terms as 'product', 'service', 'user', 'manufacturer', 'vendor', 'service provider', that equally well may be extended to the public (government) products. Since the state may be considered as a monopoly in delivery of public products, therefore any person in relation to the government's activities should be seen as a consumer, as it have been done in human rights field, despite the misleading term – "human rights" recognizing these rights to any private legal entity as well.

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[12] Author shall admit that can accede to the Egils Levits wise statement, that "the Latvian legal system in its current stage of development shall be assessed, clearly separating progressive legal thought from the reactionary legal thought. In such a manner evaluation shall be done of legislation, administrative practice and judiciary case law. In this light we better will be able to detect and remove the problems hindering the Latvian legal system rather than improving them somehow, but exactly according to principles of democracy and the rule of law [..] When creating a new legal system, we must be aware that each country, regardless of whether it is large or tiny, the similar amount of legislation is necessary". Levits E. Dažas tēzes par Latvijas tiesību sistēmas problēmām [Some theses on legal system problems of Latvia.]. Diena [The Day]. 20.02.1998. Available: http://www.diena.lv/arhivs/dazas-tezes-par-latvijas-tiesibu-sistemas-problemam-10027341 [viewed 28 May 2012].

[13] Prezidenta ierosinātā diskusija par valsts modeļa maiņu – tās nepieciešamība un nozīme [Presidents' initiated discussion on change of state model – its necessity and importance]. *Latvijas Vēstnesis* [Latvian Herald]. 06.03.2012. Available: http://www.lvportals.lv/index.php?menu=doc&sub=&id=244893 [viewed 28 May 2012].

In the context of Consumer Protection Law[14], it is irrelevant whether the state is considered to be engaged in economic (in its various forms: from a caring owner to mismanagement) or professional activity. In both cases, without any legal "chemistry" it qualifies for the "manufacturer", "vendor" and "service provider" definition. The Goods and Services Safety Law may also be attributed to those products, where the main concept of "security" in the context of quality of life is very important, especially when producing norms restricting human rights, like bill "On State of Emergency and Exceptional Conditions" and Investigatory Operations Law. Therefore, present legislation allows every consumer of governmental products – including laws, administrative acts and judgments – claim all the benefits and rights enshrined in consumer protection laws.

Product as a result of public activities

The product is a unifying name for goods, services and good-service combination. It is assumed that the goods are tangible and have a clear definition of the production cycle, which progresses from raw materials to finished products, which reaches the consumer. In turn, services are intangible and it's harder to clearly define the development and "production process". One can imagine such a trade-service segment where one end is "pure" good, but another – a "clean" service. A small number of products are located on the either end, but the majority – somewhere in the middle. Legislative act also have the production cycle: identified goal/problem → initiation of the law → drafting of the law → adoption of the draft law → publication of the law.

With the accession to the EU free "movement" of goods and services is given a very important role. Based on both the EU law, as well as judicial cooperation, legal assistance and other international treaties, countries move "their products" to other countries (in fact, countries are constantly exchanging above mentioned products); some of the examples – recognition of court decisions, arbitral awards, administrative authorities acts, notarial acts, extraterritorial application of the law, diplomatic immunity. It is remarkable, that there have been cases when the Latvian state complained on some of the equal partners (foreign governments) for delivering product, non-compliant with some standards (such as the right to a fair trial[15]). This brave action of the Latvian state shows the healthy desire for high quality governmental products.

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[14] According to "service" definition given in Article 1 of Consumer Protection Law, service is performance of a consumer's order or such fulfillment of a contract entered into with a consumer within the scope of the economic or professional activity. The definition satisfies both: supporters of social contract theory as well as those who watch elections as electorate's democratic order to representatives. Therefore for a state, including legislature, when offering products, provisions of Consumer Protection Law are binding although currently Law on Compensation of Losses Caused by Public Administration Institutions (Art.13) unconstitutionally limits its civil liability.

[15] Latvia submitted (as later became clear – unfounded) complaint against Italy (for its national court's decision) to European Commission which did not found violation of EU law. Volka I. Rūpēs par bērnu Latvija vēršas pret Itāliju [In care for children Latvia goes against Italy]. Diena [The Day]. 09.12.2008. Available: http://www.diena.lv/arhivs/rupes-par-bernu-latvija-versas-pret-italiju-13672926 [viewed 28 May 2012]; Kucina I. Bērnu pārrobežu nolaupīšanas civiltiesiskie aspekti [Civil aspects of international child abduction]. Jurista vārds [Lawyers' word] # 29/2009. Available: http://juristavards.lv/index.php?menu=auth&id=194918 [viewed 28 May 2012].

By author's opinion, it's time to treat the final product/outcome of the legislature, executive and judiciary, like any other goods or services produced, since the outcome generated and distributed by government is exceptionally on pre-paid basis condition, derived from taxes/levies. For transparency reasons all government products should be classified and included in the common product catalog, where each product is recorded and has the identifier, like a name, description, manufacturer, distributor/ vendor, cost, price and e.t.c. Describing branches of state power by inclusive term "government" and leaving the separation of powers theory to be supported by the principle of equality, it follows that products manufactured by all three branches of government – government services and goods should follow similar requirements, including requirement on the products (end results) quality and of the "production's" procedure effectiveness, thereby ensuring that good governance principle applies to all government in its broadest sense and includes all 8 major characteristics: 1) effectiveness and efficiency, 2) the rule of law, 3) transparency, 4) participation, 5) consensus oriented, 6) equity and inclusiveness, 7) responsiveness, and 8) accountability.[16]

Theoretical indications of quality and effectiveness in the governmental administration

Society increasingly more accepts an idea that the state, by performing administrative tasks entrusted, is producing goods and services, however with a major contrast to private goods and service providers – public administration's goods and services provision is a duty and shall meet a certain quality criteria.

It started in 1995, when Public Administration Reform Programme approved by the Cabinet of Ministers envisaged a system "which would efficiently and equitably carry out the functions entrusted to it by society". The concept "On Introduction of the Quality Management Systems in Public Administration" was approved by Cabinet of Ministers in 2000 and focused on ISO 9000 standards.

In compliance with quality and effectiveness principle the Ministry of Justice in 2001 created Latvian e-government Concept[17], the overall objectives of which: "Better governance – improving the quality of public services; cheaper governance – administration efficiency improvement and cost reduction."

Since then, a wide range of different documents was created, regarding to quality and efficiency of government administration. Thus, Cabinet of Ministers decree # 305/2008 approving "Guidelines for Development of the Public Administration Policy for 2008-2013. Better Governance: Administration Quality and Efficiency",

[16] United Nations Economic and Social Commission for Asia and the Pacific. What is good governance? Available: http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp [viewed 28 May 2012]. UNESCAP/UNDP/ADB. Access to Basic Services for the Poor: The Importance of Good Governance (2007). Available: http://www.mdgasiapacific.org/node/113 para. 128, 130 [viewed 28 May 2012].

[17] Cabinet of Ministers decree # 496/2002 "On Latvian e-government Concept". Available: http://www.likumi.lv/doc.php?id=66389 [viewed 28 May 2012].

points out the need for providing high quality public services, quality operation of institutional systems, as well as the quality management system development.[18] Above mentioned guidelines include description of the situation trends in public administration in order to ensure effective institutional work and high quality services.[19] In this extensive 68-page document, quality is referenced 109 times and the efficiency – 60 times.

Since 2007, the State Chancellery, jointly with Latvian Employers' Confederation annually organizes effective management forums and conferences, granting at the end Effective Management Award. In March of 2012 the Bar Council organized a Conference on "Making judicial process more efficient", the theme focuse on in-

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[18] Cabinet of Ministers decree # 305/2008 "On Guidelines for Development of the Public Administration Policy for 2008-2013". Available: http://www.likumi.lv/doc.php?id=176343&from=off [viewed 28 May 2012].

[19] Guidelines for Development of the Public Administration Policy for 2008-2013. Better Governance: Administration Quality and efficiency. Available: http://www.mk.gov.lv/lv/valsts-parvaldes-politika/ [viewed 28 May 2012]: "III Situation description and trends of development [..] implementation of the Lisbon Strategy also applies to ensur efficiency of the Latvian public administration by a commitment to reduce the administrative burdens both for businesses and for the public. [..] public administration still have to become more competitive in order to ensure efficient use of human resources, purposeful and efficient activities of institutions and provide up-to-date, well organised and convenient quality services to the public by reducing the administrative burdens and simplifying the regulatory system." "1.1. [..] There are no precise links among policy objectives, respective tasks and expected outputs and outcomes; [..] Frequently, various results indicated, do not show efficiency of the use of resources and performance efficiency. It is necessary to ensure linkage of the planned financing from the state budget and respective policy area and operational strategy of the public administration institution, thus ensuring quality services and achievement of the policy objectives. [..] There is no uniform and efficient reporting system, currently the so-called 'parallel' procedures are still used however those do not foster efficiency of public administration and useful application of resources."'1.3. [..] During the policy planning process it is necessary to improve cooperation among the top direct public administration institutions and the legislator in order to foster development of the policy planning system. Representatives of the legislative power are insufficiently involved in the processes of developing draft policy planning documents and legal acts of direct public administration institutions and in policy impact assessment. The legislator should be provided more information about impact assessment performed during the policy planning document, and it is necessary to respectively assess the impact of possible amendments to the draft law. [..] It is also necessary to improve cooperation of direct public administration institutions when drafting laws or law amendments as currently amendments to same laws are often initiated by several institutions without mutual coordination. Direct public administration institutions frequently submit to the committees of the Saeima proposals which were previously discussed at the level of public administration – by the Cabinet of Ministers and rejected, as well as new and not yet discussed draft laws, which are often incorrect from the point of view of usefulness and efficiency of public administration, by avoiding the usual endorsement with stakeholders."'2.2. [..] Insufficient legal and methodological regulation of the area of public administration services which is a pre-condition for successful provision of public services and for reorganising public authorities into client-oriented organisations. There are no guidelines for development of public service standards/ regulations [..] Currently, there is no mechanism for supervision of service quality and no information is available about service quality improvement options (methodology for quality measurements, client surveys, training courses, etc.)."2.4. [..] Introduction of quality management systems is also impeded by limited knowledge of public administration employees (at all levels) about the basic principles of quality management systems." "2.5. [..] administrative burdens constitute a part of administrative costs which are caused both to the private sector and the public sector by the effective legal regulation."

creasing the efficiency of the judiciary. Also currently ongoing Swiss-funded project "Modernization of Latvian Courts" concerns judicial process "effectivization".

This approach, also confirmed in the highest political document – "Latvian National Development Plan 2007-2013"[20] recognizes the important role of quality of life, along with the fact that the state monopoly services form integral part of country's residents daily life.

In this extensive 56-page political document, quality is referenced 29 times and the efficiency – 43 times, which indicates a high importance and significant designation of these issues. However, the transition from speeches to the real problem solving solutions, except for some "decorative" activities, have not occurred, yet. Guidelines on Performance and Performance Indicators System 2008-2013 by Cabinet of Ministers are not effective means to measure effectiveness and are just used to plan state budget. President, Constitutional court, Ombudsman, State Control and other existing institutions are not effective controllers and do not prevent creation of unfit governmental products. Also, the understanding of creating a good product initially, and creating defective product which needs to be improved at the later stages using additional human/time/financial resources in order to improve/repair it, seems to be an issue.

One should not underestimate any government's branch role and contribution to public administration, however it would be only reasonable that each branch of power, including the legislature, would be entrusted obligation to efficiently and effectively create high-quality governmental products. In order to do so, the very product creation process (for instance, drafting of laws / judgments / administrative acts) must be effective and efficient. Since judgments and administrative acts are based on legislation, the last one is of particular importance and establishes foundation for proper work of judicial and administrative systems.

Legislature's objective – problem solving for countries' creative growth and wellbeing of the people

Citizenry is the sovereign and it vests the government with powers. Government serves the best interests of sovereign and assumes an obligation to achieve its objectives. Although, the goal of the legislature (as part of government), in the opinion of author is latent and is not widely popularized[21], it is essential to understand the true goal of the legislature as a problem-solving. The mandate of the legislature is not only, as the

[20] Latvian National Spatial Plan 2007-2013. Available: http://polsis.mk.gov.lv/view.do?id=1995 [viewed 28 May 2012].

[21] Luksa M. Pavasara sesija beigusies. Saeimā paveiktais un skatījums nākotnē [Spring Session is Over. Accomplishments and future vision]. LV portāls. 28.06.2011. Available: http://www.portalslv.lv/?menu=doc&id=232197 [viewed 28 May 2012]. "The Saeima on 21 June ended the spring session, during which since April 26, 56 laws was adopted, including 7 new laws and numerous amendments to 49 laws. During this period, for a review to the committees were submitted 85 bills, including 53 by the Cabinet of Ministers, 16 – parliamentary commissions, but 13 – MPs. Three legislative initiatives in parliament submitted by President Valdis Zatlers. During the spring session Saeima gathered in 11 sessions, one of which was a solemn meeting, dedicated to the 4 May – Restoration of independence of the Republic of Latvia day, and two extraordinary meetings. But since the beginning of the work of 10th Saeima, on November 2, 2010 in aggregate it adopted

name may suggest, to formulate and pass legislative acts (one of its functions), but it is to formulate and promote national ideals / landmark checkpoints / objectives / tasks and find solutions to the existing problems in the country i.e., define the "public good". The legislation created by legislature is just a means to achieve this goal. Simply put – the legislation (as the procedure) is a production tool – legislative act, but a legislative act – the tool to achieve problem-solving and obstacle-removing objectives. Based on this view, newly created and revised law, as such, is not necessarily a positive sign. Abundance of tools does not guarantee results. A real indicator of productivity is a number of problems solved, and how much closer the country is brought to the goal of increasing wellbeing of the people and achieving growth in the international arena. Such a measuring of legislative productivity currently still is at embryonic stage.

The problem stems from the lack of clearly defined primary ideals of where the nation as a whole needs to be heading and what more specific goals should be achieved. The next level is the dynamic model of implementation of ideals/landmarks/targets. Until public administration develops such a forward thinking approaches, any claims are just claims for action to correct yesterday's most obvious mistakes, at best, and simulations of empty activity, at the worst.

Based on 1) the governing principle of private law, that "Everything is allowed, what is not prohibited", 2) the principles of human rights, which allow the rights of a private person be limited only if the society of the country or people in general gain a proportionately larger benefit, 3) Article 7 of the Law "The Procedure by Which Laws and Other Acts Adopted by the Saeima, State President and the Cabinet are Promulgated, Published, Take Effect and Being Valid": that "existing laws [..] shall be binding on the whole territory of Latvia, and no one can have excuse for not knowing them, "ignorance of the law excuses no one". Ignorance, willful blindness and just simple unawareness [..] are not the basis for exculpation and do not release from liability.", 4) Article 90 of the Constitution, stating that "Everyone has the right to know about his or her rights", 5) Cabinet of Ministers decree # 305/2008 requiring simplification of the system of legislation, 6), UN agency opinion of the legal framework ideal concisely defined as: "Fewer, better (predictable, consistent, stable, clear) and simpler"[22], it shall be concluded that the optimum would be the number of norms that are necessary (i.e. not less than) and sufficient (i.e. not more than) enough at the same time to solve particular issues. Any legal norm (its creation) imposes "costs" on both the "law maker" and "law taker" because of administrative burdens mentioned in Guidelines for Development of the Public Administration Policy for 2008-2013.

In the competence of the legislature is not only to implement/coordinate creation of national legal norms, but also to deal with selection of international norms and their enabling/empowerment (giving the force with the means of accession / ratification

225 laws, met at 45 parliamentary sessions (according to parliamentary press service information)." This clearly shows what is the current effectiveness and productivity criteria and what are the goals.

[22] United Nations Economic Commission for Europe. A Guide to Promoting Good Governance in Public Private Partnerships. Chapter 4: IMPROVING THE PPP LEGAL FRAMEWORK: 'Fewer, Better and Simpler', pp. 28.-30. Available: http://www.unescap.org/ttdw/common/TPT/PPP/text/guide_good_governance.pdf [viewed 28 May 2012].

procedures) for application at the national level. Consequently, the issue of quality and effectiveness of legislature also applies to skillful implementation of most qualitative and most effective international norms in Latvia, as well as monitoring development of the case-law (and commentaries on), and its application by relevant international bodies. With regard to supranational norms in force in a country, their creation is delegated to the European Union, while the implementation of directives, transposing their provisions to domestic law remains at national level. Domestically delegated legislative functions in the country is performed by the executive branch (Cabinet of Ministers) and the municipalities, therefore, those entities are also involved in issues of the quality of legislation. We should not forget that the legislative system includes not only the makers of final product, but also persons involved in this process, starting from a legislative initiative. This initiation phase is important in the existing legal tradition, where intent of the creator of the norm is one of the most essential interpretation criteria of legal norm, in particular, when using historical method.[23] Knowledge of legislation initiator's original idea or legislative intent, and comparing it with the final product in the form of legal norms, in addition to issue of interpretation helps to evaluate one element of quality measurement, as the exact wording of thought and clarity of expression is undoubtedly a quality indicator.

The concept and understanding of quality, efficiency and effectiveness

Terms of quality management, efficiency and effectiveness are not created by Latvian language specialists as general terms (like public order, public health etc.) that can be easily fulfilled with any individual meaning and interpreted vastly. Those are taken from physics, economics and quality management theory, where they have clearly and precisely defined content, criteria and qualities. One of such qualities is measurability, which can be expressed as indexes, factors, percent's. For instance, EU not only watches efficiency factor of the member states, but even measures level of effectiveness of each of them.[24] The European Union, itself, since 2001 has focused on improving regulation in this area and the latest (2010) document – the European Commission communication "Smart Regulation in the European Union" – shows a slight change of direction from "better regulation" to "smart regulation", although its' methodology is still quite far from the ideal.[25] EU together with OECD also established SIGMA project in order it acts as advisor to countries on better regulation and Latvia has taken part in its activities.

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[23] Meļķisis E. Tiesību normu iztulkošana [Interpretation of legal norms]. Rīga, 1999. 36.-37. lpp.

[24] LR Ekonomikas ministrija. Informatīvais ziņojums par strukturālajām pārmaiņām augstākajā izglītībā un zinātnē Latvijas starptautiskās konkurētspējas paaugstināšanai [Ministry of Economy. Informative report on structural reform in higher education and science to increase the Latvias' international competitiveness] (2009), 14. lpp. Available: www.em.gov.lv/images/modules/items/EMzino_18122009_I.doc [viewed 28 May 2012].

[25] Better Regulation in general. Available: http://ec.europa.eu/governance/better_regulation/key_docs_en.htm [viewed 28 May 2012].

Question arises whether in all, the above mentioned Latvian government issued documents, the words "quality" and "efficiency" in each and every case are filled with meaning or those words are used just as habit-words which do not carry any substantial meaning and just make it look and sound closer to customary and desirable form of expression.

Such a compulsory quality measurement prerequisite – a definition of the specification (standard) – can't be found in any Latvian governmental document. The same happens with the efficiency and effectiveness units of measurement and measuring instruments, and goals of effectiveness.

Observing previous efforts of Latvia in the direction of improving quality and efficiency, emerges an idea, that the cause of lack of progress is a usage of scientific terms without understanding, and application without comprehension of theoretical base. Putting quality and effectiveness objectives into scientific theory and principles of democracy and good governance would be the first step in the direction of success, including creation of certain quality and effective legislation. Building house without foundation haven't justified itself, therefore without serious scientific arguments such an experimental approach in the legislation area can't be seen as appropriate.

For the reader's contemplation following definitions of terms are offered:

Efficiency – the degree to which a system or its component achieves its maximum possible results with a certain consumption of resources (constant = the existing resources, variable = possible outcome).[26]

Effectiveness – the degree to which system or component reaches a certain result with the minimum resource consumption (constant = the result to be reached, variable = consumed resources).[27]

Quality – the degree to which the product or its creation process meets pre-defined standards, without taking into account the consumption of resources. (constant =

[26] This concept can be found in "the street" distributed principle: "the pay defines the work done", as well as economic, social and cultural human rights implementation, which state must implement to the maximum of its available resources (Article 2 of the 1966 UN Covenant on Economic, Social and Cultural Rights. Available: http://www.humanrights.lv/doc/vispaar/escpakc.htm [viewed 28 May 2012]).

[27] Effectiveness is favored in the area of state budged fulfillment, for instance Cabinet of Ministers # 1032/2005 "Regulation on the classification of budget revenues" Annex code 10.1.5.0. "Fines imposed for road traffic violations" in connection with "Monthly reports on fulfillment of consolidated budget" (Table 3) there are planned precise result of Ls 9'749'134 (Valsts kase. Mēneša pārskats par konsolidētā kopbudžeta izpildi. Oficiālais mēneša pārskats - 2012. gada janvāris – maijs, 3.tab. [State Treasury. Monthly reports on fulfillment of consolidated budget. Official Monthly Report - January – May, 2012. Table 3]. Available: http://www.kase.gov.lv/?object_id=1679 [viewed 28 May 2012], un Oficiālais mēneša pārskats - 2011. gada janvāris – decembris, 3.tab. [and the Official Monthly Report - January – December, 2011. Table 3] Available: http://www.kase.gov.lv/?object_id=7516 [viewed 28 May 2012]. Planned revenue in 2011 was LVL 5'130'772.), amounting for more than 190% over the previous year! Amazing effectiveness that can be taken as a model for the global expansion of Latvia into world's economic and political market and the "Baltic Tiger" brand (Jakovels I. Baltijas tīģeris [Baltic tiger]. *Neatkarīgās Tukuma Ziņas* [Independent Tukums' News]. 24.01.2011. Available: http://www.ntz.lv/blog/IvarsJakovels/article.html?post_id=20093 [viewed 28 May 2012]) further cultivation.

the standard, variable = the percentage of a product/process produced according to standard; standard compliant product/process at any price, or the result at any cost).

There are well established theoretical and methodological foundations of quality, efficiency and effectiveness. For quality and efficiency management variety of systems are created, such as the popular ISO 9000 standards series. However, currently, most successful and reaching both of these goals simultaneously is Lean Six Sigma, which, with the increasing need for innovation and creativity, can be supplemented with TRIZ problem solving approach.[28]

Articles' essence in the nutshell:

1) Democratic government consists of no more and no less than 3 mutually controlling powers and is based on concept of good governance. Good governance refers to the government in its broad sense and, among others, include effectiveness, efficiency and accountability requirements. Quality and effectiveness measurement is mandatory for the sake of sovereign.
2) Government offers and sells to the consumer the products: goods and services. Legislative act is one of the products, which in the best case complies with the requirements: fewer, better, simpler. Every consumer is entitled to require guarantees, quality assurance and compliance with certain standards for any product. Non-standard product and/or non-compliance in its production process invoke manufacturers/distributors' liability.
3) Latvian government has defined the quality, efficiency and effectiveness as its top priority. Government's responsibility is, based on scientific knowledge, to develop a methodology, to give concise definition of objectives, efficiency, effectiveness, quality and standards, and to measure the efficiency, effectiveness and quality, create for consumers user-friendly unified government product classification and catalog containing, among other, costs and prices. It is duty of every citizen to assist state in promoting and updating those priorities.

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[28] Theory of inventive problem solving. Available: http://www.talanti.lv/ [viewed 28 May 2012]; Case Study: Integrating TRIZ Into Six Sigma. Available: http://www.realinnovation.com/content/c070319a.asp [viewed 28 May 2012]; IBM Institute for Bussiness Value. Driving operational innovation using Lean Six Sigma. Available: http://www-935.ibm.com/services/at/bcs/pdf/br-stragchan-driving-inno.pdf [viewed 28 May 2012].

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Valsts kase. Mēneša pārskats par konsolidētā kopbudžeta izpildi. Oficiālais mēneša pārskats – 2011. gada janvāris – decembris, 3. tab. [State Treasury. Monthly reports on fulfillment of consolidated budget. Official Monthly Report – January – December, 2011. Table 3] Available: http://www.kase.gov.lv/?object_id=7516 [viewed 28 May 2012].

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SCOPE OF STATE BOARDER CONCEPT AND OTHER KEY CONCEPTS OF DETERMINING STATE BORDER

Keywords: state border, delimitation, demarcation, re-demarcation, rectification, state boarder regime, inviolability of state boarder.

Introduction

The aim of this paper is to expand the scope of the state boarder regime concept and specify the key concept of the state boarder definition in bilateral agreements and to improve Latvian regulatory framework in the area of state border security and inviolability with the help of theoretical inquiry, analysis and application of comparative method analyzing international regulatory framework, that of Latvia and Latvian neighboring countries in the state border area and based on legal science findings in the scientific literature.

Scope of the State Boarder Concept

The competency and procedure of signing international agreements in Latvia is regulated by 1994 law on International Agreements of the Republic of Latvia, the aim of which is to define signing, fulfillment, denunciation of international agreements of the Republic of Latvia as well as other issues related to international agreements, foreseeing signing agreements on boarders of the Republic of Latvia[1] as a separate type of agreement. Such agreements have been signed with all neighboring countries of Latvia, except for territorial sea and exclusive economic area boarder agreement with Lithuania. However, no state boarder regime agreements have been signed yet with any of neighboring countries of Latvia, although separate state boarder regime issues have been settled in many of the bilateral treaties and agreements since the nineties. These would have to be revised and consolidated in one bilateral boarder regime agreement with each of the neighboring countries. General principles of international law relating to state boarder regime and establishment of boarders arise from the Charter of the United Nations[2], 1969 Vienna Convention on the Law of

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[1] Par Latvijas Republikas starptautiskajiem līgumiem: LR likums. *Latvijas Vēstnesis*, 1994, 26. janvāris, Nr. 11 (142) 7. panta 4. punkts.

[2] Apvienoto Nāciju Organizācijas Statūti. 1. un 2. pants. Available: http://www.tiesibsargs.lv/lat/tiesibu_akti/ano_dokumenti/ [viewed 27 June 2012].

Treaties[3], 1970 United Nations Declaration on Principles of International Law [4] and 1975 Helsinki Final Act chapter III "Inviolability of Frontiers", that stipulated that participating states regard all one another's frontiers as inviolable and therefore will refrain from all attempts to assault these frontiers[5].

Key concept of the State boarder is a set of conditions of state boarder regime that serves as a legal mechanism for state boarder security and inviolability. 2009 law on the State Boarder of the Republic of Latvia (hereinafter – Law) to insure inviolability of state borders on the land, in the sea and in the air space, to control state border crossing and to stop individuals illegally crossing the external border, as well as to move property and goods across external border outside the specified border crossing points, is established by state border regime, that basically establishes order in which persons, property (and goods) are moved across the state border, the procedures by which land vehicles, aircrafts, vessels and railway transport crosses the state border[6]. By following the above mentioned principles of international law and experience of other countries, for example, Estonia[7] and Belarus[8] in border regulatory framework, the author suggests that the state border regime should be supplemented with the following state border regime provisions, that should be included in national regulatory framework, the Law, for example, and bilateral agreements with neighboring countries on state border regime . These would have to be considered as key[9] legal acts in this area:

1) inviolability of state territory, where state border serves to mark off the state territory from other territories as a warning for other states or subjects of international law and citizens of other nations signaling the end of jurisdiction of one state and beginning of jurisdiction of another state;

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[3] Vīnes konvencija par starptautisko līgumu tiesībām. 1969. gada 23. maijs, *Latvijas Vēstnesis,* Nr. 52 (2817), 03.04.2003. [effective from 03.06.1993.]. Available: http://www.likumi.lv/doc.php?id=73443.

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[5] 1975. gada Helsinku Eiropas Drošības un sadarbības apspriedes Nobeiguma akta Deklarācija par principiem, pēc kādiem dalībvalstis vadīsies savstarpējās attiecībās. III daļa. Zinātniskais redaktors Jānis Griģeļonis. Dokumentu krājums. Mūsdienu Starptautiskās un tirdzniecības tiesības. Starptautiskais civilprocess, otrais, papildinātais izdevums, Rīga: Apgāds AGB, 2000, 109. lpp.

[6] Latvijas Republikas valsts robežas likums: LR likums. *Latvijas Vēstnesis*, 2009. 2. decembris, Nr. 189. 9. pants.

[7] Riigipiiri seadus Vastu võetud 30.06.1994. (State border law of Estonia). Available: https://www.riigiteataja.ee/akt/738283 [viewed 6 March 2012].

[8] Закон Республики Беларусь о Государственной границе Республики Беларусь 21 июля 2008 г. № 419-З (Border law of the Republic of Belarus of the 21st July 2008 No. 419-3), 7 с. Available: http://newsby.org/news/2008/07/21/text11760.htm. [viewed 3 March 2012].

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2) peaceful solution of border incidents[10], based on principles of international law, mutual respect, liability and parity;
3) international recognition of state border that manifests in international recognition of state border line, territorial division between two or more states or segregation of a state from territories with a different legal regime;
4) international determination of state border, which is closely related to international recognition of state border and is expressed in elaborated international legal procedure on two processes that are mutually directly unrelated, however, supplement each other on delimitation and demarcation;
5) maintenance of state border, this refers to the procedure in which carrying out international cooperation, according to the international agreements signed by the Republic of Latvia the preservation of the state land border is ensured as well as landmarks and other securing structures or elements are preserved in conformity with the signed agreements.

According to the Law the maintenance of the state border has not been included in the conditions of setting the state border regime, rather it has been vaguely defined in a separate article of the Law as a regime condition on the one hand, on the other hand there is as a gap in procedure of exercising the conditions of this regime. Besides, essential terminology used when talking about state border determination as delimitation, demarcation, re-demarcation, rectification is not defined in the terms of article 1 of the Law, however these are used when determining state administration institution competences in delimitation, demarcation of the state border and other related activities, periodically these terms are mixed up with other terms or words that are not approved in international law as "land survey", "fixation", "marking", "renewal". Determination of the state border of the Republic of Latvia has been regulated also in the national regulatory framework article 3 of the Law. These norms have quite un-systemized formulation of separate state border determination conditions on procedure and sequence, however, there is a lack of state border determination key principles[11], that Latvia as subject of international law should undertake. Definition of these principles should be based on universal principles of international law defined in UN and other international regulatory documents, as majority of states now are members of UN[12]. As to the authors opinion, when determining the state border the following principles should be followed, these have to be defined also in the national regulatory framework, the Law for example:

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[10] О Государственной границе Российской Федерации. Закон Российской Федерации N 4730-I (принят 01.04.1993.), 7 ст. Available: http://femida.info/11/fzoggrrf011.htm [viewed 17 February 2012].

[11] "Principle (Latin *Principium* basis, root) – a theory or and idea of a training or science, a leading idea of human conscience, the basic rule. Every law enforcement agency has a set of regulations forming its structure and standard operating procedures which apply also to Criminal process and Civil process thus are obligatory to be observed." Translated from: Dubure V., Fogels A., Fridrihsons I. u.c. Darba grupas vadītājs un redaktors Krastiņš I. Juridisko terminu vārdnīca. Rīga: NORDIK, 1998, 214. lpp.

[12] Fogels, A. Modernās starptautiskās tiesības. Rīga: Zvaigzne ABC, 2009, 37.-45. lpp.

- ensuring national safety and international safety of the Republic of Latvia;
- mutual respect to state sovereignty, territorial inseparability and border inviolability;
- multilateral and mutually beneficial cooperation between sovereign states;
- peaceful handling of state border arguments;
- equality of states and nonintervention into internal affairs of states.

Key Concepts of Determining the State Border

As to international practice determining of state border happens in several stages. First stage is state border delimitation (from Latin "delimitation" – establishing, erecting). Delimitation means international agreement on mutual borders of two or more states and marking off on the geographical map – annex to the border agreement.[13] Besides, the state border line marked on the map is being described in a detail in the annex also in a textual form. The concept of delimitation has been similarly defined by prof. J. Bojārs: "Delimitation of a border is marking off the border on a map according to provisions of international agreement, by describing in detail in the annex the location of the border and marking on site."[14] Prof. A. Fogels defines delimitation as state border determination in an international agreement and marking off on geographical map, by enclosing description of the borderline[15]. In scientific sources of other countries delimitation is considered to be the marking off state border line in big scale maps with precise reflection of relief, hydrography and populated areas. End delimitation document is an agreement on state border (border agreement), state border description and a map. A map with marked state border line is inalienable part of the agreement on state border delimitation.[16] As to the author's opinion with delimitation one should perceive a detailed description of state border in the border agreement and to utmost preciseness marked state border line in special topographic maps annexed to the border agreement. Agreement on state border delimitation should be ratified in both or several member states of the agreement.

Demarcation usually comes after delimitation (from French "demarcation" – segregation), marking off the state borders on site[17]. Prof. J. Bojārs defines demarcation as marking off the border on site, that has been done by joint commissions of border states by marking off the border with special landmarks. Border demarcation has been

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[13] Sastādītāji: Kalniņa I., Čerņevska I., u.c. Svešvārdu vārdnīca 25000 vārdu un terminu. Rīga: Apgāds Izdevniecība avots, 163. lpp.

[14] Bojārs J. Starptautiskās publiskās tiesības I. 3. pārstrādātais izdevums. Rīga: Zvaigzne ABC, 2004, 308. lpp.

[15] Fogels A. Modernās starptautiskās tiesības. Rīga: Zvaigzne ABC, 2009, 176. lpp.

[16] Залесский А. Р., Соболевский В. Г. Унифицированный словарь терминов, применяемых в пограничных войсках. Минск: Харвест, 2003, с. 36.

[17] Kalniņa I., Čerņevska I. et al. Svešvārdu vārdnīca 25000 vārdu un terminu. Rīga: Avots, 164. lpp.

fixed in a special protocol containing descriptions, schemes and photo shots.[18] Prof. A. Fogels suggests the following definition: "Demarcation is marking off the state border on site with the respective landmarks. Demarcation is being done by special, joint committee with representatives from respective border states in accordance with international agreement and materials of delimitation[19]". Other sources refer to demarcation as state border line determination and marking off on site with the landmarks according to agreements on state border delimitation and annexed maps and border line descriptions that are produced by special joint committee[20]. Summarising the above analysed, as to the author's opinion demarcation is a precise determination of state border on site based on delimitation agreements and annexed topographical maps with marked off state border line and textual description of state border line location on site as well as state border line mark off on site with landmarks.

Closely related to demarcation concept is a concept of demarcation line, the legal contents in this case is fairly minimal as demarcation line it is perceived to be a line in a disputable territory of two or more states until signing off the border agreement on permanent state border. Such term could have been used also in the practice of Latvia and its neighboring countries, for example, in relation to the border between Latvia and Russia, although in no bilateral international agreement with the Russian Federation since Latvia regained its independence this term was used. In several agreements that were signed between Latvia and Russia till 2007 terms of border and borderline were used in turns[21]. Only after 1994 in the Law on "the State Border of the Republic of Latvia" Latvia unilaterally applied the term of demarcation line[22], although in the practice of international law this term has been widely applied, inter alia when Latvia signed truce agreement with Russia February 1, 1920[23]. This concept has not received enough attention in Latvian jurisprudence, although in international law practice this concept has been used quite often when dealing with territorial arguments, peace keeping and prevention of military conflicts[24]. Such territorial

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[18] Bojārs J. Starptautiskās publiskās tiesības I. 3. pārstr. izdevums. Rīga: Zvaigzne ABC, 2004, 308. lpp.

[19] Fogels A. Modernās starptautiskās tiesības. Rīga: Zvaigzne ABC, 2009, 176. lpp.

[20] Под редакцией Сухарева А. Я., Крутских В. Е. Большой юридический словарь. Москва: ИНФРА, 2004, с.145.

[21] Sastādītājs Pogrebņaks A. Latvijas Republikas un kaimiņvalstu līgumi un vienošanās par robežapsardzību. Rīga: LPA, 2000, 113 lpp.

[22] "In areas where the state does not match to international agreements concluded on the 16th June 1940, it is considered to be a temporary demarcation line until the the conclusion of new bilateral agreement." Translated from: Latvijas Republikas valsts robežas likums: LR likums. *Latvijas Vēstnesis,* 1994. 27. oktobris, Nr. 132 (263). 2. pants (2) daļa.

[23] "Demarcation line between Latvian and Russian armies actually is determined by the front-line between the two armies of both countries at 12 o'clock on the 1st February 1920." Translated from: Andrejs Edvīns Feldmanis. Masļenku traģēdija – Latvijas traģēdija. Latvijas 50 gadu okupācijas muzeja fonds, Rīga, SIA "Talsu tipogrāfija", Talsi, 2000, 12. lpp.

[24] "A line defining the boundary of a buffer zone or area of limitation. A line of demarcation may also be used to define the forward limits of disputing or belligerent forces after each phase of disengagement or withdrawal has been completed. See also area of limitation; buffer zone;

arguments exist also in practice between Latvia and Russia[25] and still with Lithuania on determining the sea territory border[26].

With ratification of international agreement and confirmation of demarcation documents the state border determination and mark off on site process is finished. The state border determination and mark off stages comprise such processes as state border rectification and re-demarcation that can take place sometime after the state border demarcation has been finished. Prof. J. Bojārs defines re-demarcation as reinstatement of state border on site according to existing agreements, renovation of damaged landmarks, development of new border description and protocol[27]. Description basically remains unchanged; however, the protocol, if necessary, documents separate amendments in the description related to renovation of landmarks, consequently, to re-demarcation. Prof. A.Fogel's definition states that re-demarcation is setting in order the borderline, renovating or repairing damaged landmarks in the course of time, replacing landmarks with a different type of landmarks and by erecting additional marks[28], checking and on separate occasions updating demarcated borderline. This definition in the context of phrase "setting in order the borderline" should be updated, as, first of all borderline is a geometric concept and would be more appropriate in respect to topographic maps. Secondly, borderline on site in most cases visually is not seen at all, although sometimes it is marked with ditches and landmarks as, for example, is state borderline with the Republic of Estonia and the Republic of Lithuania, polygonometric[29] (center) poles – used with Russian Federation and the Republic of Belarus borders, or other landmarks and warning (informative) signs. In

disengagement; peace operations." The free Dictionary by Farlex. Available: http://www.thefreedictionary.com/line+of+demarcation [viewed 7 March 2012].

[25] 29.11.2007. Satversmes tiesas spriedums "Par likuma "Par pilnvarojumu Ministru kabinetam parakstīt 1997. gada 7. augustā parafēto Latvijas Republikas un Krievijas Federācijas līguma projektu par Latvijas un Krievijas valsts robežu" un likuma "Par Latvijas Republikas un Krievijas Federācijas līgumu par Latvijas un Krievijas valsts robežu" 1. panta vārdu "ievērojot Eiropas Drošības un sadarbības organizācijas pieņemto robežu nemainības principu" atbilstību Latvijas PSR Augstākās padomes 1990. gada 4. maija deklarācijas "Par Latvijas Republikas neatkarības atjaunošanu" preambulai un 9. punktam un 2007. gada 27. martā parakstītā Latvijas Republikas un Krievijas Federācijas līguma par Latvijas un Krievijas valsts robežu un likuma "Par Latvijas Republikas un Krievijas Federācijas līgumu par Latvijas un Krievijas valsts robežu"atbilstību Latvijas Republikas Satversmes 3. pantam" (*Latvijas Vēstnesis*, 193 (3769), 30.11.2007.) [effective from 30.11.2007.]. Available: http://www.likumi.lv/doc.php?id=76123 [viewed 18 February 2012].

[26] Lejnieks M. Starptautiskās tiesības un jūras robežlīgums. 1999. gada 18. septembris. 00:00. Available: http://www.diena.lv/arhivs/starptautiskas-tiesibas-un-juras-robezligums-10524137. [viewed 24 May 2012].

[27] Bojārs J. Starptautiskās publiskās tiesības I. 3. pārstrādātais izdevums. Rīga: Zvaigzne ABC, 2004, 308. lpp.

[28] Author's note: Such border signs are not used on the border and are not accepted in classification.

[29] "from land to to an object on the water, consisting of three landmarks and a central (polygonometric) landmark, other state border landmarks are set to the central (polygonometric) landmark on the edge of a water object ..." Translated from: Latvijas Republikas valdības un Baltkrievijas Republikas valdības līgums par Latvijas – Baltkrievijas valsts robežas režīmu. 1.3.1. punkts. Available: www.mk.gov.lv/doc/2005/IEMSl_191211_Baltkrievija.3295.docx. [viewed 9 March 2012].

turn setting in order obviously refers to the maintenance[30] of state border line[31], which encompasses removing trees and bushes from the state border zone, erecting civil engineering constructions (bridges, trails, etc.), and sometimes ploughing the state border zone. Consequently, re-demarcation means checking state border demarcation on site and renewing it with landmarks on the basis of previously composed bilateral documents: state border line description, topographic maps, border sign protocols, regulations on re-demarcation provisions and procedure. This has been done to renew state border line on site correspondingly marking it with landmarks according to the signed agreements that are in force, that is- reducing state border demarcation (restoring, renewing) on site. State border re-demarcation stipulates repair of state landmarks, renewal, change and additional set up of landmarks, as well as composing the state border line description and state landmark protocol. Although the term of demarcation is not used by the Law, the essence is expressed in article 5, whereas: "The restoration of the State land border (rectification of the deficiencies or damages detected during inspection) shall be organised in accordance with the international agreements concluded by the Republic of Latvia, if necessary, in co-operation with the relevant authorised representatives of the neighbouring state".[32]

In the aspect of state border determination and demarcation the concept of rectification is essential. It has been neglected by Latvian legal scientists. However, according to the definitions of legal scientists from other states[33] and complimenting it from the author: rectification should be considered as insignificant amendment of state border line or its specification when it is necessary to deviate it in the territory from the previous position stated in the border agreement. State border rectification, carrying out delimitation of respective border sections beforehand, are used in construction of tunnels, hydroelectric power stations, bridges and other constructions, as well as satisfying international commercial interests of on the state border or in its nearness. State border rectification becomes a hot issue in respect to establishing new border crossing points and erecting them.

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[30] "Length of Latvian borders is 2.1. the Republic of Belarus – 12 meters, 2.2. with the Russian Federation – 12 m, 2.3. the Republic of Estonia – 6 m, 2.4. the Republic of Lithuania – 5 m." Translated from: 27.07.2010. MK noteikumi Nr. 674 "Noteikumi par Latvijas Republikas valsts robežas joslu, pierobežas joslu un pierobežu, kā arī pierobežas, pierobežas joslas un valsts robežas joslas norādījuma zīmju un informatīvo norāžu paraugiem un to uzstādīšanas kārtību" 2. punkts. (*Latvijas Vēstnesis*, 120 (4312), 30.07.2010.).

[31] "Within the maintaining activities of the national land border inspection of its location in nature is performed, that is, examination of border location in the area, comparison with the demarcation documents, visual analysis of the situation, detection of damages or inconsistencies, and the subsequent action to prevent damages." Translated from: Latvijas Republikas valsts robežas likums: LR likums. *Latvijas Vēstnesis*, 2009. 2. decembris, Nr. 189. 5. pants (2) daļa.

[32] Ibid., 5. panta 3., 4. daļa.

[33] "Rectification is carried out on the basis of international agreements between interested parties. These agreements, along with agreements on the establishment of state borders among the supreme authorities if signing parties". Translated from: Комментарий к закону "О Государственной границе Республики Беларусь" А. А. Павловский, Е. П. Ковалёв, В. Ф. Ермолович и др. Минск: Амалфея. 2003, 38 стр.

Ministry of Foreign Affairs organizes and leads demarcation committees within the framework of determining and renewing state border[34]. At the same time the Law does not foresee a competency of state institutions, as there is no appointed institution which would within the scope of maintenance of state land borders perform state land border review on site, that is- would perform checks in the place of its location and compare it with demarcation documents, analysis of visual state, would establish shortages, damages, or find discrepancies, as well as determine further action in eliminating the shortages or damages and which, according to the international agreements signed by the Republic of Latvia, would organize state land border renewal (review elimination of established shortages or damages)[35].

After the Republic of Latvia[36] regained independence of one of the key tasks was to renew the state border. As one of the main features of a sovereign state is the ability to control its borders, in 1990 Council of Ministers made a decision which established that land borders of the state of Latvia should be renewed in its entire length, as they were in June 16, 1940[37]. Council of Ministers passed a decision on September 23, 1991 establishing actions to take at the first stage of state border determination– the state border inspection. Inspection was finished in 1992. This was an essential step so the Ministry of Defense could take over state border and the Ministry of Foreign Affairs could start bilateral talks with all four neighboring countries of Latvia on state border renewal and determination. Further steps were taken to expropriate state border zone land and pass it in the disposal of the Ministry of Defense[38]. Thus a joint committee with the Republic of Estonia, that was created according to agreement between the Republic of Latvia and the Republic of Estonia on state border renewal, started its work on July 17, 1992. The work was finished in December 21, 1999[39], demarked state border, erected landmarks and constructions were handed over to the border guarding institutions.

Demarcation of the state border of the Republic of Latvia and the Republic of Lithuania has been done on the basis of Agreement on State Border renewal between the Republic of Latvia and the Republic of Lithuania, signed June 29, 1993[40]; 1994 documents of state border re-delimitation, Instruction on state border re-demarcation between the Republic of Latvia and the Republic of Lithuania approved on May

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[34] Latvijas Republikas valsts robežas likums: LR likums. *Latvijas Vēstnesis*, 2009. 2. decembris, Nr. 189. 31. panta 1.daļa, 1., 2. punkts.

[35] Turpat, 5. panta 2., 3. daļa.

[36] Par Latvijas Republikas neatkarības atjaunošanu: LR AP deklarācija. 1990. 4. maijs. *Ziņotājs,* Nr. 20 (17.05.1990.), 4. punkts.

[37] Par pasākumiem, kas veicami, lai atjaunotu Latvijas Republikas sauszemes robežu: 1990. gada augusta MP lēmums Nr. 108.

[38] Par pasākumiem, kas veicami, lai nodrošinātu divpusēju starpvalstu līgumu izpildi par sauszemes robežas atjaunošanu: LR MP lēmums. *Latvijas Vēstnesis*, 1992. 4. maijs, Nr. 139.

[39] 18.07.2001. MK rīkojums Nr. 354 "Par Latvijas Republikas un Igaunijas Republikas valsts robežas redemarkācijas dokumentu apstiprināšanu" *Latvijas Vēstnesis*, 110 (2497), 20.07.2001.

[40] 29.06.1993. starptautisks dokuments "Līgums par valsts robežas atjaunošanu starp Latvijas Republiku un Lietuvas Republiku". *Latvijas Vēstnesis*, 84 (367), 01.06.1995.

17, 1994, decisions of the Joint Commission on renewing state border between the Republic of Latvia and the Republic of Lithuania and other instructions[41].

Due to the fact that until June 16, 1940 Latvia did not have a state border with Belarus, as Latvia boarded with Poland at that time, it was necessary to determine state border with Belarus from the very beginning[42]. State border between Latvia and Belarus has been completely demarcated in 2008[43]. State border delimitation between Latvia and Russia was completed in March 2007[44], but joint demarcation committee started state border demarcation works only on February 2011. By entering into force the border agreement created a basis for setting in legal order the state border between Latvia and Russia and opened grounds to start demarcation of the border. End documents on completed demarcation have been planned for approval in 2014-2015[45].

Conclusion

1. In national and bilateral international regulation with neighboring countries the defined scope of state border regime is incomplete and it is advisable to supplement it with several state border regime provisions and norms, which would need to be included into bilateral agreements on state border regime with each neighboring country of Latvia. In preparation of such agreements the scope of key concepts and interpretation of state border determination, analyzed in this article, have essential role guaranteeing the state border security and inviolability, the same refers to ensuring friendly neighboring state relationship based on mutual cooperation .
2. The key essence of the state border concept is the set of conditions relating to the state border regime, which serves as a legal mechanism to the state border security and inviolability. 2009 law on the State Border of the Republic of Latvia defines state border regime which basically comprises only state border crossing process. Considering international law principles and experience of other states, state border regime would have to be supplemented also with the following state border regime provisions, that need to be included both in national regulatory

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[41] Ministru Kabineta 2002. gada 10. aprīļa rīkojums Nr. 185 "Par Latvijas Republikas un Lietuvas Republikas valsts robežas redemarkācijas dokumentu apstiprināšanu". *Latvijas Vēstnesis*, 58 (2633), effective from 17.04.2002.

[42] 1994. gada 21. februāra starptautisks dokuments "Līgums par valsts robežas noteikšanu starp Latvijas Republiku un Baltkrievijas Republiku". *Latvijas Vēstnesis,* Nr. 133 (264), 12.11.1994.) [effective from 19.05.1995.].

[43] Par Latvijas Republikas un Baltkrievijas Republikas valsts robežas demarkācijas noslēguma dokumentu spēkā stāšanos: Ārlietu ministrijas 2009. gada 17. marta dienesta informācija Nr. 41/210-1945. *Latvijas Vēstnesis*, 2009. 19. marts, Nr. 44 (4030). 18.02.2009.

[44] Par Latvijas Republikas un Krievijas Federācijas līgumu par Latvijas un Krievijas valsts robežu: LR likums. *Latvijas Vēstnesis*, 2007. 29. maijs, Nr. 85. 2007. gada 27. martā.

[45] Upmacis I., Obuhovs. План выполнения работ по демаркации Латвийско – Российской Государственной границы. (Unpublished materials offered to the author by officials of Ludza and Vilaka Territorial Boards).

documents and bilateral agreements with neighboring countries on state border regime: 1) inviolability of state territory; 2) peaceful solution of border incidents; 3) international recognition of state border; 4) international determination of state border; 5) maintenance of state border, this refers to the procedure in which carrying out international cooperation, according to the international agreements signed by the Republic of Latvia the preservation of the state land border is ensured as well as landmarks and other securing structures or elements are preserved in conformity with the signed agreements.

3. In determining state border the following principles should be observed which should be defined in national regulations: mutual respect of national security and international security of the Republic of Latvia; state sovereignties, territorial inseparability and border inviolability, multilateral and mutually favorable cooperation between sovereign states; peaceful settlement of state border arguments; equality of states and non interference in internal matters of the sates.
4. Delimitation is a detailed description of state border in the border agreement and to utmost preciseness marked state border line in special topographic maps enclosed to the border agreement.
5. Demarcation line is on site marked or unmarked line in the disputable territory of two or more states until concluding/signing the border agreement on permanent state border.
6. Re-demarcation is state border demarcation check on site and the renewal with land marks on the basis of previously drawn up bilateral documents: state border line description, topographic maps, landmark protocols, regulatory framework of provisions and procedures of re-demarcation.
7. Rectification of state border is insignificant amendment of state border line or its specification when it is necessary to deviate it in on site from the previous position stated in the border agreement.

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Kalniņa I., Čerņevska I. et al. Svešvārdu vārdnīca 25000 vārdu un terminu. Rīga: Apgāds Izdevniecība avots, 1024 lpp.

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PRINCIPLES OF THE LEGISLATIVE TECHNIQUE IN POLAND

Keywords: the legislative technique, the sources of the binding law of the Republic of Poland, the hierarchy of the legal acts, the typical means of the legislative technique, vacatio legis.

The legislative technique is the term by principle reserved to the law sciences. It is used by both the legal practice and the discipline referred to as jurisprudence. The legislative technique covers:

a) the skills of drafting the legislative acts and correct organisation of the system of such acts;
b) the set of rules (directives) indicating how to design the legal acts correctly and how to include them into or eliminate them from the legal system[1].

Initial determination of the legal tradition and legal culture of the given society is important for adjustment of the appropriate catalogue of the legislative technique means. Then, the choice of the legislative technique means for the purpose of drafting a specific legal act depends basically on two elements:

a) the contents of the specific solution developed by the legislator that has to be expressed in the form of a legal act;
b) the form of the legal act[2].

It should be highlighted that the legislative technique is not neutrally axiological. This finds expression in the situation that those creating the law have de facto some proposals for expressing the solutions in the legislative acts, which in turn determines the later clarity and legibility of the legal acts for those to whom it is addressed.

It should also be highlighted that the system of legal acts as well as the earlier mentioned legal culture have very significant influence on the final shape of the specific act. According to art. 87 of the Constitution of the Republic of Poland of 1997 the following acts are the sources of the binding law of the Republic of Poland:

a) Constitution;
b) Acts of the Parliament;

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[1] Wronkowska S., Zieliński M. Komentarz do zasad techniki prawodawczej. Warszawa: Wydawnictwo Sejmowe, 2004, p. 11.

[2] Ibid., p. 11.

c) ratified international treaties;
d) regulations.

Additionally, the Constitution, in section 2 of that article introduces the division into types of the generally effective law. On one hand we have the Constitution, Acts, ratified international treaties and regulations while on the other we have the acts of the local law[3].

The Constitution is the fundamental Act, which means that it has the highest legal power. It contains the provisions concerning the character of the state, its bodies, bases of the political, economic and social system and it defines the rights and duties of the citizens[4]. The Constitution, by means of the guaranties contained in it and the possibility of direct application, plays the stabilising function in relation to the reality of the state[5]. The fundamental Act also contains certain form of stiffening of its matter that is visible, first of all, in the procedure for enactment and amendment of it. It should be highlighted that the legislative stability that is guaranteed by the Constitution manifests in a very small number of novellas to the fundamental Act since it coming into force.

International treaties and ratification Acts are the legislative acts of special importance. International treaties must be ratified or terminated by means of the Act if they concern:

a) peace, alliance, political treaties or military treaties;
b) freedoms, rights or duties of citizens defined in the Constitution;
c) membership of the Republic of Poland in international organisations;
d) significant financial liabilities of the State;
e) issues regulated in an Act or issues where the Constitution requires an Act.

The ordinary Act[6] is a legal act the importance and weight of which is secured by the fundamental act. It should be highlighted that the field of the rights and duties of citizens may be regulated only and solely by means of Acts. Additionally, the Constitution points at the aspect of the necessity for regulating the organisation of the apparatus of the State and granting competences to the bodies of the State in the form of the Acts. The legislative initiative was attributed to the President, Senate, Council of Ministers as well as Members of Parliament (minimum 15) and 100,000 citizens.

The regulations, in turn, may be issued only by the bodies indicated in the Constitution on the base of the authorisation granted by the legislator in the specific provision of the binding Act[7]. In this case the statutory delegation is an important issue. It should

[3] More, see: Seidler G. L., Groszyk H., Pieniążek A. Wprowadzenie do nauk o państwie i prawie. Lublin: UMCS, 2003, pp. 164-165.

[4] Ibid., p. 166.

[5] Sobczyk P. Konstytucja Rzeczypospolitej Polskiej jako akt normatywny, którego przepisy stosuje się bezpośrednio. In: Akty normatywne i administracyjne. ed. M. Karpiuk. Warszawa: Difin, 2009, p. 43.

[6] In the doctrine the division exists between the ordinary Acts and the Constitutional Act that is a special legal act that makes amendments in the binding Constitution.

[7] Korybski A., Leszczyński L., Pieniążek A. Wstęp do prawoznawstwa. Lublin: UMCS, 2003, p. 178.

specify the body authorised to issue the regulation as well as the issues regulated by that act. It should also contain the guidelines concerning the contents of the regulation.

Additionally, presence of the appropriate legal culture represents a significant element for the legislative procedure and technique. It should be highlighted that currently, although the Polish legal system is formed as the system of statutory law, the culture of the precedent based law (common law) influences the legal order increasingly often. This is a consequence of the membership of Poland in the European Union.

Characterising the legal culture it should be pointed out that it represents the legal order that goes beyond the territory of a given country and the given legal system functioning in it. Characterising the legal cultures we should consider the ways of understanding the law, its sources, design, processes of creating it and its doctrine.

The legal culture of statutory law, i.e. the continental culture is one of the two most important legal cultures in the Western World. The characteristic feature of the statutory law culture is that the law is based on enactment. That culture is one of the oldest cultures in the world and its coverage is very extensive geographically. It generally covers the entire Europe (except England), countries of South America and it is found in Scotland and the State of Louisiana in the USA. It is relatively important for the doctrine in Poland because our legal system is based on it. The main characteristics of that culture are the written form, generality, promulgation, absence of contradictions, stability, publicness and completeness.

In that culture there are very many entities that possess competences for creating legislation. That number is highly diversified and generally depends on the country in which the statutory law system functions. In Poland roughly some tens of the bodies of the State possess competences to create legislation. As a consequence, a very large volume of legislation is created, sometimes even of low quality. This also involves the risk of creating conflict between provisions of some legal acts.

The process of creating the law in itself represents an important characteristic of the statutory law culture. In this case we deal with some diversification of the level of the process formalisation. The higher is the rank of the given legal act the more formalised the entire procedure is. It is also important that in the statutory law culture the representatives of the society in the Parliament, bodies of the State as well as the citizens have the legislative initiative. Attention should be drawn to the fact as a principle the local authorities take example from the parliamentary form of the legislative procedure within the frameworks of their own legislative competences. The legislative referendum that represents a specific plebiscite, compulsory or facultative form of creating the law is also an important issue. Codifications also represent the issue characteristic for that legal culture. Usually they represent statutory regulations collected into a single act concerning a given aspect of life or the law.

Promulgation is done by the body other than the body that enacted the given law. In other words it is the rule that the enacted law, to be valid, must be confirmed by another body, e. g. the President signs the Act of Parliament. Then this issue is also related to the appropriate publication of the legal act that takes place through appropriate publication in the medium for publication of legal acts. The point here is the so-called legal fiction concerning the knowledge of the law. Appropriately published legal act creates the situation of common knowledge of the given legal act.

The hierarchy of the legal acts where the fundamental act that is the Constitution has the supreme place. Then the division into Acts of Parliament and acts of the lower order takes place. The dichotomous divisions that manifest in the division into the law concerning the subject (the entire law), the law concerning the object (that part of the law concerns a given entity), public (concerning the public issues), private (concerning the individuals), conditionally valid (limiting the scope of claims) and unconditionally valid (expanding the scope of claims), general (binding for everybody) and special (applicable to a given group) as well as material (regulation of legal contents) and formal (regulation of legal contents implementation) is also important here.

Within the frameworks of the statutory law culture manifestation of the willingness to aim at enactment of the perfect law as the ideal legal system is visible. Although differences of opinions concerning that perfection exist, its understanding as the total of the binding principles and norms selected appropriately to the needs of the citizens seems to be the most justified understanding of it in this case[8].

The common law culture represents the system of common law. It literally means the law that is common, homogeneous and unified in the scale of the country. It is based on creating precedents that is the first court decisions belonging to a given category. The common law area covers England and the present day countries of the former dominion as well as the United States. The most important characteristics of it include the creation of norms by judges, casuistic character, the empirical nature, pragmatism as well as the form of written, institutional and just law.

The norms in hat legal culture always maintain relation to the actual situations as a consequence being individual and specific norms while on the other hand they create binding norms that can be applied in the future. The casuistic character of that law results from the fact that the judges create the law on the base of given cases. This is just opposed to the statutory law culture. For a given case the only appropriate law is created and, as already mentioned, it maintains the binding power for the future cases. This happens in case the judge notices similarity to an earlier case.

Common law as the continuous law is characterised by the situation that the actual status quo is generally not changed as a consequence of which the decisions rendered retain their power. The precedent formulated by the court of higher level is binding for the lower level courts. It can be changed, however, by the same court or a court of higher level or by the statutory law. The written character of the common law manifests in the written recording of the court decisions rendered. Institutionalism manifests in making the judiciary institutions the main and fundamental legal units.

Common law is based on the perception of justice of the judge. Additionally, within the frameworks of that culture the equity law, that is decisions based on the perception of rightness of judges. It should be pointed out that the equity law is partly codified and represents the institution that is auxiliary to the common law. Generally, the decisions of the common law are based on the perception of justice of the judge while in case of the equity law on the perception of rightness of judges

[8] More, see: Chomoncik S., Grzonka L., Korybski A., Szynowski A. Podstawy wiedzy o państwie i prawie. Bydgoszcz: Branta, 2012, p. 119 and following.

already mentioned. Rightness, according to the opinions by many common law culture lawyers is the secondary, more lenient and less formalised as compared to the harsher and formalised notion of justice as the measure of opinions of the court. It should be highlighted that common law is the written law as the decisions of judges are recorded in the written form. Institutionalism manifests in making the judiciary institutions the main and fundamental legal units.

That culture is outstanding because of its original specific features characteristic to the common law and the equity law complementary to it. The culture of common law does not attach any importance to the branch of the law. The fundamental and main role is played by the legal institutions such as the tort, trust, estoppel and agency.

Returning to the issues relating strictly to the legislative technique, it should be highlighted that the legislative technique rules, by their nature, represent an important factor aiming at creating the system of law within which the individual provisions currently in force can be found with ease and if needed subjected to the appropriate interpretation.

Presence of the official sets of the legislative technique directives represents also an important issue. This is a purposeful and highly required solution. The fact that currently the trend for issuing high numbers of legal acts of different types exists should be taken into account. That number and, which is important, creation of such acts that is not organised systematically may cause certain legislative chaos that will influence not only appropriate operation of the State institutions and bodies but also appropriate functioning of the entire society.

Given the above, the official sets of the legislative technique directives assume different forms as:

a) documents drafted like legal acts and containing the catalogue of the legislative technique directives and "didactic" components, explanations of the recommendations included in the set; examples of provisions edited according to the recommendations, correctly and incorrectly, contained in the document of the directive are not legally binding – the body that developed the set only recommends applying them in the legislative works although its position and authority are such that they guarantee effective application of those recommendations; that form of presenting the legislative technique directives is found the most often[9];
b) legislative acts which are usually low ranking acts of the regulation type[10].

In Poland, the official sets of the legislative technique directives are called the "Principles of the legislative techniques". They have the rank of the regulation issued on the base of art. 14 section 4 point 1 of the Act of the 8th of August 1996 on the Council of Ministers. The earlier legislative technique directives existed also under the same name The first of them was enacted in 1939 and the second in 1961. The third was implemented by the resolution of the Council of Ministers of 1991.

The aspect of coming into force of the new Constitution that regulated the concept of the sources of the law in a different way was important for enactment of the

[9] Wronkowska S., Zieliński M. Komentarz do zasad…, p. 15.

[10] Ibid., p. 15.

"Principles of the legislative techniques" of 1996. It should also be highlighted that the resolution by the Council of Ministers of 1991 lost its binding force.

According to the assumptions, enactment of the new sets of legislative technique was to lead to simplifying and specifying the established methods for formulating legal acts without unnecessary wide reform in that field. It was to result in establishing the current canon of techniques. The concept of legal-theoretical cohesion concept was additionally important. The legislative technique principles are elaborated significantly wider than the preceding guidelines on the subject. They indicate the detailed aspects of developing the drafts of Acts, regulations, internal acts and local law acts. The two main tasks of the Principles of the legislative techniques are:

a) making the editor of the legal text aware and remaining him/her about taking specific decisions concerning the text;
b) indicating to the editor of the legal text the method for expressing the decision in the legal act draft[11].

Typical subject solutions within the frameworks of the Principles of the legislative techniques concern the structure of the Act and the ways of expressing the typical subject solutions in the drafts. The new principles of referring to the legal acts represent an important novelty in the Principles of the legislative techniques; those new principles are a consequence of the constitutional concept of the sources of the law. The next group of changes concerns modification of the directives for solving intertemporal issues and making changes in the system of the law[12].

For completeness of the discussion on the legislative technique the text of the Principles of the legislative techniques should be analysed. The regulation consists of VIII Sections containing 163 paragraphs.

Section I is called the Draft of an Act. Paragraph 1.1 states that taking a decision on preparation of a draft Act shall be preceded by five operations. They include determination and description of the status of social relations in the area requiring intervention by bodies of public authorities and indicating the required direction of changes in them as well as determining the potential, legal and other than legal, measures allowing attainment of the assumed goals. Additionally, the Principles of the legislative techniques indicate the necessity of determining the projected social, economic, organisational, legal and financial consequences of the proposed solution as well as the need for obtaining opinions for stakeholders in the solution. Additionally, it is necessary to make a choice of the method of intervention by the bodies of public authorities.

The following point 2 indicates appropriately the path to be taken in the situation of taking the decision on preparation of the draft Act. Within the frameworks of its guidelines, the legislator should familiarise with the current legal status, including the effective Acts and other acts applicable to the regulated area and also determine the consequences of the current legal regulations within the given area. It is also necessary to determine the goals that the legislator intends attaining by issuance of the new

[11] Wronkowska S., Zieliński M. Komentarz do zasad…, p. 16.

[12] Ibid., p. 18.

Act as well as to indicate the alternative legal solutions. The author of the Act should formulate the projections of the core and side effects of the considered alternative legal solutions, determine the financial consequences of the individual alternative solutions and select the legal solutions optimal under the given circumstances.

§ 2. of the Principles of the legislative techniques stipulates that the Act should regulate a given area exhaustively without leaving significant elements of that area outside its scope of regulation. This is a specific implementation of the principle of comprehensive nature of legal regulation. It is also important to find a design that would not result in the necessity of introducing numerous exceptions (§ 3. of the Principles). The fact is also important that the Act should neither change nor repeal the provisions regulating issues that are not within its subject or object scope or that are related to them.

The directives contained in the Principles of the legislative techniques also indicate the necessity of designing the Act in a way that avoids repeating provisions included in other Acts (§ 4.1). The same applies also to the provisions of international regulations ratified by the Republic of Poland. Additionally the Principles of the legislative techniques indicate the necessity of editing the draft in concise and synthetic way avoiding at the same time the excessive level of detail. The recommendations in that area point out that the sentences of the Act should be consistent with the generally accepted rules of Polish language syntax and that excessive use of subordinate clauses should be avoided (§ 7.). As a consequence, the Act should not include specialist terms, unless they do not have equivalents in the common language and it should not use terms and phrases from other languages as well as neologisms (§ 8.1. of the Principles). Additionally, it is important that the Act should not contain statements that do not serve expressing legal norms such as appeals, postulates or reprimand (§ 11. of the Principles).

The regulations of Chapter 2 in Section I of the Principles of the legislative techniques concerning the design of the Act represent one of the most important components of that document. Paragraph 14.1. indicates clearly that the Act should contain the:

a) title;
b) subject provisions;
c) provisions concerning entering the Act into life.

Additionally, the Act should also contain the provisional, adjusting and regulating provisions in case the certain aspect is regulated anew. Paragraph 15 in turn specifies the order of the individual components. As a consequence the design should assume the transparent format:

a) title;
b) subject provisions, general and specific;
c) changing provisions;
d) provisional and adjusting provisions;
e) repealing provisions, provisions on entering into force and provisions on termination of the effective life of the previous Act referred to as the miscellaneous provisions.

Given the above, the title of the Act should include, in separate lines, elements such as the Act type identification, date of the Act and general description of the subject of the Act where the date should be preceded by the term "of" and then day and year should be written as Arabic numbers while the month is expressed with the word. The subject of the Act should provide the necessary, most concise, adequate description of its content.

The Principles of the legislative techniques also indicate in Chapter 4 the organisation of the subject provisions identifying the general and the specific provisions. Those earlier ones should specify the scope of issues regulated by the Act and the entities the regulations apply to as well as definitions of the terms and abbreviations used in the Act. The specific provisions in turn do not regulate the issues that had been determined exhaustively in the general provisions. Additionally a certain chronology is applicable that applies to organisation of the specific provisions:

1) provisions of the material law;
2) provisions on the bodies;
3) provisions on procedures in front of the bodies;
4) provisions on the penal liability.

It should be added that the Act may include annexes that are included in the form of reference in the subject provisions. The annexes should contain the detailed lists, graphs, formulas, tables and descriptions of specialist nature.

As concerns the provisional and adjusting provisions presented in Chapter 5 of the Principles of the legislative techniques it should be highlighted that the provisional provisions regulate the influence of the new Act on the situations that developed under the effective life of the new Act or the earlier Acts. This covers, in particular, the:

a) ways of completing the proceedings in progress, effectiveness of the legal actions undertaken and the bodies competent for completing the proceedings and the times for transferring the cases to them;
b) indication of the scope for provisional continuation of operation of the legal institutions liquidated by the new provisions;
c) pointing out of the necessity of retaining the rights and responsibilities as well as competences during the effective life of the provisions that are being repealed or repealed earlier;
d) scope of application of the new provisions to the rights and responsibilities as well as actions specified in point c;
e) scope of retaining in power of the executive regulations issued on the base of the so-far effective authorising provisions.

The adjusting provisions regulate the procedure for the first establishment of bodies and institutions created by the new Act. Additionally the methods for transformation of bodies or institutions established on the base of the earlier Act into the bodies or institutions established under the new Act. Also the method of liquidation of the bodies or institutions liquidated by the new Act, the principles of managing their property and rights and responsibilities of their present employees should be decided.

The miscellaneous provisions are regulated in Chapter 6. Their system provides for the following order:

1) repealing provisions;
2) provisions on the date of the Act coming into force;
3) provisions on termination of the effective force of the Act (if needed).

As concerns the repealing provisions, it should be pointed out that they should list in detail the Acts and individual provisions that the new Act is repealing.

Paragraph 43 of the Principles of the legislative techniques that stipulates that the Act shall include provisions defining the date of the Act coming into force unless that date is specified in the separate provisions of the implementation Act is very important. As a consequence it is correlated with the issue of *vacatio legis*. The term is understood as the period between the publication of the Act and the moment of the Act coming into force. The length of *vacatio legis* itself should be adjusted to the requirements of the specific Act. In principle the period is fourteen days. This, of course, is the standard duration although in special cases the legislator may indicate a shorter period of *vacatio legis*. Such a solution, however, requires very strong reasons for taking that decision. A very important interest of the State should for sure be included among examples of such reasons with simultaneous assumption that the principles of the democratic state of the law are not an obstacle to it.

The circumstances also occur that provide the possibility for extending the *vacatio legis* for a period exceeding fourteen days. This usually occurs when the Act is so extensive and important from the public perspective that familiarising with it requires longer time and special intellectual effort. Additionally, the Act may introduce new institutions or transform the existing organisational structures, which creates the obvious need for longer preparations to its implementation. Additionally, the legislator may extend the time until the date of coming into force of the Act when obtaining the information on the Act and obtaining the text of it is difficult for certain categories of entities[13].

It is also important that in case of issuing the implementing Act[14] to the "main" Act no date of coming into force is included in the "main" Act. Additionally, the coming into force of the Act should take place at one time without differences in the effective dates for individual provisions. In this case, however, a certain deviation is possible allowing that solution to the legislators but only when it concerns the changing, repealing, provisional and adjusting provisions.

The provision on expiration of the Act or its individual provisions is included only in case the Act or its individual provisions are to be effective for a limited period of time (§ 52.1 of the Principles). Including the provisional, adjusting and miscellaneous

[13] Wronkowska S., Zieliński M. Komentarz do zasad…, p. 113 and following.

[14] The provisions of the implementing Act should be organised in the following order: 1) provisions concerning coming into force of the "main" Act"; 2) amending provisions; 3) repealing provisions; 4) provisional and adjusting provisions. Additionally, the date of coming into force of the implementing Act must be defined in the same way as the date of coming into force of the "main" Act.

provisions under the common heading is possible as the "Provisional and adjusting provisions" but only in case they are not excessively numerous.

Identification of provisions and their organisation are important for drafting the Acts. According to § 54 the article that contains an independent thought is the basic editorial unit. The division of the article into sections is necessary in case that it consists of a group of sentences. The article is identified by the abbreviation "art." and the Arabic number.

Considering the provisions authorising issuance of a regulation it should be pointed out that such provisions identify the body competent to issue the regulation, the scope of issues passed for regulation in the regulation and the guidelines concerning the contents of the regulation. The guidelines may indicate the solutions that cannot be included in the regulation, the limits within which the provisions of the regulation must fit, the requirements the provisions of the regulation must meet, the targets that are to be attained and the circumstances that should be considered. It is important not to pass for regulation in the regulation the issues that have not been clarified or the issues that might pose difficulties in elaboration.

On the other hand, the provision authorising issuance of a resolution or order must indicate the body competent for issuance of the legal act, type of the act and the general scope of issues that must or may be regulated in that legal act.

The Principles of the legislative techniques also govern creation of the penal provisions. Considering the exceptional character and high importance of the issues regulated by such provisions, the Principles of the legislative techniques devote to that issue the separate Chapter 9. According to § 75.1, in the penal provision the features of the forbidden act are defined exhaustively without reference to the orders or bans contained in the other provisions of the same or other Act. Nevertheless, there is an exception allowing reference, but only in case when the lawlessness of the act is represented by violating the orders or bans formulated clearly in other provisions of the same Act or provisions of the international treaties.

The consecutive Section (II) governs the amendment or novella to the Act. This means repealing some of its provisions, replacing some of its provisions with provisions with a different content or wording or adding new provisions to it. The change can be made by enactment of a new Act changing it or by introduction of a provision changing it that is included in a different Act. The new draft of the Act is elaborated when the changes made would be numerous or would disturb the design or cohesion of the existing Act. The complete novella in the form of a new Act is prepared also when the earlier Act has been amended numerous times. This is related to the transparency and legibility of the legal act. A very important assumption is that a change to the Act may not be represented by just replacing the old provision with a new one without indicating at the same time that the amendment was made. This is regulated by § 86 of the Principles of the legislative techniques. It is also important that the changed provision of the Act is quoted in its full wording even though just one word has been eliminated or changed. The next principle is that no novellas are made to provisions changing another Act.

It is worth mentioning that the changing act may contain only the repealing, replacing or complementing provisions of the Act changing the existing Act, and in exceptional situations also the provisional and adjusting provisions.

The term of the uniform text to which Section III of the Principles of the legislative techniques is devoted represents an issue that may result in numerous controversies. The issue of authenticity of the uniform text and the primary text is an important one. As a consequence the uniform text encompasses both the primary text that was enacted originally and the text that we obtain with the novellas introduced. The unified text has a different meaning as it represents the text obtained after making the changes in the original text, but until the moment of drafting it, which indicates that such texts are not authentic.

It should be highlighted that in case of determining the time of announcement of the uniform text that text is prepared according to the legal status in force on the date of the Act coming into force. That text, however, considers changes introduced after the date of that Act coming into force. Publication of the uniform text takes place in the form of the proclamation where the uniform text is the enclosure to that proclamation.

It should be remembered that edition of the uniform text is conducted according to the set principles. As a consequence, the numbering of the original text of the act is retained and the numbering added by the changing Acts is then considered. Additionally no continuity of numbering is introduced. In place of the repealed provision in turn the identification of the repealed editorial unit is placed with the word "repealed". Additionally, in case of changed or added provision the reference is made to the title of the Act changing it with identification of the official journals. In case of provisions novelised several times it is important to maintain the chronology of the amendments made.

The issue of correcting an error is another issue regulated in the Principles of the legislative techniques . It may apply only to the text of the legal act published in an official journal only. The correction is made in the form of the proclamation that should contain the title of the proclamation together with the name of the body correcting the error, as well as the date of issuance and the subject. Additionally, the proclamation should specify the legal base for correction of the error with the title of the legal act in which the error is being corrected. Additionally, it is important to indicate the legal provision of the legal act that is subject to correction, presentation of the error and the fragment of the legal act text in the form considering the correction of the error.

The consecutive Section of the Principles of the legislative techniques defines designing the executive act that is the regulation. It covers only the provisions regulating the issues passed for regulation according to the authorisation contained in the Act. It is not allowed to include provisions conflicting with the Act giving the authorisation and the other Acts as well as ratified international treaties in it. The exception in that matter is the clear permission contained in the authorising provision. Additionally no penal provisions or provision referring to them are included in the regulation. The

additional negative assumptions are the lack of possibility for including repetitions of the Act granting authorisation and the provisions of other legal acts.

Additionally, on the base of one statutory authorisation one regulation is issued. It should regulate the issues transferred for regulation exhaustively. The exception here is the situation where one statutory authorisation passes various issues that may be separated according to the subject for regulation. In such a case more than one regulation can be issued.

Considering the structure of the regulation it should be pointed out that in the title, in separate lines, the identification of the legal act type, name of the body issuing the regulation, date of the regulation and subject of the regulation are presented. Then, the text of the regulation should start with quoting the provision of the Act containing the statutory authorisation that de facto is the legal base for issuance of the regulation. In the regulation the paragraph is the basic editorial unit that in turn is divided into sections, points, letters and tirets.

Additionally, it is necessary to specify the subject of the regulation and provision specifying the definitions and abbreviations applied in the regulation in the general provisions of the regulation. The principle also exists that the regulation contains the provision repealing other regulation only in case the earlier regulation was issued on the base of the same authorisation, or the still valid authorising provision by the same body or the body that was taken over the body that issued the earlier regulation. That situation also takes place when the regulation was issued on the base of the authorising provision that is no longer valid (§ 126.1 of the Principles).

It is important that the regulation should come into force on the day of coming into force of the Act on the base of which it was issued. The possibility also exists that the regulation can be issued after the date of publication of the Act containing the provision authorising its issuance but before the date of the Act coming into force (§ 128.1 of the Principles). Additionally, it must be pointed out that a regulation may be changed by means of the later regulation issued on the base of the same, still valid authorising provision by the body that issued the regulation that is being changed or the body that took over the competences of the body that issued the regulation that is being changed (§ 129.1 of the Principles). While elaborating the regulation it is important to enclose the reasons for it to it.

Another issue regulated within the frameworks of the Principles of the legislative techniques is the drafts of legal acts of internal nature that is resolutions and orders. The key is that the resolutions by the Council of Ministers are issued on the base of the Constitution of the Republic of Poland or an Act of the Parliament while the resolutions of other organs and orders are issued on the base of the Act of Parliament. A legal provision is the base for issuance of the resolution or order. It should authorise a given body to regulate a given issue as well as specify the tasks and competences of that body. They contain the legal regulations governing only the issues to the extent passed by the provision and the issues that are within the tasks or competences of the given body. Similar to regulations, the resolution or order may not contain legal regulations contrary to the Act on the base of which they are issued (§ 136 of the Principles). To the similar extent as in case of the draft regulation the issue concerning not

repeating the provisions of Acts and ratifies international treaties is regulated as well as the reasons for issuance of the legal act on the base of a number of legal provisions.

Additionally, as in case of the regulation, the resolutions and orders start by indicating the legal provision on the base of which they are issued.

The acts of local law the design of which is regulated in Section VII of the Principles of the legislative techniques, are enacted by the Voivod and the bodies of not unified administration on the base of the authorising provisions contained in the Act concerning the government administration in the voivodship or in other Acts (§ 142.1. of the Principles). It should be added that the acts of the local law issued by competent bodies of the territorial governments are issued on the base of the Act concerning territorial governments or other Acts. It should be added that among the acts of the local law the following are included:

a) provisions concerning the order;
b) executive provisions;
c) provisions of systemic-organisational type governing the internal system of the territorial bodies.

It should be pointed out that the provisions of the local law are subject to the same principles in the process of drafting them as the other legal acts of general application. This also applies to the provisions concerning the order containing penal provisions. In this case also observation of the provisions of the Principles of the legislative techniques defined in Chapter 9 for the penal provisions is required.

The last Section (VIII of the Principles of the legislative techniques) contains the typical means of the legislative technique. Provisions of § 144.1 indicate that when the provision is to be addressed to every individual this should be indicated by applying the word "who". In case the group of the addressees of the provision is to be narrower it is determined by applying the appropriate term specifying the type. Additionally it is important that if the norm is to be applicable under all circumstances no circumstances for application of it are specified in the provision. The situation is different when the norm is applicable only under specific circumstances. In that case such circumstances should be defined clearly and exhaustively as concerns their type.

Definitions are formulated in the legal act in case when the: (§ 146.1 of the Principles):

1) given term possesses numerous meanings;
2) given term is not sharp and limiting that lack of sharpness is required;
3) meaning of the given term is not understood commonly;
4) because of the type of the issues regulated the need exists for defining the new meaning of the given term.

As a consequence, the given term has the same, defined meaning in the entire legal act and it cannot be used in other meanings. In exceptional cases there is a possibility of deviating from that principle in that case providing the other meaning of the term and determining the scope of its application is necessary. Additionally, § 149 of the Principles indicates that it is not possible to formulate definitions in the legal acts of lower rank than the Act without statutory authorisation if such definitions would define the meaning of terms used in the Act.

It is also necessary to introduce an abbreviation for a complex term consisting of more than one word that is repeated numerous times in the text of the legal act (§ 154.1 of the Principles). Abbreviations are introduced in the general provisions but not in the same provision that formulates the definitions.

Additionally, if the necessity for assuring flexibility of the text exists it is possible to use terms that are not sharp, general clauses or determining the upper and lower limit of the solution (§ 155.1 of the Principles). This is applicable, first of all, in the penal provisions. On the other hand reference can be applied when there is need to achieve shortening of the text or the need for assuring cohesion of it. This does not apply to provisions that already contain references.

The Principles of the legislative techniques also indicate the application of abbreviations for the names of the official journals. According to those regulations the Journal of Acts of the Republic of Poland is represented by the abbreviation "Dz.U.", the Official Journal of the Republic of Poland "Monitor Polski" – by the abbreviation "M.P.", the Official Journal of the Republic of Poland "Monitor Polski B" – by the abbreviation "M.P. B.", the Court and Economic Monitor – by the abbreviation "M.S.G" while the official journal of the given minister is represented by the abbreviation "Dz. Urz. Min …".

Concluding, the stable rules of solving the validation problems as well as rules of the interpretation of the law make the freedom of overinterpretation impossible and as a consequence have important influence on the system of legal regulations by assuring uniformity of the application of the law[15]. Observing the rules of the legislative technique creates the system of the law that is clear, transparent and legible. Currency of the legal provisions and their appropriate organisation into the system secure the appropriate level of the interpretation made. Lack of transparency of the legislative technique or not observing its principles leads or will lead to problems related to appropriate decoding of the norms contained in the legal act and that in turn may influence excessive freedom of interpretation by the addressees of the legal norms, which may provide the beginning to abuse of the law and lack of respect for regulations contained in them.

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[15] More, see: Wronkowska S., Zieliński M. Komentarz do zasad…, p. 13

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THE QUALITY OF REGULATION ON THE CRIMINAL LIABILITY FOR BRIBERY IN THE CRIMINAL LAW

Keywords: corruption, corruptive criminal offences, bribery, criminal liability, sanction.

The article aims to provide an overview on the regulation of criminal liability for bribery in public and private sector, focusing upon the construction of legal provisions and the sanctions for some criminal offences. In defining the criminal liability for corruptive criminal offences, the legislator has basically complied with the positions of international legal acts; however, in terms of wording some provisions remain rather unclear. The legislator's approach in defining liability for bribery in private and public sector has also been ambiguous.

Even though the term "bribery" is extensively used in legal literature[1] and is included in Sections 322 and 324 of the Criminal Law[2] (hereinafter also CL) and in other legal acts[3], is used in court jurisprudence[4], it still lacks normative interpretation.

In Latvian criminal law doctrine the term "bribery" traditionally denotes a set of criminal offences – accepting a bribe (CL Section 320), giving a bribe (CL Section 323), intermediation in bribery (CL Section 322) and misappropriation of a bribe (CL Section 321)[5]; A.Niedre has with good reason indicated also trading with influence (CL Section 3261) and unlawful requesting and receiving of benefits (CL Section 3262)[6] as related criminal offences. The Council of Europe Criminal Law

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1 See: Krastiņa A. Korupcijas subjekta krimināltiesiskais aspekts. *Jurista Vārds,* 2004. 17. un 24. augusts, Nr. 31., 32.; Liholaja V. Starptautiskās krimināltiesības. Rīga: Tiesu namu aģentūra, 2003, 172.-175. lpp.; Mežulis D. Korupcijas ierobežošanas krimināltiesiskie līdzekļi. Rīga: Latvijas Vēstnesis, 2003; A. Niedres komentāri KL 320.-324. pantam. Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Sevišķā daļa. Trešais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2009, 762.-775.; Pundurs A. Par provokācijas iespējām kukuļošanas lietās. *Jurista Vārds,* 2006. 24. janvāris, Nr. 4., Liholaja V. Pētījums: Noziedzīgi nodarījumi valsts institūciju dienestā: likums un prakse. Available: http://www.tm.gov.lv/lv/jaunumi/Petijums.pdf) [viewed 5 May 2012].

2 Krimināllikums [Criminal Law]: LR likums. *Latvijas Vēstnesis*, 1998. 8. jūlijs, Nr. 199/200.

3 Administratīvā procesa likums [Administrative Procedure Law]: LR likums. *Latvijas Vēstnesis*, 2001. 14. novembris, Nr. 164; Korupcijas novēršanas un apkarošanas biroja likums [Law on the Corruption Prevention and Combating Bureau]: LR likums. *Latvijas Vēstnesis*, 2002. 30. aprīlis, Nr. 65.

4 Tiesu prakse krimināllietās par kukuļošanu. *Jurista Vārds,* 2002. 17. decembris, Nr. 25.

5 See: Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Vispārīgā un Sevišķā daļa. Papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2001, 399. lpp.; Liholaja V. Noziedzīgu nodarījumu kvalifikācija: Likums. Teorija. Prakse. Rīga: Tiesu namu aģentūra, 2007, 448. lpp.

6 A. Niedres komentāri 16.4.nodaļai. Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Sevišķā daļa. Trešais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2009, 762.-778. lpp.

Convention on Corruption[7] applies the concept of "bribery" to receiving and giving a bribe in the public and private sector.

Upon examining the concept "corruption", it must be noted that it is an international and transnational phenomenon, and, considering the diversity of its manifestations, no uniform definition of it, which would be acceptable to all countries, has been developed.[8] Thus, the concept of corruption has been provided neither by the Council of Europe Criminal Law Convention on Corruption,[9] nor by the United Nations Convention against Transnational Organised Crime[10].

The Preamble of the Criminal Law Convention on Corruption identifies the interests endangered by corruption[11], indicating that it is a threat to justice, democracy and human rights, decreases the chances of normal governance, honesty and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the ethical foundations of society. It follows from the range of endangered interests that corruption (also the phrase "corruptive criminal offences") comprises a broad range of offences[12], including the use of official position in bad faith both in public and private sector, as well as other offences. However, considering the scope of this article, the author will deal only with the material substance of bribery.

Reviewing the Criminal Law regulation of criminal liability for bribery, first of all, it must be noted that the legislator has differentiated the liability, depending upon the range of endangered interests. Thus CL Sections 320 –324, as well as 3261 and 3262 define liability for bribery in public sector, but the CL Sections 198, 199 and 1991 regulate the liability for bribery in private sector. The legislator, defining liability for corruptive criminal offences in the Criminal Law, since the moment

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7 Eiropas Padomes Krimināltiesību pretkorupcijas konvencija [The Council of Europe Criminal Law Convention on Corruption]. *Latvijas Vēstnesis*, 2000. 20. decembris, Nr. 460/464.

8 Liholaja V. Starptautiskās krimināltiesības. Rīga: Tiesu namu aģentūra, 2003, 172. lpp.

9 Eiropas Padomes Krimināltiesību pretkorupcijas konvencija [The Council of Europe Criminal Law Convention on Corruption]. *Latvijas Vēstnesis*, 2000. 20. decembris, Nr. 460/464.

10 Apvienoto Nāciju Organizācijas Konvencija pret transnacionālo organizēto noziedzību [The United Nations Convention against Transnational Organised Crime]. *Latvijas Vēstnesis*, 2001. 6. jūnijs, Nr. 87.

11 Eiropas Padomes Krimināltiesību pretkorupcijas konvencija [The Council of Europe Criminal Law Convention on Corruption]. *Latvijas Vēstnesis*, 2000. 20. decembris, Nr. 460/464.

12 In accordance with Section 1 of the Law on the Corruption Prevention and Combating Bureau "bribery or any other action by a public official intended to gain an unmerited benefit for himself of herself or other persons through the use of his or her position, powers thereof or by exceeding them." Korupcijas novēršanas un apkarošanas biroja likums: LR likums [Law on the Corruption Prevention and Combating Bureau]. *Latvijas Vēstnesis*, 2002. 30. aprīlis Nr. 65.

In accordance with the annual reports of the Corruption Prevention and Combating Bureau any act included in Chapter XXIV of CL is recognised as corruptive criminal offence. KNAB ikgadējiem pārskatiem par koruptīvu noziedzīgu nodarījumu tiek atzīts jebkurš KL XXIV nodaļā See, for example: KNAB pārskats par Latvijā reģistrētiem noziedzīgiem nodarījumiem valsts institūciju dienestā un kriminālvajāšanas uzsākšanai nosūtītajām krimināllietām 2010. gadā. Available: http://www.knab.gov.lv/uploads/free/parskati/knab_parskats_nn_2010.pdf [viewed 5 May 2012].

of adopting its initial wording, has amended it several times,[13] however, this article will focus in greater detail upon the amendments introduced with the Law of 2009 "Amendments to the Criminal Law"[14]. The amendments predominantly complied with the recommendations included in the Evaluation Report of the Group of States against Corruption (GRECO) of 10 October 2008 on criminal liability for corruptive criminal offences[15], as well as proposals included in the study conducted by professor V.Liholaja "Criminal offences in the service of state institutions: laws and practice"[16].

The following most significant innovations were introduced into the Criminal Law by the Law of 19 November 2009 "Amendments to the Criminal Law":

1) Section 320 of the Criminal Law differentiates liability for receiving a bribe as "gratitude" and accepting a bribe or its offer as "buy over". The legislator, thus, in CL Section 320, part one, defines liability for "*accepting a bribe [...] for an already performed lawful or illegal act or permitted omission […], irrespective of whether the accepted or offered bribe was meant for this State official or any other person."* In accordance with the second part of Section 320 the liability sets it *"for accepting a bribe or the offer of a bribe [..] prior to committing or non-committing of a lawful or illegal act […]*. Thus, the liability for accepting a bribe is differentiated, envisaging stricter sanctions if the offer or benefits has been accepted for illegal act to be committed in the future, compared to the liability for accepting a bribe for already performed lawful or legal act or failure to act. The introduced amendments envisage that criminal liability sets in irrespectively of whether the accepted or offered bribe is meant for the concrete State official or any other person. This wording corresponds to Article 3 of the Council of Europe Criminal Law Convention on Corruption[17], which stipulates that bribery is an act, committed intentionally, by which a public official, directly or indirectly, requests or receives any undue advantage, for himself or herself or for anyone else;
2) In Section 323 of CL the sanctions are amended, a qualifying feature is added to the second part of the Section – *large scale bribery*; a third part is added to

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[13] Grozījumi Krimināllikumā [Amendments to the Criminal Law]: LR likums. *Latvijas Vēstnesis*, 2002. 9. maijs, Nr. 69.; Grozījumi Krimināllikumā [Amendments to the Criminal Law]: LR likums. *Latvijas Vēstnesis*, 2004. gada 3. marts, Nr. 34.

[14] Grozījumi Krimināllikumā [Amendments to the Criminal Law]: LR likums. *Latvijas Vēstnesis*, 2009. gada 9. decembirs, Nr. 193.

[15] Informatīvais ziņojums par nepieciešamajiem pasākumiem Pretkorupcijas starpvalstu grupas (GRECO) rekomendāciju izpildei (pieņemts GRECO 39. plenārsēdē Strasbūrā, 2008. gada 6.-10. oktobrī). Available: http://www.knab.gov.lv/uploads/free/zinojumi/knabzino_090309_greco.pdf [viewed 5 May 2012].

[16] Liholaja V. Pētījums: Noziedzīgi nodarījumi valsts institūciju dienestā: likums un prakse. Available: http://www.tm.gov.lv/lv/jaunumi/Petijums.pdf) [viewed 5 May 2012]; regretfully, when introducing amendments to the respective provisions of the Criminal Law, not all recommendations of the study were taken into consideration.

[17] Eiropas Padomes Krimināltiesību pretkorupcijas konvencija [The Council of Europe Criminal Law Convention on Corruption]. *Latvijas Vēstnesis*, 2000. 20. decembris, Nr. 460/464.

Section 323, increasing the liability for acts envisaged in the first or second part of the Section, if it has been committed in *an organised group*;

3) In the first part of CL Section 322, intermediation in bribery is defined both as handing over of a bribe or *offering of a bribe*. As liability for complicity in bribery sets in accordance with other CL sections, the word "liaise" are deleted with good reason. One can agree to GRECO recommendations,[18] that it is rather difficult to differentiate between liaising and complicity in accepting or giving bribes. Liaising is linked with more intense involvement in the offence compared with the fact of handing over the bribe; therefore it should be assessed as complicity in accepting or giving a bribe. To prevent the situation when the liability for intermediation in bribery is more severe than for giving and receiving a bribe, the *sanction* in the first part of CL Section 322 was amended, i.e., the sentence of deprivation of liberty is four years (formerly six years), and it also envisages the possibility to apply also community work or a monetary fine up to one hundred minimum monthly salary;
4) The word "intentionally" has been deleted from the disposition of the first and third part of CL Section 198; the *requesting* of material values, properties or benefits is moved to the second part of Section 198, the legislator is creating the material substance; reference *"or in the interests of any other person*" is added to the first part of Section 198, thus the acts referred to in the Section may be committed or omitted in the interests of the giver of the benefit, as well as in the interests of any other person;
5) CL Section 199 has been expanded, envisaging also commercial bribery to an employee of an undertaking (company) or organisation, or a person who, on the basis of the law or a lawful transaction, is authorised to conduct affairs of another person, or a person who, on the basis of the law or lawful transaction, is authorised *to settle disputes*, if this has been dome with the aim to achieve the desirable action from the recipient of the benefit or the offer, thus ensuring consistency with CL Section 198;
6) Section 199[1] has been added to the Criminal Law, which stipulates that "*a person who has unlawfully offered or given material values, property or benefits of other nature shall be released from criminal liability if he or she, after committing of the criminal offence, voluntarily informs of the occurrence."* This amendment ensures equal treatment of persons, who have given or offered material benefit in private and public sector alike (CL Section 324);
7) CL Section 326[1] was supplemented, envisaging criminal liability for trading with influence *in the interests of any person* (not only in the interests of the person offering or giving the benefit), in accordance with the Council of Europe

[18] Informatīvais ziņojums par nepieciešamajiem pasākumiem Pretkorupcijas starpvalstu grupas (GRECO) rekomendāciju izpildei (pieņemts GRECO 39. plenārsēdē Strasbūrā, 2008. gada 6.-10. oktobrī). Available: http://www.knab.gov.lv/uploads/free/zinojumi/knabzino_090309_greco.pdf [viewed 5 May 2012].

Criminal Law Convention on Corruption[19]; (the aforementioned amendments to the Criminal Law introduced also other significant changes, however, because of the limited scope of the article the author will not examine them).

Assessment of the amendments that the legislator introduced by the law of 19 November 2009 "Amendments to the Criminal Law"[20], firstly, allows concluding that the amendments were not jus editorial, but contained serious innovations as to the content; secondly, one must note; even though conceptually these can be assed very positively; however, it cannot be asserted that the quality of regulation on bribery set out by the Criminal Law is sufficient.

The first part of CL Section 320 distinguishes receiving of "gratitude", which the person indicated in the disposition of this Section accepts for an already performed lawful or illegal activity or permitted omission in the interests of the person giving the bribe, the person offering the bribe or other persons by using his or her official position [..]. It follows from this wording that under such circumstance it is impossible to talk about an offerer of the bribe. The author believes that receiving the bribe as gratitude for an already committed act or failure to act excludes the existence of an offerer of a bribe. Moreover, since the legislator in this Section has criminalised only the receipt of the bribe, not accepting its offer, the reference to "offered bribe" in the disposition of the Section is redundant.

The legislator's approach, not defining differentiated liability depending upon whether the bribe has been received for lawful or illegal act committed by an official also raises doubts. The legislator, in constructing the first and the second part of CL Section 320 was guided only by the time, when the official received the benefit – before or after the actions envisaged in the Section. This approach does not seem to be quite correct, since an official, by receiving a benefit or an offer thereof for committing lawful acts, causes less damage to the interests protected by the Criminal Law compared to the case, when the benefit or an offer thereof is received for illegal official acts. By committing lawful acts for certain remuneration, the official creates a certain risk to ensuring the principles of justice and legality in the future, but by committing illegal acts and receiving remuneration for them, concrete damage is inflicted upon the official interests of the state institutions.

It must be noted that a differentiated approach is seen in the criminal laws of other countries, defining the state official's liability depending upon the fact whether the benefit is received for lawful or illegal act. Thus Para 331 (Receiving Benefit) of the German Criminal Code[21] defines the liability of an official or a person specially authorised to provide public service, who requests benefit for performing the official duty, agrees to receive it or receives it. But Para 332 (Receiving Bribe) envisages liability for the same activities, if the person has exceeded his official authorisation.

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[19] Eiropas Padomes Krimināltiesību pretkorupcijas konvencija [The Council of Europe Criminal Law Convention on Corruption]. *Latvijas Vēstnesis*, 2000. 20. decembris, Nr. 460/464.

[20] Grozījumi Krimināllikumā [Amendments to the Criminal Law]: LR likums. *Latvijas Vēstnesis*, 2009. gada 9. decembris, Nr. 193.

[21] Criminal code of the Federal Republic of Germany. Available: http://legislationline.org/documents/section/criminal-codes [viewed 4 May 2012].

The same principle for defining liability is found in Para 304 and 307 of the Austrian Criminal Code[22]; Article 225 and the first part of Article 227 of the Criminal Code of the Republic of Lithuania[23]; Article 290 and 291 of the Criminal Code of the Russian Federation 225[24], as well as in the criminal codes of other countries.

The wording of CL Sections 320 and 323, as the result of introduced amendments, leads to even more serious ambiguity, i.e., the first part of CL Section 323 "corresponds" to the second part of CL Section 320, in which the legislator, creating the qualifying substance, has envisaged punishment for the so called "buy over". Thus, the Criminal Law dos not envisage liability to a person, who has given a bribe for an already performed lawful or illegal act by an official or failure to act. Apparently the legislator considered that the behaviour of such person does not reach the level of such harmfulness that a criminal liability should be set for it, or, the legislator believes that the disposition of CL Section 232 covered also the giving of "bribe-gratitude". P.Mincs once emphasised that "the infringement of incorruptibility to a certain extent has a double meaning. It is criminal as regards the receiver of the bribe and criminal as regards the giver of the bribe"[25]. V.Liholaja has expressed a similar approach, considering that in criminal offences, which manifest themselves as bribery in the official service in state institutions or in private sector, the offence of the recipient of the benefit cannot be implemented without the offence of the giver of the benefit.[26]

It is indicated in literature, with good reason, that bribery primarily contains two independent, but simultaneously indissolubly interconnected offences – the giving and receiving of a bribe.[27] The receiving and giving a bribe are unimaginable one without the other. The indissoluble link between the offences under examination follows from the conclusions enshrined in the criminal law doctrine with regard to the moment when this offence is completed, i.e., the moment of completion for the offence committed by the giver of the bribe (as well as intermediary) is linked with the actions and wills of the receiver of the bribe.[28] Therefore there are no logical arguments why the legislator has deemed it necessary to punish only the receiver of the bribe in case of bribe-gratitude. Moreover, according to the wording of CL

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[22] Austrijas krimināl̦kodekss. Krastiņš U., Liholaja V. Salīdzināmās krimināltiesības. Latvija, Austrija, Šveice, Vācija. Rīga: Tiesu namu aģentūra, 2006.

[23] Lietuvas Republikas krimināl̦kodekss. Krastiņš U., Liholaja V. Salīdzināmās krimināltiesības. Igaunija, Latvija, Lietuva. Rīga: Tiesu namu aģentūra, 2004.

[24] Уголовный кодекс Российской Федерации. Available: http://www.consultant.ru/popular/ukrf/ [viewed 4 May 2012].

[25] Mincs P. Krimināltiesības. Sevišķā daļa. Ar V. Liholajas komentāriem. Rīga: Tiesu namu aģentūra, 2005, 73. lpp.

[26] Liholaja V. Pētījums: Noziedzīgi nodarījumi valsts institūciju dienestā: likums un prakse. Available: http://www.tm.gov.lv/lv/jaunumi/Petijums.pdf) [viewed 5 May 2012].

[27] Дононов В., Капинус О., Щерба С. Сравнительное уголовное право. Особенная часть. Москва: Юрлитинформ, 2010, с. 448.

[28] Niedres A. Komentārs KL 323. pantam. Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Sevišķā daļa. Trešais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2009, 770. lpp.; Liholaja V. Pētījums: Noziedzīgi nodarījumi valsts institūciju dienestā: likums un prakse. Available: http://www.tm.gov.lv/lv/jaunumi/Petijums.pdf) [viewed 5 May 2012].

Section 323 the giver of the bribe is not to be punished even if the bribe is given for committing an illegal act.

For the sake of accuracy it must be noted here that A.Niedre, commenting CL Section 323, has pointed out that liability for bribery sets in irrespectively of the time, when the bribe was handed over (offered) and when the state official received it (accepted the offer) – before or after he or she has committed the act the giver of the bribe is interested in.[29] This comment was provided prior to the amendments introduced with the Law of 19 November 2009 "Amendments to the Criminal Law,"[30] but it is still relevant. The author believes that A.Niedre' opinion cannot be supported, since the legislator both prior to and following the aforementioned amendments to CL Section 323, has both envisaged reference to offering the bribe and used the phrase "[…] in order that he or she, using his or her official position, performs or fails to perform some act in the interests of the giver […] of the bribe […]". The author holds the opinion that offering the bribe, as well as the wording "performs or fails to perform", is linked with the buy over, since these actions are aimed at achieving the desirable outcome in the future. Thus, also the giving of a bribe can take place only before the state official commits the relevant act, and this gives grounds to conclude that CL Section 323 envisages liability only for the so called bribe—buy over.

The next issue worth considering is the regulation of criminal liability for corruptive offences in public and private sector.

Professor A.Bezverhov, defining the concept "corruption" notes that it is an ideology of using the official position, based upon using the granted state power contrary to public interests, thus satisfying one's own interests.[31] The author considers that the reference to ideology is the basis for such construction of legal provisions, reflecting the legislator's will to combat corruption, that would compatible in both public and private sector.

A.Bezverhov believes that in defining criminal liability for corruptive actions in private and public sector, different approach should be taken.[32] N.Kuznecova, commenting the respective provisions in the Criminal Code of the Russian Federation, has expressed a contrary opinion, critically noting that the legislator has envisaged for equally severe offences different liability for private sector representatives and state officials, usually envisaging more severe liability to state officials.[33] N.Kuznecova has underlined that the liability of the employees of public and private sector for identical criminal offences should be included in one chapter, thus ensuring absolutely identical approach to the regulation on the liability of these persons.[34]

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[29] Niedres A. Komentārs KL 323. pantam. Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Sevišķā daļa. Trešais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2009, 770. lpp.

[30] Grozījumi Krimināllikumā [Amendments to the Criminal Law]: LR likums. *Latvijas Vēstnesis*, 2009. gada 9. decembris, Nr 193.

[31] Безверхов А.Г. Некоторые проблемы противодействия коррупции в условиях глобализации. Москва, МГУ 2010, материалы V Российского Конгресса 27-28 мая 2010г, с. 469

[32] Ibid. C.472

[33] Кузнецова Н.Ф. Проблемы квалификации преступлений. Москва: Городец, 2007, с. 127-128

[34] Ibid. C.130

The author's opinion can be partially supported, however, the fact that the need to differentiate the liability for offences in the public and private sector is determined by different endangered interests[35] cannot be ignored – corruption in public sector threatens normal functioning of state institutions, but corruptive actions in private sector damage the interests of economy, fair competition, etc.

Different approach in defining the liability for bribery in private and public sector is seen in the criminal laws of other states. There are states, which, like Latvia, differentiate liability, for example, Belgium,[36] France[37], the Netherlands,[38] Norway,[39] Russia[40] and others. At the same time there are also states, for example, Ukraine[41], Estonia[42], in which the concept of an official (subject of misdemeanour in office) includes persons, who perform the respective management functions both in private and public sector.

Examining the material substance of bribery and sanctions for them both in private and public sector, it must be noted, first of all, that the range of criminalised corruptive actions is significantly narrower compared to public sector. Thus, according to CL Section 198 the receipt of prohibited benefit in the form of "gratitude" (in difference to the first part of CL Section 320) is not punishable, likewise, the legislator has not deemed it necessary to criminalise intermediation and misappropriation of a bribe in private sector, even though such actions are to be evaluated as bribery, moreover, the subject of this offence, irrespectively of the sector, in which these actions take place, can be any natural person, who is legally capable and has reached the age when criminal liability sets in.[43] It must be noted here that "intermediary" is mentioned in the disposition of both CL Section 198 and CL Section 199.

It must be noted that an absence of uniform approach is observed also in the framework of public sector as such, i.e., criminal liability is not envisaged for intermediation to hand over legal benefit or an offer thereof, as well as for misappropriation of an illegal benefit, if the illegal benefit is intended for an employee of a state or local government institution, who is not a state official (CL Section 3262), even though the legislator has included a reference to "an intermediary" in the disposition of CL Section 3262. It is noteworthy that criminal liability for giving illegal benefit is not envisaged. In

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[35] Дононов В., Капинус О., Щерба С. Сравнительное уголовное право. Особенная часть. Москва: Юрлитинформ, 2010, с. 247.

[36] Уголовный кодекс Бельгии. Санкт-Петербург: Юридический цетр Пресс, 2004.

[37] Criminal Code of the French Republic. Available: http://legislationline.org/documents/section/criminal-codes [viewed 4 May 2012].

[38] Уголовный кодекс Голандии. Санкт-Петербург: Юридический цетр Пресс, 2001.

[39] Criminal Code of the Kingdom of Norwey. Available: http://legislationline.org/documents/section/criminal-codes [viewed 4 May 2012].

[40] Уголовный кодекс Российской Федерации. Available: http://www.consultant.ru/popular/ukrf/ [viewed 4 May 2012].

[41] Уголовный кодекс Украины. Available: http://meget.kiev.ua/kodeks/ugolovniy-kodeks/ [viewed 4 May 2012].

[42] Criminal Code of the Republic of Estonia. Available: http://legislationline.org/download/action/download/id/1280/file/4d16963509db70c09d23e52cb8df.htm/preview [viewed 4 May 2012].

[43] Liholaja V. Noziedzīgu nodarījumu kvalifikācija: Likums. Teorija. Prakse. Rīga: Tiesu namu aģentūra, 2003, 436. lpp.

general it can be concluded that the legislator, defining criminal liability for bribery in private and public sector (as well as within the framework thereof), in view of the deficiencies mentioned above, fails to ensure a just regulation of criminal law relations in the field of preventing and combating prevention.

The range of qualifying features included in CL Sections 320, 198 and 3262 create certain perplexity. All these provisions contain the qualifying features repeatedly, committing a criminal offence on a large scale or by a group of persons pursuant to prior arrangement, as well as demanding the respective benefit, which form the qualified substance. The range of qualifying features included in CL Sections 320 and 3262 contain in addition to these also extortion of bribe/ illegal benefit. The fact that neither in CL Section 198, nor CL Section 3262, in difference to the fourth part of CL Section 320 the committing of a crime in an organised group forms the qualified substance must be especially emphasized. This must be recognised as a serious deficiency, especially taking into account the reference included in the UN Convention against Corruption[44] Preamble to the connection between corruption and other forms of crime, "in particular organized crime and economic crime, including money- laundering […]".

The regulation on complicity in the field of corruptive criminal offences is not only significant as regards the quality of provisions and their harmonisation, but is of pure practical importance. Thus, for example, N.Kuznecova puts a reasonable question, how to qualify a criminal offence, perpetrated by an organised group consisting of both state officials and private sector officials,[45] or state officials together with employees of state or local government institutions? The author admits that in fact there is no answer and that solution should be sought in the level of endangered interests, assessing, which interests have suffered greater damage – the private or the state.[46] This solution to the problem can be disputed, however, it must be noted that inclusion of organised group in the range of qualifying features in CL Sections 198 and 3262 is the primary task to alleviate the situation with regard to qualifying and ensure equal regulation of criminal law relations in various spheres where corruptive offences are committed.

Problems identified in the field of sanctions are as serious, which, undoubtedly, decreases the quality of the Criminal Law.[47] The sanctions are neither balanced regarding bribery in the private and state sector, not for corruptive actions within the state sector. Comparing the sanctions for receiving a bribe (CL Section 320) and for receiving an illegal benefit (CL Section 198), one must conclude that the private sector has been granted ungrounded privileges, i.e., different sanctions apply for the

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[44] ANO Pretkorupcijas konvencija [United Nations Convention against Corruption]. Available: http://www.knab.gov.lv/uploads/free/konvencijas/ano_pretkorupcijas_konvencija.pdf [viewed 5 May 2012].

[45] Кузнецова Н. Ф. Проблемы квалификации преступлений. Москва: Городец, 2007, с. 129.

[46] Ibid.

[47] Regretfully, this applies also to sanctions for corruptive offences, as well as sanctions for other offences envisaged by the Criminal Law. See more: Liholaja V. Soda noteikšanas principi: likums un prakse. *Jurista Vārds,* 2006. gada 12. decembris, Nr. 49., 23.-29. lpp.; Hamkova D. Krimināltiesību globalizācijas procesi un krimināsods. Aktuālās tiesību realizācijas problēmas. Latvijas Universitātes 69.konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2011, 363.-365. lpp.

same actions. Thus, deprivation of liberty not exceeding the period of three years or community service, or monetary fine are envisaged for the offence included in the first part of Section 198; but for the offence included in the second part of CL Section 320 (corresponds to the first part of CL Section 198) – deprivation of liberty for a period up to eight years, with or without confiscation of property, depriving of right to take up certain occupation or assume a certain position for a period not exceeding three years or without it.

As underlined above, also within the limits of the public sector the sanctions for objectively identical offences are radically different. Thus, the sanction for demanding and accepting an illegal benefit (CL Section 3262) is actually equalled to receiving a bribe in the private sector – the punishment is deprivation of liberty for a period not exceeding three years or arrest, or community service or a monetary fine, depriving the right to engage in certain occupation or to take up a certain position. By such construction of sanctions the legislator has confirmed that corruption in the private sector is incomparably less damaging that in the public sector, moreover, the legislator takes the view that also receipt of the bribe, committed by a state official, is of a significantly more damaging than actions of the same type committed by an employee of a state or local government institution, notwithstanding the fact the in the latter case the same interests are endangered, i.e., normal functioning of state institutions.

It must be taken into consideration that corruption is determined by different factors. It has both culture historical, political, economic and psychological causes. Over time society develops the syndrome of being accustomed to corruption[48], thus a complex approach in all sectors and fields is needed to combat it.

Conclusion

1. Since the legislator in the first part of CL Section 320 has criminalised only receiving of a bribe, not the offer thereof, the reference to *"the offered bribe"* included in the disposition of this Section is redundant.
2. Bribery primarily consists of two independent, but simultaneously insolubly linked offences – giving and receiving a bribe. Thus, there are no logical arguments, why the legislator has set liability for the receiver of the bribe for taking the so-called bribe- gratitude, however the liability does not set in for the giver of the bribe- gratitude. To rectify this deficiency CL Section 323 should envisage liability for giving a bribe as gratitude (*For already committed lawful of illegal act or failure to act*).
3. On the basis of foreign experience and the conclusions made by professor V.Liholaja in the study "Criminal offences in the service of state institutions: the law and practice", the Criminal law should envisage different approach in setting the liability for a state official, depending upon whether the benefit has been received for lawful or illegal activity.

[48] Безверхов А.Г. Некоторые проблемы противодействия коррупции в условиях глобализации. Москва, МГУ 2010, материалы V Российского Конгресса 27-28 мая 2010 г, с. 467.

4. To ensure fair criminal law regulation in the field of preventing and combating corruptive criminal offences, uniform approach to criminalisation of corruptive acts both in public and private sector should be ensured. Thus, the Criminal Law should envisage liability for receiving an unauthorised benefit (CL Section 198) and illegal benefit and illegal benefit (CL Section 326^2) in the form of "gratitude"; a qualifying feature should be added to CL Sections 198 and 326^2– *if the offence has been committed by an organised group*; CL Section 198 should include the qualifying feature – *if the material benefit, material or any other benefit was extorted;* liability should be defined for intermediation in handing over or offering unauthorised benefit, as well as for intermediation in handing over or offering illegal benefit; misappropriation of unauthorised benefit or illegal benefit should be criminalised.
5. Comparison of sanctions for receiving a bribe (CL Section 320) and for receiving unauthorised benefit (CL Section 198) and illegal benefit (CL Section 326^2) allows concluding that sanctions for identical acts differ substantially. In view of the fact that such offences should be equally assessed as corruptive, irrespective of their subject and the sector, in which they have been committed, the sanctions for them should be compatible.

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KNAB pārskats par Latvijā reģistrētiem noziedzīgiem nodarījumiem valsts institūciju dienestā un krimināl vajāšanas uzsākšanai nosūtītajām krimināllietām 2010. gadā. Available: http://www.knab.gov.lv/uploads/free/parskati/knab_parskats_nn_2010.pdf

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INVESTIGATIVE FIELD WORK LAW – PROBLEMS AND PERSPECTIVES

Keywords: Investigative Field Work Law, Criminal Procedure Law, human rights, proposals, additions and amendments to the Investigative Field Work Law.

By now there have been countless discussions and exchanges of opinions among lawyers about the opportunities to use information acquired using investigatory operation measures for proof purposes within criminal procedure and the legal preconditions thereof.

Great uproar within law enforcement institutions and public in general was caused when one member of parliament A.Elksnins submitted amendment proposals to the 2nd reading of the Investigative Field Work Law during a meeting of the Defence, Internal Affairs and Corruption Prevention Committee on 11 January 2012. A.Elksnins based his proposals, by mentioning concrete examples, on the fact that currently in the country, by virtue of deficiencies in laws and regulations, lawlessness and uncontrolled action of law enforcement authorities and abuse of service authority is observed, both by illegal wiretapping of conversations and storing collected information in a negligent manner which is also often illegally leaked.

As regards violations in the methods of investigatory operation measures taken by the Corruption Prevention and Combating Bureau (KNAB) and the publicly available information on the Latvenergo case, the MP is very critical "if we look back just a little, it is strange to see that all leaks that have happened in one way or another have served to save the prestige of some concrete institution and have been to the benefit of political groups currently in power. It is difficult to believe that the Latvenergo case could be an exception; in this case the leading interests are either some interests of political nature or the willingness of KNAB to prove the usefulness and expediency of its existence both now and in the future".[1]

It must be noted that some lawyers consider that the existing order is consistent both with the letter of the law and its spirit, although some of them believe that we are heading towards a police-type country model because the persons performing investigative field work intervene with private lives too intensively, too often and in an uncontrolled manner.

As the initial impact assessment report of the draft law prepared by A.Elksnins shows, the main idea of the law amendments is to unify the provisions of the Investigative Field Work Law and the Criminal Procedure Law in connection with decision-

[1] Krautmanis M., Elksniņš A.: Valdošā koalīcija ir pret tiesiskumu un reformām [The Leading Coalition is against the Rule of Law and Reforms], *Neatkarīgā Rīta Avīze* ,16 April 2012.

making as regards such investigatory operation measures and investigation activities that significantly infringe human rights.

As regards their contents, submitted proposals are in fact fundamentally altering the investigatory operations' content currently reinforced with the laws and regulations of the Republic of Latvia as well as in practice, and they are marking the tendency to limit the rights of persons performing investigative field work, operativeness of response in crime detection and incorrect treatment of state secret information.

Among the most discussed issues among the law enforcement institutions are the proposed amendments to Article 7 "General and Special Method of Performing Investigatory Operations Measures" and Article 17 "Investigatory Control of Correspondence, Investigatory Acquisition of Information Expressed or Stored by a Person from Technical Means, and Investigatory Wiretapping of Conversations" of the law.

It must be noted that amendments to the Investigative Field Work Law are already being made. For instance, Article 7 Paragraph 5 of the Investigative Field Work Law used to read this way: "In cases where immediate action is required in order to avert terrorism, murder, gangsterism, riots, other serious or especially serious crime, as well as where the lives, health or property of persons are in real danger, the investigatory operations measures referred to in Paragraph four of this Section may be performed without the approval of a judge. The prosecutor shall be notified within 24 hours, and approval of a judge shall be obtained within 72 hours, regarding such measures. Otherwise the conduct of the investigatory operations measures shall be discontinued".

Amendments to the Investigative Field Work Law that came into force from 4 April 2012 altered Article 7 Paragraph 5 the following way: "In cases where immediate action is required in order to avert terrorism, murder, gangsterism, riots, other serious or especially serious crime, as well as where the lives, health or property of persons are in real danger, the investigatory operations measures referred to in Paragraph four of this Section may be performed with the approval of a prosecutor. The following working day, but not later than within 72 hours, approval of a judge shall be obtained. Judge, by approving an investigatory operations measure, decides about the grounds of its immediate conduct, as well as the necessity to continue it, if it has not been concluded. If the judge recognizes that the conduct of the investigatory operations measure is groundless or illegal, the persons performing investigative field work shall immediately destroy the information obtained". [2]

However, Article 212 Paragraph 4 of the Criminal Procedure Law foresees that "In emergency cases, a person directing the proceedings may commence special investigative actions by receiving the consent of a public prosecutor, and, not later than the next working day, a decision of an investigating judge".[3] Differences between these provisions apparently have been significantly reduced which has been the cause of sharp discussions among lawyers and professionals.

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[2] Amendments to the Investigative field work law – Likumi.lv. Available: http://www.likumi.lv/doc.php?id=245577 [viewed 25 April 2012].

[3] Criminal Procedure Law, 3rd edition. Riga: *Latvijas Vēstnesis*, 2006. 347 p.

The before-mentioned amendments to the Investigative Field Work Law also foresee additions to the Article 17 of the law that sets out investigatory operations measures during which constitutional rights of persons are significantly infringed and are carried out only using the special method. The Article now includes a new investigatory operations measure: "Investigatory video-surveillance of places not open to the public". It means that video-surveillance of activities going on at places not open to the public is carried out without the consent of their owners, managers and visitors.

Submitted proposals that foresee a change of authorisation from "prosecutor" to "Prosecutor General" should be considered as circumstances obstructing operativeness of investigatory operations and performance of officials' work, and these provisions are in conflict with the provisions of the Criminal Procedure that define both the competence of prosecutor and Prosecutor General.

In order to ensure that the framework of investigatory operations complies with the requirements of the Council's European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the case-law of the European Court of Human Rights, it should be admitted that additions are needed as regards the control mechanism of investigatory operation measures. Namely, special method investigatory operation tasks that infringe human rights should be controlled and supervised on an increased level and regular basis.

Also Ineta Ziemele, a judge from the European Court of Human Rights, in 2009 has pointed out some provisions of the Investigative Field Work Law that do not comply with the international rights.

Therefore the proposal from the Central Criminal Police Department of the State Police must be partly supported to perform supervision (Article 35 of the Investigative Field Work Law – "Monitoring of Investigatory Operations") not only by Prosecutor General and a department of prosecutors specially authorized by him or her, but also by some department of court (for example, judges specially authorised by the Chief Justice of the Supreme Court who currently perform only the approval of special method investigatory operation tasks, but it could also be assigned to chief justices of regional courts and judges authorized by them).

However, as regards the proposal to assign the supervision of investigatory operations to chief justices of regional courts and judges authorized by them, in my opinion it would be a questionable step because probably nobody could guarantee that in sparsely populated towns and villages, where judge families keep friendly and business relations with representatives from various social levels, leaking of information about the planned investigatory operation measures can be avoided.

I could agree with the forwarded amendments to Article 9 Paragraph 6 "Investigatory Inquiring" of the law, when investigatory information is acquired from credit institutions or financial institutions with a motivated decision made by chief justices of regional courts and judges specially authorized by them.

A provision could be introduced to the Investigative Field Work Law that supervision shall be performed by the same judge of the Supreme Court who accepted the investigatory operation measures of special method in the respective case, by assigning to the official performing investigative field work an obligation to report once a

month on the results and progress of the investigatory operations (if the measure is lengthy), to report to the judge of the Supreme Court, which shall be registered in the case by the judge, or he or she would order to stop the measure, if the results would not correspond to the aims of the investigatory operations as regards unreasonable infringement of human rights. In addition, at the end of the investigatory measures of special method, the official should have an obligation to report to the judge of the Supreme Court on the results of the measure. At the same time, constant control and supervision shall be carried out by Prosecutor General and a department of specially authorized prosecutors, as it is being done now.

Such amendments to the Investigative Field Work Law that would significantly increase availability of information about investigatory operation methods and tactics to criminals, as well as give an opportunity to counteract state interests should not be allowed. Otherwise it would have a negative effect on crime prevention, crime detection and calling to justice of the persons at fault as defined by law, which could increase threat to state internal security.

According to the European human rights regulatory acts, inhabitants of Latvia should have an opportunity to find out if investigatory operation measures have been performed against them using a special method, and whether they have been entered in the investigatory list, and what character of information has been collected. However, the Investigative Field Work Law should also define prohibitions to report on the before-mentioned, which should be assessed taking into account circumstances of the respective case. In such case investigative field-work service should make a grounded decision on the reasons why information may not be disclosed, and report on this decision to the Prosecutor General. Disputes between a person and officials performing investigative field work should be settled by the Office of Prosecutor General.

On 25 April 2012, during the Day of Lawyers, at the office of Ombudsman, there was a conference "Compliance of investigatory operations with human rights" organized by the Division of Civil and Political Rights, where proposals from professionals were discussed and also supported, that the Investigative Field Work Law should define and motivate prohibitions so that inhabitants of Latvia would not be informed about investigatory operation measures of special method directed against them, but they would have guaranteed rights to address to the Office of the Prosecutor General in order to verify their suspicions.

How to solve the problem regarding informing persons and the timeframes and contents of such action thus not violating human rights? Currently these proposals are developed by the respective commissions of law enforcement institutions because at the moment giving rights to a person to get introduced with service documents concerning the progress and decisions of investigatory operations etc. is in conflict with the Investigative Field Work Law, Article 8, Paragraph 3, and the Law on Official Secrets, and it could significantly affect application opportunities of investigatory operation measures in crime detection.

It must be noted that normative documents of our Baltic neighbours also do not foresee concrete timeframes and scope of answers that should be given to a person if he or she considers that during investigatory operation measures their human rights have been infringed, for example:

- Law on Operational Activities of the Republic of Lithuania (20 June 2002, No.IX – 965) Article 6 "Protection of Human and Citizens' Rights and Freedoms in Carrying out Operational Activities", Paragraph 9 sets out that "A person who considers that the actions of entities of operational activities have violated his rights and freedoms may appeal against these actions to the head of the entity of operational activities, a prosecutor or a court"; [4]
- A law on investigatory operations has not been adopted in Estonia, but the Surveillance Act (22 February 1994 RT[1] I 1994, 16, 290), Article 17 "Submission of information collected by surveillance activities for examination", Paragraph 2 sets out that "At the request of a person specified in subsection (1) of this section, he or she is permitted to examine the materials of the surveillance activities conducted with regard to him or her, and the photographs, films, audio and video recordings and other data recordings obtained as a result of the surveillance. On the basis of a reasoned written decision made by the head of the surveillance agency or a person authorised by him or her, the following information need not be submitted for examination until the corresponding bases cease to exist". Part 3 of this paragraph states that such information includes information which contains state secrets, secrets of another person or professional secrets of a surveillance agency. [5]

This issue was discussed also at the Constitutional Court where it was pointed out that "according to the Investigative Field Work Law, Article 24, Paragraph 1, information obtained in the course of investigatory operation measures shall be classified as restricted access information which may be utilised as evidence in a criminal proceeding only according to the procedures specified in the Criminal Procedure Law, ensuring the implementation of the investigatory measures and the confidentiality and safety of the persons involved therein. Thus with the framework of the Investigative Field Work Law the legislator has expressed willingness to ensure the confidentiality of investigatory operation measures. The restricted availability of acquired information can be explained with the nature and tasks of investigatory activity. The Investigative Field Work Law does not stipulate the rights of persons performing investigative field work or the obligation to inform a person on the investigatory operation measures performed after their completion. But giving information to a person about investigatory operation measures during their performance would be in conflict with the tasks of investigatory activity defined in the Investigative Field Work Law Article 2"[6]

As it was noted at the Constitutional Court, "the investigatory operation measures in cases defined in the Investigative Field Work Law, Article 7, Paragraph 5, are subject

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[4] Law on Operational Activities of the Republic of Lithuania. 20 June 2002 No. IX – 965. With latest amendments adopted on 12 May 2011 Nr. XI-1374. Available: http://legislationline.org/documents/action/popup/id/7006 [viewed 21 February 2012].

[5] Surveillance Act of the Republic of Estonia. 22 February 1994 RT1 I 1994, 16, 290. Available: http://www.legaltext.ee/en/andmebaas/tekst.asp?loc=text&dok=X30011K7&keel=en&pg=1&ptyyp=RT&tyyp=X&query=Surveillance+Act [viewed 21 February 2012].

[6] Release on a judgement – Constitutional Court. Judgement made on 12 May 2011 in case concerning performance of investigatory operations. Available: http:www.satv.tiesa.gov.lv/upload / spriedums 2010-55-0106.htm [viewed 22 May 2012].

to prosecutor's supervision which also includes control. Supervision of investigatory operation measures is done by prosecutor not only following the procedure set out in the Investigative Field Work Law, but also in compliance with other normative acts that regulate powers of prosecutor. For example, Article 12 of the Office of the Prosecutor Law (www.vvc.gov.lv/.../Office_of_the_Prosecutor.doc) includes an obligation of prosecutor to supervise investigatory operations. However, the prosecutor's supervision defined in Article 7, Paragraph 5 of the Investigative Field Work Law does not exclude judicial after-control. Court verifies the reasons of the urgency of the investigatory operation measures and the compliance with the law of measures performed. Like in the case of the control of special investigation activities, also the after-control of investigatory operation measures includes judicial evaluation concerning the grounds of measures performed and lawfulness of the information collection process.[7]

It can be concluded from the before-mentioned that Prosecutor General and his or her specially authorized prosecutors perform the control of investigatory activity and according to its results deliver opinions on the compliance with the law of the actions performed by investigative field work officials. The control is necessary so that Prosecutor General and his or her specially authorized prosecutors could make sure of the lawfulness of investigatory operation measures taken. The framework in force foresees also judicial control, including after-control. Thus at the moment I can not agree with the opinion that the framework in force does not foresee a sufficiently independent after-control for investigatory operation measures.

However, if a provision is introduced to the Investigative Field Work Law that supervision is performed also by the same judge of the Supreme Court who accepted the investigatory operation measures of special method in the respective case, by assigning to the official performing investigative field work an obligation to report once a month on the results and progress of the investigatory operations (if the measure is lengthy), to report to the judge of the Supreme Court, which shall be registered in the case by the judge, or he or she would order to stop the measure, if the results would not correspond to the aims of the investigatory operations as regards unreasonable infringement of human rights.

On 24th of April, during the Day of Lawyers, at the Great Hall of the University of Latvia there was an event "Investigatory operations and human rights". Professionals who work at investigatory operation units of law enforcement institutions participated in the event. During the event issues concerning historical, theoretical and up-to-date practical issues of investigatory operation were discussed. As practical employees regarded, one of the unsolved problems remains to be the training of investigatory employees which is connected to the formerly groundless decision: to liquidate the Police Academy of Latvia in 2009. In general there is a lack of employees at the State Police, but those who work at the investigatory services are gathered from the street, without the necessary education. Likewise it was noted that some politicians at first

[7] Release on a judgement – Constitutional Court. Judgement made on 12 May 2011 in case concerning performance of investigatory operations. Available: http:www.satv.tiesa.gov.lv/upload / spriedums 2010-55-0106.htm [viewed 22 May 2012].

should get better introduced with the provisions of the Investigative Field Work Law and only then forward amendments to it, instead of increasing own popularity in such manner. It is advisable for such politicians who have actively involved in the preparation of amendments to the Investigative Field Work Law, first of all to acquire permission to access subject matters of an official secret, which currently is denied and is not given.

Discussions among practical and theoretical experts continued also at the International Scientific and Applied Conference "Global Challenges: Legal and Organizational Methods of Conflict Management", section "Modern trends in criminology, forensic science and investigatory operations", April 27-28, Baltic International academy. Also here strong criticism was expressed against the politicians who are actively involved in supporting amendments to the Investigative Field Work Law.

Conclusion

- In order to ensure that the framework of investigatory operations complies with the requirements of the Council's European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the case-law of the European Court of Human Rights, it should be admitted that additions are needed as regards the control mechanism of investigatory operations. Namely, special method investigatory operation tasks that infringe human rights should be controlled and supervised on an increased level and regular basis.
- According to the human rights regulatory acts, inhabitants of Latvia should have an opportunity to find out if investigatory operation measures have been performed against them using a special method, and whether they have been entered in the investigatory list, and what character of information has been collected. However, the Investigative Field Work Law should also define prohibitions to report on the before-mentioned, which should be assessed taking into account circumstances of the respective case. In such case investigative field-work service should make a grounded decision on the reasons why information may not be disclosed, and report on this decision to the Prosecutor General. Disputes between a person and officials performing investigative field work should be settled by the Office of Prosecutor General.
- 23 February 2012 was the first working day of the newly formed Defence, Internal Affairs and Corruption Prevention Committee's sub-committee on improvement of the investigative field work law, and on its first session Andrejs Judins was elected as its chairman. Along with MPs, the committee includes experts from law enforcement institutions, prosecutor's office and advocacy. During the session of 9 May 2012 the MPs could not reach consensus on the methods of new law creation. Member of parliament A.Elksnins recalled his proposals for the amendments to the Investigative Field Work Law. Committee

decided to wait for more concrete proposals from the Ministry of the Interior's working group and engage in the evaluation of the proposals developed. [8]

- Taking into consideration that the Ministry of the Interior's working group includes experts from the Finance Police, Constitution Defence Bureau, Military Surveillance and Security Service, Ministry of Justice, Supreme Court, regional courts and district courts, Office of Representative of the Government of the Republic of Latvia before International Human Rights Organizations, State Border Guard, Corruption Prevention and Combating Bureau, Latvian Prison Administration, General Prosecutor's Office, Customs Criminal Board, Security Police, Military Police, as well as representatives from the Ministry of Interior, the expected proposals should be discussed not only within the sub-committee of Saeima, but also in the society.
- Based on the proposals from experts–professionals of the respective fields, the corresponding changes to the Investigative Field Work Law should be introduced similarly as additions and amendments to the Penal Law and Criminal Procedure Law are being introduced, instead of creating a new Investigative Field Work Law as some opponents wish to do.

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[8] Representatives from the LJA (Latvian Lawyers' Association) visit the Sub-commission of the Investigative field work law. Available: http://juristiem.wordpress.com/ [viewed 23 May 2012].

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ACTS OF LAWS WITH THE FORCE OF A STATUTE ISSUED BY THE EXECUTIVE BRANCH OF GOVERNMENT IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE

Keywords: acts of laws with the force of a statute, delegated legislation, executive, separation of powers.

One of the long-standing standards of contemporary democratic states is that their constitutions are founded on a number of principles defining their democratic identity. The catalogue of such principles include the principle of law-abiding state, the principle of sovereignty of the people, the principle of civil society, the principle of political pluralism, and the principle of observance of freedoms and rights of individuals. The catalogue also includes a principle that is of key importance to the subject of this paper: the principle of separation of powers. Even in the subjective Aristotelian meaning, it involved separation of different areas with different duties in the functioning of a state. Even Aristotle found it self-evident that the activities of a state take various forms. The subjective approach to the separation of powers consists, among others, in identification of several elements, with different competences, within one center of power.

The contemporary form of this principle is objective-subjective, as different types of activities of the state are performed by different government bodies. The recognized author of this concept of the principle of separation of powers is John Lock who, at the end of the 17th century formulated the proposition that it is necessary to separate the legislative, the executive (which in his opinion would include the judicature), and the federal branch of government. The author of one of the most well known concepts of the separation of powers is Charles de Montesquieu who, in his work entitled *The Spirit of the Law* (1748), divided the government into the legislative, the executive, and the judicial branch. The concept was quickly adopted in the 1787 Constitution of the United States of America and in the Polish Constitution of May 3, 1791. Nowadays, the concept is incorporated in an express manner in the constitutions of such states as Estonia (§4), Poland (art. 10), and Ukraine (art. 6), or in an indirect manner (by way of several provisions), for example in the 1992 constitution of the Czech Republic.

In the context of the subject of this paper, the principle of separation of powers is important for at least two reasons. First, of note is the origin of the principle of separation of powers in the present form. The principle was the result of efforts to

define a system of government where the government (most often absolute monarchy) is divides so as to reduce the threat on the part of the state which, until then, could arbitrarily interfere with the liberties and rights of individuals. Thus, the objective of introduction of separation of powers was to guarantee basic freedoms and rights. Also, according to P. Winczorek, separation of powers is intended to prevent state despotism and autocracy.[1] Second, the principle of separation of powers enables perceiving the institution of delegated legislation as an exception: after all, according to the principle of separation of powers, it is the parliament that should establish universal statute-level laws and the executive branch of the government should only enforce such law. Nevertheless, in certain special situations, the executive branch of government enters the realm that, in accordance with the principle of separation of powers, is restricted to the legislative branch. A departure from this principle constitutes a potential threat to the mechanisms of democratic rule and, as mentioned above, a threat to the freedoms and rights of individuals. Consequently, adoption of such institutions in the system of government as delegated legislation requires careful and deliberate regulation to guarantee its use only in justified situations and only to the absolutely necessary extent, based on detailed procedures, to include those that ensure democratic control over such law-making processes.

Consideration of delegated legislation as an exception to the model of law-making conformant to the principle of separation of powers, in particular in the context of the fact that, based on the principle of sovereignty of the people, the legislative power is exercised by the parliament, elected in universal elections, absolutely requires a thorough substantiation of the transfer of a part of the legislative power to bodies other than the parliament.

According to K. Prokop, delegated legislation can be justified by various factors. The most typical factor is the fact that the parliament works in sessions and, consequently, the power to adopt laws with the rank of a statute between the sessions of the parliament is intended to grant the law-making powers to bodies other than the parliament when the parliament is not in session. Another justification of delegated legislation, according to K. Prokop, is belief in slow pace of the parliament's work, its excessive workload, etc. In such a case, the objective is to avoid parliamentary deliberations of the most unpopular matters, to implement difficult economic reforms, and to avoid putting blame on particular parliamentary groups for certain decisions.[2] The third justification enumerated by K. Prokop is a threat to the state (a state of emergency) as "these powers are exercised by the ruling groups in emergency situations when it turns out that the means available to the government and the parliament are not sufficient to overcome the difficulties caused by the crisis. In such

[1] Winczorek P. Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku [A commentary to the Constitution of the Republic of Poland of 2 April 1997]. Warsaw: Wydawnictwo Liber 2008, p. 36.

[2] Prokop K. Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej [States of emergency in the Constitution of the Republic of Poland]. Białystok: Wydawnictwo Temida, 2005, p. 164.

situations, the government wants to eliminate even the restrictions on its actions resulting from the parliament's legislative powers."[3]

Of note is also the historical aspect of the institution of delegated legislation. Paradoxically, even though today legislation adopted by the executive branch of government is considered as an exception to the parliamentary law-making model in democratic states, in the era before modern democratic states were first established such law-making mechanisms were nearly the only ones. The executive branch body, usually the monarch, wielded the entire power of the state (*L'état c'est moi*); thus it was the sole body authorized to adopt laws in the form of acts which, irrespective of their name, supported by the authority of the monarch, constituted the highest law in the state. Consequently, the legislative acts of the executive branch of the government preceded parliamentary legislation. As modern states are based on the principle of sovereignty of the people, the legislative powers were transferred to bodies that represent the sovereign; the monarch, as the body of the executive branch was *gradually* deprived of this power because when establishing laws pertaining to taxes or matters involving deprivation of freedom, it had to gain approval of the representative body. With time, the legislative role of the parliament increased and the issue of the monarch maintaining legislative powers in some areas arose. As K. Prokop emphasized, in Continental Europe, the first constitutional act recognizing the decree-making powers of the monarch was the French Louis VIII's Constitutional Charter of 1814. Pursuant to art. 14, the king had the right to issue regulations and ordinances that were necessary for the enforcement of statutes and for the security of the state. The French solutions became the model for similar solutions in the German states. This was the first form of delegated legislation: decrees with the force of a statue issued pursuant to the constitutional delegation (decrees authorized by the constitution).[4]

Nowadays, delegated legislation is defined as a transfer of a part of the legislative power to non-parliamentary bodies (bodies of the executive branch). Such bodies have the right to issue acts with the legal force equal to that of a statute. Such acts are most often referred to as decrees with the force of a statute or regulations with the force of a statute.[5] The executive is branch most often given the power to issue laws with the force of a statute in two ways. The first is constitutional delegation where a body of the executive branch of the government is identified in the constitution as competent to issue such laws; the body exercises these powers pursuant to the provision of the constitution and subject to parliamentary control and, which is equally important, to control exercised by the constitutional court.

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[3] Prokop K. ibid., p. 165-166; as well as the authors quoted there: Stembrowicz J., Rząd w systemie parlamentarnym [The government in the parliamentary system], Warsaw: Państwowe Wydawnictwo Naukowe 1982, p. 272; Seifert J., "Notstandsverfassung", in: Handbuch des politischen Systems der Bundesrepublik Deutschland, München 1977, p. 409.

[4] Prokop K. ibid., p. 161-162.

[5] Zwierzchowski E. Wprowadzenie do nauki prawa konstytucyjnego państw demokratycznych [Introduction to the science of constitutional law of democratic states], Katowice: Wydawnictwo Uniwersytetu Śląskiego 1992, p. 97.

The second is statutory delegation where it is the parliament who decides that, for some reasons, such as threats to the state or other situations requiring a quick response of the state, it is reasonable to delegate the law-making power to the executive branch. In this situation, the body originally wielding the legislative power is the parliament and the body of the executive branch only exercises this power to the extent considered by the parliament as justified. We must keep in mind that in the first case the body that is "originally" authorized to exercise such power is the body of the executive branch. In the science of constitutional law it is considered that the advantage of the statutory delegation, compared to constitutional delegation, to bodies other than the parliament of the power to issue laws with the force of statutes is that it provides the parliament with means to control and to decide whether or not to regulate certain matters itself or, when the circumstances warrant it, to transfer the power to regulate the matters to other bodies. However, the construction of such delegation must not deprive the parliament of the right to make decisions regarding the objective and temporal scope of the delegated powers.[6]

This does not change the fact that also in the latter case, and in "particular" in that case, the parliament should be able to control the executive branch as to the proper performance of the delegated tasks. The most typical solution is that the body that issues an act with the force of a statute must submit it to the parliament for approval or cassation during the first session after its issuing. This is because regardless of the mechanisms of separation of powers adopted the state, each body of the government exercises a part of the state's power enjoyed by the sovereign who should be able to check the ways in which the power is exercised. However, the review of the constitutional solutions presented below demonstrates that the various structures of the system of government include other, non-standard solutions (Belarus, Russia) that do not conform to the two theoretical models described above.

The paper contains a review of the systems of government present in the states of Central and Eastern Europe. The discussion focuses on the following states: Belarus, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Russia, Romania, Serbia, Slovakia, Slovenia and Ukraine. Due to the scope of the paper, it focuses on the constitutions of the above-mentioned states.[7]

In the aforementioned states of Central and Eastern Europe, the constitutions that expressly provide for legislative acts with the force of a statute issued by the executive branch of government are those of Croatia (adopted on 22 December 1990), Romania (adopted on 21 November 1991), Slovenia (adopted on 23 December 1991), Estonia (adopted on 28 June 1992), Belarus (adopted on 15 March 1994), Moldova (adopted on 29 July 1994), Poland (adopted on 2 April 1997), and Serbia (adopted on 8

[6] Banaszak B. Porównawcze prawo konstytucyjne współczesnych państw demokratycznych [Comparative constitutional law of contemporary democratic states], Warsaw: Wolters Kluwer Polska 2007, p. 133; Leroy P. L'Organisation Constitutionelle et les Crises, R. Pichon et R. Durand-Auzias, Paris: R. Pichon et R. Durand-Auzias 1966, p. 45.

[7] If the text does not indicate otherwise, the individual articles make references to the constitutions of the successive states.

November 2006). The executive branch of Hungary also enjoys special powers under the constitution of 18 April 2011. It also should be noted of Latvia – before May 2007 constitution amendment (adopted on 15 February 1922).[8]

The constitutions of Russia (adopted on 12 December 1993) and Ukraine (adopted on 28 June 1996), while they do not expressly mention regulations with the force of a statute, provide for possible delegated legislation.[9]

On the other hand, the constitutions of Bulgaria (adopted on 12 July 1991), Macedonia (adopted on 17 November 1991), Slovakia (adopted on 1 September 1992), Lithuania (adopted on 25 October 1992), and the Czech Republic (adopted on 16 December 1992) do not provide for bodies of the executive branch issuing laws with the force of a statute.[10]

The matter in question is most often regulated in a single article of the constitution. As an exception, some relevant aspects can be found in two successive articles; sometimes, those articles contain references to other provisions of the constitution.

The relevant regulations most often comprise of four significant components. The first is the body that is authorized to issue laws with the force of a statute. The second is the justification for granting such special powers (which break the monopoly of the legislative branch of the government in this regard), to the relevant body. The third is the formulation of the relevant power which includes the form of the laws with the force of a statute, their objective scope, and their special limitations. The fourth is the matter of control and possible expungement of the laws, usually enjoyed by the

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[8] The Constitution of the Republic of Latvia. Available: http://www.saeima.lv/en/legislation/constitution; The constitution of The Republic of Croatia. Available: http://www.sabor.hr/Default.aspx?sec=729; The Constitution of Slovenia. Available: http://www.us-rs.si/en/about-the-court/legal-basis/; The Constitution of The Republic of Belarus. Available: http://president.gov.by/en/press10669.html; The Constitution of Moldova. Available: http://web.parliament.go.th/parcy/sapa_db/cons_doc/constitutions/data/Moldova/Constitution%20of%20Moldova.htm; The constitution of the Republic of Poland. Available: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm; The Constitution of The Republic of Serbia. Available: http://www.srbija.gov.rs/cinjenice_o_srbiji/ustav.php?change_lang=en; The Constitution of Montenegro. Available: http://www.venice.coe.int/docs/2005/CDL(2005)096-e.pdf, The Constitution of Romania. Available: http://www.cdep.ro/pls/dic/site.page?id=371; The Constitution of Estonia. Available: http://www.president.ee/en/republic–of–estonia/the–constitution/; The Constitution of Hungary. Available: http://www.parlament.hu/angol/angol.htm [viewed 20 June 2012].

[9] The Constitution of Russian Federation. Available: http://www.constitution.ru/en/10003000–01.htm; The Constitution of Ukraine. Available: http://www.president.gov.ua/en/content/constitution.html [viewed 20 June 2012].

[10] The Constitution of The Republic of Bulgaria. Avaialble: http://www.parliament.bg/en/const; The Constitution of The Republic of Macedonia. Available: http://www.sobranie.mk/en/default.asp?ItemID=9F7452BF44EE814B8DB897C1858B71FF; The Constitution of Republic of Slovakia. Available: http://www.nrsr.sk/default.aspx?SectionId=124; The Constitution of Lithuania. Available: http://www.lrkt.lt/Documents2_e.html; The Constitution of Czech Republic. Available: http://www.hrad.cz/en/czech–republic/constitution–of–the–cr.shtml; The Constitution of Bosnia and Herzegovina. Available: https://www.parlament.ba/sadrzaj/about/ustav/Archive.aspx?langTag=en-US&template_id=5&pril=b&pageIndex=1 [viewed 20 June 2012].

body whose powers were limited by the fact of delegating the legislative powers to the executive branch, i.e. the parliament.

The analysis of the constitutional provisions pertaining to laws with the force of a statute will start from states with a semi-presidential system of government where, in one case, the delegation of legislative powers to the executive branch is not temporarily or objectively limited.

The most extensive powers are enjoyed by the President of the Republic of Belarus. Pursuant to art. 85 of the Belarusian constitution, the president is authorized to issue decrees with the force of a statute. In the constitutional practice, the parliament is totally subordinated to the president, which makes the head of state the key legislator. The aforementioned article of the constitution provides that, in specific situations enumerated in the constitution, presidential decrees have the binding force of statutes; however, art. 28 of the Act on the President of the Republic of Belarus provides that, unless the constitution provides otherwise, decrees of the head of state have a priority over laws issued by other state bodies and officials.[11]

This is how all presidential decrees are treated, even though art. 1010 of the constitution regulates delegated legislation. The Belarusian House of Representatives and the Council of the Republic, by a statute issued by a majority of votes of the statutory number of their members, may, upon request of the president, grant to the president the legislative powers to issue decrees with the force of a statute. The delegating statute must define the object of the regulation and the period for which the decree issuing powers are granted to the president. The objective limitation is the prohibition to issue decrees pertaining to amendments and supplements to the constitution, its interpretation, amendments and supplements to program statutes, approval of the budget and reports from its performance, changes in the presidential and parliamentary election procedures, and limitation of constitutionally guaranteed rights and freedoms. Moreover, the statute on the delegation of powers may not allow for making changes in the statute itself and grant the power to issue laws with retroactive effect.

Also, in special cases, the president, on his own initiative or upon request of the government, may issue temporary decrees with the force of a statute. The decrees issued upon request of the government are subject to mandatory countersignature. They must be submitted within 3 days to the House of Representatives and then to the Council of the Republic, which may repeal them by a majority of at least 2/3rds of the statutory number of members of each of the chambers.

The powers related to delegated legislation enjoyed by the President of the Russian Federation are a little more limited. According to art. 90, the president issues decrees and regulations that cannot violate the constitution and the federal statutes. The decrees are not subject to parliamentary control, with the exception of a decree on the introduction of martial law and state of emergency; also, they are not subject to countersignature, which is not provided for in Russian laws. The decrees may take

[11] See: Czerwiński M. Zgromadzenie Narodowe Białorusi [The National Assembly of Belarus], Warsaw: Wydawnictwo Sejmowe 2008, p. 27.

the form of a normative, organizational, or personal act, depending on the type of regulation.[12] Normative acts are regarded as equal to statutes and are a manifestation of Russian delegated legislation.[13] The constitution does not define the object of decrees. It is assumed that they can pertain to any matter, with the exception of those that are expressly restricted for regulation by federal constitutional statutes and federal statutes that are subject to mandatory consideration by the Council of the Federation, which are enumerated in art. 106 of the constitution.

The solutions adopted in Ukraine are different. Art. 106 (3) of Ukraine's constitution provides for two types of acts of law that can be issued by the president. Acting pursuant to the Ukrainian constitution and in order to enforce the provisions of the constitution and the statutes, the president issues decrees (*ukaz*) and regulations that are enforceable in the entire territory of Ukraine. This means that the rank of all the current presidential decrees is lower than that of statutes. In 1995, another type of acts of law issued by the president was introduced: decrees on economic matters that are not regulated by statutes. Such acts of law were temporarily provided for in the current constitution, too. Pursuant to section 4 of chapter XV, Final Provisions, of the constitution of 1996, the president enjoyed the right to issue decrees on economic matters that were not regulated by statutes; however, the power was limited to three years after the adoption of the constitution.[14] The decrees were subject to approval of the Ukraine's Cabinet of Ministers and then signed by the prime minister. At the same time, the president was required to submit a corresponding draft statute to the Supreme Council of Ukraine pursuant to the provisions of art. 93 of the constitution. Only if the Supreme Council did not adopt or reject the draft law within 30 days of its submission, the presidential decree would become binding. The decree would be in force until the statute regulating the matter in question was adopted by the Supreme Council of Ukraine.[15]

Unlike the constitutions of Ukraine's neighbors, the Ukrainian constitution did not provide for law-making in the form of decrees (regulations) with the force of a statute, which is surprising given other decisions of the authors of the constitution that were advantageous to the president. The most likely reason for the lack of such provisions is that their presence would significantly strengthen the position of the president in the system of government, which the authors of the constitution wanted to avoid.

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[12] See: Bichta T., Kowalska M., Sokół W. "System polityczny Rosji" [Russia's political system]. In: Sokół W., Żmigrodzki M., eds., Systemy polityczne państw Europy Środkowej i Wschodniej [Political systems of states of Central and Eastern Europe], Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej 2005, p. 423.

[13] Ibid.; also, cf.: Zieliński E. System konstytucyjny Federacji Rosyjskiej [The constitutional system of the Russian Federation], Warsaw: Wydawnictwo Sejmowe 2005, p. 75; Zieliński E. Parlament Federacji Rosyjskiej [The parliament of the Russian Federation], Warsaw: Wydawnictwo Sejmowe 2002, p. 26.

[14] This provision lost its binding force on 3 June 1999.

[15] The president exercised this power quite often by issuing over twenty decrees a year according to this procedure. The decrees pertained most often to changes in customs duties and taxes, establishment of economic zones, but also, for example, allocation of special funds for the elimination of the effects of the Chernobyl disaster or regulation of exports of sunflower seeds.

The authors of the constitutions in another group of states decided to grant temporarily or objectively limited powers to issue acts with the force of a statute to bodies of the executive branch of government.

Art. 234 of the Constitution of the Republic of Poland regulates the special law-making powers of the president, i.e. the power to adopt delegated legislation in the form of regulations with the force of a statute. The president may exercise this power provided that certain conditions are met and certain limitations are observed. Regulations with the force of a statute may be issued only during martial law; when the *Sejm* cannot convene for a session; upon request of the Council of Ministers; and only within the objective scope and limits defined in art. 228 (3-5) of the constitution.[16] Moreover, every regulation issued by the president pursuant to art. 234 of the constitution must be countersigned by the prime minister. The regulations, already in force, are then approved by the *Sejm* during its next session. Fortunately, so far there have been no situations where those prerequisites were met.[17]

The relevant provisions in the constitution of Slovenia are nearly identical. Pursuant to art. 108 of the constitution, if the National Assembly may not convene due to a state of emergency or a war, the President of the Republic may, upon request of the government, issue decrees with the force of a statute. Decrees with the force of a statute may, as an exception, limit some rights and fundamental freedoms, but only for the duration of a war or a state of emergency and to the extent that is necessary during such a period and only in such a way that the implemented measures do not result in unequal treatment based solely on race, nationality, language, religion, political and other beliefs, property-related status, birth, education, social position, and other personal circumstances. The following matters are exempt from the scope of presidential decrees: the right to life, the prohibition of torture and inhumane and humiliating treatment, respect of personality and human dignity, presumption of innocence, the principle of legalism (*nullum crimen sine lege, nullum poena sine lege*), the existing legal guarantees in the criminal process, and the freedom of conscience and religion (art. 16). The President of the Republic submits his decrees with the

[16] The articles provide that the principles of functioning of public authorities and the scope to which the freedoms and rights of men and citizens can be limited during the respective states of emergencies are regulated in a statute. The statute may also define the grounds, the scope, and the procedure for compensating for the property losses caused by the limitation during a state of emergency of human and citizens' rights and freedoms and that the actions undertaken as a result of an emergency state must correspond to the extent of the threat and should aim to restore normal functioning of the state as soon as possible.

[17] However, the regulations with the force of a statute issued based on the pre-World War II constitutions are still binding in Poland; for example, the Regulation of the President of the Republic of Poland of 30 June 1927 on the production, import, and use of white lead, lead sulfite, and other lead compounds (Journal of Laws of 1927, No. 62, item 544); Regulation of the President of the Republic of Poland of 14 October 1927 on the determination of ownership of land given to peasants during affranchisement (Journal of Laws of 1927, No. 92, item 822); Regulation of the President of the Republic of Poland of 22 March 1928 on the National Archeological Museum (Journal of Laws of 1928, No. 36, item 346, as amended), and Regulation of the President of the Republic of Poland of 28 December 1934 on the merge of the State Food and Useable Objects Testing Institute with the State Institute of Hygiene (Journal of Laws of 1934, No. 110, item 977).

force of a statute to the National Assembly for approval as soon as it convenes for a session.

Similar provisions regarding regulations with the force of a statute can be found in the constitution of Croatia. Pursuant to art. 100, the President of the Republic may issue decrees with the force of a statute in the time of war and within the powers granted to him by Croatia's parliament (*Sabor*). If the parliament and the government are unable to work in a regular manner, the president issues decrees with the force of a statute, by himself in the event of a war or upon request and with countersignature of the prime minister, in the event of a direct danger to the independence, integrity, and existence of the republic. The decrees must not pertain to the right to life, freedom from torture and cruel treatment, and freedom of speech, thoughts, conscience, and religion and may not change the definitions of crimes contained in the penal laws (art. 17 (3)). The president is required to submit such decrees to the *Sabor* for approval during the next convened session. Otherwise, the decrees lose their binding force and the parliament initiates the impeachment procedure.

Each of the Baltic states adopted different solutions pertaining to delegated legislation. The constitutions of Estonia and Latvia (till 2007) permitted issuing laws with the force of a statute by two different bodies of the executive branch of government and in two different situations. After an amendment to the Latvian Constitution in 2007 Article 81 lost its legal force. Nowadays Latvia alike Lithuania, has no such provisions.

The constitution of Estonia regulated the matter of regulations with the force of a statute in §109 and §110. The power to issue such decrees is granted to the President of the Republic and is restricted to situations where the parliament (*Riigikogu*) cannot convene and where there is a relevant urgent state-related need. The decrees are subject to countersignature of the chairman of the parliament and the prime minister and must be submitted to the parliament as soon as it convenes for a session. The *Riigikogu* immediately adopts a statute repealing or approving the presidential decree. Presidential decrees must not pertain to adoption, amendment, or abrogation of the constitution or the statutes enumerated in §104 of the constitution, as well as the statutes pertaining to state taxes and budget.

Latvia has originally adopted a different solution. Art. 81 of the Latvian constitution, abolished on 3 May 2007, provided that between the parliamentary sessions, if an urgent need arises, regulations with the force of a statute could be issued by the Council of Ministers. The regulations must not change the parliamentary electoral law, the statutes on the structure of courts and on court procedures, the statute on the budget and the budgetary law, or the statutes adopted by the parliament of the current term; moreover, they cannot pertain to amnesties, taxes, customs, and loans. The regulations must have been submitted for approval within three days of the opening day of the successive session of the parliament. They were considered by the parliament as draft laws and transferred to the relevant committee. If the parliament did not transfer them to a committee, they would lose their binding force.[18] The

[18] Zieliński J. Parlament Łotwy [The parliament of Latvia], Warsaw: Wydawnictwo Sejmowe 1997, p. 33.

amendment of Latvian constitution of the 3rd May 2007 abolished article 81 in its entirety[19]. After this amendment Cabinet of Ministers cannot issue regulations with the force of a statute but only issue regulations when it is prescribed by law.

The Romanian government, too, enjoys the power to issue regulations with the force of a statute. Pursuant to art. 114 of the constitution, the parliament may adopt a statute that authorizes the government to issue regulations on matters that are not regulated by organic statutes. The statute authorizing the delegation of the law-making powers defines in detail the scope of the regulations and the date until such regulations can be issued. Optionally, if the authorizing statute provides so, the regulations are submitted for approval to the parliament, pursuant to the legislative procedure, before the term of the authorization expires. The failure to observe the term causes the regulations to lose their binding effects. Moreover, in exceptional cases, the government may issue urgent regulations. Such regulations enter into force only after they are submitted for the parliament's approval. In the event that the parliament is not in session at that time, there parliament must be convened. The regulations can be approved or rejected in a statute concerning also the regulations that no longer have legal effect.

Art. 106^2 added to the Moldova's constitution also authorizes regulations with the force of a statute. The Moldovan parliament may delegate the power to adopt law by way of a special statute that defines the scope of the regulations and the date until which regulations with the force of a statute can be issued. Such regulations cannot pertain to matters regulated by organic statutes. A regulation with the force of a statute becomes binding on the day it is published and does not need to be promulgated. The delegating statute may provide for approval of the regulations by the parliament. After expiry of the term of the delegation, the regulation is no longer in force, pursuant to a relevant statute.

Art. 101 of the constitution of Montenegro grants the power to issue decrees with the force of a statute to the council of ministers. The power becomes effective after martial law or an emergency state in the event that the parliament cannot be convened for a session. The regulations issued pursuant to this procedure must be submitted to the parliament for approval without delay at the next session of the parliament.

When the National Assembly of Serbia cannot convene during an emergency state, decrees limiting rights and freedoms may be issued by the government, with the countersignature of the President of the Republic (art. 200).

The 2011 constitution of Hungary adopted an innovative solution. The large part of the constitution focusing on the detailed legal regime provides for three new types of normative acts: regulations issued by the National Defense Council, the President, and the Council of Ministers. Even though the constitution does not expressly state

[19] Transitional provisions added that Cabinet Regulations issued in accordance with Article 81 of the Constitution, which were in force on the day of the coming into force of this amendment, should remain in force up to the recognition of the repeal thereof, but not longer than up to 31 December 2007.

that such regulations are of equal force with statutes, the individual provisions appear to strongly suggest such a possibility.

In the event of a danger to the state (art. 48 and 49), which corresponds to martial law, the National Assembly, or if the Assembly is unable to do so – the President, appoints the National Defense Council. The members of the National Defense Council are, by law, the President of the Republic as the chairman, the heads of the parliamentary clubs, the prime minister, the ministers, and the Chief of the General Staff of the Hungarian Armed Forces who enjoys the rights of an advisor. The Council enjoys powers that are "granted to it" by the National Assembly, the powers of the President of the Republic, and the powers of the government and may, pursuant to the organic statute on the state of danger to the state, suspend the application of certain statutes or waive selected laws. The Council's regulations lose their legal effect at the time the state of danger to the state is rescinded. The exception to this rule is a situation where the National Assembly extends the period of validity of a specific regulation of the Council.

On the other hand, during a state of emergency (art. 50), it is the president who issues regulations to implement the extraordinary measures provided for in the organic statute. Presidential regulations may suspend the application of certain statutes, waive certain laws, or introduce other extraordinary legal measures. The president must inform, without delay, the parliament of the extraordinary measures he has introduced; if the parliament cannot convene, the president must inform the national defense committee of the National Assembly, which is in session at all times. The National Assembly, or if the Assembly cannot convene – the aforementioned parliamentary committee, may suspend the application of the extraordinary measures introduced by the president. The president's extraordinary measures are in force for 30 days, unless the National Assembly (or the national defense committee of the National Assembly) extends the term of their validity. The constitution does not define whether the validity of extraordinary measures (during a state of emergency) can be extended only one time or several times; moreover, there are no constitutional provisions that clearly state for what period the validity of extraordinary measures can be extended.

The council of ministers, together with a request to announce military mobilization (art. 51), may introduce, by way of a regulation, regulations that differ from those included in the statutes that govern the functioning of public administration, the Hungarian Military, and the law enforcement bodies; it must keep the president and the relevant permanent parliamentary committees informed of such facts. The regulations introduced pursuant to this procedure are in force until the National Assembly implements military mobilization, but for not more than 60 days. After military mobilization has been announced and during an unexpected aggression (art. 52) and a state of danger (art. 53), the government may issue regulations conformant to the relevant organic statute that suspend the application of certain normative acts and waive selected laws, and may introduce other extraordinary measures. The government's regulations cease to be binding as soon as the military mobilization is rescinded.

An item worth discussing is the structure of the Czech statutes pertaining to the Senate. This is because the council of ministers is involved in the procedure of their promulgation. If the Chamber of Deputies is dissolved, the Senate may, upon request of the government, on matters that may not be postponed, make statutory decisions that are counterparts of regulations with the force of a statute (art. 33). However, such decisions may not pertain to matters related to the constitution, the state's budget, the closing of state accounts, the electoral laws, and the statutes expressing consent to ratification of international treaties. The Senate's decisions are signed by the chairman of the Senate, the president, and the prime minister. They are promulgated in accordance with the procedure applicable in the case of statutes and have the binding force of statutes. In its first session, the Chamber of Deputies approves the statutory decisions of the Senate; otherwise, they lose their binding force.

To conclude, let us start by selecting the subject enjoying the extraordinary power to issue laws with the force of a statute. Given the fact that all states of the region have a dualistic model of the executive branch of government, with the president as the head of state and a collective cabinet (council of ministers), the authors of constitutions were only limited to choosing the president or the council of ministers as the body of the executive branch to enjoy the power to issue delegated legislation. In none of the states discussed herein is a different state body, such as the prime minister or a specific minister, indicated, with the exception of Hungary where the relevant powers are enjoyed by the National Defense Council. Hungary is also the only country which has granted the potential power to issue laws with the force of a statute to more than one body, to include the president and the council of ministers. Thus, the constitutions of Romania, and Moldova (Latvia before amendment), define the council of ministers and the constitutions of Poland, Estonia, Belarus, and Russia – the president, as the body that enjoys the right to issue regulations with the force of a statute. On the other hand, the laws issued by the president of Ukraine rank lower than statutes.

In most cases where the constitution vests in the executive branch the power to issue regulations with the force of a statute, it is an exceptional power related to special legal situations, i.e. one of the states of emergency. Only in Belarus and Russia these powers are exercised on a daily basis, thus strengthening the position in the system of government of the president and violating the principle that the parliament is the only body exercising the legislative power.

The forms that the laws with the force of a statute issued by the executive branch take are presidential decrees or ordinances issued by the council of ministers, the president, or – in the case of Hungary – the National Defense Council. Notably, the acts of law that rank lower than statutes, issued by these bodies, also take the form of regulations. In the case of Ukraine and Romania, presidential decrees rank lower than statutes.

In all of the countries (formally also in Russia and Belarus) the contents of the acts of law with the force of a statute issued by the executive branch are subject to objective limitations and may not pertain to certain matters. Such limitations apply mostly to acts defining the fundamental mechanisms of the system of government of the state,

such as amendments of the constitution, the electoral laws, the budget, as well as limitation of freedoms and rights of individuals.

An analysis of the constitutional solutions pertaining to parliamentary control of legislation issued by the executive leads to the conclusion that in most cases it does exist. In some countries (Poland, Latvia till 2007), such legislation must absolutely be approved by the parliament in the next session, while in others (Romania, Moldova) this requirement is provided for in the delegating statute: if the parliament finds it necessary, such legislation must be submitted for approval. In this context, the regulations in place in Belarus raise some doubts; the Belarusian parliament does not approve the decrees issued by the president upon request of the council of ministers and instead may only reject them with a majority as large as 2/3rds of the statutory number of members of each of its chambers. This begs the question of whether in Belarus the sovereign exercises a real control over the actions of the executive branch of government.

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THE ROLE OF THE JUDICIAL COUNCIL IN ENSURING QUALITY OF LEGAL ENACTMENTS IN LATVIA

Keywords: Judicial Council, principle of independence of judiciary, principle of taking into consideration the judicial power, legislator.

Introduction

[1] One of the fundamental principles of a democratic state is the independence of judiciary. Only an independent state can achieve that when administering the justice, it is ensured that the state's constitution, laws, and other legal enactments are enforced, that the principle of justice is abided by, and that a person's rights and freedoms are protected.[2] Independence of the judiciary is not an end in itself, but instead it serves as means for ensuring and consolidating democracy and rule of law, as well as a mandatory pre-requisite for implementing fair justice.[3] The requirement for independence of the judiciary exists and it guarantees that the rule of law is protected for the sake of interests of the society and the state.[4] Therefore, it is not sufficient for a society in a democratic state that it is given fair ruling, instead, it is necessary to generate belief and conviction that any person can rely on objectivity and justice of the court.

[2] For ensuring achievement of these aims, at the end of the 20th century and at the beginning of the 21st century, the majority of democratic countries have already established judicial councils. A judicial council in various countries acts as a representative of the judiciary in communication and collaboration with other branches of the state power, other authorities, and the society, to strengthen and promote independence of the judiciary and at the same time to improve the functioning of courts. Thus, the Judicial Council operates as an institution, which on the one hand promotes independence of judges, but on the other hand, fosters accountability of judges, namely, it ensures certain openness in the work of courts, by demonstrating the level of independence and competence of the court to the society,

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1 All opinions voiced in this paper is the personal opinion and conviction of the author unrelated to any institution or organisation, in which the author is active.

2 Judgment of 18 October 2007 adopted by the Constitutional Court in the case No. 2007-03-01, Paragraph 26.

3 Judgment of 18 January 2010 adopted by the Constitutional Court in the case No. 2009-11-01, Paragraph 7.

4 Ibid., Paragraph 7.2.

thereby promoting the very important trust in the judicial power in a democratic state subject to the rule of law.[5]

The Consultative Council of European Judges of the Council of Europe has pointed out that the Judicial Council ensures that the guarantees of independence of judges are respected at a constitutional, institutional, and legislative level.[6] In the Law on Judicial Power[7], the legislator has established the status and authority of the Judicial Council, thereby establishing an institution, which is not only important in ensuring independence of judges and of the judiciary, strengthening the authority of the judicial power, and improving the work of courts, but it also plays a certain role in influencing the contents of legal enactments.

It is possible to distinguish between the following types of participation in the legislative process and in ensuring quality of legal enactments: (1) hearing out the opinion of the judges and respecting it, when the legislator makes decisions regarding the judicial power, (2) involvement of judges in carrying out court reforms, and (3) within the framework of its authority, the Judicial Council submits an application for initiating a case at the Constitutional Court (hereinafter – CC).

[3] The objective of the study is to examine the role of the Judicial Council in the legislative process, thereby ensuring and improving the quality of legal enactments, which are related to the activities of the judicial power. To study the possibilities of the Judicial Council to participate in ensuring quality of legal enactments, the following tasks are set forth: it is necessary to elucidate the authority of the Judicial Council, how the principle of separation of powers and the principle of independence of the judiciary affects the possibilities of the Judicial Council to participate in the legislative process, and how the Judicial Council can employ and employs the entitlements granted to it by the law.

Due to the restricted scope of the study, the author will look solely at the opportunities provided to the Judicial Council and the need to get involved, by voicing opinions and commenting during the process of drafting laws that affect the judicial power.

The following research methods have been used in the study: analysis, synthesis, and descriptive method.

In preparing the study, a range of various publications has been used, court practice, documents, developed by international institutions, regulatory enactments, and studies by legal scientists have been examined.

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[5] Garoupa N., Ginsburg T. Guarding the Guardians: Judicial Councils and Judicial Independence. Available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1303847 [viewed 5 June 2012].

[6] Opinion No. 10 (23 November 2007) of the Consultative Council of European Judges (CCJE) to the attention of the Council for the Judiciary at the service of society, Paragraph 3. Available: https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3 [viewed 10 April 2012].

[7] Likums "Par tiesu varu": LR likums. *Ziņotājs*, 1993. gada 14. janvāris, Nr. 1.

Authority of the Judicial Council

[4] The Judicial Council is an institution guaranteeing the independence of judicial power and effectiveness, transparency, and quality of the judicial system.[8] It must protect the independence of the court system and of individual judges, and at the same time must ensure effectiveness and quality of administering justice in line with Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, in order to foster society's trust in the judicial system.[9] The Judicial Council is an important element of a judicial state to achieve a balance between the legislator, the executive power, and the judicial branch.[10]

[5] The understanding of general values, including the independence of judicial power and democracy, depends on the country's history and traditions.[11] Similar to independence of the judiciary and the legal regulation ensuring that independence, relating to the level of understanding democracy and the separation of power, as well as the level of political and legal culture in the specific country,[12] also the Judicial Council is created within a certain legal system and it depends on that stage of development, it is affected by the historic, cultural, and social context. However, judicial councils in all countries have gone through similar experiences, challenges, and they operate on grounds of the same principles[13].

In order for the Judicial Council to be able to achieve the objective of why it is established and exists, namely, to be able to protect and foster independence of the judicial power and effectiveness of the court, it must have extensive authorisation.[14] In various countries, the judicial councils have differing authorisations and functions. Some have an advisory role (Latvia, they get involved in procedures of approving judges and progressing careers, as well as in solving issues on disciplinary accountability of judges (France, Italy), while others actively work with regard to ensuring the work of courts, preparing and administering court budgets (Switzerland and Denmark).

The European Network of Councils for the Judiciary in its 2010–2011 report indicated to the following main fields of activity of the councils for the judiciary: approving judges and progressing career, judge training, disciplinary matters, administration of financial resources necessary for administering justice, reviewing complaints regarding the court system, strengthening and preserving the image of the court, formulating

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8 European Network of Councils for the Judiciary, Councils for the Judiciary Report 2010-2011, page 3, para 1.7. Available http://www.encj.eu/images/stories/pdf/workinggroups/report_project_team_councils_for_the_judiciary_2010_2011.pdf [viewed 27 March 2012] and CCJE opinion No. 10 of 23 November 2007. Paragraph. 10 41.

9 CCJE Opinion No. 10 of 23 November 2007. Conclusion A.b).

10 Ibid., Paragraph 1.

11 The Cambridge Yearbook of European Legal Studies, Vol. 4, 2001, p. 54.

12 Judgment of 28 November 2007 adopted by the Polish Constitutional Tribunal in the case No. K 39/07, CODICES, POL-2008-1-005. Available: http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm [viewed 5 May 2012].

13 European Network of Councils for the Judiciary, Councils for the Judiciary Report 2010-2011, page 2, para 1.3.

14 CCJE Opinion No. 10 of 23 November 2007. Conclusion D.a.

opinions and drafting or initiating regulatory enactments with regard to the judicial power.[15]

[6] In Latvia, the Judicial Council is a collegial institution, which participates in developing the policy and strategy of the judicial system, as well as in enhancing the work organisation of the judicial system and representing the judicial power,[16] established with the law of 3 June 2010 "Amendments to the Law on Judicial Power", which came into force on 1 August 2010.[17]

[7] The Law on Judicial Power establishes the jurisdiction of the Judicial Council – it mainly operates as an advisory body, namely, it provides an opinion, harmonises, gives proposals. The Judicial Council determines and decides only on some issues related to the activity of the judicial power. In the author's opinion, the issue of the competence of the Judicial Council as an institution representing the judicial power is to be regarded on the grounds of the principle of separation of powers and bearing in mind the division of competence between constitutional authorities of the state power. The principle of separation of the state power is manifested in division of the state power into the legislative, executive, and judicial power, which is exercised by independent and autonomous institutions. This principle guarantees balance and mutual control between them to prevent tendencies of power usurpation and to foster moderation of power.[18] In a judicial state, separation of power is effective as a principle, which particularly protects the judges' independence from interference of other powers[19] and enables the judges to perform their duties properly.[20]

[8] The judge performs the function of administering justice. The entitlement to administer justice is granted only to the court and that determines the place of the court among the bodies of state power and the judge's status.[21] Drafting of legal enactments, including drafting of such enactments, which directly affect the work of the judicial power and the functioning of courts, falls within the legislator's competence. The principle of separation of powers prevents the executive power to decide on questions, which directly affect the functioning of the judicial power and of courts, namely, issues on financing, the number of judges, the necessary staff, requirements of competency, salaries, and other matters.[22] The duty to observe the separation of powers in the operations of all state institutions along with other

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[15] European Network of Councils for the Judiciary, Councils for the Judiciary Report 2010-2011, page 6, para 3.1.

[16] Judgment of 28 March 2012 adopted by the Constitutional Court in the case No. 2011-10-01, Paragraph 26.

[17] Likums "Grozījumi likumā "Par tiesu varu"" [Law "Amendments to the Law on Judicial Power"]: LR likums. *Latvijas Vēstnesis*, 2010. gada 22. jūnijs, Nr. 99(4291).

[18] Judgment of 1 October 1999 adopted by the Constitutional Court in the case No. 03-05(99), Conclusions, Paragraph 1.

[19] Cipeliuss R. Vispārējā mācība par valsti. Rīga: izdevniecība AGB, 1998, 244. lpp.

[20] Judgment of 18 January 2010 adopted by the Constitutional Court in the case No. 2009-11-01, Paragraph 7.3.

[21] Pleps J., Pastars E., Plakane I (2004) Konstitucionālās tiesības. Rīga, *Latvijas Vēstnesis.*

[22] Judgment of 18 January 2010 adopted by the Constitutional Court in the case No. 2009-11-01, Paragraph 24.

principles of a judicial state derives from the concept of a democratic republic included in Article 1 of the Constitution.[23]

[9] The rights of the Saeima (the Parliament) to adopt, amend, supplement laws and other regulatory enactments or to recognise them as null and void can be exercised by observing the procedure established in the Constitution and in line with the principles included in the Constitution. However, taking into account the principle of separation of powers and the principle of independence of judges, the legislator's freedom to act, when deciding on issues concerning the judicial power, is different from freedom to act on decisions in other public spheres.

The CC in the judgment of the first case of judges' remuneration considered how the separation of powers and the principle of independence of judges affect the legislator's conduct in determining remuneration of judges.[24] In the said judgment, the following principles referring to all matters that the legislator adopts regarding the activity of the courts can be distinguished:

Firstly, the fact that the legislator decides on the court, drafts legal enactments governing the activities of the court, establishes requirements for judges, decides on issues relating to the court financing, does not necessarily mean that the independence necessary for performing the relevant functions is infringed.[25]

Secondly, bearing in mind the principle of separation of powers and the principle of independence of judges, the legislator's freedom to act when deciding on issues and restrictions concerning the judicial power is different from the freedom to act when deciding on restrictions in other public spheres.[26]

Thirdly, the legislator not only prepares the legal regulation covering the judicial power, but also decides on the conditions, under which changes should be introduced into the judicial system and in the effective regulatory enactments, and on the changes as such. The rights of the Saeima to adopt, amend, supplement laws and other regulatory enactments or to recognise them as null and void can be exercised in line with the procedure established in the Constitution and with principles included in the Constitution.[27]

Fourthly, the CC has unveiled the principle of considering the opinion of the judicial power, in line wherewith the opinion of the judicial power in collaboration with the legislator is voiced by an authority entitled to represent the judicial power, namely, the Judicial Council.

Thus, the rights and obligation of the Judicial Council to participate in the legislative process, when the Saeima drafts and passes regulatory enactments affecting the activity of the judicial power, namely, the advisory function in the legislative process derives from the principle of separation of powers and of independence of judges, in

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[23] Judgment of 24 March 2000 adopted by the Constitutional Court in the case No. 04-07(99), Paragraph 3.

[24] Judgment of 18 January 2010 adopted by the Constitutional Court in the case No. 2009-11-01.

[25] Judgment of 18 January 2010 adopted by the Constitutional Court in the case No. 2009-11-01, Paragraph 11.

[26] Ibid., Paragraph 4.

[27] Ibid., Paragraph 11.5.

addition to the competence of the Judicial Council prescribed in the Law on Judicial Power. At the same time, it must be borne into mind that constitutional traditions and the possible cooperation between the judicial power and the legislator governed in legal provisions can turn out to be insufficient to ensure proper independence of the judicial power.[28] The author believes that the said jurisdiction of the Judicial Council is to be directly fixed in regulatory enactments. However, the idea of that the procedures, which are exceedingly regulated, can not only hinder the achievement of desirable results, but also in some cases encumber reaching the most reasonable solution, must be taken into consideration. The fact that the executive power and the legislator formally observe specific procedures does not always ensure that the principles are observed. Therefore, certain freedom of conduct must be ensured to the institutions involved in drafting regulatory enactments concerning the activity of the judicial power, by defining the jurisdiction of the Judicial Council and the obligation of collaboration between the legislator and the executive power, however not overly elaborately stipulating the cooperation procedures. Proper functioning of the judicial system does not always depend on whether formal procedures exist for voicing proposals of the judicial power or for consulting with the judicial power. In observing the principle of separation of powers, no such procedures and decisions are permissible, which allow for a possibility or even only create an impression of that the executive power or the legislator puts pressure on the courts, by introducing amendments in regulatory enactments.

Hearing out and respecting the opinion of the Judicial Council, when the legislator adopts decisions on the judicial power

[10] One of the possibilities of the Judicial Council to get involved in ensuring quality of legal enactments is voicing the opinion of the Judicial Council about those draft regulatory enactments, which affect the activity of the judicial power. It is one of the ways how judicial councils can provide positive input into improving the quality of the court.[29]

Consultative Council of European Judges of the Council of Europe has explained the advisory function of judicial councils by point out that all draft documents concerning the judges' status, administration of justice, procedural law, as well as all draft laws, which might affect the judicial power (independence of the judicial power) or which can curtail the access of persons (including the judges) to the court, require the opinion of the judicial council before the parliament approves it.[30] Furthermore, the said document does not indicate to an obligation of a judicial council to given an opinion, but to the obligation of the parliament to consult.[31] Meanwhile, the annual report of 2010–2011 of the European Network of Councils for the Judiciary points

[28] mutatis mutandis decision of 8 June 2012 adopted by the Constitutional Court in the case No. 2011-18-01, Paragraph 17.4.

[29] CCJE Opinion No. 10 of 23 November 2007, Paragraph 78.

[30] Ibid., Paragraph 87.

[31] Ibid., conclusion D.h.

out the need to ensure the competence of judicial councils to submit proposals or voice opinions regarding all political or legislative initiatives concerning the judicial power affecting the administration of justice or functioning of the judicial power.[32] Regardless of whether the legislator consults with the judicial power or asks for its opinion, the Judicial Council is entitled to and has the obligation to give an opinion on matters that are important for the functioning of the judicial power.[33]

[11] CC has indicated that the principle of separation of powers and the principle of judicial independence leads to the requirement that the legislator, before making decisions regarding the functioning of the courts – in matters of the budget and other matters related to the performance of a court's functions – must give an opportunity to the judicial power or an independent institution representing the judicial power, if such an institution is set up, to voice their opinion regarding issues affecting the functioning of courts.[34] The legislator is entitled not to agree with the opinion of the judicial power, however the legislator must hear it out and must treat it with respect and understanding, while justifying the "not agreeing" or "agreeing partially" decision.[35] Moreover, CC has pointed to the scope of justification to be provided by the legislator, namely, in case if the opinion of the judicial power is not taken into consideration or is taken into account only partially, then the legislator must provide justification for its conduct to such extent so that the court, if it were to evaluate the compliance of the legislator's conduct (adopted decision) with the Constitution, this justification would provide all the information necessary for examining proportionality.[36]

CC in its rulings regarding the principle of hearing out the judicial power has pointed out that, firstly, reasoning based on urgency and immediacy of a matter cannot justify a violation of the principle of hearing out and of other principles of a judicial state[37] and, secondly, the requirement that it is the legislator's duty to give an opportunity for the judicial power to express its opinion concerning matters affecting the functioning of courts, but the decision-making of which falls within the competence of the legislator, does not restrict the executive power to communicate with an institution representing the judicial power or with the judicial power itself when it concerns matters important for the branch. However, such relationship between the executive power and the judicial power does not replace communication realised by the legislator.[38] Thereby, CC has defined the principle of hearing out the judicial power, which bears great importance in the legislative process concerning

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[32] Report on councils for the judiciary 2010–2011, European Network of Councils for the Judiciary, page 12, para 3.18.

[33] Burbank B. S. Judicial Independence, Judicial Accountabilibty and Interbranch Relations. Available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922091 [viewed 3 March 2012].

[34] Judgment of 18 January 2010 adopted by the Constitutional Court in the case No. 2009-11-01, Paragraph 8.1.

[35] Ibid., Paragraph 24.

[36] Ibid., Paragraph 11.5.

[37] Ibid., Paragraph 24.4.

[38] Judgment of 22 June 2010 adopted by the Constitutional Court in the case No. 2009-111-01, Paragraph 29.1.

issues of the judicial power, and CC has unveiled its contents. The legislator, for its part, has established the Judicial Council for the development of policy and strategy of the judicial system, for enhancing the work organisation of the judicial system, and for representing the opinion of the judicial system (also within the framework of the principle of hearing out).

[12] At the time, when CC prepared judgments in the first three matters of remuneration for judges, the Judicial Council had not yet been created. Therefore, to a certain extent, one could understand (but not justify) the legislator's reference to communication with certain representatives of the judicial power. However, it is regarded as inconsistent with the principle of independence of the judiciary if the legislator approaches each judge individually asking to give an opinion regarding changes in legal enactments at a time when the Judicial Council is already established, moreover, inadmissible communication between the legislator and the judicial power was clearly described in judgments of CC prepared in 2010.

In the judgment of 22 June 2010, CC indicated to that involvement of individual representatives of the judicial power in solving matters is not desirable, because it can affect the trust in judicial independence and objectivity.[39] However, in the judgment of 28 March 2012, in the ruling on terminating proceedings, CC pointed out that the legislator's communication individually with each judge is not only inconsistent with the principle of separation of powers and with the principle of independence of the judges, but in the specific case – also formal.[40]

Thereby, in order to implement the principle of independence of judges and the principle of separation of powers, CC has clearly separated the communication between the legislator and the judicial power from the inadmissible communication with individual representatives of the judicial power, which can affect the independence of the judicial power and ruin trust in the judicial power.

Conclusion

1. Bearing in mind the principle of separation of powers and the principle of independence of judges, the legislator's freedom of conduct when deciding on matters and restrictions concerning the judicial power differs from freedom of conduct when deciding on restrictions in other public spheres.
2. The rights and obligation of the Judicial Council to participate in the legislative process when the Saeima drafts and adopts regulatory enactments, which affect the functioning of the judicial power, namely the advisory function of the Judicial Council in the legislative process, derive from the principle of separation of powers and independence of judges in addition to the jurisdiction of the Judicial Council defined in the Law on Judicial Power. The advisory function

[39] Judgment of 22 June 2010 adopted by the Constitutional Court in the case No. 2009-111-01, Paragraph 29.1.

[40] Decision of 28 March 2012 adopted by the Constitutional Court in the case No. 2011-10-01, Paragraph 30.

does not only imply the duty of the Judicial Council to give an opinion, but also the duty of the legislator to consult with the judicial power.

3. The principle of considering the opinion of the judicial power includes, firstly, the opportunity of the Judicial Council to express its opinion regarding questions that affect the work of courts, secondly, the legislator's duty to hear it out and treat it with respect and proper understanding, thirdly, the legislator's entitlement not to agree or partially agree with the opinion of the judicial power, and fourthly, the legislator's obligation to give justification to the decision of "not agreeing" or "partially agreeing" to an extent that a court, if it were to evaluate the consistency of the legislator's conduct (adopted decision) with the Constitution, this justification would provide all information necessary for examining proportionality.
4. Urgency and immediacy of a matter cannot serve as justification for violating the principle of hearing out the judicial power and other principles of a judicial state.
5. The requirement that it is the legislator's obligation to give an opportunity to the judicial power to voice its opinion in matters, which directly affect the work of the courts, but the decision of which falls within the legislator's competence, does not prevent the executive power from communicating with the Judicial Council regarding issues that are important for the judicial power. However, it does not replace communication carried out by the legislator.
6. Communication between the legislator and the judicial power, necessary to ensure implementation of the principle of independence of judges and the principle of separation of powers, must be set apart from inadmissible communication with individual representatives of the judicial power, which can affect independence of the judicial power and ruin the trust in the judicial power.

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THE CREATIVE FUNCTION OF THE SAEIMA IN THE JUDICIAL BRANCH

Keywords: Constitution, judges, courts, the Saeima, the Constitutional Court, confirmation, appointment, dismissal.

Latvia's Parliament, the Saeima, is endowed with a creative function, as is the case with parliaments elsewhere in the world. During the 1920s, Professor Kārlis Dišlers wrote about the creative function of the Saeima, indicating that it "creates several other organs of state governance or helps in creating them," adding that the creative function of the Saeima in a positive sense related to electing people to office, confirming candidates for jobs, and expressing confidence in them.[1] The creative function could also be negative, Dišlers wrote – it could dismiss officials from their posts or approve a vote of no confidence in them.[2]

The Saeima today still has a creative function that can be both positive and negative. Both manifestations apply to officials in the judicial branch, among others. This paper focuses on the creative function of the Saeima in terms of judges in the general judicial system, as well as justices of the Constitutional Court. The author will review the content of the Saeima's creative function in relation to the judicial branch, the history of legal regulations in this area, as well as differences in the implementation of the creative function when it comes to general courts and the Constitutional Court. The author will also point to several problems which relate to the implementation of this function.

The creative function of the Saeima in a positive sense

The positive manifestation of the creative function of the Saeima when it comes to the judicial branch relates to judges in the general area of jurisdiction, as well as to justices on the Constitutional Court. Because there are major differences in the legal regulations which apply to these two groups, issues which relate to the appointment or dismissal of judges and justices will be discussed separately.

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1 Dišlers K. Latvijas valsts varas orgāni un viņu funkcijas [The Organs of State of Latvia and Their Functions]. Rīga: TNA (2004), p. 106.

2 Ibid.

Confirmation of judges in the general jurisdiction

Section 84 of Latvia's Constitution speaks to the confirmation of judges in a fairly laconic way: "Judges are confirmed by the Saeima, and they cannot be dismissed."[3] This text has not been changed since the adoption of the Constitution.

The issue of confirming judges created quite a bit of debate at the Constitutional Convention. Delegates Andrejs Petrevics and Fēlikss Cielēns suggested that judges be popularly elected, but at the end of the day it was decided to entrust this function to the Saeima. There was also a discussion about the term in office of judges. Some delegates suggested that judges be appointed to six-year terms, but the majority supported the idea that judges be confirmed for an unspecified period of time.[4]

In 1934, when the Saeima was considering major amendments to the Constitution, radical proposals were made as to Section 84. There were those MPs who wanted to entrust the confirmation of judges to the President or to hold popular elections for judges. There were proposals to set a five-year term for judges, but these suggestions were rejected on second reading.[5] This means that the confirmation of judges has been in the hands of the Saeima ever since the Constitution was adopted.

Not all national parliaments have creative functions in relation to the judicial branch. A study of relevant regulations in other countries shows that there are at least five models whereby judges are confirmed in the world. Universal elections are held in some countries, but in most nations the confirmation of judges is in the hands of heads of state, governments, judicial institutions (usually Judicial Councils), or parliaments.[6]

There are also other countries in which judges are approved by national parliaments – Slovenia,[7] Ukraine,[8] and Switzerland.[9] Parliaments in Estonia and Lithuania only confirm Supreme Court justices, with the process in Estonia involving nominations

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[3] The text of the Constitution can be found in Latvijas Vēstnesis, No. 43, 1 July 1993.

[4] Latvijas Satversmes Sapulces stenogrammu izvilkums (1920-1922). Latvijas Republikas Satversmes projekta apspriešana un apstiprināšana [Excerpts from the Minutes of the Latvian Constitutional Convention (1920-1992): Consideration and Approval of the Constitution of the Republic of Latvia]. Rīga: TNA (2006), pp. 483, 484, 1011.

[5] Minutes of the 6th meeting of the ninth session of the fourth Saeima of the Republic of Latvia.

[6] For more on this, see: Kārkliņa A. Tiesnešu apstiprināšanas kārtība un tās regulējuma pilnveidošanas iespējas Latvijā [The Procedure for Confirming Judges and Opportunities to Improve the Relevant Regulations in Latvia]. In: LU 70. konferences rakstu krājums [Compendium of Papers from the 70th LU Conference], 2012.

[7] Constitution of the Republic of Slovenia, Art. 130. Available: http://www.us-rs.si/en/about-thecourt/legal-basis/constitution [viewed 12 February 2012].

[8] Constitution of Ukraine, Art. 85. Available: http://www.president.gov.ua/en/content/chapter04.html [viewed 12 February 2012].

[9] Federal Constitution of the Swiss Confederation, Art. 168. Available: http://www.admin.ch/ch/e/rs/101/a168.html [viewed 12 February 2012].

from the chief justice of the Supreme Court and the process in Lithuania involving nominations from the country's president.[10]

In historical terms, the reason why the confirmation of judges has been left up to parliaments has been related to the fact that parliaments are institutions which are legitimated by the people of the country, thus indirectly receiving authorisation from the people to act on their behalf and in line with their interests. The Latvian Constitutional Court has indicated that one of the main criteria in ensuring the independence of judges is that they are confirmed by the Saeima. In a democratic society, the court declared, the establishment of courts must largely be left in the hands of the legislative branch so as to avoid a situation in which the executive branch has an undue influence on them.[11]

This model for confirming judges is no longer viewed unambiguously, and there have been criticisms of it, as well. The Venice Commission on "Democracy through Law," for instance, has produced a report in which it says that this system ensures greater democratic legitimacy, but it can also mean that judges are involved in political campaigns and the politicisation of the process. The general confirmation of judges by parliamentary votes is not appropriate, because there is the risk that in such votes, political decisions will exceed objective achievements by the candidates for judicial posts.[12]

In recent years there have been several proposals on changing the way in which judges are confirmed in Latvia. This was particularly true in 2009 and 2010 after the Saeima rejected the nomination of Administration District Court Judge Māris Vīgants for a seat on the Supreme Court.[13] Shortly thereafter, Parliament also rejected the nomination of law professor Andrejs Judins. Several legal experts proposed that regulations concerning the confirmation of judges be amended, entrusting the process to the President of Latvia, as opposed to the Saeima. This, the supporters argued, would reduce the politicisation of the process.[14] The Presidential Commission on Constitutional Law analysed the possibility that the President's role might be expanded in the area of confirming judges, and it concluded that because judges are

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[10] Constitution of the Republic of Estonia, Art. 150. Available: http://www.president.ee/en/republic-of-estonia/the-constitution/index.html#13 [viewed 10 January 2012]. Constitution of the Republic of Lithuania, Art. 112. Available: http://www.lrkt.lt [viewed 10 January 2012].

[11] Ruling by the Constitutional Court on Case No. 2004-04-01, Art. 10.1, 5 November 2004. Available: http://www.satv.tiesa.gov.lv/upload/2004-04-01.rtf [viewed 10 January 2012].

[12] See, e.g.: European Commission for Democracy Through Law (Venice Commission). Judicial Appointments. Opinion No. 403/2006, Venice, 2007. Available: http://www.venice.coe.int/docs/2007/CDL-AD%282007%29028-e.pdf [viewed 6 February 2012]. See also: European Commission for Democracy Through Law (Venice Commission). Report on the Independence of the Judicial System. Part I: The Independence of Judges. Venice, 12-13 March 2010. Available: http://www.vehice.coe/int/docs/2010/CDL-AD(2010)004-e.asp [viewed 17 January 2012].

[13] Administratīvo tiesnešu biedrība: Saeima atriebās Vīgantam [Association of Administrative Judges: Saeima Took Revenge Against Vīgants], LETA News Agency, 22 October 2009.

[14] Vai Saeimai ir jālemj par katru tiesneša karjeras soli? [Must the Saeima Decide on Each Career Step for Judges?]. *Jurista Vārds,* No. 44(587), 3 November 2009.

included in the group of so-called professional officials,[15] the increased authority of the President's authority in terms of nominating or confirming judges should not be permitted.[16] Thus the Saeima is still the institution which decides on whether judges should or should not be confirmed.

Section 84 of the Latvian Constitution speaks to the "confirmation" of judges, but the law on the judicial branch[17] uses two different concepts in terms of how a judge gets his or her job – a judge can be "appointed" or "confirmed." These concepts have different meanings.

The word "appointment" is used only in relation to district (city) judges. Section 60.1 of the law states that "A district (city) judge shall be ***appointed*** by the Saeima at the recommendation of the minister of justice for a term of three years." Section 60.2, in turn, says that "after three years of experience as a district (city) judge, the relevant person is, on the basis of a recommendation from the minister of justice and an evaluation of the judge's professional activities by the Judicial Qualifications Collegium, ***confirmed*** for a lifetime term or ***appointed*** for another term in office of up to two years. (..) After the additional term expires, the district (city) judge is ***confirmed*** by the Saeima at the recommendation of the minister of justice for a lifetime term."

The conclusion here must be that the term "appointed" is used in those cases when a judge is appointed to the post for a specific term in office. It can be said that the term is used in those cases in which district (city) judges undergo a test period during which they have not yet appointed to a lifetime term.[18]

The important fact here is that the Saeima thus has the right not just to confirm the appointment of judges for an unspecific period of time, as indicated in Section 84 of the Constitution, but also to engage in a broader creative function – initial **appointment** of district (city) judges for a specific term in office, as well as a decision on whether the judge will, on the next occasion, be *confirmed* for the judicial position for an unspecific period of time, as opposed to being *appointed* again to a two-year term.

There is reason to discuss possible improvements to the law on the judicial system in relation to the repeated appointment of confirmation of judges (Section 60.2), because when parliamentary votes are taken on the reaffirmation of a judge, political motivations for the vote cannot be excluded in relation to rulings which the judge has handed down in the past. It would be better in terms of the independence of the

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[15] The commission argued that government officials can be divided up into three groups to a certain extent in terms of their functions – political officials (e.g., the prime minister and government ministers), politically professional officials (e.g., the Ombudsman), and professional officials (e.g., judges). See Paragraph 124 of the commission's statement in Valsts prezidenta Konstitucionālo tiesību komisija: Viedokļi 2008-2011 [Presidential Constitutional Law Commission: Views, 2008-2011]. Rīga: *Latvijas Vēstnesis* (2011), pp. 135-136.

[16] Ibid.

[17] See: Ziņotājs, No. 1, 14 January 1993.

[18] See also the ruling of the Department of Administrative Cases of the Supreme Court Senate on Case No. A8002010/8, 12 October 2010. See SKAJAAPA, 589/2010, Paragraph 9.

judicial system to declare that judicial institutions themselves take decisions on the appointment or confirmation of judges for a second time.

Section 60.2 of the law on the appointment of a judge "repeatedly for a time up to two years" is not clear in that there is ambiguity about whether Parliament can determine whether the term in office will be less than two years, as opposed to voting for a draft decision from the justice minister which speaks to the specific term for the relevant judge. Transcripts of parliamentary sessions show that when MPs are discussing the reappointment of a judge,[19] MPs do not decide on the term in office. All that is decided is to reaffirm the judge for the specific position. In practice, reappointment of judges to two-year terms is rather uncommon.[20] If a judge is reaffirmed for another term in office, then after that term ends, Parliament approves the judge for a lifetime term at the recommendation of the justice minister and in accordance with Section 60 of the law on the judicial system. If the work of the judge has not been satisfactory, the justice minister does not nominate the judge for reaffirmation, and without any specific decision, the judge loses his or her status once the term referred to in Section 60.2 of the law has expired. Parliament is not required to take a specific decision on the matter.[21]

Regulations concerning regional court judges and Supreme Court justices are simpler. Such judges are immediately confirmed for lifetime terms (which is why the word "appointment" is not used in relation to them). Section 61 of the law states that a regional court judge is approved by the Saeima at the proposal of the justice minister and for a lifetime term. The same is true with respect to Supreme Court justices, as referred to in Section 62 of the law. It must be emphasised, however, that the appointment of judges, as referred to in Section 60 of the law, and the confirmation of judges, as referred to in Sections 60, 61 and 62 of the law are the prerogative of the Saeima.

Section 84 of the Constitution only speaks to the way in which judges are confirmed – a process which is handled by the Saeima. The Constitution does not, however, regulate issues related to the selection and nomination of candidates for judicial posts,

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[19] See, e.g.: the issue of reappointing Maija Bogdane as a district (city) judge. The decision by the Judicial Qualification Board of 6 January 2012 calls for "a positive decision on the repeat appointment of Gulbene District Court Judge M. Bogdane for a term up to two years." The proposal from the justice minister of 12 January 2012 stated this: "I ask that Gulbene District Court Judge M. Bogdane be reappointed to the post of a district (city) judge for a period of up to two years." The parliamentary vote on 19 January 2012, in turn, was on the issue of "the reappointment of Maija Bogdane as a district (city) judge." Available: http://titania.saeima.lv/ LIVS11/saeimalivs_lmp.nsf/0/9d2b8fb876069fc1c225798900447ade/$FILE /Tiesne%C5%A1i_18.01.2012.doc [viewed 3 March 2012].

[20] EU pre-accession monitoring report on the independence of the judicial system, Open Society Institute Pre-Accession Monitoring Programme, Hungary, 2001, pp. 96, 97.

[21] Ruling by the Department of Administrative Cases of the Supreme Court Senate on Case No. SKA-798/2009, 23 October 2009, Paragraph 10. Available: http://www.at.gov.lv/files/archive/department3/2009/09_ska_798.doc [viewed 12 January 2012].

nor does it address the career of judges. Regulations related to these issues are included in the law on the judicial system and the relevant Cabinet of Ministers instructions.[22]

The law on the judicial system speaks to different nominating procedures for judges at various levels. According to Section 57 of the law, nominations for seats on district (city) courts and regional courts come from the justice minister, while the chief justice of the Supreme Court makes nominations for seats on that court (Section 59). A similar approach is taken in other countries of the world, with different procedures related to the selection, nomination and confirmation of judges at various levels.

Although district (city) and regional judges in Latvia are nominated by a representative of the executive branch – the justice minister, the fact is that candidates are evaluated by the Judicial Qualifications Board, which is an independent organisation that is not subject to the executive branch and is made up of judges. The board approves statements about the nomination or confirmation of judges. The Senate of the Supreme Court has said that the Judicial Qualifications Board and the justice minister evaluate the appropriateness of each individual for the job and take decisions on the career of a judge until such time as he or she is confirmed for a lifetime term. This happens each time that the relevant judge nominated or re-nominated for office. The justice minister make no nominations if the evaluation has not been received from the board, and Parliament takes no decisions if the decision is not received from the minister. A previous conclusion or decision is a prerequisite for the decision of the next institution. The conclusions of the Judicial Qualifications Board, however, are not binding for the justice minister.[23]

All branches of government are involved in the process whereby judges are nominated and approved – the executive branch, the legislature and the judicial system. The government selects candidates, the legislature takes a political decision on appointing (confirming) the judge, and the judicial branch takes part in the selection of candidates via the Judicial Qualifications Board.[24] This process means that the executive and legislative branches take part in the establishment of the judicial branch, thus balancing out the separation of powers and ensuring the moderate nature of the branches of government.

The Constitution does not dictate the procedure for confirming judges. It does not say whether the vote on a judge must be open or closed, nor does it indicate the necessary number of votes for confirmation. This is a fundamental difference in relation to regulations on the confirmation of justices of the Constitutional Court, as enshrined in Section 85 of the Constitution – in that case justices must be confirmed in a secret vote with no fewer than 51 votes from MPs. The law on the judicial system also does not include procedural regulations as to the confirmation process.

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[22] Cabinet of Ministers Regulation No. 4, *Latvijas Vēstnesis*, No. 37 (4023), 6 March 2009.

[23] Ruling of the Department of Administrative Cases of the Supreme Court Senate on case No. SKA-589/2010, Paragraph 9, on the selection of judges and their examination. See also the ruling of the Department of Administrative Cases of the Supreme Court Senate on Case No. SKA-32/2009, 23 March 2009.

[24] Ruling of the Department of Administrative Cases of the Supreme Court Senate on Case No. A42758108 SKA-528-2009, 29 June 2009, Paragraph 11 and 12 [viewed 12 January 2012].

The issue has been left to the Rules of Order of the Saeima. Parliament does not require a quorum to appoint or confirm a judge, and decisions are taken via regular procedure – the absolute majority of votes by MPs who are present.[25]

Until the Rules of Order were amended in 2012,[26] Paragraph 31.4 of the rules stated that judges, like a series of other officials, are elected, confirmed, appointed or sacked on the basis of secret votes. The fact is, however, that secret votes on the confirmation of a series of high-ranking officials, including judges, have sometimes led to unexpected surprises such as the rejection of judges about whom the Judicial Qualifications Board had issued positive ratings – something which to a certain extent was one reason for the dissolution of the 10th Saeima. The next Saeima amended the Rules of Order in 2012 to strike regulations to say that votes on such officials must be secret. This means that votes on the confirmation of judges in the general area of jurisdiction are open.

Before the Saeima takes a decision on the appointment or confirmation of a judge in a plenary session, the issue is first debated by the relevant parliamentary committee. It must be said that support or rejection of a candidate by the committee does not mean that the same result will occur when the full Saeima votes on the matter.[27] Given that parliamentary decisions are discretionary acts, the Saeima is free to act on the basis of the opinions of MPs irrespective of whether the conclusions from the relevant institutions about the appropriateness of a candidacy or the lack thereof have been received.[28]

After analysing the legal status of parliamentary decisions, the judicature has indicated several times that votes on the appointment of judges are political decisions.[29] If the Saeima has rejected a nomination, the same judge can be nominated once again.[30] In practice, the Saeima has seldom rejected the nomination of a judge.[31]

When a judge is appointed or confirmed for a new post, the first step is the oath of office.[32] The oath is administered by the president of Latvia.

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[25] Paragraphs 31, 34 and 143 of the Rules of Order.

[26] See: *Latvijas Vēstnesis*, No. 18 (4621), 1 February 2012. See: Saeima tomēr apstiprina Vīksni tiesneša amatā [Saeima Finally Confirms Vīksne as Judge], www.bns.lv, 3 November 2011 [viewed 3 November 2011]. In 2009, the Saeima rejected the nomination of Judge Māris Vīgants to a seat on the Supreme Court despite a favourable decision by the committee. See: Administratīvo tiesnešu biedrība: Saeima atriebās Vīgantam [Association of Administrative Judges: Saeima Took Revenge Against Vīgants], LETA, 22 October 2009.

[27] E.g., the Saeima confirmed Aldis Vīksne as a judge despite a negative vote in the committee.

[28] European Commission for Democracy Through Law (Venice Commission). Judicial appointments. Opinion No. 403/2006, Venice, 2007. Available: http://www.vehice.coe.int/docs/2007/CDL-AD%282007%29028-e.pdf [viewed 10 January 2012].

[29] Ruling of the Supreme Court Senate on Case No. SKA-32/2009, 23 March 2009, Paragraph 32.

[30] Minutes of a Saeima meeting, 25 October 1932, 7th meeting of the 4th session of the 4th Latvian Saeima.

[31] See the pre-accession EU monitoring report on the independence of the judicial system, Hungary, 2001, p. 96.

[32] See: Section 68 of the law on the judicial system.

Confirmation of justices for the Constitutional Court

The Constitutional Court is a comparatively new judicial institution in Latvia. It was established in 1996, when Section 85 of the Constitution was amended to exclude the so-called sworn court from the Constitution and instead to enshrine the status of the new Constitutional Court, as well as the procedure for confirming justices and the competence of the justices.[33] The law on the Constitutional Court was adopted on the same day.[34] The law states that there are seven justices on the Constitutional Court.

Constitutional regulations related to the justices of the Constitutional Court are far more specific than is the case with the aforementioned Section 84, which speaks to the confirmation of judges in courts of general jurisdiction. From the beginning, justices for the Constitutional Court have been confirmed by the Saeima. The Constitution includes *expressis verbis* principles related to the confirmation procedure, and these are more difficult to amend than is the case with regulations that are enshrined in laws.[35] Section 85 of the Constitution states that "the justices of the Constitutional Court shall be confirmed by the Saeima for the term set forth by law on the basis of a secret ballot with the majority of no fewer than 51 members of the Saeima." This means that the most substantial difference between the confirmation of justices of the Constitutional Court and the confirmation of other judges is that votes on Constitutional Court justices are secret. There are draft laws pending before the Saeima on open votes in such cases, but the debate has not yet reached the point of any discussions about amending the relevant constitutional regulations.

51 votes are needed to confirm a justice of the Supreme Court. Unlike other judges, the justices are not appointed to a temporary term. They are immediately confirmed for office, and it is essential that the term in office for the justices is 10 years.

More detailed regulations about the confirmation of justices of the Constitutional Court can be found in Section 4 of the law on the Constitutional Court. The process of nominations is also different – three justices of the Constitutional Court are nominated by no fewer than 10 MPs, two are nominated by the Cabinet of Ministers, and two are nominated by the Supreme Court. The Supreme Court selects justices from among the judges of the Republic of Latvia. When the term in office of a justice expires, the Saeima confirms a different justice in accordance with Section 11 of the law, the nomination coming from the same institution which nominated the outgoing justice. A new institution, the Judicial Council, was established in 2011, and one of its jobs is to offer its views about candidates for the Constitutional Court.[36] The justices also take an oath of office that is administered by the president.[37]

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[33] See: *Latvijas Vēstnesis*, No. 100/101 (585/586), 12 June 1996.

[34] See: *Latvijas Vēstnesis*, No. 103 (588), 14 June 1996.

[35] Section 76 of the Constitution: "The Saeima shall amend the Constitution at meetings attended by at least two-thirds of members of the Saeima. Amendments shall be adopted in three readings with the support of no less than two-thirds of the MPs who are present."

[36] Section 4.5 of the law on the Constitutional Court.

[37] Though the oath is not mandatory for justices who have taken an oath of office as judges in the past (Section 5.3 of the law on the Constitutional Court).

The competence of the Saeima in relation to the career of judges

The creative functions of the Saeima include decisions on appointing judges to a higher-level court. Section 73[1] of the law on the judicial system says that the Saeima receives a proposal from the Judicial Council and asks for the views of the Judicial Qualifications Board before a vote is taken on appointing a judge to a higher-level court. This author believes that the Saeima should only vote on the initial confirmation of the candidate, because transferring judges to higher-level courts is an organisational issue which relates to the career of judges, and that should be entrusted to judicial institutions such as the Judicial Council, which should only evaluate the professionalism and qualifications of nominees.[38] Existing regulations do not exclude the possibility that Parliament may take revenge against a judge when he or she is nominated for a seat on a higher-ranking court because of a ruling that has been handed down in the past. If a judge, for instance, has ruled against a political party in the Saeima in relation to campaign or financing violations, that might happen, and it has been seen in the past that this has sometimes happened.[39]

The Saeima is also authorised to award the title of an honorary judge to a judge whose career has come to an end and who has done his or her work honestly.[40] The Saeima also confirms the chief justice of the Supreme Court for a seven-year term.[41] Among the creative functions of Parliament is also, to a certain extent, the fact that it is up to the Saeima to determine the total number of judges in Latvia.[42]

Negative aspects of the creative functions of the Saeima

Professor Kārlis Dišlers wrote in the past that a negative aspect of the creative functions of the Saeima is the dismissal of the president and a vote of no confidence in members of the Cabinet of Ministers.[43] Today, however, the negative manifestations of the creative functions also have to do with judges from courts of general jurisdiction, because Section 84 of the Constitution states that "a judge can be removed from office against his or her will by the Saeima." This negative aspect of the creative function does not apply to justices of the Constitutional Court, because Section 10 of the law on the Constitutional Court says that issues related to the sacking or dismissal

[38] Section 731.2 of the law states that the Judicial Council takes decisions on the transfer of judges from one court to another at the same level, although a positive declaration must first be received from the Judicial Qualifications Board.

[39] In 1998, for instance, the Saeima rejected the nominations of two judges who were involved in a politically sensitive case related to the mayor of Daugavpils. One candidate was re-nominated and confirmed. The second candidate was nominated for a position as a Land Book judge and was also confirmed. See the pre-accession EU monitoring report on the independence of the judicial system, Hungary, 2001, p. 96.

[40] Section 66 of the law. This is a vote taken by the Saeima at the recommendation of the Judicial Council.

[41] Section 50 of the law on the judicial system.

[42] Sections 32, 39 and 50 of the law on the judicial system.

[43] Dišlers K. Latvijas valsts varas..., op. cit., p. 108.

of justices are the exclusive competence of the court itself. Such decisions are made by a majority of vote among all justices.

Dismissal of judges from courts of general jurisdiction

When the Constitution was adopted in 1922, the text had this to say about the dismissal of judges: "Judges shall be removed from office against their will only on the basis of a court ruling."[44]

As early as 1923, one legal specialist was declaring that the dismissal of judges against their will "is rather non-specific and incomplete in our Constitution."[45] Constitutional amendments related to this issue, however, were only adopted in on December 4, 1997, when Section 84 was amended to state the following: "A judge may be dismissed from office against his or her will by the Saeima only in cases envisaged in the law and on the basis of a decision of the Judicial Disciplinary Board or a court ruling in a criminal case."[46] There are no other amendments to this part of the Constitution, and this means that regulations in Section 84 have become broader. The amendments state that decisions on dismissal are taken by the Saeima, are more specific rules were instituted with respect to reasons for dismissal – a ruling from the Judicial Disciplinary Board or a ruling in a criminal case. There is also the requirement that all instances in which a judge can be removed from office against his or her will be enshrined in the law. The new text also speaks to the word "judge", as opposed to "judges", thus emphasising the individual nature of decisions in this regard.

The first sentence of Section 84 of the Constitution states that judges may not be recalled, but the second sentence represents an exception to this rule in that the term in office of a judge can be limited or reduced in specific cases by removing him from office against his or her will.[47] The fact that the Constitution provides for an exception to the rule of no recall is meant to ensure the authority of the courts and the quality of court rulings.

Section 155 of the law on the judicial system which existed between the wars stated that "dismissal from service depends on the branch of government that has appointed the person." After the restoration of Latvia's independence and until the aforementioned amendments took effect, such decisions were taken by the Saeima on the basis of regulations in the law on the judicial system.

Section 84 of the Constitution speaks to two incidents in which a judge can be sacked by the Saeima – a ruling from the Judicial Disciplinary Board or a court ruling

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[44] It must be noted that on February 15, 1922, when the Constitution was approved on third reading, Section 84 was Section 82. A meeting of the Constitutional Council was held on June 28, 1922, to consider many editorial changes, and this changed the numbering of the sections. The result was that Section 82 became Section 84 without any change to the content of the relevant norm.

[45] Disterlo. Juridiskas piezīmes pie Latvijas Republikas Satversmes [Legal Commentary on the Constitution of the Republic of Latvia], *Tieslietu Ministrijas Vēstnesis*, No. 7, 1923. Published in a compendium of issues of the journal (1920-1940), Rīga: Senator August Loeber Fund (1923), facsimile publication Rīga (2003), pp. 12-13.

[46] See: *Latvijas Vēstnesis*, No. 331/332, 17 December 1997.

[47] See also the ruling of the Constitutional Court on Case No. 2007-03-01, Paragraph 31.

on a criminal case (provided that the ruling has taken full force).[48] International documents which speak to the independence of the judicial branch state that a judge can be removed from office against his or her own will only if the judge can no longer handle the job or has engaged in behaviour which makes the judge unable to carry out his or her duties.[49] The United Nations Human Rights Committee has also declared that judges can be dismissed against their own will only in the case of serious violations or incompetence.[50] This means that regulations in Section 84 of the Constitution are in line with international principles in this regard. The legislature has no right to expand the list of reasons why a judge can be dismissed from office.[51]

The process for dismissal is discussed with greater precision in Section 81.2 of the law on the judicial system. If a judge is dismissed on the basis of a ruling from the Disciplinary Board, then it is the board which submits the relevant proposal to the Saeima. If, however, a judge has been convicted of a criminal offence and the ruling has taken full force, then the judge is dismissed by the Saeima at the recommendation of the justice minister. It must be concluded here that any criminal offence that is cited in the Criminal Law and involves criminal sanctions is reason to dismiss a judge against his or her own will. Judges must not do anything on the bench or apart from their work which creates reason to doubt their independence and impartiality. Judges can also be dismissed in relation to things which they do when they are not on the bench.

When deciding on regulations related to the dismissal of judges, the principle of the independence of judges must be taken into account along with the presumption of innocence and the requirement that an appropriate procedure be utilised. Decisions on the involuntary dismissal of judges must be examined independently.[52] It must also be possible to appeal rulings from the Disciplinary Board in court.[53] This approach has been approved by the Senate of the Supreme Court, which has ruled that a vote on the dismissal of a judge must be based on an independent review of the situation.[54]

When the dismissal of a judge is based on a ruling from the Judicial Disciplinary Board, the Saeima may freely decide on whether to remove the judge from office. The board proposes the dismissal and the Saeima votes on it on the basis of information that has been provided by the board and that can be found in the materials of the disciplinary case. Section 11^5.1 of the law on the disciplinary liability of judges speaks

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[48] Section 83 of the law on the judicial system.

[49] See: *Latvijas Vēstnesis*, No. 148, 28 September 1995.

[50] International Covenant on Civil and Political Rights, Article 14 General Comment, No. 32, Paragraph 20.

[51] See a ruling by the Constitutional Court of the Republic of Lithuania, 15 May 2009, Paragraph 4.2. Available: http://lrkt.lt/dokumentai/2009/d090515.htm [viewed 14 May 2012].

[52] Fundamental UN principles on the independence o f the judicial system, Paragraph 20. See: *Latvijas Vēstnesis*, No. 148, 28 September 1995.

[53] Report on the Independence of the Judicial System, Part I: The Independence of Judges. CDL-AD(2010)004, Paragraph 43.

[54] Ruling of the Department of Administrative Cases of the Supreme Court Senate on Case No. A8002010/8, SKA-589/2010, 12 October 2010.

to what happens when the Saeima rejects the dismissal of the relevant judge. In that case the matter is sent back to the Judicial Disciplinary Board for a new review. The dismissal of judges, however, has occurred in the past.[55] There have also been cases in which a judge requests the right to resign from the bench when there is a threat for dismissal.[56] Minutes of parliamentary sessions show that issues of this kind usually do not involve much debate in Parliament.

The Saeima's competence in other issues related to the end of a judicial career

In addition to the aforementioned cases in which the Saeima has the right to remove a judge from office, there are also cases in which it is asked to vote on the resignation of judges. This issue is not addressed in the Constitution, but Section 82 of the law on the judicial system says that judges can resign if they are elected or appointed to a different job, if their health has deteriorated to the point where they can no longer do their job, or if they have reached retirement age, as dictated by law.

Conclusion

1. The creative function of the Saeima vis-a-vis judges from courts of general jurisdiction has both positive and negative elements. In terms of justices of the Constitutional Court, the creative function of the Saeima is only positive, and the negative manifestation is entirely in the hands of the Constitutional Court itself.
2. Constitutional rules on judicial posts and the end of such appointments are laconic. Section 84 only speaks to the competence of the Saeima in confirming and dismissing judges. The law on the judicial system, however, provides the Saeima with several other issues related to how judges get their jobs, how their careers develop, and when their careers end.
3. The competence of the Saeima in confirming and dismissing judges was explained in the past on the basis of the idea that Parliament is an institution that has been legitimated by the people of the country, with indirect authorisation to act on

[55] In 2001 and on the basis of a decision from the Judicial Disciplinary Board, the Saeima dismissed from office Judge Kārlis Rācenājs of the Jūrmala City Court, and in 2006 the same happened to Judge Vents Sobočevskis from the Balvi District Court. See minutes from the Saeima session of 21 December 2006. Available: http://helios-web.saeima.lv/steno/Saeima9/061221/st061221.htm#s14. See also: http://www/delfi.lv/news/national/politics/atcel-no-amata-tiesnesi-racenaju.d?id-2330079 [viewed 12 March 2012].

[56] On June 5, 2008, the Saeima dismissed Judge Irēna Poļikarpova from the Vidzeme District Court of the City of Rīga. A criminal investigation of the judge was launched in 2006, and the result was an eight-year prison sentence handed down by the lower court. The ruling was appealed, and on October 13, 2012, the Department of Criminal Cases of the Supreme Court reduced the sentence to three years. For minutes of the Saeima session. Available: http://www.saeima.lv/steno/Saeima9/080605/st080605.htm#s29. See also: http://www.tvnet.lv/zinas/kriminalzinas/349834-tiesnesei_polikarpovai_piespriez_tris_gadus-cietuma [viewed 12 March 2012].

behalf of the people and their interests. There are at least five different ways of confirming judges in the world at this time. The difference among these various systems relates to the institution which has the final word on the election or appointment of a judge – the people via universal elections, Parliament, the head of state, the government, or judicial institutions. International experts argue that parliamentary votes can be risky for reasons of politicisation which can influence the judicial system and its independence.

4. Section 84 of the constitution, which says that judges can be dismissed from office by the Saeima against their will only in specific cases related to the Judicial Disciplinary Board or a court ruling on a criminal case, is not in violation with the principle that judges cannot be recalled. The norm does include exceptions from the principle, limiting terms in office so as to enhance the authority of the courts and ensuring the quality of court rulings.

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ASPECTS OF SPECIAL CONFISCATION OF PROPERTY

Keywords: Criminal Law (CL), Criminal Procedure Law (CPL), criminal sentence, other compulsory measures, confiscation of property, special confiscation of property, presumption, property, material benefits, criminally acquired property, a tool for committing a criminal offence, animals, vehicle.

The Constitution of the Republic of Latvia[1] in Article 105 has entrenched the constitutional principle – everyone has the right to property. The same Article stipulates that the property rights may be restricted if they are used against the interests of society. Property rights may be restricted only in accordance with the law. Among the laws that provide for exemptions from the property rights guaranteed in Article 105 of the Constitution are the Criminal Law[2] (henceforward CL) and Criminal Procedure Law[3] (henceforward CPL).

Section 42 of the Criminal Law lays down that confiscation of property or parts of that property of the convicted person is the compulsory transfer to State ownership without compensation of and can be applied as the basic sentence or additional punishment but only in the cases provided for in the Special Part of CL (paragraph 1 and 2 of the mentioned Section). Confiscation of parts of property provided for in paragraph three of Section 42 of the Criminal Law on the grounds of committing criminal offences stipulated in Section 260 of CL (violation of traffic provisions and provisions regarding vehicle operation) and in Section 230 (violations of the keeping of animals regulations) concerns correspondingly the vehicles and animals).

Special form of confiscation of property is provided for in Section 27 of the Criminal Procedure Law which regulates the activities with criminally acquired property. Within the scope of this section, Section 355 explains the notion of criminally acquired property and its substance.

Confiscation of property as a compulsory measure can be applied to legal persons on the grounds of an offence committed in the interests of a natural person (Section 702 of CL).

Since any restriction of the property rights concerns very important interests in economic and social area of the natural and legal persons, the legal regulation of property confiscation and its practical application has always been within the scope of attention of legal sciences. The property confiscation issues became particularly topical

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2 Krimināllikums. Par Krimināllikuma spēkā stāšanās un piemērošanas kārtību [Criminal Law. On Procedure of Coming into Force and Application of the Criminal Law]. Rīga: Firma "AFS", 2011.

3 Kriminālprocesa likums [Criminal Procedure Law]. Rīga: Zvaigzne ABC, 2010.

after the accession of Latvia to EU, because, firstly, the legal regulation of property confiscation in the Western countries is considerably different compared to the regulations in force in Latvia, and, secondly, activities carried out by organized crime within the area of property become more complex and thus create a need for more effective measures to be able to take more efficient steps in regard of manifestations of the organized crime.

The aim of the present article is to analyse the institution of property confiscation from the perspective of criminal law in conjunction with the existing provisions of law, to identify insufficiencies of the legal provisions and trends of development of the institution of property confiscation in the nearest future.

A very wide study about property confiscation legal issues in criminal law as well as from the perspective of legal procedure has been done in Latvia[4], which reflects the existing property confiscation regulation, foreign legal provisions on property confiscation, practical enforcement of the legal provisions, as well as constructive proposals within the area of property confiscation have been made. There are several analytical publications about property confiscation issues.[5] Views on property confiscation as a criminal sentence are different, so far that there is even an opinion that property confiscation should be excluded from the system of criminal punishment.

The injunction No. 6 issued on January 9, 2009 by the Cabinet of Ministers of the Republic of Latvia "On the Concept of Criminal Punishment Policy" plays a particularly significant role in the further development of the property confiscation institute.[6] Two theses are included in the resume of the concept of criminal punishment policy concerning property confiscation – property confiscation shall not be ruled out from the criminal punishment system; in the interests of proportionality of criminal punishments commensurately with the offence committed the list of that property which is not to be confiscated is to be compiled (the draft of such a list has been worked out).

It is unlikely that in the nearest future the legislator will decide about giving up property confiscation as a form of criminal punishment, but in view of the concept of Criminal punishment policy positions in order to further improve the criminal punishment system and the regulation of forms of punishment, the legal regulation on property confiscation as provided by Section 42 of the Criminal Law, should still be reviewed by, firstly, narrowing down property confiscation as an area of enforcement of criminal punishment and, secondly, the main emphasis should be transferred to the possibilities of confiscating criminally acquired property.

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[4] Meikališa A., Strada-Rozenberga K. Pētījums "Mantas konfiskācijas tiesiskais regulējums Latvijā un Eiropas Savienībā, tās izpildes mehānisma efektivitātes nodrošināšana" [Legal Regulation of Property Confiscation in Latvia and Ensuring Efficincy of Its Enforcement]. Latvijas Tiesu informācijas sistēma. Available: http://court.jm.gov.lv/

[5] Reigase A. Jā vai nē mantas konfiskācijai [Yes or No for Property Confiscation]. *Jurista Vārds*, 2004. gada 12. oktobris; Kūtris G. Noziedzīgi iegūta manta: tiesiskais regulējums un problemātika. *Jurista Vārds,* 2007. gada 17. aprīlis.

[6] Latvijas Republikas Ministru kabineta 2009. gada 9. janvāra rīkojums Nr. 6 Par Krimināsodu politikas koncepciju [Ordinance of the Cabinet of Ministers of January 9, 2009 No. 6 on Policy of criminal sentences]. *Latvijas Vēstnesis*, 2009. gada 13. janvāris, Nr. 6.

For this purpose Ministry of Justice has worked out a draft of Amendments in the Criminal Law (henceforward – Draft) which contains several essential norms about property confiscation, including some innovative ones, and the standing working group approved by the Ministry of Justice continues to work in this area (the initial Draught has been conceptually approved at the first reading at the Parliament).

About property confiscation as a form of sentence. The draft of amendments in the Criminal Law envisage excluding from the sentencing system the confiscation of property as the basic sentence (Section 36, part one, point 4). I believe there should be no objection to that. Property confiscation as the basic sentence was included in Section 36 of the CL and in eleven sections of the special part or among the sanctions of the chapters in 2004.[7]

It should be noted that in the existing regulation confiscation of property as the basic sentence has been formulated (grammatically) among the sanctions of the Special Part in a way that the law as if permits to apply to the guilty person two basic sentences – deprivation of liberty and confiscation of property For instance, in paragraph 2 of Section 85 of the CL the sanctions for committing espionage stipulate deprivation of liberty from 5 to 20 years with confiscation of property. Such a formulation of the sanction can be found in some other sections of the Special Part of the Criminal Law where property confiscation is envisaged as the basic sentence. Apparently there should be the connective "or" between the parts of the sentence about deprivation of liberty and confiscation of property because the first part of Section 36 of the Criminal Law states that the person who has committed an offence can be sentenced only one of the basic sentences stipulated in this article (it means in the whole sentencing system).

The formulation of the sanction as it has been expressed in Section 85 can be just as well understood as a mandatory applicable additional sentence. In those cases when confiscation of property as an additional sentence is not applicable as a mandatory measure, the sanction indicates – "..., "with confiscation of property or without confiscation of property" (for instance, in paragraph 1 of Section 154 of the CL). Such an indication about confiscation of property clearly states that it is an additional sentence.

The need to speak about at least imprecise if not incorrect formulation of property confiscation will be eliminated if the suggested amendments in Section 42 of the Criminal Law will be adopted.

The Draft proposes confiscation of property as an additional sentence in the cases stipulated in the Special Part of the Criminal Law only for severe and particularly severe crimes and not even for all. Confiscation of property for severe crimes may be applied if the Criminal Law provides for such offences deprivation of liberty for more than five years and if they have been committed for the purposes of acquiring property. Confiscation of property may be applied for a particularly severe crime against the state, as well as for a particularly severe offence if it has been committed for the purposes of acquiring property, on a large scale or in an organized group.

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[7] Grozījumi Krimināllikumā [Amendments in Criminal Law]. *Latvijas Vēstnesis*, 2004. gada 3. marts, Nr. 34.

Confiscation of property is not laid down in the sanction as a mandatory applicable sentence but as an alternative for this additional sentence.

The innovation in the Draft is that only that property shall be confiscated that has been found because it is stated that the court prescribing confiscation of property specifically indicates what property is to be confiscated. Wherewith such formulations as "confiscation of all property" is eradicated from all the court judgements.

Apart from confiscation as one of the criminal sentences stipulated by the whole sentencing system, the Criminal Procedure Law provides for confiscation of criminally acquired property in Chapter 27 of the Criminal Procedure Law – "Actions with Criminally Acquired Property". Section 240 of the CPL provides for confiscation of tools used for a criminal offence or the tools intended to be used for the criminal offence. Since these cases of confiscation are stipulated by provisions of procedural law, sometimes this type of confiscation is called procedural confiscation.

I consider that such a normative and theoretical solution in the theory of criminal law is not acceptable for several reasons.

Firstly, confiscation of criminally acquired property, as well as of the tools and means (objects) of committing the offence although is not criminal punishment, it is to be regarded also as one of criminal-legal compulsory measures, since it is being applied for committing a certain act or failure to act that is defined in the Criminal Law as an offence.

Secondly, confiscation of the above mentioned property, objects and tools has not been included in the system of criminal punishments neither as the basic or the additional sentence (Section 36 of the CL), which means that the purpose of this kind of confiscation is different from the purposes of the criminal punishment (Section 35 of the CL)[8], therefore they are to be classified as other type of compulsory measures.

Thirdly, in the criminal laws of the EU member states (not only) the confiscation of criminally acquired property and the confiscation of other types of objects associated with the commitment of the offence has not been provided by the criminal punishment system either, but is singled out in a separate chapter as other forms of compulsory measures. This type of confiscation is applied to property if it has been acquired in a criminal way and to objects that have been used or have been intended to be used for committing an offence[9].

Fourthly, since the confiscation of criminally acquired property and of the objects linked with commitment of a criminal offence is a criminal-legal compulsory measure, then such a confiscation is to be regulated by the Criminal Law while the Criminal Procedure Law may stipulate the rules of its enforcement.

Fifthly, since in the existing edition of the Criminal Law it is technically impossible to create a separate Chapter on general provisions that would list in one place all

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[8] See more in: Krastiņš U. Krimināsods un citi piespiedu ietekmēšanas līdzekļi [Criminal Sentence and Other Compulsory Means]. *Jurista Vārds*, 2007. gada 13. marts, Nr. 11.

[9] Додонов В. Н. Сравнительное уголовное право. Общая часть: Монография (Comparative Criminal Law. General Chapter: Monogrpah). М.: Изд. Юрлитинформ, 2010, С. 318.

the compulsory measures that are not criminal sentences[10], a new Chapter in the Criminal Law, Chapter VIII2 must be worked out– "Special confiscation of property". (In the legal literature the notion "special confiscation of property" is used by keeping the Latvian equivalent of the English word "special" (Latvian speciālā), but I believe it is better to substitute it by the Latvian native origin word "īpašā" that has the same semantic value by this emphasizing its different status in the criminal law and separating it from the confiscation of property provided for by Section 42 of the Criminal Law.

Given the above mentioned conceptual proposals about the special property confiscation, in the General Provisions chapter of the new Criminal Law three basic provisions of the special property confiscation forms that must be regulated should be entrenched: confiscation of criminally acquired property; confiscation of the object used to commit a criminal offence; confiscation of the property related to the committed criminal offence (the regulation of these three forms of special property confiscation have been included in four norms of the Draft – Sections 709–7012). Another Section has been prescribed concerning replacement of the special confiscation of property (7013).

The new Section is introduced by the definition of the special property confiscation notion (Section) – the special confiscation of property is compulsory transfer to State ownership without compensation of the criminally acquired property or the object used in committing the criminal offence or of the property related to the committing of the offence, emphasising that the property confiscation is not a criminal punishment.

In Section 7011 of the Criminal Law proposed in the Draft it is said that the object of the criminal offence are tools and resources that have been intended to use or have been used to commit the criminal offence. Such a formulation of the object used for committing a criminal offence fully complies with the one elaborated in the criminal law theory.

Section 7012 of the Criminal Law has been mainly designed in reference to the partial confiscation of property provided in the existing Criminal Law, in the third part of section 42: when the court rules confiscation of property for violation of traffic provisions (part 3 of Section 260 of the Criminal Law), partial confiscation of property is applied to the vehicle; when ruling property confiscation for violation of keeping of animals regulations, the court applies partial confiscation of property and applies it to the animals (CL, Section 230).

The sanctions of the above mentioned Sections also provide for such a partial property confiscation. In view of the fact that partial property confiscation in the above mentioned cases by its purpose and character correspond more to the institute of the special property confiscation, it is planned to exclude it from sanctions of Section 42 of the CL, and also from paragraph 3 of Section 260 of the CL recognizing that they are other forms of compulsory measures but not criminal sentences, therefore are to

[10] See more in: Krastiņš U. Krimināllikuma Vispārīgās daļas sistēmas problēmas [Problems of the System of General provisions part of the Criminal Law]. Administratīvā un Krimināla Justīcija. Rīga: LPA, Nr. 1, 2008.

be included among the cases of property confiscation that are related to committing a criminal offence.

The newly designed Section 7012 should also provide the definition of the notion of property related to the criminal offence. Such a notion has not been worked out in the theory of criminal law. Overcoming barriers of diverse opinions and doubts the working group arrived at the following formulation: property related to the criminal offence are materials the circulation of which is forbidden or materials whose origin and ownership has not been identified, or property owned by the person who has committed a criminal offence which on the grounds of the committed offence shall not be left in the possession of the person. As mentioned above, the further paragraphs of the given Section contain specific indications concerning confiscation of vehicles or animals.

Confiscation of a vehicle is associated with drunken driving, driving under influence of drugs, psychotropic substances, toxic or some other intoxicating substances. I believe that confiscation of the vehicle should also be related to the cases when committing a criminal offence as laid out in Section 260, the traffic regulations are intentionally violated while driving the vehicle.

Much more complicated situation is in the area of regulation of confiscation of criminally acquired property. The notion of criminally acquired property could be adopted in a concentrated way from the CPL Section 355 – criminally acquired property is the property that has come into the property or possession of a person as a result of a criminal offence directly or indirectly. Thus with the court sentence it is being identified that the particular type and amount of property has been acquired by the guilty person s a result of committing the specific criminal offence and the court confiscates it. It is a classical case of criminally acquired property.

The second paragraph of Section 355 of the CPL provides for another type of confiscation of criminally acquired property. It can rather be defined as confiscation of presumed criminally acquired property.[11] Which means that in the specific criminal case it has not been proven that the property found in the possession of the defendant has been acquired in a criminal way, but the guilty person has committed a criminal offence that is indicated in the second part of Section 355 of the CPL and therefore it is presumed that he has acquired the property in a criminal way unless he can prove the opposite (apparently it means that he does not prove legitimate origin of the property). A similar situation is also in those cases if another person has maintained permanent relations with the person who has committed a criminal offence stipulated in the second part of the given Section, and property has been found in the possession of the first individual. Such property can also be recognized as criminally acquired unless the opposite can be proved.

The third paragraph of Section 355 of the Criminal Procedure Law provides explanation of what "maintenance of permanent relations" means. It says – in the understanding of the given Section maintenance of permanent relations with another

[11] Presumption (lat. praesumtio) law: determining of a fact, recognition of a conclusion or statement as indubitable before the opposite has been proved. In: *Svešvārdu vārdnīca* [Dictionary of foreign words], Rīga: Jumava, 1999, 625. lpp.

person who has been engaged in certain criminal activities means that the person lives together with a second person or controls, determines, or influences the behaviour thereof. It is slightly complicated – which of the persons controls, determines or influences the other one.

One of the variants of the drafted Chapter proposed to transfer fully the text of the CPL, Section 355 to the second part of the CL, Section 7010.

I categorically objected to such a regulatory solution in the Criminal Law for several reasons. The main ones were as follows: establishing in the Criminal Law certain provisions one should avoid too broad enumerations of violations of law (referential norms); the provision must contain concentrated formulations, at the same time encompassing in it the meaning of the regulated subject: one should avoid using in the provisions notions and attributes that are unclear and cannot be understood without additional explanation; the provision must not contain logically inexplicable matters.

Concerning the substance of Section 355 of the CPL. To get an insight into the provision to be analysed I will quote the initially proposed wording of the second part of the CL Section 7010: if the opposite is not proved property is recognized as criminally acquired if it belongs to a person who: 1) is a member of an organized criminal group or supports it; 2) has him or herself engaged in terrorist activities or maintains permanent relations with a person who is engaged in terrorist activities; 3) has him or herself engaged in the trafficking of human beings, or maintains permanent relations with a person who is engaged in the trafficking of human beings; 4) has him or herself engaged in criminal activities with narcotic or psychotropic substances, or maintains permanent relations with a person who is engaged in such activities; 5) has him or herself engaged in criminal activities with counterfeit currency, State financial instruments or maintains constant relations with a person who is involved in such activities; 6) has him or herself engaged in criminal activities in order to cross the State boundary or to promote relocation of another person across the State boundary, or to ensure a possibility to other persons to reside illegally in the Republic of Latvia, or maintains permanent relations with a person who is involved in such activities; 7) has him or herself engaged in criminal activities in relation to child pornography or sexual abuse of children, or maintains permanent relations with a person who is involved in such activities; 8) has him or herself engaged in bribetaking, misappropriation of bribe, in intermediation of bribery, trading with influence, unauthorized demand of benefit and its receipt, receipt of unauthorized benefit or commercial bribery, if these offences have been committed on a large scale or maintains permanent relations with a person engaged in such activities; 9) has him or herself engaged in the exceeding official authority, or using official position in bad faith or in failure to act as a state official, if these offences have been committed for the purposes of acquiring property or maintains permanent relations with a person engaged in such activities; 10) has him or herself engaged in smuggling or maintains permanent relations with a person engaged in smuggling; 11) has him or herself engaged in criminal activities of tax evasion and payments equivalent thereto or maintains permanent relations with a person engaged in such activities; 12) has him or herself engaged in deliberate criminal activities against property if these offences have been committed on a large

scale or the person has been involved in deliberate criminal offences against property or if these crimes have been committed on large scale, maintains permanent relations with a person engaged in such activities.

First, the list of criminal offences in the second paragraph of Section 355 of the CPL keeps being expanded. For instance, in 2010 edition of the Criminal Procedure Law[12] there are only seven paragraphs in which criminal offences are mentioned and that are to be related to criminally acquired property. Also we can see, the above list is considerably longer (almost twice). And how can one guarantee that the list will not be supplemented? An immediate question arises why, for example, the list of criminal offences does not include seizure of hostages (Section 154 of the CL) or seizure of an air or water transport vehicle (Section 268 of the CL).

An unsuccessful attempt is to indicate in one provision two categories of persons to whom confiscation of criminally acquired property can be applied – the person who has committed the criminal offence and the person with whom he or she has been maintaining permanent relations. Legal status of these persons in the criminal proceedings is quite different (in the first case – the accused, in the second case – possibly a witness in the criminal case) therefore it should be emphasised by singling them out in two separate paragraphs of the Section.

When discussing a specific criminal offence, for instance, smuggling, it is not common in the criminal-legal practice to say that the person has engaged in a criminal offence; irrespective of the fact whether the person has him or herself committed a criminal offence or is an accomplice (organizer, instigator or supporter) the person has committed a criminally punishable offence.

Interpretation what it means to maintain permanent relations with another person provided in the third paragraph of Section 355 of the Criminal Procedure Law is not without blemish. It has too many designations of personal relations that cannot be understood unambiguously (controls, determines, influences the other person's behaviour) and thus requires at least special explanation. I consider that the persons' proprietal links must be more stressed in the relations between the persons.

If we analyse the list of those criminal offences whose commitment is linked with presumed criminally acquired property then we see that the enumeration includes criminal offences by committing of which it is not possible at all to gain any tangible benefit or not in all the cases it is possible to gain it. But the whole point is about criminally acquired property after all because it is already said in the title of Section 7010 – confiscation of criminally acquired property. Not in all the cases by committing a criminal offence in an organized group (point 1 of the second paragraph of Section 355) it is possible to obtain some material benefit. For example, in the case of homicide if it has been committed by an organized group (point 5, Section 118 of the CL) also if intentional serious bodily injury has been inflicted in an organized group (paragraph 4, Section 125 of the CL). Criminal liability for sexual abuse of children is laid out in several sections of the Criminal Law (Sections 159, 160, 161, 162 and 1621). It is difficult to imagine that by committing such criminal offences the offender could gain certain material benefit. But sexual abuse of

[12] Criminal Procedure Law. Riga: Zvaigzne ABC, 2010, p. 224.

children is mentioned in point 7 of the second paragraph in Section 355 of the CPL as a criminal offence for which the criminally acquired property is to be confiscated.

The above mentioned considerations indicate that it is necessary to find some other provisional regulation in the Criminal Law in addition to the general notion of criminally acquired property (the first paragraph of Section 7010 of the proposed CL) and such provisions must be put in place that would more specifically interpret the presumption that certain property has been acquired criminally.

As a result of evaluation of diametrically opposite opinions at the standing working group at the Ministry of Justice, the second part of Section 7010 of the CL could be worded as follows: property can be recognized as criminally acquired if it belongs to the person who has committed a crime that by its nature is aimed at gaining material or some other type of benefit if the person does not prove that the property has been acquired in a legal way. That concerns the person who himself or herself has committed the respective crime and only for the purposes of gaining certain material benefit resulting from the committed offence.

Concerning property that is to be presumed as criminally acquired as a result of a crime committed by another person, the third paragraph of Section 7010 of the CL should contain the following wording: property can be recognized as criminally acquired which is at the disposal some other person and who maintains permanent family, economic or some other type of financial relations with the person mentioned in the second paragraph of the given Section and who does not prove that the property has been acquired in a legitimate way.

An important provision has been included in the subsequent part of the given Section: the criminally acquired property or assets that the person has acquired from selling this property, as well as the "fruits" gained from the use of such a property use shall be confiscated.

I have objections of inclusion of the word "fruits" in the text of this part of the Section. Law should use the terms that can be perceived by readers of the law unambiguously. The term "fruits" has been transposed from the Civil Law without any serious need. Section 855 of the Civil Law states that fruits within the widest meaning of this word, are every benefit which may be obtained through the use of a principal property. In such a wide meaning both material and other forms of benefit are understood in the criminal law. For example, in Section 320 of the CL (accepting bribes) and in Section 323 (giving of bribes) as the object of the bribe is recognized material value, property or benefits of another nature. The title of Section 198 of the Criminal Law is unauthorized receipt of benefits; offering or giving of benefits are formulated in Section 199 of the CL (commercial bribery). The word usury (the Latvian equivalent is a derivative of the word "auglis" – fruit: translator's note) has been used in Section 261 of the CL and only in one meaning – in relation to different types of loans. Then why, opening a Criminal Law chapter that regulates the special property confiscation, one should be hastily looking for the respective provision in the Civil Law in order to understand what "fruits" are. In criminal law the notion of "benefit" has already been accepted and it includes everything that can be gained from criminally acquired property and we should keep to the term in criminal-legal regulations.

The last Section (7013) of the proposed General Provisions chapter in the Criminal Law deals with the issues of substitution of the special confiscation of property in those cases when the criminally acquired property that by law should be confiscated is not possible.

If it is necessary to confiscate the object that has been used to commit a criminal offence but it belongs to another person who is neither the offender, nor an n accomplice then it is possible to confiscate some other property belonging to the offender or claim from the person the equivalent of its value.

If the criminally acquired property has been forfeited, destroyed, hidden or concealed and it is impossible to confiscate it, then some other property of the equivalent value can be confiscated or recovered.

This Section also states that if the guilty person does not possess such other property to be confiscated or some other property that can be recovered then it is possible to confiscate his spouse's property unless at least a year before starting to commit the offence the property of the spouses had not been separated.

Apparently for practical considerations in the interests of the State Treasury this Section contains a provision that allows the criminally acquired property that should be confiscated to be substituted with financial resources of the value equivalent to the property to be confiscated except if the confiscated property has historical, artistic or scientific value. Such a form or substitution of the property to be confiscated is not to be evaluated positively because it tends towards "buying oneself off" from the actual confiscation of the property. Such an option can create negative attitude of society and can even be linked with corruption risk during the process of evaluation of the property and so on.

Finishing the analysis of the Draft of the newly elaborated chapter "Special confiscation of property" of the General Provisions chapter of the Criminal Law, it must be concluded that we will hardly find another country's Criminal Law that provides for so many forms of property confiscation and such strict provisions for its application, in particular it concerns confiscation of the presumably criminally acquired property. In fact such a form of property confiscation could be justified if the Criminal Law did not identify property confiscation as a criminal sentence. But such a form of sentence remains in Section 42 of the CL and in accordance with this Section in those cases when it is provided by law the court can confiscate the found property if the property crimes are severe and particularly severe.

Conclusion

1. The Criminal Law provides for two forms of compulsory measures – criminal sentences defined by the sentencing system and other compulsory measures that are not criminal sentences.
2. The Criminal Law provides for property confiscation as a criminal sentence (Section 42 of the CL). While the Criminal Procedure Law provides for confiscation of criminally acquired property (Section 27) and confiscation of tools intended for or used for committing the criminal offence (Section 240).

3. Confiscation provided for in the Criminal Procedure Law is not a criminal punishment but since it is a criminally-legal compulsory measure it is to be regulated in the Criminal Law.
4. The chapter on general provisions in the Criminal Law does not contain a special division devoted to other compulsory measures therefore a new division in the General Provisions chapter of the Criminal Law "Special confiscation of property" must be elaborated.
5. The new division must provide for three types of special confiscation of property: confiscation of criminally acquired property, of the tool of commitment of the criminal offence and of property connected with the committed criminal offence.
6. The standing working group at the Ministry of Justice has worked out a draft of amendments in the Criminal Law that contains the definitions of the three above mentioned types of confiscation and the provisions related to their substance and enforcement.

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GOOD FAITH RECIPIENT OF CRIMINALLY ACQUIRED PROPERTY: TWO LAWS AND TWO SOLUTIONS

Keywords: criminally acquired property, confiscation, good faith recipient, property, compensation for damages.

Out of all criminal offences committed nowadays, the lesser part is of the type committed for the sake of a certain idea or because of one's caprice (entertainment, revenge, etc.). People more frequently violate the law to receive certain material gains. It refers to petty pick-pockets and basement burglars and to the organised drug market and human trafficking alike. If these people are deprived of their aim of activity – the material gains are taken away, the meaning of this criminal conduct is lost. Hence, successful operations of state authorities, as a result of which the criminal is found and punished, moreover, the criminally acquired property is found, ensure not only reinstatement of justice in the specific case, but it serves also as important preventive means.

This applies also to organised crime, nevertheless – from a slightly different perspective. Confiscation of criminally acquired property does not only hinder enjoying "the fruit of one's labour" but at the same time also takes away (or at least reduces) the economic grounds for further development of criminal activity. It is for this reason that international documents regulating cooperation in the battle against transnational crimes promotes finding and removing the criminally acquired property as one of its tasks.[1] Moreover, it is linked to the duty to follow the "dirty money" flow, regardless of how skilfully it is "laundered".

Therefore, one can conclude that it is in the interests (and it is also the duty) of a judicial state to remove criminally acquired property from the offender's possession or to deprive the offender of the opportunity to use these gains in their interests. However, a person, who has suffered losses as a result of a criminal offence, is interested in retrieving this property or in receiving compensation for damages.

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[1] See, for instance, the Criminal Law Convention on Corruption of the Council of Europe, Article 23, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Article 2, Second Protocol of the Convention on the Protection of the European Communities' Financial Interests, drawn up on the grounds of the Treaty on the European Union, Article K3, Article 5, UN Convention on Transnational Organized Crime, Article 12.

Options provided by normative regulation

This paper will not include contemplations on what is criminally acquired property. Let us assume that pursuant to Article 355 of the Criminal Procedure Law (hereinafter – CPL) "Property shall be recognised as criminally acquired, if such property directly or indirectly has come into the property or possession of a person as a result of a criminal offence". Moreover, the law entitles the state to recognise such property as criminally acquired property, which belongs to a person, which has been involved in criminal offences of a certain type[2] or which keeps up habitual (economic, familial, subordination, etc.) relations with such a person, unless that person, who owns the property (with whom the property is kept), proves legal origin of that property.

Property can be recognised as criminally acquired and decisions can be made with respect to handling it:

(1) a decision of a person directing the proceedings, if, during a pre-trial criminal proceedings, property was found with and seized from a suspect, accused, or third person in relation to which property the owner or lawful possessor thereof had previously submitted a loss of property, and, after the finding thereof, has proven his or her rights to such property, eliminating any reasonable doubt;

(2) a decision of a district (city) court in accordance with the procedures specified in (Chapter 59 of CPL), if there is sufficient evidence that does not cause any doubt regarding the criminal origins of the property or the connection of the property with a criminal offence;

(3) with a court adjudication or a prosecutor's decision on terminating a criminal procedure.[3]

Thus, during the pre-trial proceedings, the person directing the proceedings (an investigator, a prosecutor) with a decision can recognise that certain found property (for instance, a ring, bicycle, or vehicle) is the item, in case of which theft is under investigation, and there are no doubts as to that its owner is the victim. In this case, the provision refers to property, which is individual and is identifiable according to specific features. A matter worth discussing is whether during this stage, the person directing the proceedings could also decide on "lost" immovable property. The author believes that this should be forwarded to the court to decide (according to procedures established in Chapter 59 of CPL), because the entries into the Land Register regarding rights to such property is also made by a judge of the Land Register division.

The second situation is slightly more complicated. Namely, during the pre-trial proceedings (in future, it will, possibly, be feasible also during other stages of the proceedings), property has been found and evidence has been gathered, which does

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[2] Part 2 Article 355 of CPL provides for seven types of criminal offences, which are planned to be supplemented with another five. Simultaneously, amendments to the Criminal Law are under preparation at the Ministry of Justice; these amendments will allow that such property that is owned by a person, who has committed an offence (but not a crime), which by its nature is tended to obtaining material gains, will be presumed as criminal.

[3] Article 356 of CPL.

not cause doubts of that it is of criminal origin, however, the criminal case cannot be forwarded to the court in the nearest future, or keeping this property can cause unnecessary expenses. In practice, it is most frequently linked to money found in accounts of companies (mutually affiliated companies, through the accounts of which money flows to evade tax payments, to defraud on tax money or to legalise criminal proceeds), however, there are also cases when defrauding concerns real property. In such cases, the person directing the proceedings (the investigator, the prosecutor) initiates proceedings on criminally acquired property, sorts out materials (evidence) of the criminal case, and delivers them to the court for it to decide whether the property is of criminal origin.

The third situation, for its part, is the "classic" one. The court, as it decides on a case on its merits (on the guilt of a person), it must be simultaneously determined whether as a result of the offence any property is obtained, and then must determine how this property should be handled. The law does not specify whether the criminally acquired property must be found and seized, however the wording employed in the provision decision on [..] confiscation or recovery"[4] gives grounds for drawing a conclusion that the ruling might prescribe not merely confiscation of the specific property, but also the amount (value) of the criminally acquired property to be recovered.

Similar authorisation is granted also to the prosecutor, when adopting a decision on terminating criminal proceedings.[5] Even though the CPL provisions do not contain explicit wording on the prosecutor's rights or obligations to decide on the recognition of property as criminally acquired property, nevertheless, Article 392[1] prescribes that a decision on terminating criminal proceedings must include instructions regarding actions with the seized objects and valuables. An implicit indication to the same is included also in Part 5[1] of the said Article, envisaging that the person, whose rights have been infringed upon, must be informed about the adopted decision. Therefore, it would be only logical to conclude that in cases, when a non-exonerating decision is adopted and criminally acquired property is found during the proceedings, the person making the decision must decide not only on the guilt of the offender, but also on how such property should be handled (moreover, the person's consent is necessary for terminating the proceedings). If anybody challenged such a solution, then the same could be achieved with procedurally even less economic (and less logical) conduct, namely, the prosecutor would have to initiate separate proceedings on criminally acquired property and would have to forward it to the court for adjudication, in order for the prosecutor to decide on the guilt of the person at a later time. However, the issue on ownership of real property, similar to the first situation, would have to be forwarded to the court for adjudication.

To eliminate doubts regarding the prosecutor's entitlement to decide on confiscation of property, one must bear in mind, that at least in an injunction on a punishment, such entitlement is explicitly prescribed in Part 2 Article 636 of CPL. As the prosecutor

[4] Clause 11 of Part 1 Article 528 of CPL.

[5] Part 1 Article 356 of CPL.

cannot determine confiscation of property as a punishment, then confiscation stipulated in this article undoubtedly refers to criminally acquired property.

The law prescribes three options for actions with criminally acquired property:

(1) property is to be returned on the basis of ownership to the owner or lawful possessor;

(2) property, the circulation of which is prohibited by law and which, as a result of such prohibition, is located in the possession of a person illegally, shall not be returned to such possessor, but rather transferred to the relevant State authority, with a decision of a person directing the proceedings, or to a legal person that is entitled to obtain and use such property;[6]

(3) property shall be confiscated if it does not need to be returned to the owner or lawful possessor.[7]

Likewise, several provisions in the law contain the following principle: if criminally acquired property is alienated, destroyed, hidden, or concealed and it cannot be returned or confiscated, then other property matching the value of property to be confiscated can be subject to confiscation or recovery.

Nevertheless, the reality introduces its own conditions in this clearly understandable regulation, namely, that the offender quite often does not have any property – they have alienated, destroyed, or hidden the obtained property, and they do not own any other property. Meanwhile, for the victim, especially if it is a natural person, the particular property lost in the criminal offence is often what is important (a piece of jewellery – family relic, real property, a painting, etc.)

Certainly, to prevent these "corrections" in enforcing a decision on returning or confiscating property, timely and skilful action by the investigatory bodies is of critical importance. If the whereabouts of criminally acquired property are discovered, it can be attached, seized, and as a result – returned to the owner (lawful possessor) or confiscated in the favour of the state.

In-depth examination is due in a situation, when the criminally acquired property is found with a third party, who does not know anything about its connection to a criminal offence, moreover, it is the only property, which can be used to mitigate the damages suffered by the victim, or it is particularly important to the victim (it is not a common item, which can be replaced with another or reimbursed through in money).

Two different approaches

For such a situation, the legislator has prescribed an unequivocal solution in the Criminal Procedure Law: "If criminally acquired property has been found on a third person, such property shall be returned, on the basis of ownership, to the owner or

[6] Article 357 of CPL.

[7] Article 358 of CPL.

lawful possessor thereof".[8] However, if this property is returned to the owner or lawful possessor, then the third person, who acquired such property, or pledge, in good faith has the right to submit a claim, in accordance with civil procedures, regarding compensation for the loss, including against an accused or convicted person.[9]

The said provisions are successfully applied in practice. Thus, for instance, on 10 May 2010, the Krāslava District Court, upon having considered the materials distributed within the criminal proceedings No. 11240007409 regarding criminally acquired property, decided to recognise the real property (land lot, residential building with auxiliary buildings) as criminally acquired and to return it (the land) to the owner and lawful possessors (the buildings). The court considered that it is proven that several persons, taking advantage of the owner's trust, with deceit, having falsified a power of attorney and signatures, obtained rights to the real property and later sold it to another person. In the part of reasoning of the decision, the court also indicated that "the third person [..], who could also be a good faith recipient of this property", is entitled to requesting reimbursement of losses through a procedure of civil proceedings.

A similar decision was adopted at the same court on 11 May 2010 in proceedings dealing with criminally acquired property, which is separated from the criminal proceedings No. 11240028905. In this case, a person, who was authorised to perform works of forest development, with a falsified power of attorney sold the entire real property (a forest and residential buildings). The property was returned to the owner. Likewise, the decision also indicated to the rights of the good faith acquirer to file a claim in a civil procedure for the recovery of losses.

However, when adjudicating such matters in civil proceedings, the attitude differs. Based on the provisions of another law and in the protection of other equally important principles, another decision is made. Thus, for instance, in the judgment of 12 May 2010 adopted by the Civil Case Department of the Supreme Court Senate of the Republic of Latvia in the case No. SKC-11/2010, it was concluded that the law protects the rights of a good faith acquirer. The protection of a good faith acquirer's property rights with respect to real property derives from Article 994 of the Civil Law (what is known as "presumption of ownership of real property") and "the principle of public reliability of land registers" included in Article 1 of the Land Register Law. Regulations on obtaining ownership to real property allegedly prescribe a significant and in practice very important exclusion from the principle, according to which, nobody can transfer more rights to anybody than they own; aim of these regulations are to ensure stability of civil turnover and protection of reliability.[10]

In the given case, it was decided on the rights to real property (an apartment), which after the owner's death (a murder), was alienated from a person by another certain person, by using a falsified power of attorney, and later, this property was sold three

[8] Part 1 Article 360 of CPL.

[9] Part 2 Article 360 of CPL.

[10] In the judgment of the Supreme Court Senate of the Republic of Latvia in the case No. SKC-11/2010, a reference to Grūtups A., Kalniņš E. Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. 2. izd. Rīga: Tiesu namu aģentūra, 2002, 198. lpp.

times within less than half a year. The court of appeal instance had recognised that all four purchase agreements are ineffective and that the lawful successor has property rights to this apartment. Meanwhile, the court of cassation instance recognised that only the first agreement is unlawful, but in other cases, it prioritised the principle of protection of good faith acquirers.

One can agree to the opinion voiced by scholars: "In circulation of real property, one must be guided by what the law stipulates, namely, that the owner is the person recorded in land registers. In exceptional cases, for instance, with a court decision that establishes an offence committed by the acquirer, notary, or land register judge, the legal presumption is disproved."[11] A chain of agreements of impressive number of links can make one generally reconsider the possibilities of application of Article 1041 of the Civil Law.[12] Nevertheless, at the same time, a question arises: if the offence committed by a notary (or a judge) provides grounds for recognising that the entries in the land register are incorrect, why, then, the same consequences would not set in, if another person had falsified the necessary documents instead of a notary?

Another argument for a different opinion in the specific example at hand (and concerning real properties overall), a mention is due regarding the fact that the real property should not be regarded as goods that people exchange each month without considering legal shortcomings of those goods. If a property is sold four times within six months, logically, doubt arises about good faith of a person, who purchases such an apartment without making sure of its legal quality.

In this situation, another important nuance must be emphasised: protection of a good faith acquirer of real property is a principle, which is more based on legal doctrine and Senate practice.[13] Possibly, such attitude has originated by means of interpretation of legal provisions. Therefore, a serious discussion might arise here regarding whether the importance and infallibility of an entry into the land register is not exaggerated. There is no doubt about the importance of this entry for recording ownership rights. In the interests of the society, legal stability and reliability is to be highly regarded, however, nobody is protected from that this entry has originated on initially "poor quality" (erroneous or even criminal) grounds. If the court detects such facts, then the question arises of whether an individual can rely on that the state will reinstate justice.

Moreover, provisions of the Civil Law do not contain explicit notion to the protection of such good faith acquirer. And what is more, for instance, Article 1003 of the Civil Law prescribes "Ownership may not be acquired through prescription for property obtained by criminal means, neither by the committer of the criminal offence, nor by a third person whose rights are obtained by alienation from the committer".

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[11] Torgāns K. Prettiesiski iegūta īpašuma tālākpārdošanas sekas. *Jurista Vārds,* 2010. gada 7. decembris, Nr. 49.

[12] Ibid.

[13] See: Judgment of 23 September 2009 adopted by the Supreme Court Senate of the Republic of Latvia in the case No. SKC-160/2009 and the judgment of 21 April 2010 in the case No. SKC-105/2010.

Meanwhile, Article 1041 stipulates that "Owners may reclaim their property by an ownership action against any third party possessor".

Possible solution

International documents in this case cannot provide us with a solution. They mainly deal with confiscation of property, namely, with the state's entitlement to remove criminally acquired property without compensation for the sake of the state from the offender or a third party, who knew or should have known (justifiably should have realised) the criminal origins of property.

If rights to property in the particular case theoretically pertain to two persons, the state must seek for a solution and decide on which of the values are regarded as higher.

During the criminal proceedings, it can be discovered that the property is an object of a criminal offence and that corroboration, because of which the Land Register entry has been made, is the result of a criminal offence. And consequences of a criminal offence manifested as an exchange in possession (and perhaps also ownership) in a judicial state should not be protected regarding personal effects or real properties. A situation enabling legalisation of such consequences on the grounds of civil transactions would go contrary to the principle of a judicial state.

If through a civil transaction it were possible to legalise stolen, alienated, defrauded property, it would not be just. Would it matter here how long the link of good faith acquirers is, if the transaction from the very beginning is a result of criminal offence. The author believes that from the perspective of lawfulness and justice, it is not acceptable to allow for a situation that within the framework of criminal proceedings at first the property is returned to its owner, who was the owner before the criminal offence, but later through a civil procedure, the good faith acquirer could recover the property.

One could agree to a particular opinion voiced by the judge with respect to one case: "the act of committing criminal offence [..], as a result of which real property is acquired and then alienation in favour of third parties is performed, does not describe civil circulation. Therefore, if the principle of protection of a good faith acquirer is applied in a case when the lawful owner of an object has lost possession over it as a result of a criminal offence, it must be concluded, that the boundaries of its application are expanded."[14]

Expanded application of the principle leads to that the offender after committing the criminal offence tries to alienate the obtained property as soon as possible. Sometimes, property can be hidden this way (it does not refer to real property), because it is safer to know that the property cannot be removed. Thus, the offender, who "does not own anything", can spend the received payment (immediately or after serving

[14] The opinion of the LR Supreme Court senator A. Laviņš in civil matter SKC-11/2010. (Judgment of 12 May 2010 in the case No. SKC-11/2010).

the sentence), while "the good faith acquirer" can enjoy the benefits of the acquired property (possibly, at a low price, unless alienation has not occurred at all). Only the victim of the criminal offence is left with moral satisfaction that the guilty party has been found.

The author believes that regulation included in the laws should be unambiguous. Meanwhile, those applying the provision should have uniform understanding of the protection of a good faith acquirer. If criminally acquired property was owned by a certain person before this criminal offence, then the criminal offence may not serve as justification for losing these rights. Ownership rights must be reinstated.

At the same time, one must consider the ways of how receipt of compensation for losses could be fostered for the good faith acquirer.

The good faith acquirer loses good faith possession to property, when it is returned to the initial owner, who has lost it as a result of a criminal offence. The good faith acquirer has an option to request compensation for damages not only from the person sentenced in the criminal offence, but also from another good faith acquirer, who has been the alienator of that property. Thus, "the link" could continue up until the first good faith acquirer, who has obtained the property from the offender.

One can agree that from the procedural viewpoint, it would not be economical (the work overload in courts is a well-known fact). Furthermore, it would not foster legal stability, because a person could not feel safe that after some time, claims would not be filed against them for compensation of losses, because they have alienated somebody else's property. Elimination of both of the mentioned factors is the duty (and serves the interests) of the state. Therefore, possibly, it should be the state, which should get engaged in ensuring that compensation for losses is granted to the good faith acquirer, while retaining the rights to collect from the offender's property, should the offender have any such property at any time in future.

This solution is based on several other considerations, including ethical, even though sometimes they are referred to as populist. For instance, the state must bear certain responsibility for that the mechanism it has created has not prevented the act of criminal offence, and after the criminal offence is committed, it has not been able to timely stop further transactions with the property.

In conclusion, the author would like to claim that no civil law or criminal law principle should be proclaimed absolute or superior over others. They are successfully developed for certain legal relations and they can be applied therein, however at a point of merging between various relations, the priority or higher value must be chosen. People believe in their country, if it operates under the rule of law and it protects and guarantees justice. A judicial state should not pass laws or agree to conduct, which would legalise property that has been criminally removed.

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PRECISENESS OF CRIMINAL LAW PROVISIONS AND FAIR REGULATION OF CRIMINAL-LEGAL RELATIONS

Keywords: Criminal Law, Criminal Procedure Law, provisions of criminal law, criminal-legal relations, sentence, general rules of prescribing criminal sentence, release from criminal punishment.

The presumption that the basis of any legal precept is a specific task (aim) that in criminally-legal science could be designated generally as fair regulation of criminally-legal relations including those between the individual who has committed a criminal offence and "determinant body called state", besides, "the relationship between the state and the individual must be clearly defined even if the individual has violated law."[1] The same provision should be put in place also if the state in the person of is authorized officials and institutions has not complied to the provisions set out by law in its relations with an individual who has committed a violation of law.

The task (aim) of criminal law is: 1) to define what offences are to be recognized as criminal and prohibit them; 2) to define the punishment for such offences; 3) to define the grounds of criminal liability and its terms, as well as the grounds and terms according to which the person's sentence can be mitigated or the person can be released from criminal liability and punishment that can be achieved by providing precise regulation of the specific area, strictly complying to the basic principles of criminal law and relying on the theory principles consolidated by legal practice. Only by complying with all the above said, the system of prohibitions and punishments set out in the Criminal Law can function successfully while the degree of achieving implementation of prohibitions and punishments during the process of enforcement of such provisions of criminal law provides evidence about their efficiency.

Scaling down the further discussion to defining of punishment for the committed criminal offence and release from criminal liability, first a reference must be made to the provisions set out in paragraph one of Section 35 of the current Criminal Law[2] that "sentence is a compulsory measure which a court, within the limits of this Law, adjudges on behalf of the State against persons guilty of the commission of a criminal offence or in the cases provided by law is adjudged by the prosecutor, writing an injunction regarding the penalty." From the above said it follows that "a criminal offence" and "sentence" have close mutual relationship by emphasizing

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[1] Mincs P. Krimināltiesību kurss. Vispārīgā daļa. Ar U. Krastiņa komentāriem [A Course in Criminal Law. General Part. U. Krastiņš' comments]. Riga: Tiesu nama aģentūra, 2005, 15, p. 19.

[2] Latvijas Republikas Krimināllikums [Criminal Law of the Republic of Latvia]. *Latvijas Vēstnesis*, July 8, No. 199/200.

which P. Mincs wrote that "a criminal offence as a negative phenomenon of social life and a sentence as reaction to it have been interconnected from times immemorial."[3] Continuing this thought one should refer to the principle entrenched in the criminal doctrine that the interests jeopardized by the criminal offence enable to determine the harm of the offence and "the more significant the object of the criminal offence, that is, the interests protected by the Criminal Law, the more harmful is the respective criminal offence", from which in its turn the severity of the sanctions stipulated by law depend[4], that is to be evaluated as the guarantee of protection of both certain interests of a person (the rights to life, health and so on) and also of the interests of society at large.[5]

Compliant to Section 46 of the Criminal Law (henceforward CL) the court adjudges a sentence as set out in the section of the Special Part of this Law for the criminal offence committed, and in compliance with the provisions of the General Part of this Law which is in accordance to the principles of lawfulness and equality. While the provisions of the second paragraph of the same Section provides that in determining sentence, a court and the prosecutor writing an injunction regarding the penalty shall take into account the character of and harm caused by the criminal offence committed, the personality of the offender and mitigating or aggravating circumstances, which incorporates the principle of fairness that is mainly manifested as individualization of the punishment.

Guided by the principles of humanism, the legislator has prescribed the terms under which the person who has committed a criminal offence can be adjudged a lesser sentence than the sentence provided by law, namely, to reduce the sentence prescribed by law for the committed criminal offence or to impose a lesser, another form of sentence[6] (Section 49 of CL), as well as to release the person from criminal liability (Section 58 of CL). Since October 21, 2010[7] the Criminal Law has been supplemented with a new Section– 491 "If the Rights to Termination of Criminal Proceedings in Reasonable Term have not been Observed", according to which if the court determines that the rights of a person to the termination of criminal proceedings in reasonable term have not been observed, it may: 1) take this circumstance into consideration when determining the punishment and mitigate the punishment; 2)

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[3] Mincs P. Krimināltiesību kurss. Vispārējā daļa. Ar U.Krastiņa komentāriem [A Course in Criminal Law. General Part. U.Krastiņš' comments]. Rīga: Tiesu namu aģentūra, 2005. 192. lpp.

[4] Krastiņš U. Noziedzīgs nodarījums [Criminal Offence]. Rīga: Tiesu namu aģentūra, 2000, 34. lpp.

[5] Зубкова И. Проблемные вопросы построения санкций в уголовном кодексе РФ. В кн.: Научные основы уголовного права и процессы глобализации. Материалы V Российского конгресса уголовного права [Problematic Issues of Determining Sanctions in the Criminal Code of Russian Federation, see in: Basic Principles of Criminal Law and Globalization Principles. Proceedings of the 5th Russian Congress on Criminal Law]. Москва: Проспект, 2010, с. 679.

[6] In the draft law "Amendments in the Criminal Law" that is now reviewed by the Parliament of Latvia, a provision granting an opportunity to determine another, lesser sentence in Section 49 of the CL is not included, at the same time retaining it in Section 491 of the Criminal Law. The draft "Amendments in the Criminal Law" is available: TMLik_290911_KL [viewed 14 June 2012].

[7] Grozījumi Krimināllikumā: LR likums [Amendments in the Criminal Law. The Law of the Republic of Latvia] *Latvijas Vēstnesis*, 2010. 10. novembris, Nr. 178.

determine a punishment which is lower than the minimum limit provided for the relevant criminal offence by the law; 3) determine another, lesser type of punishment than provided for the relevant criminal offence by the law. With these amendments Section 58 of the Criminal Law has been supplemented with paragraph five that provides a new provision for the release from criminal liability, namely, a person may also be released from criminal liability if it is established that his or her rights to the termination of criminal proceedings in reasonable term have not been observed.

The rights to termination of criminal proceedings have been incorporated also in the legal regulations of European Council[8], to which corresponds Section 14 of the Criminal Procedure Law[9] "The rights to the completion of criminal proceedings in reasonable term", by declaring in its first paragraph that "Each person has the right to the completion of criminal proceedings within a reasonable term, that is, without unjustified delay", A person directing the proceedings shall choose the simplest type of criminal proceedings that complies with the specific circumstances, and shall not allow for

unjustified intervention in the life of a person and unfounded expenditures (paragraph 2 of the Section). The third and fourth paragraph of the section correspondingly provide that Criminal proceedings wherein a security measure related to the deprivation of liberty has been applied shall have preference, in comparison with other criminal proceedings, in the ensuring of a reasonable term while criminal proceedings against an underage person shall have preference, in comparison with similar criminal proceedings against a person of legal age, in the ensuring of a reasonable term.

The fifth paragraph of Section 14 of the Criminal Procedure Law provides that inobservance of a reasonable term may be the basis for the termination of proceedings in accordance with the procedures specified by this Law. Also paragraph 4 of the fist part of Section 379 of the given law provides that an investigator with consent of a supervising public prosecutor, public prosecutor or a court may dismiss criminal proceedings, if it is not possible to complete the criminal proceedings within reasonable term.

Refraining from the discussion within the present publication the issues about termination of criminal proceedings within reasonable term and its evaluation[10], which is the competence of criminal procedure specialists, I would like to dwell on the remedy mechanisms proposed in the documents by the European Council and

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[8] Report on the effectiveness of national remedies in respect of excessive length of proceeding. Adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006). Available: www.venice.coe.int [viewed May 12, 2012]; Recommendation CM/Rec (2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings. Adopted by the Committee of Ministers on 24 February 2010 at the 1077th meeting of the Ministers, deputies. Available: Council of Europe portals wcd.coe.int [viewed May 12, 2012].

[9] Krimināprocesa likums: LR likums [Criminal Procedure Law. The Law of the Republic of Latvia]. *Latvijas Vēstnesis*, 2005. 11. maijs, Nr. 74.

[10] See: Rozenbergs J. Tiesības uz kriminālprocesa pabeigšanu saprātīgā termiņā [The Rights to Termination of Criminal Proceedings in Reasonable Term]. *Jurista Vārds,* 2011. 5. jūlijs, Nr. 27, 6.-13. lpp.

the criminal-legal consequences following from them, J.Rozenbergs classifies these mechanisms as preventive and compensatory, subdividing the latter into material and immaterial ones.[11]

The mentioned remedy mechanisms, in the author's view, neither the preventive remedies that are aimed at speeding up the proceedings, nor the material compensation mechanisms when the person receives a financial remuneration for the material or immaterial harm inflicted upon him or her cause any discussion. If we evaluate immaterial compensation there can be likewise no objections against moral compensation for the infringement of the fundamental rights of the person that can be expressed as a recognition of the state of this infringement in view of the fact that that the state has not fulfilled its obligations to organize the work of its authorized persons, institutions and establishments in a way that they would be capable of ensuring compliance of criminal proceedings to the stipulated requirements.

A different evaluation concerns the immaterial compensation which is manifested as mitigation of the sentence or release of the person from criminal liability that, I believe, contradicts the general principles of determination of punishment as set out in the Criminal Law. How can such a statement be substantiated?

As already mentioned, the legislator has strictly and meticulously defined what mandatory provisions the court must observe determining the sentence, which refer also to the prosecutor compiling the injunction about punishment; and the analysis of their contents and taking each provision separately and together enables to conclude that the general provisions for determining sentence set out in the second paragraph of Section 46 of the Criminal Law are not to be linked with reasonableness of the term of criminal proceedings and with the consequences following from failure to comply with it. To prove it we must briefly dwell on the essence of these criteria.[12]

Thus the law firstly indicates that when the court determines the sentence and the prosecutor compiles the injunction about the punishment they take into account the character of the criminal offence committed, which in the theory of criminal law is usually linked with the significance of the threatened object, namely "what interests of the state, individual are threatened."[13] One should add here that assessment of these criteria is quite formal in the jurisprudence of courts, either including in the ruling only a reference that in determining the sentence, the court takes into consideration the character of the committed crime or noting how according the Section 7 of

[11] See: Rozenbergs J. Tiesības uz kriminālprocesa pabeigšanu saprātīgā termiņā [The Rights to Termination of Criminal Proceedings in Reasonable Term]. *Jurista Vārds,* 2011. 5. jūlijs, Nr. 27, 11. lpp.

[12] See more: Liholaja V. Soda noteikšanas principi: likums un prakse [Principles of Determining Sentence. Law and Practice]. *Jurista Vārds,* 2006. 12. decembris, Nr. 49.

[13] Niedre A. 12.1. Soda noteikšanas vispārīgie principi [General Principles of Determining Sentence]. In: Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Vispārīgā daļa. Trešais papildinātais izdevums [Criminal Law. General Part. The Third Supplemented Edition]. Rīga: Tiesu namu aģentūra, 2008, 378. lpp.

the Criminal Law this criminal offense is to be classified.[14] But significance of the threatened interests and identifying of the committed criminal offence as less severe, particularly severe crime can characterize the offence only when we talk about posing danger to different objects, but, for example, in the case of homicide any deliberate act of murdering will both endanger the interest of protection of any individual's life, and it will also be classified as a particularly grave crime. Therefore while evaluating the character of the committed criminal offence, such additional circumstances as the mode of perpetrating the crime, motivation of the guilty person and attitude towards the committed act, existence of qualifying conditions and so on must be taken into consideration as well.

Secondly, when determining the sentence the harm inflicted by the criminal offence must be considered, for example, the degree of severity of bodily injury and the character of irrevocable consequences[15], the scope of the material damage and so on. It is important to note that the harm caused by the criminal offence is connected with the character of the criminal offence and in general it essentially influences the form of punishment and sentence determined for the perpetrator, as it can be explicitly seen from the court judgement in the charges brought against S.J. for committing the crime stipulated in paragraph 3 of Section 118 of the Criminal Law.

Zemgale regional court Criminal cases council recognizing S.J. as guilty of murder of three women after which one of the corpses was defiled when determining the sentence took into account that the accused had committed three particularly grave crimes with qualified and particularly qualified constituent elements of the offence that posed a threat not only to life of specific persons but poses a threat to society at large since the person who committed the crime by dwelling in society creates a possible risk that such actions may be repeated. Considering the severity of the criminal offences and the circumstances of their committing the court justifiably ruled that the aim of sentence as defined in the second part of Section 35 the Criminal Law, as well as the need to protect society and restore justice can be only achieved by isolating the accused from society for life.[16]

Thirdly, while determining the sentence the personality of the guilty person is to be evaluated which, as shown by analysis of court judgements, is paid increasing attention that is to be seen as confirmation of the thesis put forward some time ago by P.Mincs

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[14] See, for instance, Riga City Kurzeme district court judgement of May 25, 2011 in the case No.K28-327/11, criminal case No. 1106227710; Aizkraukle regional court judgement of May 25, 2011 in the criminal case No. 11370073910; Jūrmala court judgement of October 18, 2011 in the case No. K17-0251-11/01, criminal case No. 11410012811; Rēzekne court judgement of January 5, 2012 in the case K26-115/12/1, criminal case No. 11331082111.

[15] For example, when the Criminal Cases Department of the Senate of the Supreme Court of Latvia repealed the judgement by Liepāja court in criminal proceedings against D.V. indicated that while determining the sentence the court had not taken into considerations the harm inflicted on the victim of the criminal offence R.V., namely, that he was inflicted severe, life-threatening bodily injury as a result of which he was struck blind in one eye. Criminal Cases Department of the Senate of the Supreme Court of Latvia ruling of October 31, 2006 in the case No. SKK-647.

[16] Zemgale regional court, Criminal court council judgement of November 24, 2011 in the case No. 112221100611.

that "it is not the offence that is punished but the perpetrator for the committed offence."[17] In practice, identifying the person's biological and social characteristic features, attention is paid to the age of the accused, state of health, marital state and the dependents of the person, attitude to work and/or studies, behaviour in society, the person's law-abidingness before committing the criminal offence, previous criminal record, its scale and the character of the previously committed offences which play a particular role in assessing the person and in determining the sentence and scope of punishment[18] and the like.

And finally, fourthly, the aggravating and mitigating circumstances of liability that are laid down in Section 47 and 48 of the Criminal Law are to be taken into consideration. Evaluating their substance, it can be seen that those circumstances are mitigating that have influenced the person's will before the criminal offence or facilitated its perpetration in a way that legislator recognizes them as mitigating, for example, the criminal offence was committed due to serious personal or family circumstances, under the influence of violence, or on account of financial or other dependence, the unlawful or immoral behaviour of the victim, or also indicates to the person's positive actions already after committing the criminal offence, for instance, the perpetrator of the criminal offence has admitted his or her guilt, has freely confessed and has regretted that which he or she has committed; the offender has facilitated the disclosure and investigation of the crime; the offender has voluntarily compensated the victim or has allayed the harm caused. While aggravating circumstances mainly indicate at the form and circumstances of perpetrating of the criminal offence, for example, it has been committed in a group of persons, it was committed with particular cruelty or with humiliation of the victim, it has been committed employing weapons or explosives, or in some other generally dangerous way, or they indicate the motivation – the criminal offence has been committed out of a desire to acquire property, the offence has been committed due to racist motives or under some other circumstances that indicate to higher degree of its harm.

Thus even such a superficial analysis of the general principles of determining the punishment confirms the previously promoted thesis that none of the examined criteria can be linked with reasonableness of the term of criminal proceedings, and violation of the rights to have the criminal proceedings finished in reasonable term can in no way influence the character and harm of the perpetrated criminal offence, neither can it influence the circumstances that characterize the personality of the perpetrator, mitigate or aggravate liability and consequently it does not influence the sentence for the committed criminal offence.

It is essential to emphasize that it is exactly the existence of several mitigating circumstances, absence of aggravating circumstances and the personality of the perpetrator that according to provisions of Section 49 of the Criminal Law allow stepping back from the general principle of determining the sentence as stipulated by the first paragraph of Section 46 of the Criminal Law that the sentence shall be

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[17] Mincs P. Krimināltiesību kurss. Vispārējā daļa. Ar U. Krastiņa komentāriem [A Course in Criminal Law. General Part. U. Krastiņš' comments]. Rīga: Tiesu namu aģentūra, 2005, 306. lpp.

[18] Ферри Э. Уголовная социология (Criminal Sociology). Москва: Инфра-М, 2005, с. 607-608.

adjudged according to the sanction provided in the Section of the Special Part of the Criminal Law because both the provisions of the Law provide the same circumstances that must be evaluated. That excludes any similarity with the provision in Section 1491 of the Criminal Law when in determining a lesser sentence than provided by law completely different grounds are set out, linking the form and length of sentence not with the perpetrated criminal offence and the perpetrator but with the offence committed by persons performing their official duties.

A similar conclusion is to be made analysing the additional provision provided in paragraph 6 of Section 58 of the Criminal Law about the possibility of releasing the person from criminal liability if it is established that his or her rights to the termination of criminal proceedings in reasonable term have not been observed, which likewise is not to be linked with the criminal offence committed by the person or the person's positive action in the interests of jurisdiction.[19] If we evaluate the provisions for a possible release of a person from criminal liability in paragraphs 1-4 of this Section, then we can see that

- the provision in the first paragraph indicates at the harm caused by the criminal offence – material, physical and other that by its scale is not of the kind that requires adjudging of criminal sentence;
- in accordance with the second paragraph the grounds for releasing a person who has committed a criminal offence from criminal liability may be settlement with the victim or his or her representative when in the opinion of the victim it ensures fair regulation of criminally-legal relations without unjustified intervention in the person's life;
- the third paragraph of the Section indicates that the grounds of releasing the person from criminal liability may be substantial assistance provided by the person in the uncovering of a serious or especially serious crime, which is more serious or dangerous than the crime committed by the person himself or herself;
- paragraph four of the Section includes a reference to the especial circumstances laid down in the Special Part of the Criminal Law when the person can also be released from criminal liability. Such circumstances are enumerated in Sections 235, 221[4], 254, 303, in the first and third paragraph of Section 324, and they all, except Section 303 of the Criminal Law, indicate person's positive actions, either on his or her free will submitting the tool of the criminal offence or notifying about their illegal activities.

[19] Since initially paragraph 5 of Section 58 was not incorporated in the daft law the abstract does not contain its motivation. Available: http://tirania.lv/LIVS/saeimaLIVS.nsf/07/7318F47F694717E9C22576CB000505314?OpenDocument [viewed June 14 2012], then voting for incorporation of such a provision in the process of reading (from the minutes it is impossible to conclude during which reading and at whose proposal) J. Rozenbegs' opinion was accepted that this material rights provision was adapted to the procedural provision that already regulated release from criminal liability on such grounds. See: Rozenbergs J. Tiesības uz kriminālprocesa pabeigšanu saprātīgā termiņā [The Rights to Termination of Criminal Proceedings in Reasonable Term]. *Jurista Vārds,* June 5, 2011 p. 7.

All the above said leads to a conclusion that inability of the person directing proceedings to ensure the person's rights to termination of criminal proceedings in reasonable term, permitting unjustified delay instead of resolving the liability for the committed violation of law with appropriate and adequate means, thus ensuring both the precision of legal provisions as well as their efficiency, has been unduly used as a condition that could influence the form of punishment and the sentence for the committed criminal offence which is in conflict both to the legal regulation when solving similar issues connected with determination of sentence, as well as to the assumptions entrenched in doctrines and practice of criminal law.

It needs to be added that in the case of committing a criminal offence criminally-legal relations form not only between the person who has committed criminal offence and the state but the subject of these relations is also the victim – natural or legal person who has been inflicted harm by this criminal offence, namely, moral injury, physical suffering or material loss (paragraph one of Section 95 of the Criminal Procedure Law). And here, in the opinion of the author, the question about fair settlement of relations remains open.

Concerning determination of punishment another criminal law provision must be examined that was included in the Criminal Law as of June 16, 2009[20], namely, it is the second sub-paragraph that provides that if a person has committed a criminal offence before attaining eighteen years of age regarding which the minimum limit of the applicable punishment of deprivation of liberty has been provided for in the sanction of the relevant Section of Special Part of the Criminal Law, a court may impose a punishment which is lower than this minimum limit also in the cases when a court has recognised that a criminal offence has been committed under liability aggravating circumstances.

At the same time the second paragraph of the same Section was also amended providing that for a person who has committed a criminal offence before attaining eighteen years of age, the period of deprivation of liberty may not exceed ten (instead of the previously stipulated fifteen) years – for especially serious crimes. Likewise it was laid down that deprivation of liberty sentence shall not exceed five years for serious crimes, which are associated with violence or the threat of violence, or have given rise to serious consequences; and two years for other serious crimes (in the previous edition deprivation of liberty sentence could not be more than five years for less severe and severe crimes which are not associated with violence or threat of violence and have not given rise to serious consequences). For criminal violations and for less serious crimes the sentence of deprivation of liberty shall not be applied for such a person.

Motivating these amendments it was noted in the abstract of the draft that the second paragraph of Section 65 lays down special provisions concerning the permissible limits for deprivation of liberty sentence for persons under age, which taking into account that "legal effects upon a person under age for committing a criminal offence must be

[20] Grozījumi Krimināllikumā: LR likums [Amendments in the Criminal Law. Law of the Republic of Latvia]. *Latvijas Vēstnesis*, 2009. 30. jūnijs, Nr. 100.

of the kind that facilitate reintegration of a child with social behaviour disturbances in society, as well as the orientation and strengthening of values appropriate for society, is unproportionally high." It was also mentioned that it has not been taken into account that sanctions of the Special Chapter of the Criminal Law may also lay down the minimum limits of punishment which may be too severe for persons under age.[21]

Thus, without going into discussion about the preventive role of such criminal punishment policy, let us examine a hypothetical case about a murder committed by juveniles, for example, in a group of persons and connected with robbery that is most frequent case in practice. Although Section 117 of the Criminal Law provides for deprivation of liberty from ten to twenty years, for this particularly severe crime the maximum liberty deprivation sentence for juveniles may not be more than ten years, which in this sanction is the minimum limit of deprivation of liberty. Since the legislator has allowed to reduce also the limit of the minimum limit for the sentence of deprivation of freedom then a court despite existence of aggravating circumstances of liability (legislator uses this provision in plural!) can considerably reduce the already reduced period of deprivation of liberty. One should also keep in mind that the person who has committed a criminal offence before attaining the age of 18 can be released on parole from the punishment before the end of the term if the person has served no less than half of the sentence. I believe that here are grounds for evaluation of the principle of fairness looking from the perspective of crime and punishment for the perpetrated act of malice[22], unfair treatment against somebody[23] or to compare, in how much more favourable situation will be the persons who would have committed such a particularly severe crime some months, even some days before attaining the age of 18 compared to their peers who will not be considered to be children any more it they would have surpassed the threshold of lawful age.

Conclusion

1. Fair regulation of criminally-legal relationships that is the aim of both material and procedural provisions, can be achieved by precisely defining the regulation of s specific area, strictly complying with the basic principles of criminal law and relying in practice of the theoretical conclusions that in their own turn guarantee successful functioning of the system of prohibitions and punishments set out in the Criminal Law.

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[21] Likumprojekta "Grozījumi Krimināllikumā" anotācija [Abstract of the draft law "Amendments in the Criminal Law"]. Available: http://titania.lv/LIVS/Saeima LIVS.nsf/0/4763CE76EA9767FBC2 2575C9002BCF067OpenDocument [viewed 14 June 2012].

[22] Куртц П. Запретный плод. Этика гуманизма [Kurtz P. Forbidden Fruit: The Ethics of Humanism]. Перевод с английского И. В. Кувакина. Москва: Российское гуманистическое общество, 2002, с.77-78.

[23] Aristotelis. Nīkomaha ētika [Aristotle. Nicomachean Ethics]. Rīga: Zvaigzne, 1985, 104. lpp.

2. Provisions for determining punishment if the person's rights to termination of criminal proceedings have not been observed set out in Section 49[1] of the Criminal Law and the possibility to release a person from criminal liability for the same reason as set out in the fifth paragraph of Section 58 of the Criminal Law is in conflict with principles of criminal law and the general principles for determining punishment, which does dot facilitate fair regulation of criminally-legal relationships.
3. The amendments in Section 65 of the Criminal Law concerning determination of liberty deprivation sentence for persons under age should be evaluated from the perspective of the principle of fairness and proportionality.

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Rēzeknes tiesas 2012. gada 5. janvāra spriedums lietā Nr. K26-115/12/1, krimināllietā Nr. 11331082111 [Rēzekne Court judgement of January 5, 2012 in the criminal case No. 11331082111].

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THE HISTORIC DETERMINANTS OF THE CRIMINAL PROCEEDING LAW QUALITY IN LATVIA

Keywords: conceptual framework of criminal procedure, Work groups, state-of-art criminal procedure, quality of law.

Legal documents have been drafted in a number of ways and following very different traditions depending on the time and the place; the debate (if any of it has been allowed) and the adoption process has also varied. This paper aims at clarifying whether it is indeed possible to develop a criminal procedure of a high quality standard in a State with a frequently changing political system. The author, however, does not wish to analyse the power struggle between the executive and the legislative branch in the legislative process. The paper, instead, takes a historical approach.

I take the liberty to state that all those who have been involved in drafting legislation have tried hard to achieve quality both in form and in content. By "quality" we mean some correspondence between 'validity' or 'benefit', on the one hand, and certain standards and requirements, on the other hand[1]. It may largely be seen, however, as a goal to strive for rather than to achieve. Also, practical experience shows that quality standards, as well as opinions about such standards may vary to a considerable degree. There has also been a lot of debate about whether at certain historical time periods it should be more appropriate to amend the existing law or to adopt new legislation, or even to take over a piece of law from another State. Over the past hundred years Latvian lawyers have been trying to work out to what degree the existing Criminal Procedure Law could be seen as state of-art and how it could be improved.

In the early 20th century Alksnis wrote that "From a practical point of view we should admit that the criminal procedure legislation applied by our Criminal Courts is not always appropriate for the particular period of time. This does not mean that the present Criminal Procedure Law should be set aside as completely out-dated and useless; and that a completely new and modern version of (criminal) procedure should be worked out. That would be a job too complicated and one that would involve too much responsibility – it would also require a lot of knowledge and experience. This is something we should leave for the future generations; thus, for the time being we have to make do with the procedure we have, and if it – in some way – turns out to be too old-fashioned and inappropriate for the present conditions, it would require some 'repairing' and 'patchwork'"[2]. This approach, even though the author might

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[1] Balčunskis J., Pokrotniece K. Svešvārdu vārdnīca. Rīga: Jumava, 2005, p. 310.

[2] Alksnis V. Mūsu kriminālprocesu vajaga vienkāršot. *Tieslietu Ministrijas Vēstnesis,* 1926, No. 2/3, p. 65.

be prone towards self-criticism, would rather be one of amending and modifying the existing law to adapt it to contemporary conditions rather than to develop an entirely different piece of legislation. Dramatically, the debate on how the legislative process should develop was cut short in 1940, as Latvia lost its independence and the Criminal Procedure Code of another State – that of the Russian Soviet Socialist Republic – was adopted on an uncontested basis.[3] Further historical changes in the development of Latvian criminal procedure have been related to attempts of harmonizing the legislation on criminal procedure to match the largely declarative statements on combating crime posed by the specific political regimes; this has had less to do with attempts to improve quality.

In 1961 the Criminal Procedure Code (CPC) of the Latvian SSR was adopted[4]. Supplemented and amended it was in force for almost three decades. During all this time the objectives and the formulations, and also the language of the Law largely remained unchanged. Many of the lawyers who studied and applied the Code in the Soviet time certainly saw it as a well-drafted piece of legislation of a high quality standard. It should, however, be kept in mind that the provisions of the CPC of the Latvian SSR were frequently clarified through case law and during plenary sessions of the Supreme Court. Speaking about quality this is an example when a high quality standard of a piece of legislation is attained over a time-span of sufficient duration.

On May 4, 1990, the Restoration of Independence of Latvia was declared[5]. It was a time when Latvia was actually neither de facto, nor de jure independent; however, there was already some understanding of the need for new legislation, for criminal procedure including. In the circumstances when the Sovereign State of Latvia was still a fuzzy concept, on October 18, 1990, the Presidium of the Supreme Council took a decision to form a work group for drafting the Criminal Code, the Criminal Procedure Code, the Penal Code, the preliminary version of the Administrative Violations Code and the draft law on the Latvian Judiciary System[6]. This was followed by a long period of search and reflection. The criminal procedure reform roughly falls into two stages:

1) October 18, 1990 – February 26, 2001;
2) February 26, 2001 – April 21, 2005.[7]

The process had two aspects that were significant: one was the perceived objectives and goals of the new legislative document, whereas the other concerned the composition

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[3] Liede A. Kriminālprocess. Tiesu pierādījumi. Rīga: Zvaigzne. p. 54.

[4] Latvijas Padomju Sociālistiskās Republikas Kriminālprocesa kodekss: oficiāls teksts ar pielikumiem, kuros ievietoti pa pantiem sistematizēti materiuāli. Rīga: Liesma, 1973.

[5] Latvijas PSR Augstākās Padomes deklarācija "Par Latvijas Republikas neatkarības atjaunošanu" Available: http://www.likumi.lv/doc.php?id=75539&mode=DOC [viewed June 28 2012].

[6] Latvijas Republikas Augstākās Padomes Prezidija lēmums par darba grupu izveidošanu Latvijas Republikas krimināLkodeksa, krimināLprocesa kodeksa, administratīvo pārkāpumu kodeksa projektu un Latvijas Republikas likumprojekta par tiesu iekārtu izstrādāšanai. Available: www.likumi.lv [viewed June 15 2012].

[7] Meikališa Ā., Strada Rozenberga K. Kriminālprocess. Raksti. 2005-2010. Rīga: Latvijas Vēstnesis, 2010, p.13.

of the work groups that were responsible for the formulations in the draft document. It is important to note that the work groups that set out to do the job towards the end of the 90-ies, in fact, worked on two different tasks:

1) drafting a new Criminal Procedure Code;
2) amending and supplementing the Criminal Procedure Code already in force [8]

Remarkably, in 1990 the Criminal Procedure Code of the Latvian SSR was actually still in force. The legislator, initially, amended only the title – deleting the reference to the Latvian Soviet Socialist Republic.[9]

By 2001 nine long years of continuous effort had passed to both amend the existing Code in force and draft a new version of it; nevertheless, the goal of having a new piece of legislation in place had not been achieved. Skrastiņš writes: "Over the past decade the CPC has been significantly amended, and this has had a remarkable effect on the structure and basic principles of the procedure. Generally speaking, the law that is now in force intends to comply with international standards; it has, however, a number of significant faults:

1) Since it has numerous amendments and its origin is rooted in the Soviet period, it does not form an organic entity;
2) The criminal procedure is extremely labour-consuming, which makes it costly and lengthy;
3) Intelligence is separated from procedural activities, which makes it difficult to use evidence as proof;
4) All alternative methods of decision-making that might be used in the early stage of the procedure have been eliminated; thus, there are no alternative measures left which could be applied to the guilty party;
5) Some formulations are declarative rather than applicable, because, on the one hand, they are absolutely ineffective and, on the other hand, there is no mechanism for their implementation;
6) The rapidly growing potential of technical means for facilitating criminal procedure has not been put to use."[10]

That was a time when in the Latvian law journal Jurista vārds Skrastiņš published a number of articles expressing his criticism on the new Criminal Procedure Code developed. His principle conclusions were that the ideas contained in the draft had been already implemented in the many amendments to the existing Code, and that, in fact, we already had a new Law which basically complied with the framework human rights' requirements. According to Jānis Skrastiņš, the legislative document

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[8] Meikališa Ā., Strada-Rozenberga K. Krimināprocess. Raksti. 2005-2010. Rīga: Latvijas Vēstnesis, 2010, p. 14.

[9] Latvijas Republikas likums "Par grozījumiem Latvijas PSR krimināprocesa kodeksā, Latvijas PSR civilprocesa kodeksā, Latvijas PSR labošanas darbu kodeksā un Latvijas PSR likumā "Par Latvijas PSR tiesu iekārtu sakarā ar likumu "Par prokurora uzraudzību Latvijas Republikā". Availble: http://www.likumi.lv/doc.php?id=72828 [viewed June 27 2012].

[10] Skrastiņš J. Par mūsdienīgu krimināprocesu Latvijā. *Jurista Vārds,* No. 7(200), March 13, 2001.

drafted by Jākobsone's work group could no more be considered up-to-date, because at the time when it was conceptually developed it did not include some relevant requirements. The reason was that some of these requirements had not as yet been developed and some other requirements, for a valid reason, were not as yet known. Admitting some subjectivity of judgement, Jānis Skrastiņš mentioned his feeling that in a number of areas the Draft was a 'nostalgic' document, tending to stick to old practices and traditions.[11]

The long-lasting work conducted by the group of indisputably talented lawyers ended up in a status-quo which, in fact, started a new stage in the process, i.e. a radically new concept of the Criminal Procedure Law was proposed. [12] The basis of the new approach was to simplify and modernise criminal procedure by making it less-time consuming and less costly. In a way, it turned things around, and the Criminal Procedure Law finally adopted has provided proof that in order to get results, appropriate goals have to be set, in the first place, and then sufficient effort has to be made towards achieving them. Notably, at that time it was never stated that the legislative document to be produced should fulfil any criteria for "high quality", though quality was certainly presumed as the expected outcome of years of hard work and reflection. Even today, as we look back at the decisions taken by the Latvian government more than a decade ago, they earn a lot of respect even despite the problems that have later appeared and the ways chosen for resolving them.

The conceptual approach to the Criminal Procedure Law was approved by the Cabinet on June 12, 2001. The work group led by Gunārs Kūtris[13] started the immense and difficult task of drafting a new law, whereas, in parallel the provisions of the Latvian CPC were further amended and supplemented. The Criminal Procedure Law (CPL) was adopted by the Saeima (Parliament) of the Republic in Latvia on April 25, 2005[14].

Speaking about the quality of the CPL, it is important to note that the Law came in force already on October 1, 2005. The Judiciary, Prosecution, Criminal Investigation and Defence lawyers had only half a year's time for training and understanding the new CPL. At the time when the Law was adopted, the prevailing expectations, beyond doubt, were that it would be efficient and yield tangible results in combating a wide range of criminal offences, which given the short history of Latvian statehood was a matter of importance. On the one hand, the sincerity with which the job was undertaken stood in the way of producing a document of the highest quality standard; on the other hand, so much time had been already spent on debate and reflection. Apparently, there was not enough space for model-building and there was a lack of experience in producing new legislation. Yet, I would still side with the 'shock therapy' approach of introducing the Law, since it helped to uncover the practical problems of applying it at an early stage. When looking back from a today's standpoint, there

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[11] Skrastiņš J. Par mūsdienīgu kriminālprocesu Latvijā. *Jurista vārds*, No. 7(200), No 8(201), No. 9 (202).

[12] Kriminālprocesa likuma koncepcija, 12.06.2001. *Jurista vārds,* No. 20.

[13] Ministru Prezidenta rīkojums Nr. 63. 26.02. 2001. Available: www.likumi.lv [viewed June 15 2012].

[14] Kriminālprocesa likums. *Latvijas Vēstnesis*,11.05.2005, No. 74(3232).

were already too many assumptions about how the Law would function in specific situations and circumstances and whether its provisions could be worded in the way they now stand. There was the obvious concern on whether pre-trial investigation, criminal prosecution and adjudication would at all be possible, if based on the provisions of the CPL. Also, there was the strength of the habit in the system and the wish to take the easier way. In order to make the CPL work, the supervisory rights of the Prosecutor's Office had to be used to the best of their advantage. "After the first two weeks, both the Investigation and the Prosecution bodies saw that things were slowing down. Over the period of two weeks only 68 criminal cases had been sent to court. To compare, when the previous CPC was applied (up to October 1, 2005), on the average 800 criminal cases went to court on a monthly basis. In order to gain a better understanding of the situation, the chief prosecutors were asked to send in weekly reports on the way things were proceeding. We understood that a number of adjustments were urgently required."[15] This is how we first reacted as the Law came into force.

The quality of the legislative document and the need to adjust it became a central point of discussion both in the academic circles and among practitioners. This was a topical issue also of public debate. In November 2005, Ilze Kuzmina wrote as follows: "Representatives of the law-enforcement bodies urge the Saeima to once again amend – without undue delay – the Criminal Procedure Law in order to eliminate the discrepancies that have surfaced. The law which came into force on October 1 was amended as a matter of urgency at the end of September; however, we see that new discrepancies have appeared as we are now applying the Law in our practice. Edgars Puriņš, Deputy State Secretary responsible for judicial affairs, has already come forth with his comment noting that the Ministry had wished to make more than one hundred amendments to the Law before it entered in force, yet the Legal Committee of the Saeima had not given their agreement and had selected those proposals only that concerned the amendments most urgently required, while leaving the other requests to be reviewed in detail at a later stage. For this reason the system of the criminal procedure had slightly gone off course. The Legal Committee, as he said, was looking at a draft law with 170 proposals to amend it"[16]. The above quotation is another testimony, since, when there is freedom of expression, journalists turn to topics that are high on the public agenda.

One other aspect mentioned in the Report of the Prosecutor's Office submitted in 2006 is important. At that time the new CPL had been in force for a full calendar year. Prosecutor General wrote: "The Investigation and the Prosecution bodies, as well as the Judiciary have been applying the provisions of the new Criminal Procedure Law for slightly over one year. This certainly is not long enough to draw any final conclusions about how the Law enables dealing with crime, but the preliminary conclusions have been made. As we look back at what has been accomplished in the past year and the problems that we have understood, we have to remind ourselves that we are now applying the Law in a situation when there apparently is a crisis in

[15] Prosecutor General Jānis Maizītis Report for Year 2005. Not avaible.

[16] Kuzmina I. Atkal jālabo Kriminālprocesa likums. Latvijas Avīze. November 24, 2005.

the police, i.e. the chief investigatory body of the state, when there are numerous changes in the staff and an overall staff deficit in the investigatory bodies. At the time when the Law was introduced, the police officers responsible for investigation had had little but no training. In such circumstances there would be problems with applying any law, not to speak of a new Law."[17]

The academic circles, too, reacted against the new formulations. The proof lies in the headings of the articles published: they spoke about the drawbacks of CPL and their principal causes, inconsistency in resolving similarly constituted and comparable cases, mismatch of the provisions and their wording, insufficient modelling of real-life situations, gaps in analytical approach.[18] There were also some well-wishing rhetoric remarks of the kind: "A lot of work still remains to be accomplished – both in the quantitative and in the qualitative aspect. We want to wish those responsible for the process to be truly responsible, consistent, knowledgeable and diligent; so that any future amendments to the Law would be less sporadic and would be based on a more stable foundation than resolving single cases, so that the amendments would be well-designed, systemically useful, sustainable and compliant with the common goal pursued in the Law."[19]

By 2012 a lot of experience in applying the Law has been accumulated, even though the Law itself has been significantly amended and supplemented. Cases have been successfully investigated, prosecuted and adjudicated, and the process has never been disrupted. It has been possible to foresee issues that are not completely clear and avert possible mistakes. The Criminal Procedure Law is being and will continue to be further improved, since the work group is still at work.[20] It is important to note that Latvia has a number of human rights guarantees that are much more relevant, the duration of the pre-trial detention time has been decreased, a number of simplified procedures have been implemented. This opens up a lot of possibilities for those who apply the Law to cut budgetary costs and to save time. Concerning implementation, it is time now for a more fundamental discussion about whether the provisions of the Law are applied to their fullest extent and greatest benefit and what problems there are, and how they can be resolved. Today's result is based on the conceptual framework of 2001. We can only guess how criminal procedure would have developed, should it have been possible to continue the discussion started in the nineteen twenties with a view towards a state-of-art criminal procedure for Latvia. State-of-art would then also involve appropriate quality standards.

The author of this paper is of the view that a short historical overview is sufficient to draw conclusions and summarize on the quality of criminal procedure in Latvia.

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[17] Prosecuter General Jānis Maizitis Report for Year 2006. Available: http://prokuratura.gov.lv/upload_file/Faili/Gada_parskati/Gada_parskats_2006.pdf [viewed 28 June 2012].

[18] Meikališa Ā., Strada-Rozenberga K. Krimināprocess. Raksti. 2005-2010. Rīga: Latvijas Vēstnesis, 2010, pp. 20-27.

[19] Ibid., p. 27.

[20] Tieslietu ministra rīkojums No 1-1/438 Par darba grupas Krimināprocesa likuma grozījumu izstrādei izveidošanu. 07.12.2010. Not Available.

Conclusion

1. During the past 100 years of our history we have time and again been debating in Latvia the state-of-art of our criminal procedure, its quality standard and the need to amend the legislation in force. This bears a relationship to the fact that Latvia lost its independence and became part of another legislative area. As Latvia regained its independence, it could also make its own choice on whether to amend its legislation or to produce new legislation, but also one that would respect the fundamental human rights and freedoms in a democratic country. For Latvia a new Criminal Procedure Law has proved to be an effective solution; however, in order to achieve this result we had to have some time throughout which we supplemented and amended the Criminal Procedure Code already in force, also in order to gain assurance that we really need the new Law.
2. As a new piece of legislation is created, the conceptual framework and the goal is extremely important. The work group that is responsible for developing the document has to support the goals of the conceptual framework. They need experience in drafting the provisions of the law, appropriate theoretical knowledge and practical skills. It is, however, easier to state than to fulfil these requirements; there are only about a few lawyers who would qualify. There has to be support from the executive and the legislative branch, but the quality standard can be only set by a group of highly qualified lawyers, even if their thinking is different (which would even prove to be an asset). Only when the foundations of the new law are there, there is the need for a broad discussion. We did not have enough of it in Latvia before the CPL was adopted.
3. The quality standard of a law can not be ensured through adhering to tradition. History shows that we live at a time when we need change based on reflection, and assessment of tradition should be part of that change. It is important to understand that a law can never be simultaneously complete and of a high quality standard. To build situational models we need experience and discussions that are both theoretical and practical. It is important to be conscious of the movement towards new quality, because the lives of a large number of people might be affected.

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Latvijas Republikas likums "Par grozījumiem Latvijas PSR kriminālprocesa kodeksā, Latvijas PSR civilprocesa kodeksā, Latvijas PSR labošanas darbu kodeksā un Latvijas PSR likumā "Par Latvijas PSR tiesu iekārtu" sakarā ar likumu "Par prokurora uzraudzību Latvijas Republikā". Availble: http://www.likumi.lv/doc.php?id=72828

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50 YEARS OF CRIMINAL PROCEDURE LEGISLATION IN LATVIA – TRENDS, RESULTS, PROSPECTS

Keywords: criminal procedure legislation, provisions of criminal procedure law, Criminal Code of Latvia SSR, Criminal Procedure Code of Latvia, Criminal Procedure Law.

Introduction

50 years for the development of a branch of law or its sub-branch is a sufficiently long period to give its general overview, make conclusions about trends, developments and future forecasts. Development of criminal procedure law, as well as development of other sub-branches of law in Latvia during the last decades are interesting also for the reason that this has been period extremely rich in historical, political and legal changes, that among other things was marked by Latvia's incorporation into the USSR, regaining of independence and accession to the European Union. The 50 year period of development of criminal procedure law in Latvia has been chosen since during this time span the major legal documents of criminal procedure law came into force or were later replaced by others. In 1961 Criminal Procedure Code of Latvia SSR was adopted and came into force, which in 1991 was renamed into Criminal Procedure Code of Latvia. But in 2005 the Criminal Procedure Law (CPL) was adopted and came into effect, which is in force also today. At the time of finishing the present article (i.e., on June 8, 2012) from the existing edition of the CPL one can see that the last amendments of the Criminal Procedure Law, that have come into force, were made in summer of 2011. Thus a fifty year period is formed from 1961-2011 whose general survey I will give in my report.

To make the survey more structured, the development of criminal procedure law will be dividend in three periods – 1961-1990, 1990-2005 and 2005-2011.

Criminal Procedure Code of Latvia SSR and development of its provisions from 1961-1990

On January 6, 1961 The Supreme Soviet of Latvia SSR approved Criminal Procedure Code of Latvia SSR[1] (henceforward – LSSR CPC), ruling that it comes into force in April of the same year. Till May 4, 1990 when the declaration "On Restoring

[1] Latvijas PSR Kriminālprocesa kodekss (Criminal Procedure Code of Latvia SSR): LPSR likums. *Latvijas PSR Augstākās padomes un Valdības Ziņotājs*, 1961, Nr. 3. [Revoked]. Available: http://www.likumi.lv/doc.php?id=90971 [viewed 8 June 2012].

Independence of Latvia"[2] was adopted, that means within less than 30 years, by the decrees of the Presidium of the Supreme Soviet of Latvia SSR amendments and addenda were adopted 18 times. For the first time LSSR CPC was amended in the year of its adoption and coming into force, i.e., on August 21, 1961, and for the last time in the studied period – on January 12, 1990. Thus on the average the text of the code was edited slightly more often than once in two years. Numerically amendments in the LSSR CPC in the respective period can be characterized as follows: in 1961– 1, in 1962 – 1, in 1963 – 1, in 1964 – 1, in 1966 – 3, in 1967 –1, in 1970 – 2, in 1972 – 1, in 1974 – 1, in 1977 – 2, in 1982 – 1 (these were among the most extensive amendments that affected more than 80 provisions of the LSSR CPC), in 1983 – 1, in 1985 – 1, in 1990 – 1.

Survey of the amendments and addenda[3] allows concluding that they were made

- to make the terms used more precise (for example, in 1982 in several Sections of the LSSR CPC the word "guilty" was replaced with "person", "working people collective" was changed to "court", "institutions safeguarding public order" to "internal affairs institutions" and the like)
- to introduce and implement new institutions reflectingf the topical issues of those times, as well as changes in access to technology and so on (for example, in 1966 a new chapter was introduced providing for specific proceedings in cases of hooliganism, in 1967 the code was supplemented with provisions of the use of audio recordings, in 1977 termination of criminal case was introduced if the person had been held criminally liable but the materials were passed over to the so-called "comrades' trial", to commission of juvenile afairs or if the guilty person was placed under public supervision or warranty);
- to specify and supplement provisions and legal regulation in regard to the already existing institutions (for example, in 1963 investigators of institutions safeguarding public order were included among the investigating institutions, both in this year and in 1964 the category of private prosecution was expanded, in 1977 legal regulation of short-term detention was supplemented and specified);
- to specify legal status of participants of criminal proceedings, as well as to introduce additional procedural guarantees (for example, in 1972 essential amendments were introduced that concern participation of defence council in criminal proceedings; in 1974 amendments were introduced that provided that for refusal of giving testimony and giving deliberately false testimony, as well as for failure to arrive at the person directing proceedings, the victim has the same liability as

[2] Par Latvijas Republikas neatkarības atjaunošanu [On Restoration of Independence of the Rebublic of Latvia]: Latvijas PSR Augstākās padomes deklarācija PSR Augstākās padomes un Valdības Ziņotājs, 1990. g. 17. maijs, Nr. 20. [Came into force 04.05.1990.] Available: http://www.likumi.lv/doc.php?id=75539 [viewed 8 June 2012].

[3] Indications to precise legal documents and more detailed survey see in: Meikaiša Ā. Latvijas krimināl procesuālās likumdošanas attīstība Latvijā līdz 1990. gada 4. maijam (Development of Criminal proceedings legislation in Latvia till May, 1990). In: Meikališa Ā. Kriminālprocesa tiesības. Vispāŗigā daļa. 1 grāmata. [Criminal Proceedings Law. General Part. Book 1] Rīga: IU "RaKa", 2000, pp. 108-116.

the witness, in 1982 the Code was supplemented with the following Sections: "Inviolability of the dwelling apartment" and "Protection of privacy of person's personal life and correspondence").

The common trend of the amendments in the LSSR CPC made during this period was expansion of rights of the suspected and accused persons, strengthening of prosecutor's supervision and simplification of proceedings. The amendments made during the given period both by their number and substance are to be recognized as significant. At the same time, despite the multitude and significance of the amendments, at the end of the given period i.e., at the beginning of 1990s the LSSR CPC can be still be perceived as systematically unified, still comparatively lucid and clear for application.

Criminal Procedure Code of Latvia and development of its provisions from May, 4, 1990 till 2005

At the same time when the already mentioned Declaration on Independence was adopted on May 4, 1990, the declaration "On joining by the Republic of Latvia international legal documents on human rights" was also adopted, with which Latvia acceded 51 international legal acts in the area of human rights[4]. That created a need also to work out a new criminal procedure legal act. On October 1990 presidium of the Supreme Council of the Republic of Latvia passed a decision "On setting up a working group for elaboration of the draft of criminal code, criminal procedure code, penal execution code, administrative violations code of the Republic of Latvia and the draft law on judiciary of the Republic of Latvia"[5], In accordance to this decision V.Jākobsone was appointed as the head of the group that was to elaborate the criminal procedure code (CPC RL) and the task was set to work out and submit the concept of the draft law already by December 15, 1990. The concept was submitted and when beginning its implementation the working group worked in two directions

- elaboration of a new code
- elaboration of amendments and addenda in the code that was in force.

As for the first direction of work, one can note, that the first edition of CPC RL was submitted to the Ministry of Justice in March 1994. The draft was widely discussed both on local and international level. The second edition of the draft was submitted

[4] Par Latvijas Republikas pievienošanos starptautisko tiesību dokumentiem cilvēktiesību jautājumos: Latvijas PSR Augstākās padomes deklarācija [On Accession by the Republic of Latvia International Human Rights Documents. Latvia SSR Supreme Council declaration] *PSR Augstākās padomes un Valdības Ziņotājs*, 1990. g. 24. maijs, Nr. 21. [Came into force 04.05.1990.]. Available: http://www.likumi.lv/doc.php?id=75668&from=off [viewed 8 June 2012].

[5] Par darba grupu izveidošanu Latvijas Republikas krimināLkodeksa, kriminālprocesa kodeksa, sodu izpildes kodeksa, administratīvo pārkāpumu kodeksa projektu un Latvijas Republikas likumprojekta par tiesu iekārtu izstrādāšanai [On setting up a working group for elaboration of the draft of criminal code, criminal procedure code, penal execution code, administrative violations code of the Republic of Latvia and the draft law on judiciary of the Republic of Latvia]: *LR Augstākās padomes lēmums* (Decision of the Supreme Council of the Republic of Latvia). Available: http://www.likumi.lv/doc.php?id=72748 [viewed 8 June 2012].

in summer of 1995. But the third edition was ready on October 31, 1996. It was sent for harmonization and as information to all the involved ministries and public institutions. After collecting and evaluating the submitted proposals and after their integration into the draft the Ministry of Justice was submitted the fourth edition. On February 13, 1998 a working group for Improvement of elaboration of the draft law of Criminal procedure code was set up, which once again evaluated and discussed all the submitted proposals. The fifth edition of the draft was prepared and submitted to the government in December of 1998. The daft of the code had 15 parts, 63 chapters and 592 sections or articles and one appendix. As its new trends legal regulation of international cooperation, speeding up and simplification of proceedings, special procedural legal remedy regulation and others were mentioned.[6]

On September 17, 1999 a new working group for elaboration of the criminal procedure draft law was set up and J. Skrastiņš who was prosecutor general at the time, was appointed as its head. Data about the work of this group have not been preserved. In 2000 the administration of the Ministry of Justice after discussions with law-enforcement agencies concluded that the draft worked out under the leadership of Mrs. Jākobsone does not meet today's requirements and it is necessary to work out a new draft. On February 26, 2001 a new working group was established to work out the draft of CPL, and G.Kūrtis, who was adviser to the minister at the time, was appointed as its head. On June 12, 2001 the Cabinet of Ministers approved the draft concept of the new CPL. The CPL draft was submitted to Saeima (Parliament) on 29.05.03, at Saeima plenary session of 29.05.2003 it was sent to the Saeima committees and on 19.06.2003 it was approved in its first reading. After its adoption by Saeima in the first reading, Saeima Legal committee's special sub-committee for the work with CPL draft was set up on 01.04.2004. The draft was approved in the second reading on 21.04.2005, after its third reading the Criminal Procedure Law[7] (henceforward CPL) was announced on May 11, 2005 and it came into force on October 1, 2005.

The entire given period is characterized not only by working out of a new legal document but also by very intensive work on introducing changes in the existing code. One could admit that the provisions of LSSR CPC were amended speedily, extensively and essentially. At the beginning of the given period the title of the legal document was still Criminal Procedure Code of Latvia SSR. That was changed only with the law of August 21, 1991 which prescribed that till the adoption of the Criminal Procedure Code of the Republic of Latvia, the Criminal Procedure Code of Latvia SSR is to be considered as Criminal Procedure Code of Latvia (henceforward CPCL)[8]. Till that

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[6] See more about this period (1990-2008): Meikališa Ā. Latvijas Krimināprocesa likuma attīstība pēc 1990. gada 4. maija [Development of Criminal Procedure Law in Latvia after May 4, 1990), or in: Meikališa Ā. Krimināprocesa tiesības. Vispārīgā daļa. 1 grāmata [Criminal Procedure Law. General Part. Book 1] Rīga: IU "RaKa", 2000, pp.116-133.

[7] Krimināprocesa likums [Criminal Procedure Law]: LR likums. *Latvijas Vēstnesis*, 2005. gada 11. maijs, Nr. 74 [with amendments that came into force on 08.06.2005.]. Available: http://www.likumi.lv/doc.php?id=107820 [viewed 8 June 2012].

[8] Par grozījumiem un papildinājumiem Latvijas PSR kriminākodeksā un Latvijas PSR krimināprocesa kodeksā [On amendments and addenda in the Criminal Code of Latvia SSR and in Criminal Procedure Code of Latvia SSR]: LR likums, *Ziņotājs*, 1991. gada 29. augusts, Nr. 33. [came into

moment LSSR CPC was amended still four times. All in all since May 4, 1990 till it became invalid on October 1, 2005, which means approximately in 15 years time, this legal document was changed 39 times, in other words – 2.5 times per year. It should be admitted though that not all the years are characterized by the same intensity of amendments. Most of all CPCL was changed in 1991 when five laws on amendments and addenda were adopted and in 1993 this legal document was changed even 9 times. By the number of changes introduced in the code the next year is 1994 when it was amended 4 times and 1998 with three times[9].

As the most significant areas of amendments one should mention the following ones

- changes in terminology
- changes that are associated with harmonization of CPC provisions with the provisions of other laws, mainly with provisions of the Criminal Code and Criminal Law (for example, provisions were harmonized with the changes in CC and CL where new criminal offences were included, CPCL was amended on several occasions in the chapter on mandatory character of pre-trial investigation and jurisdiction of cases)
- introduction of several essential basic principles (such a fundamental criminal proceedings principle as presumption of innocence was introduced in the CPC in 1993)
- revision of compulsory measures and creation of additional guarantees to the persons against whom they are applied (in this context amendments of June 22, 1994 have a special significance)
- changes of competences of different law-enforcement agencies involved in criminal proceedings. In this sense the reform of 1994–1995 was of particular importance which was to do with transformation of the system involving Prosecutor's Office and investigating (inquiry) institutions. Procedurally important at that stage was delegating of the criminal prosecution function (this category was introduced in CPC with the law of June 22, 1994) exclusively and solely to the prosecutor, also abolishment of investigators' institution, setting out certainly a transition period. The establishment of appeals institution is also important.
- revision of the scope of compulsory measures and creation of additional guarantees to persons against whom they are applied. Thus, for example, with the law of June 22, 1994 it was provided that such procedural compulsory measures as arrest, house arrest, search and others can be performed only on the grounds of a decision by a judge. With the same law the scope of compulsory measures was extended, providing for such new compulsory measures as bail, placement under police supervision, house arrest, placement of a soldier under supervision of the military command of a unit of troops. In 2004 decision on European arrest warrant was accepted.

force on 22.08.1991; revoked on 01.10.2005]. Available: http://www.likumi.lv/doc.php?id=68680 [viewed 8 June 2012].

[9] Data acquired using the information in likumi.lv [viewed 8 June 2012].

- Introduction of other procedural guarantees. For example, in 1997 CPC a provision on special procedural protection of persons providing evidence. Larger protection of juveniles in the criminal proceedings was provided by prescribing shorter sentences of deprivation of liberty and so on, in 2002 for the protection of persons under age that are to be interrogated a provision was introduced that such a person can be interrogated via a specialist and so on.
- changes in types of proceedings. Initially some of the types of proceedings were crossed out, for instance, in 1993 the provision about termination of criminal proceedings when the case was passed over to the-called "comrades' trial", submitted to the commission for juvenile affairs or if a person was placed under supervision or warranty were crossed out; later on new forms of proceedings were created, for example, in 1993 the shortened procedure was included into the CPC, in 2002 the conditional termination of criminal proceedings was included, in 2004 agreement proceedings were included in the CPC prescribing a possibility to have an agreement between the prosecutor and the accused in the pre-trial period.
- inclusion of international cooperation into the CPC devoting to it a separate chapter which was done with the law of June 20, 2002.[10]

As a result of the multiple and extensive amendments one can identify both positive and negative features. Undeniably it allowed to modernize criminal proceedings, to introduce provisions compliant to international standards, it provided the grounds for transition to new legal regulation of criminal proceedings. Yet at the same time the negative feature was that at the end of the given period, the CPCL could not be considered to be systemic and unified, lucid, understandable, hence not a legal document suitable for application. That was mentioned among the main reasons why there was a need for a new Criminal Procedure Law that was adopted in 2005.

Criminal Procedure Law and development of its provisions from 2005-2011

As mentioned above the CPL was adopted on April 21, 2005 and came into force on October 1, 2005. This law was associated big expectations.[11] After its adoption it

[10] See more: Strada-Rozenberga K. Krimināltiesību un kriminālprocesa tiesību attīstības galvenie aspekti Latvijā [Main Aspects of Development of Criminal Law and Criminal Procedure Law in Latvia] 1990-2007, or: Tiesību harmonizācija Baltijas jūras reģionā pēc ES paplašināšanās [Harmonizing Law in the Baltic Sea Region after Enlargement of the EU]. Proceedings of the international conference (Riga, January 24-27, 2007). Rīga: LU Akadēmiskais apgāds, 2012, 411.-422. lpp.

See more about the period 1990-2008: Meikališa Ā. Latvijas Kriminālprocesa likuma attīstība pēc 1990. gada 4. maija [Development of Criminal Procedure Law in Latvia after May 4, 1990]. Meikališa Ā. Kriminālprocesa tiesības. Vispārīgā daļa. 1 grāmata [Criminal Procedure Law. General Part. Book 1]. Rīga: IU "RaKa", 2000, pp. 116-133.

[11] See, for example: Skrastiņš J. Par jauniem likuma pamatprincipiem [On New Principles of Law]. Latvijas Vēstnesis, *Jurista Vārds*, 13.03.01., Kūtris G. Par modernu, ātru un lētu kriminālprocesu [On modern, fast and cheap criminal proceedings]. *Jurista Vārds,* 13.03.01; Kūtris G. Par jauno kriminālprocesa likumprojektu [On the draft of the new Criminal Procedure Law], Administratīvā un krimināla justīcija R., 2001, Nr. 4.

was both praised and criticized in criminal procedure theory and practice in Latvia.[12] One should agree to the positive and negative aspects of the CPL of implementation of the law as indicated in literature.[13] among the positive features it is indicated that

- CPCL replacement was needed because it was poorly structured, did not conform to the needs of the times;
- CPL contains more realistic and up-to-date definition of the aim of the criminal proceedings;
- CPL includes issues that previously were not considered at all or considered insufficiently;
- CPL has an extended scope of participants of criminal proceedings, solving the issue about the scope of authority of each participant.
- The range of simplified and special proceedings and their legal regulation have been improved and so on.

While the negative features are as follows:

- non-uniform approach to the solution of uniform and comparable situations;
- insufficient mutual harmonization among the CPL provisions;
- careless use or terms;
- insufficient modelling of practical situations;
- evasion from solution of problematic foreseeable situations;
- elaboration of some legal provisions that have a significant impact without a comprehensive view at the essence of criminal proceedings and without in-depth scholarly analysis.

The apparent lack of coordination among provisions, other reasons mentioned above and also by other specialists have been the cause that since its adoption the CPL has been amended and supplemented very often and essentially. Since the moment of its adoption till 2011 changes have been made 13 times, i.e., on the average twice a year. Although it is slightly less than in the previous period examined in this paper, the quantity and the essential quality of amendments lead to a conclusion that the legal document has been amended as much if not even more intensively. The first changes were made already before the CPL came into force – with September 28 law of 2005 amendments were made in 18 sections of the law and its transitional

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[12] See, for example: Gailīte D. Beidzot pieņemts kriminālprocesa likums [Finally Criminal Procedure Law has been adopted]. *Jurista Vārds,* 26.04.2005.; Meikališa Ā. Kriminālprocesuālā reforma Latvijā – galvenās tendences, problēmas un rezultāti [Criminal procedure reform in Latvia]. In: Meikališa Ā., Strada-Rozenberga K. Kriminālprocess [Criminal proceedings]. Raksti 2005-2010. Rīga: Latvijas Vēstnesis, 2010, 13.-19. lpp.; Strada-Rozenberga K. Kriminālprocess teorijā un praksē – ieguvumi un zaudējumi [Criminal proceedings in theory and practice. Gains and losses]. In: Meikališa Ā., Strada-Rozenberga K. Kriminālprocess [Criminal Proceedings]. Raksti 2005-2010. Rīga: Latvijas Vēstnesis, 2010, 20.-30. lpp.; Vietnieks V. Mērķis sasniegts daļēji [The aim has been achieved partly]. *Jurista Vārds,* 31.01.2006.; Kalnmeiers Ē. Jānoregulē apcietinājuma piemērošana [Application of detention must be regulated]. *Jurista Vārds,* 31.01.2006.; Grīnbergs J. Likumā vērojamas pretrunas [Contradictions in the law]. *Jurista Vārds,* 31.01.2006. u.c.

[13] Strada-Rozenberga K. Kriminālprocess teorijā un praksē – ieguvumi un zaudējumi [Criminal proceedings in theory and practice. Gains and losses]. In: Meikališa Ā., Strada-Rozenberga K. Kriminālprocess [Criminal Proceedings]. Raksti 2005-2010. Rīga: Latvijas Vēstnesis, 2010, pp. 20-30.

provisions. Later, by adopting 12 laws about amendments and addenda in the CPL, it has been changed so far that in part A and B that regulate the so-called local criminal proceedings less than 59% of provisions remained unchanged, while part C that is devoted to international cooperation, has been both amended and significantly supplemented[14]. The leader by number of amendments is the year 2009 when by the law of March 12 changes were made in more than 320 (!) sections of the CPL and in the transition provisions. Although it is outside the given period of time, one must mention that at the time of writing the present article the Saeima has adopted the current (14th) CPL amendments which as of today have not yet been announced[15]. Also those are to be evaluated as multiple and essential by their substance (more than 100 positions are concerned). That calls for some reflection. Beginning of 1990s was characterized by fast historical and political changes, also by the change of the whole body of law that serves as an objective reason for the amendments. Such changes have not been characteristic for the last 5 years of this century's first decade and for its second decade. As the only one accession to the EU should be mentioned but this fact, except for certain issues of international cooperation, has not for now essentially influenced development of criminal procedure provisions. Thus a conclusion must be made that the changes in the CPL even if they are to do with objective necessity in many cases are of the kind whose incorporation now could have been prevented by adequately considering the wording of provisions already at the initial stage of their adoption. This is explicitly confirmed also by the draft law abstracts. Thus, for example, the abstract of the law passed on 28.09.2005 "Amendments in the Criminal Procedure Law" points out the need for adopting the respective amendments by stating that "Amendments in the law are necessary to eliminate the existing imperfections in the law that could essentially impede successful investigation of criminal cases, as well as to avert collisions among legal provisions."[16]; The abstract of the law adopted on of 19.01.2006 states "Amendments in the law are required to avert the existing deficiencies in the law that essentially impede successful investigation of criminal

[14] Legal document survey based on likumi.lv data base. See more about development of CPL in the period of 2005-2010 and comments to the amendments in: Meikališa Ā., Strada-Rozenberga K. Rakstu kopa [Article collection] "Pārmaiņu laiks kriminālprocesa turpinās" [Time of change in criminal proceedings continues]. In: Meikališa Ā., Strada-Rozenberga K. Kriminālprocess [Criminal Proceedings]. Collection of articles 2005-2010. Rīga: Latvijas Vēstnesis, 2010, pp. 189-283; Meikališa Ā., Strada-Rozenberga K. Kārtējie grozījumi Kriminālprocesa likumā – 14.01.2010. likuma komentāri [The current amendments in the Criminal Procedure Law. Comments on the law of 14.01.2010]. In: Meikališa Ā., Strada-Rozenberga K. [Criminal Proceedings]. Collection of articles 2005-2010. Rīga: Latvijas Vēstnesis, 2010, pp. 304-316; Meikališa Ā. Kriminālprocesa likuma pilnveides vispārīgs raksturojums [General characteristics of improvement of the Criminal Procedure Law]. In: Aktuālās tiesību realizācijas problēmas [Topical problems of law enforcement]. LU 69.konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2011, pp. 396-404.

[15] Grozījumi KPL likumā [Amendments in the CPL]: LR likums [Approved in the Parliament on 24.05.2012; not announced; not in force]. Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/webAll?SearchView&Query=%28[Title]=*krimin%C4%81lproces*%29&SearchMax=0&SearchOrder=4 [viewed 8 June 2012].

[16] Likumprojekta "Grozījumi Kriminālprocesa likumā" anotācija [Abstract of the draft law "Amendments in the Criminal Procedure Code]. Available: http://helios-web.saeima.lv/bi8/lasa?dd=LP1347_0 [viewed 8 June 2012].

cases and their adjudication."[17], The abstract of the law adopted on 22.11.2007 – "Section 4 of the Law on Ombudsman prescribes specific immunity against criminal proceedings to the ombudsman. The Criminal Procedure Law regulates immunity to criminal proceedings of different state officials but the ombudsman is not mentioned in the Criminal Procedure Law as a person who has criminal proceedings immunity. The law does not stipulate how to act if the ombudsman is caught in flagrant delict"[18].

It must also be admitted that in several cases the indications in the abstracts of the law only partly reflect precise necessity of the amendments since they are related only to some of the amendments. Actually already in the initial draft of the law, but more often in preparing it for the 2nd and 3rd reading, the numbers of amendments, jurisdiction and so on, considerably expands. That is explicitly demonstrated by the law of March 12, 2009 "Amendments in Criminal Procedure Law", by which, as mentioned above, more than 320 sections were amended but the abstract mentions the reasons only for some of the section amendments. This is not surprising because in the initial edition of the draft law it was planned to make amendments in eight sections and add to the CPL a new chapter[19]. Also in the so called "included" draft law abstracts only the grounds for some of the amendments are mentioned.[20]

Characterizing amendments in the CPL they can be classified into several groups:

- editorial amendments, including elimination of insufficiencies and imprecision's that had been created as a result of carelessness introducing the previous amendments. Such amendments actually mean elimination of mistakes, elimination of the previous, insufficiently considered consequences;
- Amendments of separate Sections of the CPL, adding,, specifying – by finding a better, more precise wording for the edition of the section at the same time harmonizing regulation of identical issues in different provisions;
- amendments that change the essence of criminal procedure institutions or create entirely new criminal procedure institutions.

As the most significant amendments that essentially influenced the whole system of criminal proceedings and the provisions regulating it one could indicate abolishing of the institute of lay judges from July 1, 2009 and abolishment of private prosecution

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[17] Likumprojekta "Grozījumi Kriminālprocesa likumā" anotācija. Available: http://helios-web.saeima.lv/bi8/lasa?dd=LP1481_0 [viewed 8 June 2012].

[18] Likumprojekta "Grozījumi Kriminālprocesa likumā" anotācija [Abstract of the draft law "Amendments in the Criminal Procedure Code]. Available: http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/CD33EC084EE3AB54C22572FA004A11AF?OpenDocument [viewed 8 June 2012].

[19] Likumprojekta "Grozījumi Kriminālprocesa likumā" anotācija [Abstract of the daft law "Amendments in Criminal Procedure Law"]. Available: http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/2B26E9081FA5C037C225726E00291A38?OpenDocument [viewed 8 June 2012].

[20] Likumprojekta "Grozījumi Kriminālprocesa likumā" anotācija [Abstract of the daft law "Amendments in Criminal Procedure Law"]. Available http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/0842071F0EC02DDCC22573B50047A0FF?OpenDocument [viewed 8 June 2012] un Likumprojekta "Grozījumi Kriminālprocesa likumā" anotācija [Abstract of the daft law "Amendments in Criminal Procedure Law"]. Available: http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/DFA64F8B1C03C7F0C22575010058CBE9?OpenDocument [viewed 8 June 2012].

proceedings from January 1, 2011. Likewise, the planned reform to refer all the criminal cases in the first instance to district-city courts, which actually means refusal the Criminal cases court chamber of the Supreme Court as an appeals instance court also f July 1, 2012.

Characterizing the process of amending the Criminal Law so far and attempting to forecast subsequent development of the CPL, it can be indicated that amendments in the Criminal Procedure Law are certainly still to be expected because the elaboration of amendments seems to be without a systemic approach, done episodically, "fragmentary" and without sustainable analysis of the provisions. Obviously in some of the cases (and not only concerning provisions of criminal proceedings law) it has to do with attitude to legislation process and the quality of its implementation and its results. Without a sense of responsibility (yes, who is responsible for poor quality laws?), without understanding the respective area of law, sometimes with a touch of cheap populism – these are the words one is tempted sometimes to address to some representatives of the legislator. It seems that those involved in this process have not yet understood that legal stability, including also awareness of society about laws, the capacity of law-enforcers to apply them, to create at least reasonably sustainable guidelines for practice and so on, that all of it is possible if the law is sufficiently stable. How can one reproach absence of homogeneous or stable judicature under conditions when the applicable provisions keep changing incessantly and essentially? Society does not gain belief in the system that in not understandable, is subject to continuous and incessant changes. Yet instead of thinking how to make law more stable, society is being "informed" with the words "Necessity to amend the Criminal Procedure Law is nothing extraordinary"[21]. The saddest fact is that representatives of "Legality coalition" apparently think like that, submitting the current proposals for amendments in the CPL (a proposal to amend two Sections of the CPL) less than a week after the current large-scale amendments in the CPL have been adopted[22].

In order to avoid creating a confusion in the system of criminal procedure law and practice of its application the method of elaboration and adoption of amendments in the Criminal Procedure law must be changed – instead of making tiny, fragmentary and frequent amendments, much more seldom but more carefully analyzed and systemically evaluated amendment elaboration and adoption method should be

[21] Holma D. "Inese Lībiņa-Egnere: Krimināprocesa likuma grozīšana pati par sevi nav nekas ārkārtējs" (preses relīze) [Amendments of the Criminal Procedure Law is nothing extraordinary, a press release]. Leta, 08.09.2012. Available: http://www.leta.lv/search/find/?patern=L%C4%ABbi%C5%86a&mode[]=stem,wide&item=69335697-86B5-49D1-A495-0781CA73AFD1 [viewed 8 June 2012].

[22] Grozījumi Grozījumi Krimināprocesa likumā: LR likums [projekts, spēkā neesošs] [Amendments in the Criminal Procedure Law: Law of the Republic of Latvia [draft, not in force]. Available http://www.leta.lv/search/find/?patern=L%C4%ABbi%C5%86a&mode[]=stem,wide&item=69335697-86B5-49D1-A495-0781CA73AFD1 [viewed 8 June 2012]. Submitted on 01.06.2012, while on 24.05.2012 the amendments mentioned in the article were adopted whose discussion has gone on for a lengthy time at the Parliamentary Legal Affairs committee whose members are three of the deputies who signed the draft law.

adopted. The basis of such an assumption is that amendments in the Criminal Procedure Law cannot be a daily practice but a strictly motivated exceptional situation.

In view of the quantity and essential character of the adopted amendments in the CPL, as well as seeing the need for and forecasting large-scale amendments in the nearest future, adoption of a new Criminal Procedure Law is to be discussed.

Conclusion

- In the analysed period of time two legal documents have been in force – Latvia SSR Criminal Procedure Code (renamed as Latvia Criminal Procedure Code in 1991) and the Criminal Procedure Law.
- In the period of 1961-1990 LSSR CPC was amended on the average once in two years, maintaining during the process of amending a systemic approach and ensuring lucidity and clarity of the application of the law.
- The period 1990-2005 is characterized by multiple and essential changes in the LCPC, which to a large extent, at least at the beginning of the given period, was determined by a transition to a different legal community, implementation of international human rights guarantees, rapid changes in society an so on. Criminal proceedings become more modern and in conformity to contemporary requirements, yet at the same time at the end of the given period the process has lost its systemic unity, has become "cumbersome", losing lucidity and hence more encumbered in its application.
- In 2005 the new CPL is adopted. But it is not to be considered as the end of reform of criminal procedure law but only its intermediary stage because the changes of provisions of criminal procedure law become more intensive. They can be explained by both previously unforeseen necessities, topical innovations as well as by mistakes in legislation, i.e., careless, irresponsible and insufficiently evaluated, systemically analyzed and substantiated attitude. As a result of the implemented addenda and amendments the CPL edition that is in force now is only remotely similar to the initial version adopted in 2005.
- The incessant changes that have already been implemented and the changes forecast in future call for a proposal about the need to work out a new Criminal Procedure Law.

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DOES PERSON HAVE THE RIGHT TO BE ACQUAINTED WITH CASE MATERIALS ABOUT REFUSAL TO INITIATE CRIMINAL PROCEDURE (ABOUT QUALITY OF APPLYING SEPARATE SECTIONS OF LAW ON CRIMINAL PROCEDURE)

Keywords: criminal procedure, initiation of criminal procedure, rights of person in criminal procedure, further law-making, analogy, conclusion on quantity.

There are a lot of situations in criminal legal praxis (for example in State Police) during which factual victim is denied rights to get acquainted with case materials about refusal to initiate criminal procedure, description of official's duties or materials about reviewing his/her complaint; in these situations victim is usually told that such a right is not directly provided for in the Law on Criminal Procedure or that there isn't any duty for the police to do so.

The aim of the article is to find out if there really isn't any possibility for person to get acquainted with case materials about refusal to initiate criminal procedure provided for in the Law on Criminal Procedure as well as to propose solution based on statements of legal theory.

It is stated in the Law on Criminal procedure Section 373 that in case the official finds out that there isn't any base for initiating criminal procedure he has to take decision about it and has to inform person who submitted data about possible criminal offence; it results from Section 318 of the Law on Criminal procedure that decision has to be motivated. Besides it is provided for in the Section 345 part 3 that "… inspection materials have to be appended to the criminal case materials". Accordingly it should be presumed that during considering and deciding the question, for example, about refusal to initiate criminal procedure as well as about deciding complaints, inspection materials have to be formed before taking motivated decision. In its turn in the Section 375 part 2 of the Law on Criminal Procedure it is provided for that after criminal procedure is completed and final decision has come into force the persons rights of whom were violated in concrete criminal procedure have the right to be acquainted with criminal case materials. All the final decisions are publicly available ensuring protection of information prescribed by law. Accordingly for persons, the rights of whom were violated, the rights to get acquainted with case materials (the significance and protectability of them is certainly higher) as well as with the final decision (taking into account restrictions stated by laws) are secured. But still in legal praxis, for example, in State Police, the right to get acquainted with case materials

about refusal to initiate criminal procedure (the significance and protectability of them should be and is lower) is often violated (ignored).

The situation mentioned above could be solved in two ways: using possibilities given by other laws or using possibilities of further law-making.

Firstly, taking in account that the Law on Criminal Procedure is not regulating relationship – "acquainting with case materials about refusal to initiate criminal procedure"[1] one could find out what is said in other laws, for example, the Law on Publicity of Information. This approach could be admitted as the right one, and it is seen also in court decisions during administrative procedure in cases when person had approached, for example, the State police on the matter – acquainting with refusal materials, and had been rejected. Rejection to be acquainted with refusal materials violates constitutional rights – the freedom of expression including the right to get, keep and disseminate information, express own opinion. The Supreme Court Senate Administrative cases department has concluded, that "Section 100 of the Constitution (latvian – Satversme) of the Republic of Latvia includes the right to information in a wider understanding – namely not only to get information from the state, but also active search for information (active require information)".[2] At the same time these rights are not absolute. It is stated in the Charter of Fundamental Rights of the European Union Section 52 that according to the principle of proportionality restrictions can be set only in case if they are needed and devised for public interests or for the defense of rights and freedoms of other people.[3] In addition the Constitutional Court has pointed out that "restrictions of freedom of expression have to be 1) defined by law, 2) justified by legitimate goal, 3) proportional with this goal."[4] The researchers also have mentioned that scrupulous analysis and appraising has to be made in order to conclude that it is necessary to restrict information.[5]

But still the question rises: is it really necessary to charge administrative courts if the situation could be solved using possibilities of interpretation of legal norms and/or possibilities of further law-making?

Looking at the possibilities of further law-making it would be useful to look for statements of legal theory and to decide whether interpretation of legal norms or further law-making is necessary.

It is presumed in legal science that in order to indicate methods used during applying law mutually consecutive concepts are used: 1) intra legem (from latin – within the framework of law), 2) praeter legem (from latin – according to law), 3) extra legem

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1 This relationship have to be separated from refusal to initiate criminal procedure; according to the Supreme Court these decisins are not inspected in administrative procedure (See, for example: decisions SKA-521-05, SKA-459-06, SKA-355-05).

2 LR Augstākās tiesas Senāta Administratīvo lietu departamenta 08.06.2007. nolēmums lietā SKA – 194/2007.

3 Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 2000. 18. decembris (2000/C 364/01).

4 Satversmes tiesa. 2003-05-01. 29.10.2003. 22. punkts.

5 See, for example: Erdmane A., Gromovs J., Kučs A., Lulle A.Imigrācija un mediji. Rīga: Starptautiskā migrācijas organizācija, 2009.

(from latin – more than law), 4) contra legem (from latin – contrary to law).[6] At the same time it should be specified that there isn't any consensus between researchers about these methods as interpretation methods or further law-making methods as well as about content of some methods and necessity to separate them.[7]

Question of separating further law-making from interpretation is considered to be topical in Continental Europe including Latvia. Different viewpoints could be found about basis of separating, for example, the base – simple or complicated case[8], the base – text of legal norm[9], the basis – degree of legal creation[10], the basis – immanent or exceeding further-making.[11]

The problem of separating further law-making and interpretation is discussed also by latvian researchers, for example, E.Kalniņš, J.Neimanis, G.Sniedzīte. J.Neimanis has named the following kinds of further law-making: secundum legem (as interpretation of law norms), praeter legem (completing of gaps in law), contra legem (correcting of law norms).[12] G.Sniedzite, in her turn, considers that praeter legem is interpretation method but not law further-making method.[13] Accordingly it could be concluded that still there isn't any unified viewpoint about the content of the concepts "interpretation" and "further law-making", but the support has to be given to the idea of J.Neimanis that the object of interpretation can be only norm of law. The relationship mentioned in the introduction part of the article is not directly regulated in criminal procedure norms, therefore possibilities of further law – making have to be used to solve the situation.

There is also point of view that easy way to separate interpretation and further law-making is criteria – type of gap in law taking into account subdivision of gaps in law – "insubstantial" gap and "real" gap. In cases when there is a gap in law the method extra legem has to be used and it manifests in applying analogy.[14] Therefore in situation mentioned in the introduction part of the article (rejection to get acquainted with refusal materials about initiation of criminal procedure), while completing gap in law, it is possible to use the method extra legem.

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6 See, for example: Gailītis K. Tiesību tālākveidošana contra legem. *Likums un Tiesības.* 10. sēj., Nr. 12 (112), decembris 2008, 368.-375. lpp.

7 Ibid., 370. lpp.

8 See, for example: Peczenik A. On Law and Reason. London: Kluwer Academic Publishers, 2007; Dworkin R. Taking Rights Seriously. London: Harward University Press, 1977.

9 See, for example: Alexy R. The Argument from Injustice. Oxford: Clarendon Press, 2004.

10 Cipeliuss R. Tiesību būtība. Rīga: Latvijas Universitāte, 2001.

11 See, for example: Gailītis K. Tiesību tālākveidošana contra legem. *Likums un Tiesības.* 10. sēj., Nr 12 (112), decembris 2008, 368.-375. lpp.; Larenz K., Canaris C. Metodenlehre der Rechtswissenschaft. 3. Auflage. Berlin: Springer, 1995.

12 See, for example: Neimanis J. Tiesību tālākveidošana. Rīga: Latvijas Vēstnesis, 2006.

13 Sniedzīte G. Tiesību normu iztulkošana praeter legem. *Likums un Tiesības,* 2005, 7. sēj. Nr. 10, 326. lpp.

14 Gailītis K. Tiesību tālākveidošana contra legem. *Likums un Tiesības.* 11. sēj., Nr. 1 (113), janvāris 2009, 31. lpp.

As it is stated in legal theory analogy is admissible in administrative procedure as well as in criminal procedure, excluding cases when legal security and principle of prospective is violated.[15] Analogy is defined as mode of completing gaps in law; and it has two types.[16] Qualified subtype of conclusion in analogy is conclusion about length (latin – argumentum a fortiori). Using conclusion about length the consequences foreseen in one norm of law are related to other, directly not regulated life situation because the last one needs the same legal solution.[17] In addition one of the types of conclusion about length is conclusion from greater to smaller (latin – argumentum a maiori ad minus). The structure of this conclusion is: if consequences stated by law are foreseen for more important life situation, then these consequences have to be in force also in case of less important life situation.

Therefore concerning the situation described in the introduction part of the article (rejection to be acquainted with refusal materials about initiating criminal procedure) further law-making conclusion "from greater to smaller" could be applied as follows: if the persons, rights of whom were violated in concrete criminal procedure, have the right to be acquainted with criminal case materials (which are investigation secret during criminal procedure) after criminal procedure is completed and final decision has come into force, then persons, rights of whom were violated, should be allowed also to get acquainted (securing protection of information set by law) with refusal materials (which are not investigation secret).

Using of legal theory statements should provide higher quality of state officials work during applying Law on Criminal Procedure.

Conclusion

1) It is stated in the Law on Criminal procedure that in case the official finds out that there isn't any base for initiating criminal procedure he has to take motivated decision about it and has to inform person who submitted data about possible criminal offence.

   In the Section 375 part 2 of the Law on Criminal Procedure it is provided for that after criminal procedure is completed and final decision has come into force the persons rights of whom were violated in concrete criminal procedure have the right to be acquainted with criminal case materials. All the final decisions are publicly available ensuring protection of information prescribed by law

2) There are a lot of situations in criminal legal praxis (for example in State Police) during which factual victim is denied rights to get acquainted with case materials about refusal to initiate criminal procedure. Rejection to be acquainted with refusal materials violates constitutional rights – the freedom of expression including the right to get, keep and disseminate information, express own

[15] See, for example: Neimanis J. Tiesību tālākveidošana. Rīga: Latvijas Vēstnesis, 2006, 106.-107., 141.-145. lpp.

[16] Kalniņš E. Privāttiesību teorija un prakse. Rīga: TNA, 2005, 331.-335. lpp.

[17] Neimanis J. Tiesību tālākveidošana. Rīga: Latvijas Vēstnesis, 2006, 113. lpp.

opinion. In addition the Constitutional Court has pointed out that "restrictions of freedom of expression have to be 1) defined by law, 2) justified by legitimate goal, 3) proportional with this goal.

3) Rejection to be acquainted with refusal materials could be solved in two ways: using possibilities given by other laws, for example, Law on Publicity of Information, or using possibilities of further law-making. The relationship mentioned in introduction part of the article (getting acquainted with case materials about refusal to initiate criminal procedure) is not directly regulated by criminal procedure law therefore possibilities of further law-making (but not interpretation of norm) should be used in particular situation.

4) One of further law-making methods is conclusion about length. One of types of conclusion about length is a conclusion from greater to smaller (in latin – *argumentum a maiori ad minus*). Concerning the situation described above (rejection to be acquainted with refusal materials about initiating criminal procedure) further law-making conclusion "from greater to smaller" could be applied as follows: if the persons, rights of whom were violated in concrete criminal procedure, have the right to be acquainted with criminal case materials after criminal procedure is completed and final decision has come into force, then persons, rights of whom were violated, should be allowed also to get acquainted with refusal materials.

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RIGHT TO FREEDOM AND SECURITY: MYTH OR REALITY

Keywords: pre-trial detention, arrest.

Introduction

One of the basic principles of the Criminal Law Procedure is the right to liberty and security. Despite the aforesaid one of the main difficulties typical for the procedure is the high rate of applying detention/ arrest as a measure of restraint. Georgia is not an exception with this regard. As a rule court and prosecution give priority to pre-trial arrest and detention. The European Court of Human rights underlined the significance of presumption of liberty on many occasions and established the strict standards for applying detention, inter alia in judgments rendered against Georgia. The problem acquires extra actuality as the new the Criminal Law Procedure starts to operate and the sweeping reform of the procedural law is being carried out; when the Criminal Procedure Code envisages two types of systems for measures of restraint, grants higher degree of discretion to the judge in selecting the measure of restraint and establishing new additional guarantees while the case law of the Courts sets wider practice of recalling the case law of the European Court of Human Rights in the judgments.

In the situation when the united European legislative sphere and legal systems are coming together, problems concerning the introduction of directly applicable European standards into the Georgian procedural legislation have become highly significant, as have the compatibility of the national court and investigative practices with Strasbourg case law. Articles 6 and 7 of the Georgian Constitution not only recognize the principle of the direct applicability of international standards in Georgia, but they also require the state authorities to ensure the appropriate guarantees for the realisation of the individual's right to freedom.

Article 5 of the Georgian Criminal Procedure Code (hereinafter, the CPC of Georgia) acknowledges the presumption of innocence. The CPC of Georgia is based on fundamental principles and norms of human rights and international law, and introduces standards and criteria under international law regarding the restriction of liberty and notions such as reasonable assumption, the reasonableness of a term for the restriction of liberty and the promptness of a trial.

Basic constitutional principles equally require realization of private as well as public interest necessary for the existence of a democratic and lawful State, inter alia

keeping reasonable, commensurate and proportionate balance[1]. That is why national legislation as well as international law envisages the possibility of restricting the right of personal liberty. In case of an unconditional prohibition of applying detention until finding a perpetrator guilty by a court judgment, swift and just punishment of a crime and adequate reaction to it would often become impossible.[2] However as the restriction of liberty is permanently opposed by the right to require liberty by a yet unconvicted person – as an opposite pole ... the pre trial detention with regard to taking it into consideration and its enforcement shall correspond to the principle of proportionality.[3]

That is why national and international law give priority to the presumption of liberty[4], establish the possibility of arrest and detention only in cases and according to the rule expressly determined by law, do not envisage a possibility of unconditional pre trial detention even if the period of detention is short[5], sets an exhaustive list of the basis for restriction of liberty[6], establishes the necessity of bringing the length of restriction of liberty to the minimum which corresponds to the interest of administration of justice and prohibits refusing from such a right by a person on his own will.[7]

According to Georgian legislation application of detention shall be subject to strict necessity and respect for the principle of subsidiarity, which envisages not only its efficiency but ineffectiveness of applying another less strict measure instead of it. Moreover, such a measure shall be proportionate, temporary, shall be subject to revision in case of alteration of situation, its maximum length shall be determined as well as the gravity of the unlawful act, in regard of which it is applied or for preventing of which it is intended. As regards its purposes, it shall be directed towards administration of justice, prevention of hampering enforcing a Judgment and the risk of repeated commission of a crime. Its application is impermissible for the purpose of punishment, for securing punishment beforehand or even for facilitating the investigation purposes.[8]

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1 Judgment of the Constitutional Court of Georgia #1/3/407, 26 December 2007, § 7.

2 Judgment of the first Chamber of the German Federal Constitutional Court of 15 December 1965 # E-19, 342, in the book I. Shvabe, Judgments of the German Federal Constitutional Court, 2011, p. 47.

3 Ibid.

4 Giorgi Nikolaishvili v. Georgia, #37048/04, 13.01.2009, § 75, see also: Patsuria v. Georgia #30779/04, 06.11.2007 §§ 66-67, Mc Kay v. the United Kingdom [GC], # 543/03, § 41.

5 See: Belchev v. Bulgaria, # 39270/98, 08.04.2004, § 82; Patsuria v. Georgia #30779/04, 06 November 2007w, § 66.

6 Labita v. Italy [GC], # 26772/95, § 170, ECHR 2000-IV; Quinn v. France, Judgemen of 22 March 1995, Series 1995 A # 311, p. 17, § 42.

7 De Wilde, Ooms and Versyp v. Belgium, 18.06.1971, § 65; Winterwerp v. the Netherlands, 24.10.1979, § 37.

8 ESP-1995-2-025 a) Spain / b) Constitutional Court / c) Second Chamber / d) 26-07-1995 / e) 128/1995 / f) / g) Boletín oficial del Estado (Official Gazette), 22.08.1995 / h).

Objective necessity

According to the CPC application of detention is permissible if it is the only way to prevent hampering of administration of justice by defendant.

"Interference in the right to liberty is permissible only when on the one hand there is a reasonable and concrete suspicion that a person did not commit any offence and on the other hand a legitimate demand of public to detect and punish an offender swiftly and comprehensively, which can not be ensured by any other means and it is necessary to detain the suspect.[9] That is why while filing a motion a prosecutor is obliged to substantiate why the measure of restraint required by him is expedient as well as to give reasons why it is not expedient to apply a less strict measure of restraint. The court is entitled to impose imprisonment upon defendant as a measure of restraint only if by using a less strict measure of restraint it is impossible to prevent hampering of administration of justice by the defendant or the risk of absconding[10]. While assessing the risks and selecting a measure of restraint the court takes into consideration defendant's personal qualities, his occupation, age, state of health, family, property, a fact of compensation of inflicted property damage, a fact of breaching previously imposed measure of restraint and other circumstances. That is why on its own 'even the gravity of a crime interfering with the right to life or gravity of [not yet established] guiltiness can not justify detention of a defendant. Nor is the purpose of protecting population form more or less substantiated presumable agitation, according to which public can not tolerate a situation where a murderer goes unpunished sufficient. In such case there shall exist circumstances, according to which is possible to justify that if the defendant is not detained a threat will be posed to timely detection of a crime and imposition of a respective punishment. In a concrete situation deriving from existing circumstances it may be enough to indicate on the risk of absconding, concealing facts and trace of crime, which can not be proved by "respective facts". A serious threat of committing a repetitive crime can also be sufficient for applying detention[11] as well as in case of a conditional sentence committing a new crime in the period of probation, committing a new crime in a penitentiary establishment while serving a sentence and etc. However, the fact that a person is convicted, is placed in an establishment for deprivation of liberty and that a person has yet to serve a substantial part of sentence does not exempt the court from obligation and does not entitle the court to impose detention as a measure of restraint with regards to defendant without respective substantiation and adequate evaluation of threats.

The Supreme Court of Georgia particularly elaborated upon the issue of applying detention as a measure of restraint for several times. The court noted that: in practice

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[9] ESP-1995-2-025 a) Spain / b) Constitutional Court / c) Second Chamber / d) 26-07-1995 / e) 128/1995 / f) / g) Boletín oficial del Estado (Official Gazette), 22.08.1995 / h) p. 47.

[10] See, e. g.: Article 5, 38,12, 171, 198, 205 etc of the Criminal Procedure Code ['Sakanonmdeblo Matsne of Georgia #31,03.11.2009, Article 190].

[11] Judgment of the first Chamber of the German Federal Constitutional Court of 15 December 1965 # E-19, 342, in the book I. Shvabe, Judgments of the German Federal Constitutional Court, 2011, p. 48.

there are cases when on the basis of a new motion the court again imposes detention on a person detained for a particular crime. Detention is applied in order to prevent possibility for a defendant to abscond or commit further illegal acts. It is indisputable that a person who is already detained cannot carry out actions, for prevention of which the aforesaid measure of restraint is applied. Therefore, repeated detention of a person in such a case is devoid of any base and is illogical.

Later the court reverted to the issue of applying detention as a measure of restraint for several times and specified: "As to application of a measure of restraint with regards to defendant accused of committing several different offences ... any criminal act perpetrated by a person can be assessed separately, criminal prosecution as well as investigation of each incident can be conducted independently. Therefore the aforesaid originates a possibility of applying a measure of restraint with regards to one person for several times"[12]

As mentioned above application of a measure of restraint is directly linked to the right of liberty and security. The aforesaid gives priority to presumption of liberty and application of detention in an exceptional regime. The CPC strictly requires bringing all defendants before the court in 48 hours after starting criminal prosecution, notwithstanding the fact whether the prosecution files a motion concerning application of a measure of restraint or not. Therefore no matter whether a person commits a new crime while serving a sentence or the fact of committing a crime by a convict before conviction is revealed in the period of serving a sentence, the CPC equally requires from the court to elaborate on necessity of applying detention as well as ineffectiveness of using other measures of restraint. Even more so that legislation envisages a number of procedures and possibilities for exempting a person from serving a sentence[13].

As a study on the court's case law reveals courts give arguments substantiating the necessity of applying detention as a measure of restraint with regards of convict/ inmate defendant in case he/she commits a new crime. The courts do not merely appeal to the fact that the defendant is an inmate. E. g. in the case N.B the court stated: the court takes into consideration the fact that a crime for committing of which he is alleged to be guilty pertains to the category of less grave crimes, however there exist law procedures [amnesty, pardon etc], application of which can result in exemption of Mr. N.B from serving a sentence, there exists a supposition that in case he is on liberty he may abscond from investigation and court in order to escape punishment, he may also continue criminal activities.[14]

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[12] 5-th section of the recommendations elaborated by the Supreme Court of Georgia on 18 March, 2006.

[13] Section 3 of the recommendations elaborated during the meeting held on 17 April 2006 concerning the problematic issues of Criminal case law.

[14] Decision of the Chamber of Criminal Law Cases of Tbilisi City Court, 28.01.2011 [available in the court archive].

Proportionality

One of the most important conditions for the stability of a modern State represents a right and just definition of priorities between private and public interests and creation of a reasonably balanced system of human relations.[15] That is why restriction of liberty shall be applied only when and to the extent that is necessary for achieving lawful purposes, which justify its application.[16] Accordingly despite the existence of a legal base for restricting liberty, arrest/detention will be considered to be a violation if the damage inflicted as a result of restriction overweighs the prevented threat and the CPC foresees a possibility of applying other more lenient measure[17] according to Article 205 of the CPC.

Pursuant to the principle of proportionality a judge defines:

1. Existence of a legitimate public interest;
2. Inefficiency of using other less radical measure for achieving the purpose[18];
3. Necessity of imposing pre trial detention for achieving the purpose.

The more grave and wide is interference in liberty the more insufficient and unsatisfactory is the precondition of public interest. Accordingly, for assessing commensurability between the purpose and the means it is important to take into consideration the implication of the criminal activity for investigation of which interference is carried out...

The intended interference should be adequate and directly proportional to the crime, so as to avoid "burdening" a criminal by the results of the investigation more than by an expected penalty. Therefore, deriving from constitutional-legal perspectives while applying a measure prescribed by law a judge should examine it in the light of the principle on prohibition of excessiveness[19]

Therefore, application of restriction of liberty should be:

1. lawful;
2. objectively justified, should represent an exception and be applied only when it is practically impossible to achieve the purpose of the procedural coercive measure through other type of measure of restraint[20];

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[15] Citiczens of Georgia – David Jimsheleishvili, Tariel Gvetadze and Neli dalalishvili v. the Parliament of Georgia, #1/2/384, Judgment of the Constitutional Court of Georgia of 02.07.200.

[16] ESP-2000-1-008 a) Spain / b) Constitutional Court / c) Plenary / d) 17-02-2000 / e) 47/2000 / f) / g) Boletín oficial del Estado (Official Gazette), 66, 17.03.2000, 66-71 / h) CODICES (Spaniss).

[17] See: Witold Litwa v. Poland 04.04.2000.

[18] See, e. g.: Recommendation No. R(80) 11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial.

[19] Judgment of the first Chamber of the German Federal Constitutional Court of 10 June 1963 # E-790/58, 16, 194, in the book I. Shvabe, Judgments of the German Federal Constitutional Court, 2011, p. 44.

[20] Ibid. Article 198.4 according to which application of detention as a measure of restraint is permissible only if it is impossible to achieve the purpose through other, less stringent measure of restraint.

3. commensurate to the legitimate aim;
4. should not last longer than is required by an absolute necessity[21];

However, since two legal values protected by legislation, that is, individual liberty and legitimate interest of the state to uncover crime, contradict one another in the process of using arrest, Article 12.4 of the Criminal Procedure Code of Georgia stipulates that the legitimate interest for uncovering a crime should be outweighed by a legal value protected by Article 18 of the Georgian Constitution. That is why the CPC states that possibility for the use of an arrest should occur only when there is a probable cause to believe that a person has committed a crime and it is necessary to arrest him for the proper administration of justice and this is the last resort:

a) "to prevent absconding and the obstruction of justice by the defendant;
b) to prevent obstruction in obtaining evidence;
c) to prevent the commission of a new crime by the defendant" (Article 205 (1), CPC of Georgia)."

In compliance with the principle of proportionality, a judge shall establish:

1. Existence of legitimate public objective;
2. Ineffectiveness of more lenient measures for achievement of such an objective;[22]
3. Necessity of custody pending trial for achievement of the objective.

Probable cause [reasonable suspicion]

The case law of the Strasbourg Court attaches particular significance to the standard of substantiated presumption ["reasonable suspicion"] – in what case will a suspicion be considered to be reasonable, how many circumstances should be proved or what should they concern to be considered reasonable, whether it is necessary to present evidence in the amount which is sufficient for proving participation in committing a crime for restricting liberty etc.

The reasonable suspicion is what connects the concrete person with the concrete crime. Suspicion is a subjective attitude of an individual, but the interference with freedom of an individual will not take place on the basis of such suspicion that rests only on subjective disposition. Such approach will be a green light for arbitrariness. …. it necessary that there should be an objective link between the crime and the arrested person, objective circumstances, data that will create the ground for assumption that the crime is committed and exactly by the person who is being arrested. In other

[21] Ibid. Article 198.4 according to which application of detention as a measure of restraint is permissible only if it is impossible to achieve the purpose through other, less stringent measure of restraint

[22] See also, e.g.: Recommendation No. R(80) 11 of the Committee of Ministers of the Council of Europe concerning Custody Pending Trial.

words, the suspicion should be well-grounded. At the same time, the suspicion should rest upon reasonable and good-faith assessment of the objective data[23].

According to the 4-th amendment to the United States Constitution substantiated presumption should be based on facts and circumstances which are essential and sufficient for convincing a reasonable person that the defendant has committed or is being committing a crime[24]. Similar formulation can be found in CPC of Georgia – The aggregate of the facts and information, which on the basis of the circumstances of the present criminal case would satisfy an objective person in concluding that the person concerned may have committed the offence, a standard directly prescribed for carrying out investigative action and/or applying a measure of restraint. However, since suspicion and presumption are subjective notions and is not a category exhaustively regulated by law, whether it originates or not in every concrete case depends on the entirety of a number of objective and subjective circumstances. That is why what may be regarded as "reasonable" will depend upon all the circumstances[25]. Presumption is reasonable, if there is an objective link between the crime and the detained person, objective circumstances, data, which give rise to presumption that a crime was committed and it was committed by the detained person.

One of the essential elements of substantiated presumption is its credibility and bona fides[26] However, even if a suspicion arises bona fides, it should first of all be objective, reasonable, it is impermissible to interfere in the right of liberty of person merely on the basis of subjective presumption, prejudiced view, opinion[27], or on the fear of possible consequences of such an act[28]. Only a presumption that a person may abscond, unlike other basis for detention enumerated by the CPC can not give rise to suspicion that a person committed a crime[29] At the same time the fact of committing a crime in the past can be a reason for giving rise to presumption but it should not be the only ground[30] and should relate to the acts committed by a person in present[31]

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[23] Decision of the Constitutional Court of Georgia, The Public Defender of Georgia v. the Parliament of Georgia, appl.# 2/1/415, 06.04.2009, par. 21.

[24] M. W. Janis, r. S. Kay, A.W. Bradley, European Human Rights law, Text and materials, third ed. 2008, 700.

[25] Fox, Campbell and Hartley v. The United Kingdom 30.08.1990, 14 E.H.R.R.108; "There exists a grounded suspicion when the facts and investigations... concerning which a law enforcer has reasonably credible information, and which on its own in enough for satisfying a reasonable person in believing that a crime has been committed or is being committed [Brinegar v. United States, 338 U>S>160,68 S.Ct.1302(1949)]".

[26] Murray v. United Kingdom, 28.10.1994, 19 E.H.R.R.193.

[27] See: Caballero v United Kingdom, 8.2.2000 [application # 32819/96].

[28] Nikolaishvili v. Georgia, [§ 74] The appellate court, apart from reiterating the argument relating to the severity of the punishment, justified the applicant's pre-trial detention by reference to the interests of the investigation into the completely unrelated murder case which was pending at that time against the applicant's brother. Such reasoning was not only irrelevant for the purposes of assessing the reasonableness of the applicant's detention under Article 5 § 3 of the Convention, it also circumvented the very essence of the exception under Article 5 § 1 (c) of the Convention.

[29] Judgment of the Constitutional Court of Georgia #2/1/415, 06.04.2009.

[30] Fox, Campbell and Hartley v. the United Kingdom 30.08.1990, 14 E.H.R.R.108.

[31] See: K.-F. v. Germany,27.11.1997,26 E.H.R.R.390, Punzelt v. the Czech Republic 25.04.2000.

For that reason the investigation organs in a motion on application of detention should indicate the evidences which are sufficient for bringing charges and even more so for finding a person guilty of committing a crime.[32]

However, acts which raise a suspicion need not be of the same level of certainty as those necessary to justify a conviction or even the bringing of a charge, which comes at a later stage of the process of criminal investigation[33]

According to CPC of Georgia when selecting a measure of restraint to be imposed upon defendant "other" circumstances shall also be taken into consideration, enumeration of which is given in Article 198.5. E. g. Personality of the defendant, his occupation, compensation of inflicted property damage, fact of breaching previously imposed measure of restraint etc. The law does not set a degree of importance of any of the circumstances, nor does it give an exhaustive enumeration of such circumstances thus obliging the organs of investigation and the court – along with the gravity of crime, age of the defendant his health etc to take into consideration numerous other circumstances (e. g. property, place in society, working capacity, existence of a job and a living place, previous conviction, social networks, the history of life etc). It shall also be examined to what extent the crimes previously committed by the defendant can be compared to the character and level of gravity of the charge anew brought against him[34]. Gravity of the charge may also serve as an important base for preventive detention, but even in such a case the gravity of the charge shall be examined in conjunction with other general criteria[35] in order to establish existence of evidence proving the risk. The Strasbourg court does not consider the gravity of crime to be a sufficient precondition for using detention.[36] "By failing to address the specific facts of the applicant's case or to consider alternative non-custodial pre-trial measures, and by relying essentially on the gravity of the charges, the authorities imposed and maintained the applicant's detention on grounds which cannot be regarded as "relevant" or "sufficient".[37] The Georgian legislation does not directly link applica-

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[32] See: Brogan v. The United Kingdom 24.11.1988,11 E.H.R.R117. Murray v. The United Kingdom 28.10.1994, 19 E.H.R.R. 193.

[33] Galuashvili v. Georgia # 40008/04, 17.07.2008, § 33, Saginadze and other v. Georgia #18768/05, 27.05.2010 §126; Murray v. United Kingdom, 28.10.1994, 19 E.H.R.R.193 §55. See also: M. W. Janis, r. S. Kay, A.W. Bradley, European Human Rights law, Text and materials, third ed. 2008, 608, 652.

[34] Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), Interights "Руководство для юристов", Council of Europe, 2008, 42, ob. Clooth v Belgium (1991) [Appl. No. 12718/87, 12.12.1991].

[35] See: CRO-2006-1-001 a) Croatia / b) Constitutional Court / c) / d) 07-12-2005 / e) U-I-906/2000 / f) / g) Narodne novine (Official Gazette), 2/06 / h) CODICES (Croatian, English). It shall be noted that gravity of charge is a criteria, which is based on the one hand upon the penalty envisaged by the CPC and on the other hand the effect which it exerts upon public. In particular one and the same action foreseen by CPC can have different influence and can bring along different reaction in different ethnic groups. Available: http://www.arab-niaba.org/publications/hr/jordan2/eric2-e.pdf

[36] See: Mamedove v Russia 7064/05, 01.06.2006; Scott v Spain 18.12.1996, para. 78); Van der Tang v Spain 17.07.1995, Series A., No 321 p.19, § 63; Tomasi v France, 27. 08.1992, No 241-A, p. 37, § 98.

[37] Patsuria v. Georgia #30779/04, 06.11.2007w, § 77.

tion of detention to gravity of crime either. CPC potentially increases the number of application of detention as it gives the investigative organs the possibility to apply detention with regards to less grave crimes as well. As the aftermath of the aforesaid substantiation of applying detention becomes even more important, so as to avoid sharp rise in the number of application of detention and its mechanical application with regards to wider range of crimes without necessity. That is why CPC obliges a prosecutor to substantiate expediency of applying required measure of restraint in his motion as well as inexpediency of using other less stringent measure of restraint, to indicate the essence of the charge, as well as any information or evidence on which the charge is based. However at the same time the code does not and is not capable to give enumeration of the aforesaid materials. "Practical recommendations for magistrate judges" establishes that along with a motion the "materials necessary for examining the motion" shall be presented to the court. The aforesaid implies e. g. a copy of the detention record (if a person is detained or was detained), copy of the record on personal search, copies of records on other pressing investigative actions, a copy of resolution for prosecuting as an accused, copies of all the evidences which serve as basis of the charge (i.e. all that is indicated in the copy of resolution for prosecuting as an accused) If it is possible the documents on the defendant's previous conviction and the circumstances envisaged by paragraph 4 of Article 198 should also be presented to the court. In each concrete case the prosecutor decides what other documents are to be presented for examining the motion i.e. for substantiation of the demand[38].

The standard of a reasonable doubt ensures the possibility of restricting liberty of a person in case a presumption is substantiated, it precludes arbitrariness, represents a significant part of protection from arbitrary restriction of liberty. That is why with the aim of proper administration of justice judgments of courts and tribunals should adequately state the reasons on which they are based[39]. However, it cannot be understood as requiring a detailed answer to every argument[40]. The court considered sufficiently substantiated application of detention in the Case Saghinadze v. Georgia where the basic argument was the fear that if released, the defendant could have used his authority as a former high-ranking law-enforcement official to influence the parties to the proceedings[41].

On the other hand, The Strasbourg Court believes that using the formulaic argumentation for the arrest in the fill-out papers by the judges is inadmissible practice. The Strasbourg Court ruled that a violation of Article 5 occurred in the case of Nikolaishvili against Georgia, where the use of an arrest against the defendant was justified on the basis of the following circumstances: "[in accordance with

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[38] Practical recommendations for magistrate judges on the basic issues of the criminal procedure, p.14. Available: http://www.supremecourt.ge/default.aspx?sec_id=565&lang=1

[39] Jgarkava v. Georgia # 7932/03, 24.02.2009w § 71, see also García Ruiz c. Espagne [GC], no 30544/96, § 26, CEDH 1999-I; Ruiz Torija c. Espagne, arrêt du 9 décembre 1994, série A no 303-A, § 29; Higgins et autres c. France, 19 février 1998, § 42, Recueil 1998-I.

[40] Jgarkava v. Georgia # 7932/03, 24.02.2009, para. 71; see also: Van de Hurk c. Pays-Bas, 19 avril 1994, § 61, série A no 288.

[41] Saghinadze and others v. Georgia #18768/05, 27.05.2010, §137.

the requirements of procedural legislation] after I considered the reasonableness of the motion/request for the use of an arrest and the motions submitted by the parties I made the conclusion that the evidence gathered – [reference to evidence obtained in June and July 2003 – see, Para. 8] – bring forth sufficient doubt that Giorgi Nikolaishvili committed an offence. Evidence is obtained in compliance with criminal procedures. The arrest and indictment of Nikolaishvili were conducted in full compliance with procedural law. I believe that [reference to prosecutor], a motion/request for the use of an arrest is substantiated, and has a relevant legislative ground. Therefore, if Nikolaishvili, charged with a less serious crime, is released, the risk of the obstruction of the investigation and the failure to appear before court have been grounded..."

The practice of a court to rely on circumstances typed in a paper form reveals the lack of "special attention" on the part of local entities.[42] The court is obliged to check not only the compliance of detention with national procedural legislation, but also to examine the substantiation of the suspicion which served as a ground for detention, as well as the lawfulness of the detention".[43] Similar guarantees should be in place where the second level of jurisdiction is available for such cases.[44]

Therefore for applying arrest/detention CPC requires establishment of a link between the person deprived of liberty and the action which allegedly is a crime, as well as existence of sufficient grounds for asserting that the action constitutes the alleged signs of crime for which CPC foresees the possibility of applying detention as a measure of restraint[45] as well as existence of a substantiated presumption of posing threat to administration of justice[46].However, these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to the most basic guarantee of individual freedom[47].

Therefore, the decision should be grounded and based not only on the provision of the CPC of Georgia which authorizes a judge to use an arrest;[48] but it should examine all those aspects which justify the use of this measure and its continuation,[49] it should

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[42] See: Nikolaishvili v. Georgia, para 73, see, Patsuria vs Georgia, No. 30779/04, para. 74, 06.11.2007, G.K. v. Poland, № 38816/97, § 84, 20.01.2004.

[43] Nikolaishvili vs Georgia; see also: Brogan et al vs the United Kingdom, para. 65.

[44] Nikolaishvili vs Georgia, para. 92; See: Navara vs France, 23.11.1993, series A, № 273-B, para. 28; Toth vs Austria, 12.12.1991, series A, № 224, para. 84).

[45] Lukanov v. Bulgaria 20.03.1997, 24E.H.R.R.121.

[46] Implies: absconding, escaping from summoning before the court, further criminal activity, committing a new crime, posing threat to obtaining evidences as well as to enforcement of a judgment.

[47] See: Kurt v Turkey 25.05.1998 E.H.R.R. 373, § 122, mutatis mutandis, Quinn v France, 22.03.1996, E.H.R.R. 529 para. 42.

[48] As it was the case in Mansur v. Turkey, 08.06.1995, 20 E.H.R.R.535; Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5), Interights "Руководство для юристов. Текущее издание по состоянию на сентябрь 2007 г.", Council of Europe, 2008, 40.

[49] ESP-2000-1-008 a) Spain / b) Constitutional Court / c) Plenary / d) 17-02-2000 / e) 47/2000 / f) / g) Boletín oficial del Estado (Official Gazette), 66, 17.03.2000, 66-71 / h) CODICES (Spanish).

be based not only on the gravity of probable penalty[50] but it should also take into consideration specific circumstances in which the act had been committed and the personal characteristics of the defendant.[51]

At the same time, numerous suggestions have been put forward concerning the use of preventive arrest in cases of serious crimes or crimes which the state authorities believe are of high priority due to a grave criminal situation. It should be noted that the use of probable cause about the activities of specific individuals in a specific criminal organization for the objectives of public prevention policy, which target all those persons who create danger because of their permanent criminal inclinations, is inadmissible. The Convention regards as possible for the state authorities to carry out measures against offences that are concrete and established.[52]

At the same time, as noted above, for maintaining a genuine balance between the security of the state and personal freedom, it is necessary to ensure that any deprivation of freedom during a criminal prosecution is based on exclusive grounds, is an exceptional measure, objectively justified and reasonably long.[53] As the study of court practice reveals, an upward trend, though insignificant, is still observed in applying detention [in 2009, the indicator stood at 51.1 percent, while it reached 52.6 percent in the first quarter of 2010. In 2008, it comprised 45.3 percent]. Courts use pre-trial detention rather often and this measure is also frequently applied to minors, the elderly and sick persons and detentions are often based on so-called trite substantiations lacking comprehensive and detailed arguments. In frequent cases, unfortunately, judges share scarce arguments presented by the prosecution, do not consider concrete factual circumstances, do not detail in their decisions the circumstances that serve as grounds for the probable cause that a defendant may abscond or obstruct the administration of justice, and they also do not substantiate the necessity and proportionality of applying detention. Their decisions often lack a detailed and deep critical analysis of the materials of the case. In the absence of all of this, the guarantees established under the law lack any sense and lose practical meaning, which has been repeatedly pointed out by the European Court as well.[54]

Along with detention, the new code establishes the possibility of using other punitive measures commensurate with the aim of detention, provides a possibility of applying several measures simultaneously and, at the same time, establishes only a sample list of these measures thus facilitating the development of the so-called "judge law", on

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[50] Kalashnikov v. Russia, 15.07.2002.

[51] ESP-2000-1-008 a) Spain / b) Constitutional Court / c) Plenary / d) 17-02-2000 / e) 47/2000 / f) / g) Boletín oficial del Estado (Official Gazette), 66, 17.03.2000, 66-71 / h) CODICES (Spanish).

[52] Сальвия М. де, Право на свободу и личную неприкосновенность, в сб. Комментарий к Конвенции о защите прав человека и основных свобод и практика ее применения – под общей ред. В. А. Туманова, Л. М. Энтина, М. изд-во Норма,2002, 58.

[53] Aydin Y. The delimination of the scope of one of the guarantees of personal security set out in the European Convention on Human Rights, p. 14.

[54] See, e.g.: Z.N.S. v. TURKEY (Application no. 21896/08),19.01.2010; mutatis mutandis, Stoichkov v. Bulgaria, No. 9808/02, § 66 in fine, 24 March 2005; and Vachev v. Bulgaria, No. 42987/98, § 71, ECHR 2004-VIII.

the one hand, and a decrease in detention cases to the minimum, on the other hand. This further increases the need for the substantiation of the detention and its length.

Article 206 [as well as Article 207] provides in detail the criteria for the consideration of the admission of a request related to detention and obliges judges to examine the factual and formal (procedural) grounds of the request. However, it says nothing about a judge's obligation to provide a detailed substantiation of the decision on the merits of the request, based on the factual circumstances of the case. In particular, Paragraph 6 of Article 206 states that "the decision on the application, change or nullification of detention shall indicate the date and the place of the decision, the names of the judge, prosecutor, accused and his lawyer, the essence of the presented charge, the instructions on the application, and the change or denial of detention. Moreover, it shall precisely indicate the essence of the decision and the addressee of the decision, which official or entity is responsible for the implementation of the decision, the rule of its appeal, the signature of the judge and the seal of the court". Thus, the code does not formally establish the obligation to substantiate a decision.

As noted above, according to practical recommendations for Magistrate Judges, "A judge shall substantiate which factual or procedural circumstances [or both] exclude the use of detention or which factual or procedural circumstances [or both] justify the sufficiency of, say, the use of bail for ensuring the aims of detention".[55] At the same time, to substantiate the use of a particular punitive measure, it provides the following sample wording for the motivation part of a court decision: "essential procedural violations during the detention of an accused, the institution of criminal prosecution against the accused, and the obtaining of evidence, which would result in the denial of detention, are not established from the case materials [protocols of the relevant investigative and other procedural actions].

The evidence indicated in the resolution on instituting a criminal prosecution against the accused [a list of, for example, search and identification protocols] and other materials provide factual circumstances [sufficient evidence] that are sufficient to use detention against the accused".[56]

Therefore, a judge has no formal obligation to consider the evidence indicated in the request of the parties and presented by them at the hearing and has no obligation to substantiate the threat that the accused may go into hiding or obstruct justice, according to the above-mentioned criteria.

At the same time, while deciding on the application of preventive measure, the recommendations obligate a judge to pay attention to whether the requirements set out by the legislation were followed:

- during arrest;
- while charging the defendant; and
- while obtaining/fixing evidence.

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[55] Practical recommendations for magistrate judges on the main issues of criminal justice process, 24.12.2007, 22.

[56] Ibid., p. 21.

The judge should also take into consideration the factual (proving) and formal (procedural) grounds and decide what type of preventive measure is necessary and why a more lenient measure cannot be effective for achieving the objectives as stated in Article 171 of the CPC of Georgia.

If the party to the criminal process does not question the compliance with requirements during the arrest, charging or obtaining of evidence, the court nevertheless must assess whether all of the requirements were observed while detaining the person and obtaining evidence in its ruling. However, when the court is assured that there were no violations during these processes, its instruction can be relatively Conventional. But if the party challenges the legality of the arrest, charging and obtaining of evidence, then the court must study why the party believes so, on what grounds the party concludes that violations took place, what particular requirements were not followed and how it materialized.

In this case, the court cannot confine itself with the Conventional direction that the requirements were not met. However, it is not necessary to make extended reasoning. Above all, it should be exhaustive and able to respond to the party's claims comprehensively. The motivational section should contain a substantiation of the existence of both the factual as well as the formal grounds for the use of the arrest.

Thus, although the new CPC of Georgia rests on the principle of the presumption of freedom of a person, defines the principle of using an arrest and detention on exclusive grounds, the fulfilment of international obligations and standards in the criminal proceedings will still largely depend on the decency of persons conducting a proceeding and the due performance of the discretionary rights granted to them, on the one hand, and on the amendment of the code to improve procedural legislation or the establishment of uniform court practice in accordance with international requirements, on the other hand.

In light of a new criminal procedure code and the overall significance of this problem it is reasonable that the recommendations emphasise not only the persuasiveness of the reasoning of the motion/application, but also the necessity for proving that a defendant can abscond or obstruct the administration of justice or commit a new crime by factual concrete evidence in the case. It is also very significant to define the proportionality of the term of detention, as well as the rules for its monitoring.

Duration of Detention

Georgian legislation sets a maximum of nine months for the restriction of a person's freedom. According to the Georgian Constitutional Court, this term, as established under Article 18 of the Georgian Constitution, includes the pre-trial detention of the accused and "does not include the term of detention of the indicted individual before court delivers its decision on the punishment for the concrete crime". The new criminal code of reduces the term for the detention of the accused and brings it into line with the court's above-mentioned decision. As a result, the maximum length of the pre-trial detention of a person at the stage of the investigation is 60 days. The criminal code no longer envisages the possibility of remitting the case for an

additional investigation and, accordingly, the additional extension of the duration of the detention by court; does not establish an initial minimum term for the detention, thus contributing to the use of the reasonable term of detention in each individual case. At the same time, the code envisages the further extension of the length of the detention limit to a "reasonable term" on the basis of a substantiated request on behalf of the defence and a one-off mediation on behalf of the prosecutor. At the same time, the criminal code does not define a limited length or the number of such extensions [in case of a request from the defence].

When assessing the legality of the extension of the proceedings and the length of the detention at the initiative of the accused, the Strasbourg court noted that "a very small segment of hearings have been extended upon the requests of applicants, which were rather articulate and this has somewhat impeded the pace of the hearings. However, the resulting impediments have never been of a significant size and their duration ranged between one and two months (see paragraphs 10, 12-14, 19-20). Therefore, the court does not regard that the applicants' actions have not affected the duration of the hearing. Moreover, most of the applications submitted by the applicants regarding the postponement of hearings, especially those submitted at an the initial stage of the hearings, represented the ordinary implementation of their procedural rights aimed at obtaining needed evidence without which it would have been impossible to prepare the case for hearing on its merits".[57]

As already noted above, the detention shall be used only in case it serves a legitimate aim and when its duration is proportional to its aim.[58] Therefore, international law attributes special importance to both the use of detention and the issue of its duration. However, it is unacceptable to abstractly determine the reasonability and legality of the term of detention. The reasonability of the term must be evaluated on a case by case basis, taking into account the concrete circumstances of a case and such elements as the nature of the crime (crossing borders, organised crime, terrorism,[59] etc.), the number of the accused, difficulties related to the investigation, the complexity of legal issues, the behaviour of the accused.[60] However, the above-mentioned circumstances can justify the extension of the term only in case the entities conducting the hearing display "due diligence".[61] International and Georgian practice prove that a significant

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[57] Kharitonashvili v Georgia, sited above, par. 42.

[58] Wafa Shah, overview of case studies relating to pre-trial detention, Fair trials international – March 2009, submission to the directorate-General for Freedom Justice and Security of the European Commission on Issues relating to Pre-trial Detention, 3.

[59] See, for instance: Klass and Others v. Germany, 06.09.1978, 2.E.H.R.R 305. para 48-49& 59; Brogan and Others v. United Kingdom, 29.11.1988, 11 E.H.R.R.117 para 48; Murray v. United Kingdom, 28.10. 1994, 19 E.H.R.R193, para 47; Pantano v. Italy, т. 60851/00, para 70, 06.11.2003; Van der Tang v. Spain, 13.07.1995, 22E.H.R.R262, para 75; Chraidi v Germany (Appl. No. 65655/01, 26.10. 2006, para 37; W v. Switzerland 26.01.1993, 17 E.H.R.R.60.

[60] Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5). Interights "Руководство для юристов. Текущее издание по состоянию на сентябрь 2007 г.", Council of Europe, 2008, 44.

[61] See, for instance: Kalashnikov v. Russia 15.10.2002. Assenov &Others v. Bulgaria 28.10.1998., 28 E.H.R.R652.

amount of violations of Article 5.3 result from the lack of due diligence on the part of the bodies conducting the hearing[62] which may be attributed to management-related objective circumstances[63] or the failure by a separate participant to properly perform their duties.[64] Therefore, when extending the term, the court takes into account and checks the substantiation of the assumption of the possibility of the accused relapsing into the crime, on the one hand, and the "due diligence" conducted by the bodies holding the proceedings, on the other hand".[65]

"The length of the restriction of freedom shall not exceed a reasonable term. It is acknowledged that it is impossible to translate this concept into concrete days, weeks, months or years or any other periods corresponding to the severity of crime. At the same time, this notion is not subject to abstract control as the reasonability of the terms must be assessed on a case by case basis taking into account the concrete properties of each case. The restriction of freedom is justified until the concrete circumstances of the case indicate public interest which, irrespective of the presumption of innocence, overweighs respect of personal freedom.[66] The court assesses the reasonableness of the length of the proceedings in light of the circumstances of the case and having regard to the following criteria – the complexity of the case, the conduct of the applicant and the relevant authorities, and the importance of what is at stake for the applicant in the litigation (see, Mikulić v. Croatia, No. 53176/99, §38, ECHR 2002 I).[67]

Regularity of Revision of Duration of Term

When a person is detained, the issue of the extension of the term, according to international standards, must be reviewed in accordance with the legislation or at a reasonably short regularity as established by court,[68] until the date of the hearing on the merits of the case has been set. To this end, the body conducting the proceedings shall, at a regular periodicity,[69] present the court with the grounds available to it, which justify the restriction of freedom and the accused must have the automatic right to be brought before the court at regular intervals for a periodic, systematic review of

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[62] See, for instance: Nikolaishvili v Georgia [par. 78], where the court, when assessing a 10 month pre trial detention of the applicant, noted that such a long duration of detention indicates that the government failed to hear the case with due diligence, which is of utmost importance when assessing the legality of pre trial detention against the requirements of paragraph 5, article 5 of the Convention.

[63] See: Assenov & Others v. Bulgaria 28.10.1998., 28 E.H.R.R, 652; Stögmuller v. Austria 10.11.1969, 1. E.H.R.R.155; Clooth v. Belgium [Appl. No. 12718/87, 12.12.1991]; Muller v. France 17.03.1997; Trzaska v. Poland [Appl. No. 25792/94, 11.07.2000].

[64] See: Clooth v. Belgium [Appl. No. 12718/87, 12.12. 1991].

[65] See: W v. Switzerland 26.01.1993, 17 E.H.R.R.60, Assenov &Others v. Bulgaria 28.10.1998., 28 E.H.R.R652 and Punzelt v. the Czech Republic [Appl. No. 31315/96, 25.04.2000], Melnikova v Russia 21.06.2007 ECHR Applic. No. 24552/02.

[66] Kudla, 110.

[67] Kharitonashvili v. Georgia, No. 41957/04, 10.02.2009, par. 41.

[68] Herczegfalvy v Austria 10533/83, 24 September 1992.

[69] See, for instance: Melnikova v Russia, 21.06.2007, ECHR Appl. No. 24552/02.

the restriction of his freedom.[70] At the same time, the intervals between the reviews must be short[71] [the nature of detention itself "requires short time spans between two applications for release], as in view of the assumption under the Convention such detention is to be of strictly limited duration. Since it rests on the need for a quick investigation, an interval of one month is deemed to be reasonable".[72]

Court control on the legality of the restriction of freedom must not only be immediate, but also automatic. It must not depend on the submission of an application by a person whose freedom is restricted. Such an approach would have essentially changed the nature of a guarantee.[73] The Criminal Code of Georgia does not establish an obligation to carry out an automatic periodic control and, therefore, reveals the need for the harmonization of the code with the requirements of the Convention. However, the Court noted in the Patsuria case that, "while the Criminal Procedure Code in this wording does not require the authorities review legality of continuation of arrest on their own initiative at regular intervals, according to a disputable paragraph 17 of the Article 140 of the CPC the applicant could demand reconsideration of a challenged measure during detention in case of any new circumstances."[74]

A term of detention can be extended only in case "there is an unbroken causal link between the original sentence and the re-detention".[75] The above-mentioned statement makes clear that the interests of the investigation prevail over the presumption of innocence and a departure from it is justified by the inability to complete the investigation or the excessive complexity of the case. That's why the court must consider in light of all of the circumstances of the case and substantiate the necessity and expedience of the extension of the detention term of the accused, the existence of legal and factual, procedural and material and legal grounds for the extension of the detention term and their "relevance" and "sufficiency" for an extension. "Ruling of the court on continuation of a term should contain "appropriate" and "sufficient" argumentation and it should be related to specificity of the given case in order to justify restriction of freedom[76]. In other words, any period of continuation of arrest notwithstanding its length requires appropriate motivation from the competent national authorities that are obliged to be "exceptionally attentive" while using these procedures."[77]

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[70] Васильева Е. Г. Вопросы уголовного процесса в международных актах. Учебное пособие, 2007 г. Башкирского государственного университета, 137; Право на свободу и личную неприкосновенность европейские стандарты и российская практика. Под общ. ред. А. В. Деменевой. Екатеринобург, Урал ун-та, 2005, 29.

[71] Assenov, 162.

[72] Bezicheri, 21.

[73] Aquilina, 49.

[74] Patsuria v. Georgia, application # 30779/04, 6 November, 2007. par. 55.

[75] Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5). Interights "Руководство для юристов. Текущее издание по состоянию на сентябрь 2007 г.", Council of Europe, 2008, 11.

[76] See: Jecius v. Lithuania, No. 34578/97, § 93, ECHR 2000-IX.

[77] Patsuria vs Georgia, application # 30779/04, 6 November, 2007, Par. 62, see also: Jablonskiv. Poland, No. 33492/96, §80, 21 December 2000.

The court must demonstrate how it arrived at the conclusion that the reason for the extension of the term still exists. The reason for the extension of the term must be proportionate to the aim pursued by this extension. A detailed study of the circumstances of the case must not reveal that the extension of the detention results in a constitutionally unacceptable disproportion between the legitimate aim of detention and the provision of law; in this particular case – between its entire duration and its necessity. The court has a lot of other instruments at its disposal to ensure that an accused be brought before court, including the possibility of the repeated use of a detention measure against the accused at a later stage of the proceedings.[78]

Even though a well-founded assumption is a necessary prerequisite for the extension of the detention term, this may not be sufficient,[79] after a certain time, to justify the continued detention, because the allegation that an accused committed the crime may prove to be wrong,[80] the suspicion about the culpability of the accused may be dispelled, and instituting a criminal prosecution against him may established as inexpedient due to his family or his own health and so on and so forth. That's why the court shall, after a certain period, make sure that the restriction of freedom is necessary by examining other circumstances relevant to the case under consideration and convincingly corroborate the necessity of further the extension of the term of the accused's detention;[81] it must check whether investigative bodies conduct the investigation with "due diligence",[82] and how the detained person behaves. At the same time, while a suspect may validly be detained at the beginning of proceedings on the basis of a confession, it necessarily becomes less relevant with the passage of time, especially where no further evidence is uncovered in the course of the investigation.[83]

Unless a court takes a substantiated decision on the extension of the detention term based on a detailed study of the circumstances of the case, this procedure may turn into a mere injustice instead of guaranteeing protection from injustice and the defence of the rights of an accused.[84]

As already noted above, detention at the initial stage of the investigation may be justified only by the nature of the crime and the severity of the expected punishment, the necessity to institute criminal prosecution and to avoid a crime, and the absence

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[78] CRO-2007-3-012 a) Croatia / b) Constitutional Court / c) / d) 20-12-2007 / e) U-III-4286/2007 / f) / g) Narodne novine (Official Gazette), 1/08 / h) CODICES (Croatian, English).

[79] Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5). Interights, Руководство для юристов | Текущее издание по состоянию на сентябрь 2007 г., Council of Europe, 2008, 40.

[80] See: Brogan and Others v. United Kingdom, 29.11.1988, 11 E.H.R.R.117; Murray v. United Kingdom, 28.10.1994, 19 E.H.R.R, 193.

[81] See: Punzelt. the Czech Republic (Appl. No. 31315/96, 25.04.2000. para 73; v Germany [Appl. No. 2122/64, 27.06.1968].

[82] See, for instance, Scott v. Spain 18.12.1996, 24 E.H.R.R.391; Kemach v France, 27.11.1991, par. 45, 59.

[83] Labita v Italy, 159.

[84] Право на свободу и личную неприкосновенность европейские стандарты и российская практика. Под общ. ред. А. В. Деменевой. Екатеринобург, Урал ун-та, 2005, 29.

of a place of permanent residence.[85] However, none of the above circumstances are sufficient for prolonging the term of detention.[86] Automatic prolongation of a term of the arrest … only because of presumption determined by law based on gravity of a charge and a hypothetical risk of flight, commission of a new crime or agreement, is not consistent with the paragraph 3 of the Article 5 of the Convention.[87]

An assumption that the accused may go into hiding, which is based on schematic, scarce evidence, may be sufficient for the initial detention, but not after the possibility emerges to further support it with evidence. The states are charged with the obligation to seek additional evidence.[88]

The gravity of the accusation and the severity of the expected punishment do not in themselves justify the prolongation of detention, the state shall take a detailed examination and assessment of the "emerged circumstances" in order to legitimate the extension of detention. A mere repetition of the previously indicated grounds at later stages of the investigation will not justify the detention. Similarly, trite phrases like "the nature of crime attributed to an accused and the circumstances of the case", without indicating the concrete motives of the detention,[89] is insufficient for the substantiation of the extension of detention.

Such issues as the health of the accused, his having under-age dependants, the availability of alternative preventive measures, may also be important in deciding the lawfulness of detention.[90] As soon as the threat that the defendant can abscond, obstruct justice, endanger public order and security or commit a new crime is eliminated, the person must be immediately released. Therefore, the extension of the term is acceptable when there are essential reasons for the extension[91] and these reasons are related to the personality of the accused due to which the extension of detention may be unjustified even in relation to crimes falling under the categories of grave and extremely grave crimes.[92] It is not possible to specify the particular point at which further reasons will be necessary to justify the continued detention – each case must be assessed on its merits in order to determine the point at which the prosecution must show more than a reasonable suspicion that the accused committed the offence in question.[93]

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[85] Melnikova v. Russia 2007, ECHR Application #24552/02, 21.06.2007.

[86] Stögmuller v. Austria 10.11.1969, 1. E.H.R.R.155; Clooth v. Belgium Appl. No. 12718/87, 12.12.1991; Contrada v. Italy (Appl. No. 27143/95, 24.08. 1998; Jėčius v. Lithuania (Appl. No. 34578/97, 31.07.2000) and Barfuss v. the Czech Republic 01.07.2000, 34 E.H.R.R.37.

[87] Patsuria vs Georgia, application # 30779/04, 6 November 2007, Par. 67. Also see Nikolov v. Bulgaria, no.38884/97, § 70, 30/01/2003.

[88] Alexsandr Makarov v Russia 15217/07, 12.03.2009.

[89] See, for instance, Demirel v Turkey [Appl. No. 39324/98, 28.01.2003]. para 58.

[90] 21.06.2007 Applic. No. 24552/02.

[91] Decision 02-12-1998 of the Croatian Constitutional Court. T. Mamukelashvili, R. Tushuri, Decisions of Constitutional Courts of European States Concerning Fundamental Human Rights, Tbilisi, 2004.

[92] I.A. v. France, 23.09.1998; Letellier v. France 26.06.1991, 14 E.H.R.R.83.

[93] Право на свободу и личную неприкосновенность в рамках Европейской конвенции о защите прав человека (статья 5). Interights "Руководство для юристов. Текущее издание по состоянию на сентябрь 2007 г.", Council of Europe, 2008, 40.

Thus, the Georgian Constitution defines differentiated maximum terms for the deprivation of liberty [9 months, 48 hours, 24 hours], though it says nothing of the reasonability of the detention, which differs from the requirement of observing the maximum terms.[94] The CPC of Georgia repeats this provision, but does not fill the existing gap. The issue becomes more urgent due to the fact that although, by establishing neither the minimum term of detention nor the periodicity for reviewing detention, the new code envisages the introduction of higher standards in the process that imply the possibility for determining the individual term of detention based on the circumstances of the case. At the same time, it creates the possibility for the automatic use of detention for 60 days in any case. Even though the Strasbourg case law does not consider a two-month detention to be a violation, it emphasises the link between the length of the term and the issue of the conscientious performance of duties by investigative bodies and determines that it is unacceptable to restrict freedom for the purposes of facilitating an investigation, to apply detention for the entire term of the investigation, etc.

Thus, although the code determines the limits of the length of detention before the pre-trial hearing as well as the entire length of the proceeding, the above does not rule out the use of an unreasonable term of detention in the criminal proceeding on the grounds of its short length, as it is concrete circumstances of the case and not a mechanic length of the term that determines the reasonability of the term.

The new Code does not envisage a list of grounds for the continuation of detention and in contrast to the current Code does not set out all of the criteria for the extension of detention, such as the complexity of the case, the change of the degree of severity of charge, etc. At the same time, the prosecution is no longer formally obliged to substantiate the necessity for extending the detention and to prove that the investigation was conducted with due diligence by investigative bodies, as the code no longer provides for the extension of detention. Therefore, it no longer provides for such issue as which documents should serve as the basis for extension, how many days prior to the expiration date the court should consider the issue of the prolongation of detention or what procedure the court should apply.

Article 206.8 of the CPC of Georgia grants the defence the right to apply to court at any time with the request to change the detention, provided that the request is connected with new circumstances, which were not known at the time when the detention was applied. Accordingly, the code does not envisage any revision of the detention unless new circumstances are uncovered. The issue is further complicated as it is unclear what will be regarded as new circumstances by the court. In particular, it is unclear whether the court will mull over the issue of changing the punitive measure if new circumstances were found during the initial 15 days, when everyone was interrogated and all of the evidence obtained could potentially be blocked by the accused and within the following 15 days, an investigation into the case did not take place. A literal analysis of the article shows that the burden of proof for the detection of new circumstances rests with the defence whereas "habeas corpus implies that a

[94] See: Article 18 of the Constitution.

person who appeals with the request of control shall first submit prima facie evidence and a defendant authority, which bears the burden of proof, shall substantiate the legality of the decision on detention".[95]

The new code significantly decreases the length of detention as a punitive measure and by the deregulation of the initial minimal length of detention allows the subject conducting the proceeding to take into account the circumstances of the case and the personality of the defendant and to establish a proportional and fair term, but it does not determine the compulsory periodicity for reviewing the length of detention, thus enabling a court to use the detention for the entire period of the investigation. This conflicts with international standards and ECtHR case law. That's why it is of the utmost importance to introduce effective mechanisms for the monitoring of the terms of detention and to reasonably restrict the discretionary authority of the prosecution – to establish a reasonable periodicity for reviewing the terms of detention. Especially considering that the code envisages the extension of the investigation and the criminal prosecution even beyond the limits established under the code on the basis of a request from the accused to ensure the aims of a fair court trial.

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[95] Page 109.

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THE PRINCIPLE OF PROPER LEGISLATION IN THE REPUBLIC OF POLAND

Keywords: proper legislation, retroactivity of law, vacatio legis, vested rights, specificity of law, Poland.

Introduction

The principle of proper legislation is not directly recorded in the Polish Constitution, however it has been derived from the principle of a democratic legal state (Art. 2 of the Constitution of the Republic of Poland)[1]. The principle was included into the Polish Constitution pursuant to the December Novelization (1989)[2]. In an unchanged form – in terms of content – it was taken over by the Constitution of 1997. Therefore rich jurisprudence of the Constitutional Tribunal, which was developed on the background in the first half of the nineties, retains its relevance today. As the Constitutional Tribunal stated in its judgment of 25 November 1997, "the basic content of a democratic legal state as expressed in Art. 2 of the Constitution may and should be understood in the same way as the content of this principle was understood in the previous constitutional order"[3].

On the background of Art. 2 of the Constitution the Constitutional Tribunal developed a number of other constitutional principles. One of them is the principle of citizens' trust in the state and its laws[4]. It is a guarantee of legal security of citizens[5]. State authorities must treat citizens with a certain minimum of fairness (the principle of the state's loyalty to the citizen)[6]. In turn, the principle of citizens' trust in the state and its laws was the base for the Constitutional Tribunal to derive the principle of proper legislation. The order of rational law-making is functionally related to the principles of legal certainty and legal security and protection of trust in the state

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1 The Constitution of the Republic of Poland of 2nd April, 1997, *Journal of Laws,* No. 78, item 483 as amended. Available: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [viewed 14 July 2012].

2 Act of 29 December 1989 on Amendments to the Constitution of the People's Republic of Poland. *Journal of Laws,* No. 75, item 444). See: Ciemniewski J. Nowela konstytucyjna z 29 grudnia 1989 r. Przegląd Sejmowy, 2009, No. 3, pp. 32-36.

3 K 26/97, OTK 1997, No. 5-6, item 64.

4 See: Zalasiński T. Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego. Warszawa: Wydawnictwo Sejmowe, 2008, pp. 35-41.

5 Judgment of the Constitutional Tribunal of 30 October 2001, K 33/00, OTK 2001, No. 7, item 217.

6 Garlicki L. Polskie prawo konstytucyjne. Zarys wykładu. Warszawa: Liber, 2006, p. 62.

and law. The laws must be created in such a way as to ensure legal security of an individual[7].

The principle of good legislation means a system of closely related directives addressed to the legislator, showing how to make changes to the law in a legal state. The principle of citizens' trust in the state and its laws consists of a number of detailed rules. Under the principle of proper legislation the Constitutional Tribunal formulated the following principles of law-making: the prohibition of retroactive law, the order to maintain an appropriate vacatio legis, the principle of protection of vested rights and the principle of specificity of law.

In its later part the article will discuss the above mentioned principles, which constitute together the principle of proper legislation. In the article method of dogmatic interpretation was applied. Although reference to the principles of proper legislation very often appears in the jurisprudence of the Constitutional Tribunal, its content is not ultimately shaped[8].

Prohibition of retroactivity of law

The principle of lex retro non agit originated in the Roman law. As such, it is widely recognized in the legal systems of continental European countries. This rule applies only to regulations which aggravate the situation of recipients. There are no obstacles in establishing regulations that improve the situation[9].

Before the entry into force of the Constitution of 1997 no provision of the constitutional status formulated explicitly ban on retroactive laws. The Constitutional Tribunal developed it under the principle of a democratic legal state and the ensuing principle of proper legislation. In the Constitution of 1997, this principle is formulated directly – in relation to criminal law – in Art. 42 Section 1 of the Constitution. However, the judicature of the Constitutional Tribunal has not lost its validity on the prohibition of retroactivity issued under the principle of a democratic legal state.

In the judicature of the Constitutional Tribunal we can observe hesitation as to how to understand the discussed principle. Generally speaking, it refers to the inability to establish regulations binding legal consequences with legal events that took place in the past. From the prohibition of retroactivity it occurs that the law must be predictable. The recipient of a legal norm must be sure whether in a given situation he is complying or not complying with the laws of the time of the legal event.

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[7] Judgment of the Constitutional Tribunal of 25 June 2002, K 45/01, OTK 2002, No. 4A, item 46.

[8] Wronkowska S. Zasady przyzwoitej legislacji w orzecznictwie Trybunału Konstytucyjnego. In: Zubik M., ed. Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego. Warszawa: Biuro Trybunału Konstytucyjnego, 2006, p. 671.

[9] Garlicki L. Polskie prawo konstytucyjne. Zarys wykładu. Warszawa: Liber, 2006, p. 62.

Both in the judicature and the doctrine, there are narrow and broad definitions of the prohibition of retroactivity of law[10]. At the beginning of its activity the Constitutional Tribunal adopted a narrow interpretation of the retroactive effect, based on a purely formal criterion. In the judgment U 1/86[11] the Tribunal saw the essence of the prohibition of retroactivity in prohibition of the legal standards that would require the use of newly established legal standards to events that took place before the entry into force of the newly established legal standards with which the law does not yet entail legal consequences provided for these standards. If the legislator requires to qualify events which occurred before the entry into force of these standards by the new standards, we deal with the establishment of standards retroactively. The standard is not retroactive, if on its basis we should qualify events that occurred after its entry into force. In determining legal consequences of events that took place under the old standards, but they occur at a time when the new standard came into force should be – in accordance with the principle of lex retro non agit – the consequences of those should be determined on the basis of on the old standards, but only until the entry into force of new standards.

Two years later, in the jurisprudence of the Constitutional Tribunal appeared a substantive aspect of the prohibition of retroactivity (a broad understanding of the reverse operation of law). The Tribunal repeated that the principle of non-retroactivity means a ban on creating legal standards that would require use of newly established standards of law to events occurring before their entry into force with which the law has not yet entailed legal consequences (the principle of lex retro non agit in its proper sense). However, the Tribunal added that it should be also understood as prohibition of creating inter-temporal rules, which are to define the content of legal relations occurred under the rule of old standards and existing in the moment of entering into force of the newly created standards of law, if such rules cause negative consequences for the legal security and respect for acquired rights[12]. In this way, next to the formal criterion, the Tribunal also upheld the material aspect of the prohibition of retroactivity.

The principle of non-retroactivity is not absolute. As stated in Art. 5 of the Act of 20 July 2000 on the publication of normative acts and certain other legal acts[13] it is possible to give a retroactive effect to a normative act, if the rules of a democratic legal state do not stand in the way. Derogation from the principle of non-retroactivity should occur in an emergency situation and should be justified by special circumstances. It may connected with the need to give a particular priority to the implementation of other constitutional principles or values (e. g. the principle of social justice). The principle of non-retroactivity of law only applies to provisions that aggravate the situation of recipients (lex severior retro non agit)[14]. There are no obstacles in making regulations

[10] See: Pietrzykowski T. Podstawy prawa intertemporalnego. Zmiany przepisów a problemy stosowania prawa. Warszawa: LexisNexis, 2011, p. 38 et al.

[11] Judgment of the Constitutional Tribunal of 28 May 1986, OTK 1986, No. 1, item 2.

[12] Judgment of the Constitutional Tribunal of 30 November 1988, K 1/88, OTK 1988, No. 1, item 6.

[13] Uniform text: Journal of Laws of 2010, No. 17, item 95 as amended.

[14] Judgment of the Constitutional Tribunal of 24 July 1990, K 5/90, OTK 1990, No. 1, item 4.

that improve the situation. The Constitutional Tribunal stated that this principle does not preclude granting or extending rights retroactively. Also it is not breached when the retroactive change does not deprive or restrict the rights of citizens[15].

Prohibition of retroactivity is absolute only in criminal law, except for acts which, when committed, were criminal under international law (Art. 42 section 1 of the Constitution)[16]. A similarly great importance is attached by the Constitutional Tribunal to preserving the prohibition of retroactivity of the tax law. The Tribunal has formulated a particular ban on changing the tax law during the fiscal year[17].

Order to keep an appropriate *vacatio legis*

The order to keep an appropriate vacatio legis means that it must be appropriate in the sense that the recipients have time to adjust to the new regulations. It is crucial to properly define the terms "announcement" and "entry into force" of a normative act. Under this first term we understood "a complex, and also particularly important conventional function, involving announcing of this act (and not information about it) to the public in the form prescribed by the legal system, nowadays usually by publishing a given legislative measure in the official journal of laws"[18]. The entry into force of a normative act means that "from the moment (day, events) defined in the act, all whose actions are determined by the standards contained therein, are obliged to carry out, in particular – to apply standards of conduct formulated by the act"[19].

From the moment of constitutionalisation of the principle of democratic legal state in 1989, the Constitutional Tribunal saw in it an appropriate basis for vacatio legis. In the order of 13 February 1991 the Tribunal stated that there is a need to establish a general principle of separation of date of entry into force of a normative act from the date of its announcement as a suitable vacatio legis, which would be at least 14 days[20]. This position – supported by the doctrine[21] – retained relevance after the entry into force of the Constitution of 1997, which – as mentioned above – adopted the clause of a democratic legal state as it was.

Under the Law on Promulgation of normative acts, legislative measures containing provisions generally applicable, published in the official journals come into force

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[15] Judgment of the Constitutional Tribunal of 14 March 1995, K 13/94, OTK 1995, No. 1, item 6.

[16] See: Zalasiński T. Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego. Warszawa: Wydawnictwo Sejmowe, 2008, pp. 91-99.

[17] See: ibid., pp. 100-105; 177-180.

[18] Wronkowska S. Ustawa o ogłaszaniu aktów normatywnych i niektórych innych aktów prawnych. Przegląd Sejmowy, 2001, No. 5, p. 10.

[19] Działocha K. Article 88. In: Garlicki L., ed. Konstytucja Rzeczypospolitej Polskiej. Komentarz. Vol. 1. Warszawa: Wydawnictwo Sejmowe, 1999, pp. 3-4.

[20] W 3/90, OTK 1991, No. 1, item 27.

[21] See in particular: K Działocha K. Zasada ochrony praw nabytych w orzecznictwie TK. In: Banaszak B., ed. Prawa człowieka. Geneza, koncepcje, ochrona. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1993, p. 23.

after 14 days of their announcement, unless the act shall specify a longer period[22]. In justified cases normative acts may enter into force in less than 14 days. If, however, an important state interest requires an immediate entry into force of a normative act and the rules of a democratic legal state do not stand in the way, the effective date may be the day of its announcement in the official journal[23]. Provisions of the Law on Promulgation of normative acts are in line with the decisions, which – even before its entry into force – were taken by the Constitutional Tribunal. In some cases, a 14-day vacatio legis may be too short. Then, it does not meet the test of "appropriateness". It is especially the case in branches of law such as tax law or economic law[24].

The principle of protection of vested rights

The principle of protection of vested rights is closely connected with the principle of legal certainty (legal security), according to which new legislation should protect the acquired rights. Once obtained the right may not be withdrawn or adversely modified[25]. The principle of protection of vested rights protects individual rights of an individual against arbitrary action by public authorities[26]. It refers only to protection against actual loss, not lost profits. The principle of protection of vested rights protects in fact the so-called expectancies of vested rights. The subject of protection are only expectancies fully shaped, that is, those whose conditions are defined by law[27]. However, created in the act possibilities to grant certain rights, actual granting of whose is subject to additional terms and conditions, are not protected[28].

The protection refers to the rights acquired 'correctly', i.e. in accordance with the principle of social justice[29]. The protection does not apply to situations where rights have been obtained in an unfair way, inconsistent with the principles of justice. In this case the granted rights may be received by the legislature[30]. In addition, this rule does not apply if the acquired rights are not based on the constitutional order in force at the time of the statement[31].

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[22] Art. 4 section 1 of the Act.

[23] Art. 4 section 2 of the Act.

[24] See: Judgment of the Constitutional Tribunal of 23 March 2006, K 4/06, OTK 2006, No. 3A, item 32.

[25] Garlicki L. Polskie prawo konstytucyjne. Zarys wykładu. Warszawa: Liber, 2006, p. 63.

[26] Judgment of the Constitutional Tribunal of 23 May 2006, SK 51/05, OTK 2006, No. 5A, item 58.

[27] Pietrzykowski T. Podstawy prawa intertemporalnego. Zmiany przepisów a problemy stosowania prawa. Warszawa: LexisNexis, 2011, p. 116.

[28] Judgment of the Constitutional Tribunal of 17 October 2005, K 6/04, OTK 2005, No. 9A, item 100.

[29] Cf. Art. 2 of the Constitution of the Republic of Poland in fine.

[30] Judgment of the Constitutional Tribunal of 20 December 1999, K 4/99, OTK 1999, No. 7, item 165; cf. Lipowicz I. Polska wizja państwa prawa. Dylematy przebudowy państwa według reguł państwa prawa – aspekt publicznoprawny. In: Ulicka G., Wronkowska S., ed. Spory wokół teorii i praktyki państwa prawa. Warszawa: Wolters Kluwer, 2011, p. 73.

[31] Judgment of the Constitutional Tribunal of 10 April 2006, SK 30/04, OTK 2006, No. 4A, item 42.

The principle of protection of vested rights results in the order to create appropriate temporal rules (transitional provisions)[32]. This operation complies with the principle of protection of interests in the course[33]. The term "interests in the course" means financial and economic projects that were started under the previously applicable law and have not been completed at the time of changes to these provisions. In the absence of a decision of the legislator as to how to resolve inter-temporal problems, the rule of direct action of the new law is used.

According to the "Principles of Legislative Technique" in the transitional provisions we regulate the impact of the new law on the relations arising under the effect of existing law or laws. In the transitional provisions we decide in particular about 1) the way to end the pending proceedings (initiated during the term of existing rules and not completed until the end of its repeal), the efficiency of process steps performed and the authorities competent to complete the procedure and time limits for notification of the cases; 2) whether and to what extent remains temporarily in force legal institutions abolished by the new legislation; 3) whether the powers and responsibilities and competences which arose under the earlier repealed or repealed provisions are effective and whether the acts committed during the term of these rules are effective; these matters are only regulated in case you do not want to keep the generated powers, duties or competences or want to amend them, or if you want to consider the performed activities as ineffective; 4) whether and to what extent the new rules apply to the rights and obligations and to the above mentioned activities; 5) whether and to what extent remain in force regulations issued under current authorizing regulations.

The Constitutional Tribunal allows a departure from the protection of vested rights in the event of a situation of higher necessity. This is especially true of a crisis of public finance, which justifies the decision to freeze salaries, or the indexation of pensions[34].

The principle of specificity of law

A condition for the achievement of legal certainty is reasonable creation of legislation. This is achieved by the principle of specificity of law. It includes an order to create legislation in a clear and transparent and linguistically correct way. The requirement of clarity translates into a duty of establishing rules that are clear to their recipients, who can expect from a rational legislator creation of legal norms raising no doubts as to the content of the duties imposed and conferred rights. Precision associated with the clarity of the provision should be reflected in the specificity of imposed obligations and rights granted so that their content was clear and allowed to enforce them[35].

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[32] Pietrzykowski T. Podstawy prawa intertemporalnego. Zmiany przepisów a problemy stosowania prawa. Warszawa: LexisNexis, 2011, passim.

[33] See: Zalasiński T. Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego. Warszawa: Wydawnictwo Sejmowe, 2008, pp. 120-126.

[34] Judgment of the Constitutional Tribunal of 30 November 1993, K 18/92, OTK 1993, No. 1, item 41.

[35] Judgment of the Constitutional Tribunal of 21 April 2009, K 50/07, OTK 2009, No. 4A, item 1.

It is impossible to enact ambiguous laws, allowing for any interpretation which does not allow the citizen to foresee the legal consequences of his behaviour[36]. An individual must be assured that he/she will be able to adjust their conduct to the rules clearly defining the rights and freedoms, or – in other words – the legal consequences of their actions. Vague or imprecise wording of a legal rule creates uncertainty of the recipient as to the content of rights and responsibilities, especially when it grants to the authorities too much freedom (and even arbitrary) of interpretation[37].

The Constitutional Tribunal formulated three criteria for evaluating the correctness of provisions of law. First, each rule should be formulated so as to establish clearly who and what situation is restricted. Second, such a provision should be sufficiently precise as to have a uniform interpretation and application. Third, this provision should be presented in such a way so that its scope was limited to those situations in which acting rationally legislator intended to introduce regulation that restricts the use of constitutional rights and freedom[38].

The principle of specificity of provisions of law has an impact on the process of their use by public authorities. It requires the adoption of a uniform way to interpret the rules, especially by the courts. The creation of too broad framework for the authorities applying the law means that they replace the legislator with respect to these issues that are dealt with in a vague and imprecise way. The legislator cannot by vague formulation of the text of provisions leave the authorities which are to apply them excessive freedom in determining the practical range of subjective and objective limitations of constitutional freedoms and individual rights. This assumption can be described as the principle of specificity of statutory invasion of constitutional freedoms and rights of the individual[39].

The legislator cannot by vague formulation of the content of provisions leave the authorities which are to apply them excessive freedom in determining their subjective and objective scope. This assumption can be called a general principle of specificity of the statutory interference with the rights and obligations of recipients of legal norms. Exceeding a certain level of ambiguity of the provisions could be an intrinsic condition of stating their conflict with expressed in Art. 2 of the Constitution the rule of a legal state[40].

The principle of specificity plays a particularly important role in the area of criminal law[41]. Any law burdened with the sanction to the addressees of law must be formulated with due care and caution. Lawmakers must be guided by the desire to preserve the principle of citizens' trust in the state and its laws.

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[36] Judgment of the Constitutional Tribunal of 22 May 2002, K 6/02, OTK 2002, No. 3A, item 33.

[37] Judgment of the Constitutional Tribunal of 30 October 2001, K 33/00, OTK 2001, No. 7A, item 217.

[38] Judgment of the Constitutional Tribunal of 21 April 2009, K 50/07, OTK 2009, No. 4A, item 51.

[39] Judgment of the Constitutional Tribunal of 30 October 2001, K 33/00, OTK 2001, No. 7, item 217.

[40] Judgment of the Constitutional Tribunal of 21 April 2009, K 50/07, OTK 2009, No. 4A, item 51.

[41] Judgment of the Constitutional Tribunal of 3 November 2004, K 18/03, OTK 2004, No. 10A, item 103.

The principle of specificity of provisions of law requires the normative act to be duly announced. It is a condition of its entry into force (Art. 88 section 1 of the Constitution). Compulsory disclosure of normative acts did not appear in Poland in the constitution until the entry into force of the current constitution. Previously, it only resulted from the Act and was not of general nature. Nevertheless, since the early 90's the Constitutional Tribunal has recognized that the requirement arises from the principle of a democratic legal state and the derived from it the citizens' trust in state[42].

Conclusion

The principle of proper legislation was not recorded explicitly in the Polish Constitution. It was derived by the Constitutional Tribunal from the principle of a democratic legal state. It became basis for construction of other principles, especially the principle of non-retroactivity, the principle of appropriate vacatio legis, the principle of protection of vested rights and the principle of specificity of the law. Observing these rules determines the functioning of the rule of democratic state of law, which takes a prominent place in the legal system of the Polish Republic. It protects the individual against the omnipotence of state regulation in an arbitrary manner, without regard to constitutional safeguards. Therefore, the principle of proper legislation is the standard that should be respected in any democratic country.

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[42] Zalasiński T. Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego. Warszawa: Wydawnictwo Sejmowe, 2008, p. 151.

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Wronkowska S. Ustawa o ogłaszaniu aktów normatywnych i niektórych innych aktów prawnych. Przegląd Sejmowy, 2001, No. 5, pp. 9-24.

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Judgment of the Constitutional Tribunal of 14 March 1995, K 13/94, OTK 1995, No. 1, item 6.

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CRIMINAL LAW AND SANCTIONS

Keywords: criminal law, concept, punishment, system of punishment, sanction.

Reform I of the criminal law (including criminal punishment) was concluded on 1 April 1999, when the current Criminal Law[1] (hereinafter – also CL) came into force in Latvia. Even though at the time of drafting the Criminal Law, the considerable alterations in philosophy of punishment, most recent tendencies in humanisation and liberalisation of criminal punishment were taken into account, it must be borne in mind that CL took shape at a time, when massive impact of the Soviet criminal law still existed, there were no opportunities to examine criminal law of European countries and introduce major novelties in the law.[2] Even though after CL took effect relevant amendments have been made to CL, it is still believed that the criminal punishment policy implemented in Latvia is severe, which thereby criminalises the society.[3]

The adopted criminal punishment policy planning documents, in which opinions of the criminal law doctrine are summarised, practice of applying and executing compulsory measures of the criminal law, statistical materials, experience of foreign legislators, and international document provisions on humanisation and liberalisation of criminal punishment served as grounds in Latvia for the amendments in the Criminal Law and in other regulatory enactments linked to issues of criminal proceedings and of execution of punishment. One of such criminal punishment policy planning documents is the Decree No. 6 of 9 January 2009 of the Cabinet of Ministers "Concept of criminal punishment policy",[4] the implementation of which in practice allows concluding that the reform II of criminal law is now rapidly continuing in Latvia with the key objective, as pointed out by the drafters of CL, is to approximate the criminal law system to the system existing in other European Union countries, by abandoning the repressive systems of punishment employed during the Soviet times.[5]

The new reform is manifested in the need: (1) to reconsider the current system of punishment, bearing in mind that out of the six basic punishment types included

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1 Krimināllikums: LR likums [Criminal Law]. *Latvijas Vēstnesis*, 1998. g. 8. jūlijs, Nr. 199/200.

2 Opinion of Prof. U. Krastiņš about CL in the article: Luksa M. Sākta otra nozīmīgākā krimināl sodu reforma. Available: http://www.portalslv.lv/?menu=doc&id=238275 [viewed 4 June 2012].

3 Zahars V. Latvijas krimināl politika: retrospekcija un nākotnes vīzija. Daugavpils: DU Akadēmiskais apgāds "Saule," 2011, 16. lpp.

4 Par krimināl sodu politikas koncepciju: Ministru kabineta 2009. gada 9. janvāra rīkojums Nr. 6. [Decree No. 6 of 9 January 2009 of the Cabinet of Ministers "Concept of criminal punishment policy"] *Latvijas Vēstnesis*, 2009, 13 January, No. 6.

5 Laganovskis G. Krimināllikumu tuvina Eiropas Savienības sodu sistēmai. Available: http://www.lvportals.lv/?menu=doc&id=218925 [viewed 4 June 2012].

therein capital punishment may not be imposed during times of peace, custodial arrest was postponed until 1 January 2015, but confiscation of property was imposed infrequently, hence the basic punishment system established in CL functioned only partially; (2) to evaluate the conditions and effectiveness of applying punishment types; (3) to review the sanctions of CL Special Part sanctions, their relevance to the harmfulness of the committed criminal offence, to the conditions of committing the criminal offence, their mutual balance, etc., with the purpose of achieving the aim of punishment.

It must be pointed out that the legislator has never stopped working on improving the CL system of punishment. Even though in 2002, having evaluated the system of punishment in force, it was concluded that "all those types of punishment which realistically can be imposed are already introduced in CL" and that "it is infeasible to introduce something radically different in the field of criminal punishment",[6] on 12 February 2004, without due reason[7] CL was supplemented with a new basic punishment type – confiscation of property,[8] but on 8 December 2005, another additional punishment – a type of limitation of rights – was included in the system of additional punishment as a permanent type of punishment, namely, a prohibition to become a candidate in the Saeima (the Parliament), European Parliament, city council, county council, and parish council elections (Section 441).[9] This novelty as well was later criticised as inconsistent with principles of criminal law, and it should be excluded from CL.[10]

Improvement of the system of criminal punishment became topical after the adoption of the 2009 Concept of Criminal Punishment Policy (hereinafter – also "the concept"). With the law of 1 December 2011, capital punishment was excluded from the system of punishment; in Latvia it could be applied only for one crime only – a murder committed in especially aggravating circumstances, and if the crime is committed during the time of war.[11] In line with the Concept of Criminal Punishment Policy, considerable amendments were introduced in the system of punishment of the Criminal Law with the law of 16 June 2009,[12] for instance, by determining the

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[6] Koncepcija "Par izmaiņām sodu sistēmā": Ministru kabineta 2002. g. 20. jūnija rīkojums Nr. 337. [Concept "On changes in the system of punishment", Decree No. 337 of 20 June 2002 of the Cabinet of Ministers] *Latvijas Vēstnesis*, 2002, 20. jūlijs, Nr. 104.

[7] See more in: Reigase A. Jā vai ne – mantas konfiskācijai. [Yes or no to confiscation of property]. *Jurista Vārds,* 2004. g. 12. oktobros, Nr. 39, 10-11. lpp.

[8] Grozījumi Krimināllikumā [Amendments to the Criminal Law]: LR 2004. gada 12. februāra likums. *Latvijas Vēstnesis*, 2004. g. 3. marts, Nr. 34.

[9] Grozījumi Krimināllikumā [Amendments to the Criminal Law]: LR 2005. gada 8. decembra likums. *Latvijas Vēstnesis*, 2005. g. 22. decembris, Nr. 205.

[10] Krimināsodu politikas koncepcija (informatīvā daļa), 1.1.8. sadaļa: LR Ministru kabineta 2009. gada 9. janvāra rīkojums Nr. 6. [Concept of criminal punishment policy (informative part) Section 1.1.8: Decree of 9 January 2009 of the Cabinet of Ministers of the Republic of Latvia] Available: http://polis.mk.gov.lv/view.do?id=2891 [viewed 5 May 2012].

[11] Grozījumi Krimināllikumā [Amendments to the Criminal Law]: LR 2011. gada 1. decembra likums. *Latvijas Vēstnesis*, 2011. g. 20. decembris, Nr. 199.

[12] Grozījumi Krimināllikumā [Amendments to Criminal Law]: LR 2009. gada 16. jūnija likums. *Latvijas Vēstnesis*, 2009. 30. jūnijs, Nr. 100.

shortest term of deprivation of liberty at three months, by reducing the maximum time of custodial arrest to three months, by changing the wording of the punishment in form of a fine, by determining the restrictions of imposing a fine as an additional punishment (from 3 to 100 minimum monthly salaries), among others.

With the aim to ensure an opportunity to more effectively prevent the person having committed an offence from reoffending, to reinstate justice, to protect safety of society, etc., it is expected that the draft law "Amendments to the Criminal Law"[13] (hereinafter – also "the draft law"), at the basis of which approaches included in the Concept of Criminal Punishment Policy are also used, will exclude the basic punishment – confiscation of property (Section 42 of CL) – from the system of criminal punishment. Keeping custodial arrest as temporary compulsory imprisonment (Section 39 of CL) in the Criminal Law is debatable, because due to lack of financial resources, it will not be imposed until 1 January 2015. As indicated by the authors of the draft of amendments to the Criminal Law,[14] it has been decided to keep custodial arrest as a basic punishment in the system of punishment, by formulating it as a part of deprivation of liberty and referring to it as temporary deprivation of liberty, which can be 15 days to three months long in cases specifically stipulated in CL for criminal offences and crimes, for which deprivation of liberty is prescribed for a period that is not longer than five years. Or: the draft law envisages differentiating between the amount of a fine as a basic punishment according to the level of harm inflicted with the criminal offence and to the offender's property status (Section 41 of CL). Furthermore, significant amendments are to be introduced in the system of additional punishments: exclusion of the already mentioned additional punishment – prohibition to become a candidate in the Saeima, European Parliament, republic city council and county council elections (Section 441 of CL), and expansion of the application opportunities for the additional punishment – limitation of rights (Section 44 of CL); compulsory work can be determined also as an additional punishment (for duration of 40–100 hours) for persons, who have received suspended sentences (Section 40 of CL), thus starting to introduce combined punishment in Latvia. It has been suggested to introduce an additional punishment – replacing police supervision (Section 45 of CL) with a new additional punishment – probation supervision (Section 451 of CL) – for which due to financial considerations, a transitional period has been established (until 1 January 2015), however, for criminal offences against morals and for sex-offences (8 offences), probation supervision is applied already since 1 October 2011.[15]

The already introduced and expected amendments in the system of criminal punishments overall can be evaluated as timely and corresponding to the trends of

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[13] Likumprojekts "Grozījumi Krimināllikumā" [Draft law "Amendments to Criminal Law"] Available: http://titania.saema.lv [viewed 5 May 2012].

[14] Explanation of Director of Criminal Law Department of the Ministry of Justice I. Gratkovska in article: Luksa M. Sākta otra nozīmīgākā kriminālsodu reforma. [Second most important reform of criminal punishments has been started] Available: http://www.portalslv.lv/?menu=docU&id=238275 [viewed 6 June 2012].

[15] Grozījumi Krimināllikumā [Amendments to Criminal Law]: LR 2011. gada 8. jūlija likums. *Latvijas Vēstnesis*, 2011. g. 28. jūlijs, Nr. 117.

liberalisation of punishment, which will provide greater opportunities for courts and, in cases prescribed by the law, also for prosecutors to choose punishment that is best fit and more just for the offenders.

Punishment is inseparably linked to such function of the court as determining the punishment. Pursuant to CL, punishment for criminal offences is determined by the court in a judgment or, in cases determined in the law, by the prosecutor, by preparing an injunction on the punishment (Section 1(2) and (3) of CL). However, the conditions of determining the punishment are prescribed in Section 46 of CL (the legislator refers to them as general principles of determination of punishment). One of such conditions is the requirement to adjudge punishment to an extent as prescribed by the relevant article of the Special Part of CL, in other words – the punishment must be determined within the boundaries of the sanction.

A sanction (Lat. sanctio – punishment regulation) is explained as: (1) means of influence; (2) means of the state applied on violators of certain provisions and regulations; (3) a part of a legal provision, which includes means of influence of the state with regard to the violator of that provision.[16] Sanctions are divided into criminal, administrative, disciplinary, civil (property), among others.[17] In criminal law, a sanction is a part of the relevant article of the Special Part of CL in which the legislator has prescribed the type of punishment and its extent, which can be applied for committing the criminal offence described in the disposition.[18]

Any of the types of punishment included in the system of punishments can obtain its manifestation only through a sanction. However, a sanction can include only those types of punishment and to such extent as determined by the system of punishment. Therefore, amendments introduced in the system of punishment of CL and in regulation of separate types of punishment, and the expected novelties gain portrayal also in sanctions of articles of the Special Part of CL. For instance, exclusion of confiscation of property as a basic penalty from the system of punishment will cause changes in sanctions of ten sections and parts thereof, where this punishment is stipulated, but the exclusion of custodial arrest from the sanction or its replacement with temporary deprivation of liberty will affect about 30 % of sanctions of all CL sections and their parts.

In order to reach the objectives of punishment established in Section 35(2) of CL: to punish the offender for the criminal offence, as well as to achieve that the convicted person and other persons abide by the law and avoid getting involved in committing criminal offences the legislator must not only determine, which offences are criminal, but also must prescribe mutually balanced sanctions relevant for the level of harm inflicted through the offence and the offender's personality. It is believed that a

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[16] Enciklopēdiskā vārdnīca 2 sējumos. 2. sējums. Rīga: Latvijas Enciklopēdiju redakcija, 1991, 162. lpp.; Latviešu konversācijas vārdnīca, XIX. Rīga: Grāmatu apgādniecība A.Gulbis, 1939, 37548. sleja.

[17] Juridisko terminu vārdnīca. Rīga: Nordik, 1998, 233. lpp.

[18] See also: Judins A. Krimināltiesību terminu skaidrojošā vārdnīca. Rīga: RaKa, 1999, 147. lpp.; Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Vispārīgā daļa. Trešais papild. izdevums. Rīga: Tiesu namu aģentūra, 2008, 30. lpp.

sanction must be such that, on the one hand, the judges are not restricted with too narrow a framework, that there is sufficient choice of punishment, but, on the other hand, so that this choice is not too extensive, to avoid subjectivism, which originates, if the gap between the minimum and maximum limit is too broad.[19] It must be clear for the legislator, which sanctions must be included in CL to prevent unjustified increase or reduction of the punishment.

Even though due to the reform of criminal punishment, the question has become topical about the meaning, structure, and formation of sanctions, in the criminal law doctrine, it is recognised that there still is no complete understanding of how sanctions are formed.[20] In an analysis of CL, it is reasonably established that:

(1) by means of sanctions, CL is one of the severest laws in Europe;

(2) the main emphasis is placed on the punishment of deprivation of liberty;

(3) punishments of deprivation of liberty are envisaged longer than elsewhere in Europe.

Such regulation of the punishment of deprivation of liberty in the law does not encourage achievement of the aims of punishment. The courts sometimes avoid imposing strict punishment on the accused, and instead impose suspended sentence or other institutes of criminal law.

A reasonable suggestion has been included in the Concept and in the draft law, namely, in the sanctions to reduce the minimum and maximum limit for the punishment of deprivation of liberty for property criminal offences (theft, fraud, etc.), for criminal offences that do not endanger the life, health, sexual inviolability of a person, and similar. The punishment in sanctions for these crimes, which threaten the fundamental basis of persons, as well as for selling drugs, remains at the same level.

The Concept emphasises the need to assess the range of punishment prescribed in the sanction, i.e. the difference between the minimum and maximum limit of the punishment. With respect to this issue, legal writings do not present a uniform opinion – it is believed that this hap of the term of deprivation of liberty could be three years,[21] while others differentiate this gap depending on the severity of the committed criminal offence,[22] which, the author believes, is a more logical and better reasoned opinion.

When analysing the expected amendments in the CL sanctions, one must take into account an important principle, which is portrayed in Section 7(6) of the draft law, and it is borne in mind when forming sanctions: if CL envisages deprivation of liberty for a criminal offence for a period that does not exceed five years, then it must also stipulated a less severe type of punishment therein as well. In line with the

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[19] Энциклопедия уголовного права. Т.9. Назначение наказания. Санкт-Петербург: Изд. проф. Малинина-СПб ГКА, 2008, с. 190.

[20] Зубкова В.И. Уголовное наказание и его социальная роль: теория и практика. Москва: Изд. НОРМА, 2002, с. 203.

[21] Judins A. Par krimināls odu mēra precizēšanu. *Jurista Vārds,* 2000. g. 5. decembris, Nr. 38, 5. lpp.

[22] Непомнящая Т.В. Назначение уголовного наказания. Теория, практика, перспективы. Санкт-Петербург: Изд. Р.Асланова "Юридический центр Пресс," 2006, с. 126..

new classification of criminal offences envisaged in the draft, CL does not prescribe the punishment of deprivation of liberty for a criminal violation; it is envisaged to impose the punishment of deprivation of liberty for less serious crimes only if the objective of the punishment cannot be achieved with any of the less severe types of punishment envisaged in the sanction of the relevant section, thus, basically, community service, a fine, but only in special cases – deprivation of liberty – should be imposed for less severe crimes.[23] Owing to the reduced possibilities of imposing the punishment of deprivation of liberty stipulated in the draft law, upon it taking effect, the utilised capacity of places of imprisonment will be reduced on average by 30 %, and the average imposed term of a punishment of deprivation of liberty to be served at places of imprisonment will be reduced by two years (currently, it is six years, which corresponds to the average punishment of deprivation of liberty, which can be currently imposed pursuant to CL). However, for property criminal offences (which make up the greatest part of the convictions), the punishment of deprivation of liberty will be reduced on average by 40 %.[24]

The Concept of Criminal Punishment Policy has set forth a requirement to use alternative punishment even more extensively, because deprivation of liberty indeed is not the most suitable punishment for the committed criminal offence and for the offender's personality. Thus, the legislator must continue the formation of alternative sanctions. An alternative sanction is such sanction, which prescribes two or more types of basic punishment, moreover, for each type of punishment, its extent can be established within certain limits or only one punishment can be imposed.[25] In the doctrine, it is recognised that sanctions of this type enables the court: "(1) to choose that or another type of punishment; (2) to vary within the boundaries of the extent of the punishment; (3) to impose additional penalties. These types of sanctions are favourable for in-depth individualisation of the punishment and they allow to best consider the totality of all conditions to a case."[26] By recognising the importance of alternative sanctions in individualisation of penalties, discussions are raised with regard to the issue of the number of basic punishments to be included in a sanction. For instance, for prohibited entrepreneurial activity (Section 208 of CL), a person can be punished with deprivation of liberty or custodial arrest, or with confiscation of property, or with community service, or with a fine. This sanction includes all basic penalties included in the system of punishments. In the draft law, such sanctions will be rather frequent, because, as already mentioned, it is prescribed for less serious crimes to impose community service, a fine, and in exceptional cases – also deprivation of liberty. If formerly, the doctrine of criminal law recognised the benefit of including various types of punishment in the alternative sanction, because it allows

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[23] Gratkovska I., Zemzars U. Krimināls odu politikas aktualitātes. *Jurista Vārds,* 2011. g. 3. maijs, Nr. 18, p. 9.

[24] Luksa M. Sākta otra nozīmīgākā krimināls odu reforma. Available: http://www.portalslv.lv/?menu=doc& id=238275 [viewed 4 June 2012].

[25] Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Vispārīgā daļa. Trešais papild. izdevums. Rīga: Tiesu namu aģentūra, 2008, 31. lpp.

[26] Энциклопедия уголовного права. Т. 9. Назначение наказания. Санкт-Петербург: Изд. профессора Малинина-СПб ГКА, 2008, с. 200.

individualising the penalty, then at this time, such practice is doubted. It is pointed out that unlimited alternative sanctions give room for a rather subjective insight without the relevant lawful base. A punishment can be individualised also within the framework of a relatively definite[27] or an alternative sanction with a small number of types of punishment.[28] This stance is to be supported because extensive sanctions, at times, are formed as a compensation in cases when the constituent elements of a criminal offence is not precisely formulated,[29] when the legislator cannot determine the actual level of harmfulness of the criminal offence[30] etc.

Construction of sanctions is a difficult task and in legal writings, it is still discussed as to the criteria of their formation. In the author's opinion, when forming sanctions, the following must be assessed: (1) the object under threat – the more important is the threatened interest, the more severe punishment options must be envisaged in the sanction; (2) the level of harmfulness of the committed criminal offence; (3) manner of committing offence, and other conditions.

No longer the scope of punishment will be determined in the sanctions of the Special Part of the draft law for such punishment types as temporary deprivation of liberty and a fine, because Section 38(21) of the general part of CL already stipulates the term of applying this type of punishment of deprivation of liberty, while Section 41(2) stipulates the extent of imposing a fine for committing a criminal violation, a less serious and serious crime. Therefore, it is not necessary to repeat that scope in the sanctions. This practice is not an innovation, but the legislator has already used in the current Criminal Law, when forming sanctions including custodial arrest and community service.

In compliance with Section 46(1) of CL, when determining the punishment to an extent as prescribed by a relevant section of the Special Part of CL, envisaging accountability for the committed criminal offence, the provisions of the general part of this law must be observed prescribing a range of options for reducing or increasing the punishment prescribed in the sanction. Thus, in compliance with Section 49 of CL, the court can determine a less severe punishment for a person than prescribed in a sanction or can impose a suspended sentence (Section 55 of CL). The court can increase the punishment stipulated in the sanction by, for instance, adding to the basic punishment additional punishments that are not stipulated in the sanction – a fine (Section 41 of CL) or limitation of rights (Section 44 of CL), etc.

Hopefully, as the draft law takes effect, the amendments introduced in the system of criminal punishments, in certain types of punishments and sanctions will foster achievement of aims of punishments determined in the Criminal Law.

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[27] A relatively determined sanction determines one specific type of basic punishment and its scope (minimum or maximum limit or the maximum limit of the relevant punishment). Krastiņš U., Liholaja V., Niedre. A. Krimināltiesības. Vispārīgā daļa. Trešais papild. izdevums. Rīga: Tiesu namu aģentūra, 2008, 31. lpp.

[28] Зубкова В.И. Уголовное наказание и его социальная роль: теория и практика. Москва: НОРМА, 2002, с. 205-206.

[29] Judins A. Par kriminālsoda mēra precizēšanu. *Jurista Vārds,* 2000. g. 5. decembris, Nr. 38, 5. lpp.

[30] Hamkova D. Kriminālsodi starptautiskajos tiesību aktos. In: Aktuālas tiesību realizācijas problēmas. LU 69. konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2010, 365. lpp.

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Grozījumi Krimināllikumā [Amendments of Criminal Law]: LR 2009. g. 16. jūnija likums. *Latvijas Vēstnesis*, 2009. 30. jūnijs, Nr. 100.

Grozījumi Krimināllikumā [Amendments of Criminal Law]: LR 2011. g. 8. jūlija likums. *Latvijas Vēstnesis*, 2011. 28. jūlijs, Nr. 117.

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THE OMBUDSMAN AND THE SAEIMA: COOPERATION AND CONFLICTS, SOLUTIONS TO THEM FOR ENSURING THE QUALITY OF LEGAL ACT

Keywords: Ombudsman, Saeima, Constitutional Court, enforcement of Constitutional Court judgement.

Relevance of the topic

The establishment of the Ombudsman's institution in Latvia raised the hope in society that the Ombudsman would be actively involved and have a say in the legal life.[1] The practice showed that the Ombudsman's opinion was not always expressed or was not heard during events significant for the state. However, considering the rights granted to the Ombudsman by the legislator, he should be one of the most influential officials in the state. Inter alia, the Ombudsman can use various instruments to influence the content of a legal act. The cooperation between the Saeima [the Parliament] and the Ombudsman is possible during the legislation process in the Saeima. The Constitutional Court can solve the conflicts between the Saeima and the Ombudsman, if the parties are unable to reach a compromise.

Whether the Ombudsman uses the rights granted to him, including the ability to influence the content and validity of a legal act, first of all depends upon the Ombudsman himself. Perhaps more time is needed for the Ombudsman to become aware of the entire authorisation granted to him and the implementation mechanisms thereof. However, the cooperation between the Ombudsman and the Saeima can be evaluated already now, and both institutions can make corresponding conclusions and learn from mistakes.

Cooperation between the Ombudsman and the Saeima in the legislation procedure

The Ombudsman, in accordance with the objectives defined in the Ombudsman Law (Para 8, Section 12), has the right to provide the Saeima, the Cabinet, local governments or other institutions with recommendations in respect of the issuance

[1] Dreifelds J. Latvijā ombuds nepieciešams. *Diena*, 14.06.2001.; Dreifelds J. Par ombudsmeni pasaulē un Latvijas iespējām. *Jurista Vārds,* 27.04.200. Nr. 17, 04.05.2000. Nr. 18, 11.05.2000. Nr. 19, 18.05.2000. Nr. 20.

of or amendments to the legislation.[2] When the law "Amendments to the Rules of Procedure of the Saeima" was adopted on 15 May 2008 and the Section 95 of the Rules of Procedure of the Saeima were adopted, the Ombudsman was included into the circle of those subjects, who may submit proposals with regard to amendments to a draft law or a draft Saeima decision.[3] When the draft law "Amendments to the Saeima Rules of Procedure" were reviewed by the Saeima, Dz.Rasnačs, a representative of the Legal Affairs Committee, noted that "[i]nitiative with regard to this proposal came from the Chancellery of the President of the State. If we take a look back at the history of this proposal, then the Legal Affairs Committee agrees that the Ombudsman could be another subjects in addition to all previous ones – thus, the President of the State, Committees of the Saeima, factions, political blocks, the Prime Minister, the Deputy Prime Minister, etc., all of them are enumerated in the Rules of Procedure of the Saeima. Thus, the Ombudsman could also submit proposals regarding amendments to legislation."[4]

The accurate definition of the Ombudsman's rights to participate in the Saeima legislative procedure and express not only opinion and assessment, suggestions, but also concrete legislative proposals should be assessed positively. Thus the Ombudsman has the possibility to influence the content of a draft law, inter alia, to point to the incompatibility of legal provisions with the Satversme [Constitution] before the law is adopted and comes into force. It must be specified, however, that the Saeima Rules of Procedure grant to the Ombudsman the right to submit proposals, but not to submit draft laws. This, however, does not that mean nonexistence of legislative initiative, which is not a function typical of an ombudsman, would hinder the Ombudsman to fulfil the duties set for him. How actively is the Ombudsman involved in the legislative procedure – that is another question. The effectiveness of cooperation between the Saeima and the Ombudsman is also significant, i.e., the assessment of the proposals submitted by the Ombudsman to the Saeima. The Constitutional Court has pointed out in its judgement (criticising the Saeima") that the Saeima needs to cooperate with the Ombudsman, "the Saeima shall have the duty to assess, as carefully as possible, the suggestions submitted by the Ombudsman regarding the necessity to amend existing legal acts or to adopt new ones in respect to exercise, ensuring or protection of human rights. [..] It is not permissible that the Saeima commissions would fail to assess suggestions of the Ombudsman on their merits by alleging their non-compliance with requirements established in the Saeima Rules of Procedure in respect to draft laws and indicating that the suggestions do not mention the source of financial resources necessary to implement the suggestions."[5]

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[2] Tiesībsarga likums [Ombudsman's Law]: LR likums. *Latvijas Vēstnesis* Nr. 65 (3433), 25.04.2006.

[3] Grozījumi Saeimas kārtības rullī: LR Likums. *Latvijas Vēstnesis* Nr. 86 (3870), 04.06.2008. [Amendments to the Saeima Rules of Procedure].

[4] Latvijas Republikas 9. Saeimas pavasara sesijas astotā sēde 2008. gada 15. maijā [The eight sitting of spring session of the 9th Saeima of the Republic of Latvia on 15 May 2008]. Available: http://www.saeima.lv/steno/Saeima9/080515/st080515.htm#ss [viewed 10 May 2012].

[5] Par Aizturēto personu turēšanas kārtības likuma 7. panta piektās daļas 1. punkta vārdu "kuras augstums nepārsniedz 1,2 metrus" un pārejas noteikumu 1. punkta atbilstību Latvijas Republikas Satversmes 1. un 95. pantam: LR Satversmes tiesas 20.12.2010. spriedums lietā Nr. 2010-44-01, 14.1. p. [On Compliance of the Words of Section 7 (5) Indent 1 "the Height of Which Does not

An examination of the materials on the working of the Saeima reveals the way cooperation between the Saeima and the Ombudsman proceeds in submitting and examining proposals. Thus, for example, at the end of 2011 the Ombudsman was expressing his opinion in a more concrete and harsh way that the state should ensure legal assistance also during the Constitutional Court procedure.[6] On 15 December 2011the Ombudsman exercised his right to submit to the Legal Affairs Committee of the Saeima (received on 21 December 2001) proposals for the draft law "Amendments to the Law on State Legal Aid".[7] The proposal envisaged the right to receive state funded legal aid during the Constitutional Court procedure.[8] The Legal Affairs Committee, examining and criticising the Ombudsman's proposal, as well as underlining the Ombudsman's own rights in the process of constitutional control, rejected it.[9] Examination of, regrettably, publicly unavailable records from the meeting of the Saeima Legal Affairs Committee, does not lead to the conclusion that the proposals submitted by the Ombudsman were not evaluated as to the merit. It was pointed out that the state had limited financial resources, however, the committee members had conceptual objections against the proposals as such, disagreeing with the conclusions made by the Ombudsman.

The Ombudsman's right to submit proposals for amendments to a draft law or a draft decision of the Saeima does not mean that the Saeima will automatically accept all proposals submitted by the Ombudsman. Undeniably, in the legislation procedure the Saeima has to look for the "golden mean" frequently. On the other hand, ignoring the proposals submitted by the Ombudsman would be unwise. The Ombudsman, as we know, has been granted another right – the right to contest legal acts at the Constitutional Court.

Exceed 1.2 Meters" of the Law "On Procedures for Keeping of Detained Persons" and Para 1 of Transitional Provisions Thereof with Article 1 and Article 95 of the Satversme of the Republic of Latvia: Judgment of the RL Constitutional Court of 20.12.2010 in case No. 2010-44-01]. Available: http://www.satv.tiesa.gov.lv/upload/spriedums_2010_44_01.htm [viewed 23 April 2012].

6 Valsts nodrošinātās juridiskās palīdzības nepieciešamība vēršoties Satversmes tiesā un Eiropas Cilvēktiesību tiesā [The need for state legal aid when applying to the Constituional Court and the European Court of Rights]. Available: http://www.tiesibsargs.lv/lat/tiesibsargs/jaunumi/?doc=323 [viewed 27 April 2012].

7 LR tiesībsarga 2011. gada 15. decembra vēstule Nr. 1-8/24 [The Letter of the RL Ombudsman of 15 December 2011 No. 1-8/24]. Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/EE20661B0D2456E1C225796D002B1B89?OpenDocument [viewed 27 April 2012].

8 Grozījumi Valsts nodrošinātās juridiskās palīdzības likumā (Nr. 94/Lp 11). Likumprojekts [Amendments to the Law on State Legal Aid (No. 94/Lp 11). Draft Law.]. Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/CD2834894CBAF940C22579B1004FD083?OpenDocument [viewed 23 April 2012].

9 Compare the tables of proposals for the draft law before the second and third reading. Grozījumi Valsts nodrošinātās juridiskās palīdzības likumā (Nr. 94/Lp 11). Likumprojekts [Amendments to the Law on State Legal Aid [No. 94/Lp 11). Draft law.]. Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/CD2834894CBAF940C22579B1004FD083?OpenDocument and http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/01D74525C7DBB84FC22579E9004796A3?OpenDocument [viewed 27 April 2012].

The Ombudsman as the subject of constitutional control

The Ombudsman is the subject of abstract[10] constitutional control, with the right to apply to the Constitutional Court, subject to procedural restrictions. Para 8 of the first part of Section 17 of the Constitutional Court Law stipulates that the Ombudsman, has the right to turn to the Constitutional Court, if the authority or official, who has issued the disputed act, has not rectified the established deficiencies within the time period specified by the Ombudsman.[11] Para 8 of Section 13 of the Ombudsman Law contains a similar provision. Thus, the legislator has presumed that the Ombudsman will initially attempt to resolve disputes without the intervention of the Constitutional Court. If the cooperation has a negative outcome, the Ombudsman shall have the right to take a more radical action – turn to the Constitutional Court and, inter alia, contest the law adopted by the Saeima.

Applications submitted to the Constitutional Court

Thus far[12] only two Constitutional Court cases have been initiated on the basis of an application submitted by the Ombudsman. In one case the Constitutional Court recognised the contested provision as incompatible with the Satversme (the so-called "Ombudsman's first case"). In the other case court proceedings were terminated. Both cases – the judgement and the decision reflect the cooperation between the Saeima and the Ombudsman, and important procedural aspects in exercising the Ombudsman's right are analysed.

The decision on initiating a case, which contests the constitutionality of the social protection of the participants of the Chernobyl Nuclear clean-up and persons who suffered as a result of the Chernobyl Nuclear Power Station accident points out that "[t]he applicant on 13 November 2010 turned to the Saeima of the Republic of Latvia. The Ombudsman's letter to the Saeima points out legal arguments regarding the incompatibility of the contested provisions with the equality principle enshrined in the Satversme. The applicant requested the Saeima to amend the contested provision [..]. The applicant had set 1 March 2011 as the deadline for rectifying the identified

[10] The Ombudsman, submitting applications to the Constitutional court, acts in the interests of the whole society, not in the interests of a person. Thus, the Ombudsman's application will be abstract, with no need to prove the infringement to a person. Compare to: Par Kredītiestāžu likuma 59.2 panta, 59.3 panta, 59.4 panta, 117. panta ceturtās daļas 3. punkta, 173. panta ceturtās daļas un 185. panta pirmās prim daļas atbilstību Latvijas Republikas Satversmes 1., 90., 91., 92. un 105. pantam: LR Satversmes tiesas 30.03.2011. spriedums lietā Nr. 2010-60-01, 9. p. [On Compliance of Section 59.2, Section 59.3, Section 59.4, Section 117 (4) Indent 3, Section 173 (4) and Section 185 (1) Prim of the Credit Institutions Law with Article 1, Article 90, Article 91, Article 92 and Article 105 of the Satversme of the Republic of Latvia: Judgement of the RL Constitutional Court of 30.03.2011 in case No. 2010-60-01]. Available: http://www.satv.tiesa.gov.lv/upload/spriedums_2010-60-01.htm [viewed 23 April 2012]; see also: Rodiņa A. Konstitucionālās sūdzības teorija un prakse Latvijā. Rīga, *Latvijas Vēstnesis*, 2009, 32.-38. lpp.

[11] Grozījumi Satversmes tiesas likumā [Amendments to Constitutional Court Law]: LR Likums. *Latvijas Vēstnesis* Nr. 41 (3825), 13.03.2008.

[12] The article contains information that was available at the moment of preparing the article on 1 May 2012.

deficiencies."[13] The decision on terminating court proceedings in the aforementioned case concludes that "the Saeima did not answer to the aforementioned letter, neither did it start assessing the need to amend legal acts. [..] The documents included in the case materials do not reveal that the Saeima had assessed proposals submitted by the Ombudsman."[14] It is logical that after the Ombudsman was not heard or was ignored this case, the next step followed – submitting an application to the Constitutional Court.

In the first case, initiated on the basis of the Ombudsman's application, which examined the provisions of the Law on Procedures for Keeping Detained Persons, it was established that the Ombudsman had failed to abide with the procedural restrictions set in the law for submitting the application to the Constitutional Court. The Ombudsman "on 26 August 2009 submitted letter No. 6-8/774 [..] to the Speaker of [..] the Saeima of the Republic of Latvia. [..] The letter asked the Saeima to introduce amendments to Para 1 of the fifth part of Section 1 of the Law in Procedures for Keeping Detained Persons and to delete from the Law Para1 of the Transitional Provisions."[15] However, the Ombudsman, for incomprehensible reasons, had failed to indicate the deadline for rectifying these deficiencies. At the same time it is concluded that "The Defence, Internal Affairs and Corruption Prevention Committee has already examined the Applicant's [i.e. the Ombudsman's (author's note)] Letter and has decided not to propose an initiative regarding amendments to the respective Law. Thus, the Saeima has already expressed its opinion on this matter."[16] The Constitutional Court concluded that failure to indicate an official term for rectifying the deficiencies cannot be regarded as a circumstance prohibiting the Ombudsman to submit an application to the Constitutional Court, thus recognising the Ombudsman's rights to submit an application to the Constitutional Court also in this case.

"Legal Incapacity Case" – complete exhaustion of the Ombudsman's right?

The fact that the Ombudsman from the moment when this institution was established on 1 March 2007 (when Ombudsman R.Apsītis was appointed to the office for the first time) till 1 May 2012 has turned to the Constitutional Court only twice leads to the question, whether the Ombudsman fully exhausts the rights granted to him in this respect. To compare – the Estonian Chancellor of Justice has used the right

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[13] Par lietas ierosināšanu: LR Satversmes tiesas 4. Kolēģijas 13.06.2011. lēmums, 4. p. [On initiating a case; Decision of the 4th Panel of the RL Constitutional Court of 13.06.2011]. Available: http://www.satv.tiesa.gov.lv/upload/Leimums%20par%20lietas%20ierosin_Cernobila.htm [viewed 23 April 2012].

[14] Par tiesvedības izbeigšanu lietā Nr. 2011-12-01: LR Satversmes tiesas 1.03.2012. lēmums, 11. p. [On terminating court proceedings in case No. 2011-12-01. Decision of the RL Constitutional Court of 01.03.2012]. Available: http://www.satv.tiesa.gov.lv/upload/2011-12-01_Lem%20par%20tiesved%20izb.pdf [viewed 23 April 2012].

[15] Par lietas ierosināšanu: LR Satversmes tiesas 2. Kolēģijas 22.06.2010. lēmums, 4. p. [On initiating a case; Decision of the 2nd Panel of the RL Constitutional Court of 22.06.2010]. Available: http://www.satv.tiesa.gov.lv/upload/lem_ierosin_2010_44.htm [viewed 23 April 2012].

[16] Ibid.

to initiate control 4 times in 2010, once in 2009.[17] The examination of the materials of the so-called "legal incapacity case" shows that, perhaps, the Ombudsman has not always used the authorisation and possibilities granted to him in full scope[18].

On 28 April 2010 the Constitutional Court initiated a case, in which a natural person J.F. contested the compatibility of the provision of Section 358 of the Civil Law, to the extent it envisages setting restriction to legal capacity of only one type and scope, as well as Section 364, which envisages full recovery as the only criteria for restoring a person's legal capacity, to Article 96 of the Satversme.[19] The Ombudsman, like in a number of Constitutional Court cases, had the status of a summoned person in this case. After the Ombudsman was heard, the following conclusions were included into the Judgement in this case: "[a]lready in the frameworks of examination of 2008, the Ombudsman concluded that legal norms regulating the issue of legal capacity did not comply with the Satversme and international documents on human rights. Therefore, on 14 October 2008, a letter was sent to the Ministry of Justice requesting to introduce necessary amendments to the Civil Law and the Civil Procedure Law in respect to incapacitation of person and restoration of legal capacity of persons. In the reply of the Ministry of Justice, support to improve normative regulation was expressed."[20] Further on it is indicated that currently a representative of the Ombudsman office participated in working group established by the Ministry of Welfare, which had the task to assess the necessity to amend the institution of legal capacity and guardianship.

All activities of the Ombudsman are commendable, however, it is not clear what the reasons were – why the Ombudsman's findings of 2008 regarding incompatibilities with the Satversme, were not followed by the actions presumed by the legislator, i.e., turning to the Constitutional Court, complying with the procedural restrictions. Likewise, the relevance of this topic can be seen in the annual reports of the Ombudsman. The Ombudsman's Annual Report of 2008 points out that the rules on incapacitating a person and on restoring legal capacity do not comply with the Satversme and international human rights documents. "To point out the need to deal

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[17] 2009. Overview of the Chancellor of Justice's activities for the prevention of ill-treatment, P. 52. Available: http://oiguskantsler.ee/sites/default/files/overview_2009.pdf; 2010. Overview of the Chancellor of Justice's activities for the prevention of ill-treatment P. 75. Available: http://oiguskantsler.ee/sites/default/files/overview_2010.pdf [viewed 23 April 2012].

[18] Par Civillikuma 358. panta un 364. panta atbilstību Latvijas Republikas Satversmes 96. Pantam: LR Satversmes tiesas 27.12.2010. spriedums lietā Nr. 2010-38-01 [On Compliance of Section 358 and Section 364 of the Civil Law with Article 96 of the Satversme of the Republic of Latvia: Judgement of the RL Constitutional Court of 27.12.2010 in case No. 2010-38-01]. Available: http://www.satv.tiesa.gov.lv/upload/spriedums_2010-38-01.htm [viewed 23 April 2012].

[19] Par lietas ierosināšanu: LR Satversmes tiesas 1. Kolēģijas 28.04.2010. lēmums, 2. p. [On initiating a case; Decision of the 1st Panel of the RL Constitutional Court of 28.04.2010]. Available: http://www.satv.tiesa.gov.lv/upload/lem_ierosin_2010_38.htm [viewed 23 April 2012].

[20] Par Civillikuma 358. panta un 364. panta atbilstību Latvijas Republikas Satversmes 96. Pantam: LR Satversmes tiesas 27.12.2010. spriedums lietā Nr. 2010-38-01, 5. p. [On Compliance of Section 358 and Section 364 of the Civil Law with Article 96 of the Satversme of the Republic of Latvia: Judgement of the RL Constitutional Court of 27.12.2010 in case No. 2010-38-01]. Available: http://www.satv.tiesa.gov.lv/upload/spriedums_2010-38-01.htm [viewed 23 April 2012].

with these issues, the Ombudsman prepared opinion "On the Necessary Amendments to the Civil Law and the Civil Procedure Law with regard to incapacitating a person and restoring the legal capacity", which was submitted to relevant institutions."[21] In the Report the Ombudsman also promised to follow carefully "the progress in solving these issues and whether his recommendations are taken into consideration."[22] The examination of the aforementioned opinion, which was prepared on 14 October 2008, shows that the Ombudsman had, indeed, pointed to the legal provisions, which later were recognised as anti-constitutional in the Constitutional Court Judgement, as well as made proposals with regard to amendments to legal acts.[23] The Annual Report of 2009 makes a similar conclusion that the legal provisions that regulate the procedure for incapacitating a person and restoring capacity are anti-constitutional and that "[i]n order to solve this problem the Ombudsman has turned to the Ministry of Justice, requesting amendments to this provision. The Ministry of Justice has supported the need to introduce amendments to the Civil Law and the Civil Procedure Law in connection with these issues."[24] The Annual Report of 2010 contains similar conclusions to the ones made in the Constitutional Court Judgement "[..] about which the Ministry of Justice has been informed."[25]

These activities of the Ombudsman allow concluding that it would be wrong to assert that the Ombudsman did not attempt to solve this legal issue at all. However, it is doubtful, whether the Ombudsman chose the appropriate form and exhausted all legal possibilities granted to him by legal acts. The Ombudsman had the right not only to turn to the Ministry of Justice, but also to the Saeima, as the responsible legislative institution, to set deadlines for rectifying deficiencies, and, in case it were ignored, the Ombudsman would have been able to apply to the Constitutional Court.

Enforcement of the Constitutional Court judgement in "the incapacity case" – the legislator's responsibility

The enforcement of a court judgement, including a judgement by the Constitutional Court, is the foundation for the existence of any law-based state.[26] In general, the

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[21] Tiesībsarga 2008. gada ziņojums [Annual Report of the Ombudsman, 2008], 22. lpp. Available: http://www.tiesibsargs.lv/lat/publikacijas/gada_zinojumi/?doc=596 [viewed 23 April 2012].

[22] Ibid.

[23] Par nepieciešamajām izmaiņām Civillikumā un Civilprocesa likumā attiecībā uz personas rīcībnespējas atzīšanu un rīcībspējas atjaunošanu [On necessary amendments to the Civil Law and the Civil Procedure Law with regard to incapacitating a person and restoring the capacity]. Available: http://www.tiesibsargs.lv/lat/petijumi_un_viedokli/viedokli/?doc=403&underline=r%C4%ABc%C4%ABbnesp%C4%93j [viewed 23 April 2012].

[24] Tiesībsarga 2009. gada ziņojums [Annual Report of the Ombudsman, 2009], 24. lpp. Available: http://www.tiesibsargs.lv/lat/publikacijas/gada_zinojumi/?doc=625 [viewed 23 April 2012].

[25] Tiesībsarga 2010. Gada ziņojums [Annual Report of the Ombudsman, 2010], 35. lpp. Available: http://www.tiesibsargs.lv/lat/publikacijas/gada_zinojumi/ [viewed 23 April 2012].

[26] Compare: Par likuma "Par zemes reformu Latvijas Republikas pilsētās" pārejas noteikumu 7. punkta, ciktāl tas attiecas uz zemi zem daudzdzīvokļu mājām, un likuma "Par valsts un pašvaldību dzīvojamo māju privatizāciju" pārejas noteikumu 40.punkta atbilstību Latvijas Republikas Satversmes 1. un 105. pantam: LR Satversmes tiesas 27.01.2011. spriedums Lietā Nr. 2010-22-01, 8. p. [On

Constitutional Court judgements, even though sometimes being financially difficult to implement, have always been enforced and observed in Latvia. However, the aforementioned "legal incapacity case" has to be mentioned as a rare exception, when the Constitutional Court judgement was not enforced within the term indicated for it.

The Constitutional Court in the case No. 2010-38-01 recognised the contested provisions incompatible with Article 96 of the Satversme.[27] Being aware of the consequences, which could arise, if the contested provisions were removed from the legal space, the Constitutional Court concluded "[..] that immediate cancellation of the Contested Norm would not solve the existing problems and would even cause inadmissible gap in the national legal regulatory framework. [..]in order to improve legal regulatory framework in accordance with the above mentioned principles, the duty of the State is not only to introduce necessary changes in material and procedural norms, but also to provide material and institutional basis for successful functioning of such system, to ensure appropriate training of judges and other persons applying particular legal norms, and to perform all other necessary measures. The Constitutional Court takes into account the fact that performance of respective measures requires reasonable time period."[28] Thus, it was decreed that legal provisions recognised as being incompatible with Article 96 of the Satversme should lose their legal power from 1 January 2012 (*ex nunc*).

Regretfully, the legislator failed to implement the Judgement of the Constitutional Court within a year, and the amendments to the necessary legal acts, defining a new model for incapacitation, inter alia, envisaging partial incapacity, were not drafted. The publicly accessible information shows that the Cabinet of Ministers submitted the draft law package (Amendments to the Civil Law, Amendments to the Civil Procedure Law and Amendments to the Law on Custody Court) belatedly.[29] I. Čepāne, the head of the Saeima Legal Affairs Committee, pointed out that "[t]he Cabinet of Ministers was, in due time, given the task to align this issue, unfortunately, the Cabinet of Ministers submitted a package of draft laws only on 15 November 2011. [..] It has lead to the current situation – there is no legal mechanism Latvia for

Compliance of Para 7 of Transitional Provisions of the Law "On Land Reform in Cities of Latvia", to the extent it refers to land beneath apartment houses, and Para 40 of Transitional Provisions of the law "On Privatisation of State and Local Government Houses" with Article 1 and 105 of the Satversme of the Republic of Latvia: Judgement of the RL Constitutional Court of 27.01.2011 in case No. 2010-22-01]. Available: http://www.satv.tiesa.gov.lv/upload/spriedums_2010_22_01.htm [viewed 10 May 2012].

[27] Par Civillikuma 358. panta un 364. panta atbilstību Latvijas Republikas Satversmes 96. pantam: LR Satversmes tiesas 27.12.2010. spriedums lietā Nr. 2010-38-01 [On Compliance of Section 358 and Section 364 of the Civil Law with Article 96 of the Satversme of the Republic of Latvia: Judgement of the RL Constitutional Court of 27.12.2010 in case No. 2010-38-01]. Available: http://www.satv.tiesa.gov.lv/upload/spriedums_2010-38-01.htm [viewed 23 April 2012].

[28] Ibid., 14. p.

[29] Likumprojekta Grozījumi likumā "Par atjaunotā Latvijas Republikas 1937. gada Civillikuma ģimenes tiesību daļas spēkā stāšanās laiku un kārtību" Anotācija [Draft Amendments to the Law "On the Time and Procedure for Coming into Force of the Chapter on Family Law of Restored Civil Law of the Republic of Latvia from 1937." Annotation]. Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/5BD51B97A0A50044C22579900044F3B1?OpenDocument#b [viewed 10 May 2012].

restricting a person's legal capacity, and, consequently, a temporary regulations must be adopted with regard to the situation that has evolved."[30] "Temporary solution" was the elaboration of a draft law "Amendments to the Law "On the Time and Procedure for Coming into Force of the Chapter on Family Law of the Restored Civil Law of the Republic of Latvia from 1937", its aim was to deal with the temporary situation until all necessary amendments to laws came into force. The Saeima in its sitting of 26 January 2012 recognised this draft law as urgent, because "[..] this problem demands urgent solution".[31] During the sitting of 2 February 2010 the draft law "On the Time and Procedure for Coming into Force of the Chapter on Family Law of the Restored Civil Law of the Republic of Latvia from 1937" was adopted in the second – the last reading, and it came into force on 13 February 2012.[32] I. Čepāne, the head of the Legal Affairs Committee, once again explained during the Saeima sitting the urgent need to adopt this law, pointing out that "[..] this draft law ... thus, amendments to this law ... were needed in connection with the Constitutional Court Judgement, which envisaged that starting with 1 January of this year several Civil Law provisions relating to the legal capacity of persons become invalid."[33]

One can agree entirely to the statement made by the head of the Legal Affairs Committee I. Čepāne that "[t]is was, indeed, such an extraordinary situation."[34] It seems that this was the first occasion in Latvia, when the legislator failed to enforce a Constitutional Court judgement within the set term. Consequences – longer than a month the state had no valid legal regulation, establishing the mechanism for establishing and terminating of the legal incapacity institution. This time one must also agree entirely to the assessment of the legislator's passivity made by Ombudsman J. Jansons, that "the existing situation is a manifest procrastination by the legislator, which must be assessed as irresponsibility. [..] At the same time this is also a negative signal to the international community, showing that the legislator does not abide by the Constitutional Court Judgement and reveals the understanding of the rule of law in Latvia among politicians."[35]

Thus, "the legal incapacity case" reflects the shortcomings not only in the work of the Ombudsman, but also of the Saeima, proving that passive actions or lack of any action expected by the state may lead to legal consequences.

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[30] Latvijas Republikas 11. Saeimas ziemas sesijas trešā sēde 2012. gada 26. janvārī [The third sitting in the winter session of the 11th Saeima of the Republic of Latvia on 26 January 2012]. Available: http://www.saeima.lv/lv/transcripts/view/103#LP0192_010 [viewed 24 April 2012].

[31] Ibid.

[32] Grozījums likumā "Par atjaunotā Latvijas Republikas 1937. gada Civillikuma ģimenes tiesību daļas spēkā stāšanās laiku un kārtību" [Amendments to the Law "On the Time and Procedure for Coming into Force of the Chapter on Family Law of the Restored Civil Law of the Republic of Latvia from 1937]: LR Likums. *Latvijas Vēstnesis* Nr. 24 (4627), 10.02.2012.

[33] Latvijas Republikas 11. Saeimas ziemas sesijas piektā sēde 2012. gada 2. februārī [The fifth sitting in the winter session of the 11th Saeima of the Republic of Latvia on 2 February 2012]. Available: http://saeima.lv/lv/transcripts/view/105#LP0192_286 [viewed 24 April 2012].

[34] Ibid.

[35] Saeima demonstrē tiesisko nihilismu rīcībnespējas jautājumā [The Saeima demonstrates legal nihilism regarding the issue of legal incapacity]. Available: http://www.tiesibsargs.lv/lat/tiesibsargs/jaunumi/?doc=355&ins_print [viewed 10 May 2012].

Conclusion

1. The cooperation between the Ombudsman and the Saeima may serve as the basis for adoption of qualitative laws – i.e., compatible with the Satversme. In view of the significance and tasks of the Ombudsman's institution, it is inadmissible to ignore his proposals and leave them unexamined.
2. Failing to reach a compromise in the legislative process, the Ombudsman has the right to turn to the Constitutional Court and contest the law adopted by the Saeima.
3. The fact that only two Constitutional Court cases have been initiated on the basis of the Ombudsman's application leads to considerations, whether the Ombudsman's rights to initiate constitutional court are fully exhausted.
4. The materials of the so-called "legal incapacity case" (No. 2010-38-01), heard by Constitutional Court, as well as the Ombudsman's annual reports show that the Ombudsman, in dealing with the legal incapacity issue, did not act in the way envisaged by the legislator. The Ombudsman concluded already in 2008 that the Civil Law provisions were incompatible with the Satversme and international agreements; however, an application to the Constitutional Court was not submitted. The Ombudsman had the right to turn not only to the Ministry of Justice, but also to the Saeima as the responsible legislative institution, setting a deadline for rectifying the deficiencies, in case this were ignored, the Ombudsman would have had the possibility to turn to the Constitutional Court.
5. The enforcement of a court judgement is the foundation for the existence of any law-based state. In general, the Constitutional Court judgements, even though sometimes being financially difficult to implement, have always been enforced and observed in Latvia. However, the aforementioned "legal incapacity case" (No.2010-38-01) has to be mentioned as a rare exception, when the Constitutional Court judgement was not enforcement within the term set for it. Even though a temporary solution was found, for longer than a month the state had no legal regulation envisaging a mechanism for establishing and terminating the legal incapacity institution.

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SUBSIDIARITY IN PARLIAMENT, OR HOW TO IMPLEMENT THE EUROPEAN CONVENTION ON HUMAN RIGHTS AT THE LEGISLATIVE LEVEL

Keywords: European Convention on Human Rights; European Court of Human Rights; principle of subsidiarity; Parliament; legislative power; erga omnes effect; principle of legality; accessibility; foreseeability; positive obligations; procedural obligations; differential diagnosis.

The European Convention on Human Rights (hereinafter referred as to the "Convention"), the most efficient human rights instrument in the post-war world, has been ratified by almost all the European States, on which it is legally binding. The whole efficiency of the Convention rests on the existence of a mechanism of individual applications before the European Court of Human Rights in Strasbourg (hereinafter referred as to the "Court" or the "ECHR"), which is judicial in nature and the judgments of which are binding on the respondent Governments. The Convention entered into force with respect to Latvia on 27 June 1997, and the temporal jurisdiction of the Court over Latvia exists since that date.

As the Court itself has repeatedly emphasised in its case-law, one of the cornerstones of the whole Convention system is the principle of **subsidiarity**.[1] Although not expressly mentioned by name anywhere in the Convention, it transpires from its very logic and corresponds to the will of the "Founding Fathers" of the Convention as reflected in its *travaux préparatoires*. In the context of the Convention the principle of subsidiarity has several facets, but it basically means one thing: that **the primary task in implementing the Convention lies with the Contracting States themselves, not with the Court**. As far back as 1968, in the "Belgian linguistic" case, the Court ruled as follows:

"In attempting to find out in a given case, whether or not there has been [a violation of the provision relied upon], the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting

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[1] All opinions expressed in this article are strictly personal.
See, among the latest judgments, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], No. 13279/05, § 84, judgment of 20 October 2011. On the principle of subsidiarity in the case-law of the ECHR, see Villiger M. The principle of subsidiarity in the European Convention on Human Rights. In: Kohen M.G. (ed.) Promoting justice, human rights and conflict resolution through international law: Liber amicorum Lucius Caflisch. Leiden: Martinus Nijhoff, 2007, pp. 623-637, and Rudevskis J. L'application du principe de subsidiarité par les Cours européennes de Luxembourg et de Strasbourg: une comparaison générale. In: Baltic Yearbook of International Law, Vol. 4, 2004, pp. 129-166.

Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention."[2]

The latest High Level Conference on the Future of the ECHR, held at Brighton in April 2012, has repeatedly emphasised the importance of the principle of subsidiarity, even recommending that it be included in the Preamble to the Convention.[3] Only when – and insofar as – the State has failed to comply with the Convention obligations, can the Court intervene. According to Article 46 § 1 of the Convention, the Court's judgments have binding force on the States against which they are made.

The Convention binds the State as a whole, which means all three branches of government: the legislative, the executive and the judiciary. Many things have already been written about the interaction between the Strasbourg Court and the domestic courts. As to this short contribution, its purpose is to examine the same issue from the point of view of the legislative branch, i.e., a national Parliament.

One of the most pertinent questions in this respect is how the legislator should act *a posteriori*, when the ECHR has already found a violation of the Convention by the State. Members of national Parliaments sometimes feel confused about what they should do in order to comply with an ECHR judgment and how far they should go in implementing the general measures requested by it. However, given the lack of time and space, we shall concentrate upon another, more complicated key question: **how should laws be drafted in order to avoid a conviction of the State by the ECHR?**

The powers of the Court and the authority of its judgments

We should first clarify the nature of the Court's powers and the exact legal force of its judgments. In recent years there have been numerous bold scholarly attempts to overcome the so-called "obsolete and formalistic internationalist paradigm" and to assimilate the ECHR to a supranational constitutional court with powers similar to a national constitutional court of a federal state.[4] However, this approach seems to

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[2] Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), judgment of 23 July 1968, *The Law*, §10, Series A, No. 6.

[3] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 19 and 20 April 2012, paras. 11, 12 and 29. Available: http://www.coe.int/en/20120419-brighton-declaration [viewed 1 July 2012].

[4] Wildhaber L. A constitutional future for the European Court of Human Rights? In: Human Rights Law Journal, Vol. 23, No. 5-7, 30 October 2002, pp. 161-165; Harmsen R. The European Court of Human Rights as a "constitutional court": definitional debates and the dynamics of reform. In: Morison J., McEvoy K., Anthony G. (ed.) Judges, transition, and human rights. Oxford, New York: Oxford University Press, 2007, pp. 33-53.

be discarded by the latest case-law of this same ECHR.[5] Of course, it is legitimate to say that the ECHR is a "constitutional" court in a symbolic meaning, to the extent that its case-law shapes the common European understanding of fundamental rights. However, as soon as we start examining the limits of the Court's jurisdiction, the comparison with a constitutional court becomes flawed. First, in the Westphalian system, the sovereign States (and their authorities) are the source of primary sovereign power, and therefore they remain the main actors in public international law. The remaining actors (such as international organisations and their bodies, including the ECHR) operate only by delegation: their powers, competences and legitimacy are delegated by States and derived from them. Therefore the powers of an international court, such as the ECHR, are intrinsically limited to what the Contracting States have entrusted to it by their sovereign will. The Court's jurisdiction is thus expressly limited by Article 19 of the Convention, according to which its sole purpose is "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". Unlike a domestic constitutional court, the ECHR cannot rely, e.g., on some general principles of law in order to invent a substantially[6] new fundamental right and to impose it upon the Contracting States; such a step would constitute an *ultra vires* act and be presumptively invalid. Second, in the absence of powers to intervene *directly* in the legal systems of the Contracting States, – again, unlike a constitutional court – the ECHR must respect the autonomy of those legal systems (even more so than the Court of Justice of the European Union, which intervenes to a greater extent on account of the system of preliminary rulings).

The second important issue is the legal effect of the Court's judgments. Here it is very important to stress that according to Article 46 of the Convention, **a judgment of the ECHR does not have a formal erga omnes effect. It has the authority of a res judicata and therefore is binding only on the State against which it is delivered.** Of course, the judgments of all superior courts always have a *de facto erga omnes* effect insofar as the lower courts abide by their case-law; if they did not, they would be reversed over and over again. The same is true for the ECHR: if one State has been convicted for violation of a Convention right, other States will often preventively amend their own legislation in order to avoid similar judgments against themselves. This *de facto erga omnes* effect is nevertheless limited by its voluntary nature; moreover, when the ECHR takes a stance on a particular legal issue, it is almost always taken within the context of the specific case and against the background of the specific legal system. Only rarely does the Court pronounce an abstract ruling that may be directly applied in the domestic legal systems of all the Contracting States; such was, for example, the case of *Selmouni v. France*[7] in which the Court gave a definition of "torture" as per Article 3 of the Convention.[8] Therefore other States can often argue

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5 See, e.g.: Lautsi v. Italy [GC], No. 30814/06, § 68, judgment of 18 March 2011.

6 "Substantively" is meant here as opposed to "merely accidental", within the meaning of the classical Aristotelian philosophy.

7 Selmouni v. France [GC], No. 25803/94, §§ 95-101, judgment of 28 July 1999.

8 Zupančič B. M. On the interpretation of legal precedents and of the judgments of the European Court of Human Rights. In: The Owl of Minerva: Essays on Human Rights. Utrecht: Eleven International Publishing, 2008, pp. 351-392 [Ch. 12].

that the previously established precedent simply does not apply to them because of some substantial differences.

Technically speaking, the problem is that in such cases the reasoning of the national legislator tends to be lateral (i.e., analogical) rather than vertical (i.e., syllogistic). It proceeds to finding a common major premise to the precedent of the ECHR and a hypothetical domestic (e.g., Latvian) case; however, the analogical reasoning permits to vary the remoteness and the precision of the major premise according to the wishes of that same legislator.[9]

The principle of legality

Now let us go to the core of the first of our two main questions. Among the very basic principles upon which the whole Convention system is built, the principle of **legality** occupies a prominent place. This is more or less self-explanatory: the Convention enshrines the fundamental values of a democratic society, of which the rule of law is a necessary and substantial component.

The nearly identical wording of the second paragraphs of Articles 8 to 11 requires every interference with the respective rights to be "in accordance with the law" (Article 8) or "prescribed by law" (Articles 9 to 11). Article 7 § 1 of the Convention, which incorporates the principle of legality in criminal law (*nullum crimen, nulla poena sine lege*) prohibits criminal punishment for "any act or omission which did not constitute a criminal offence under national or international law". According to Article 1 of the First Protocol to the Convention, "[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law". However, the application of the principle of legality is not limited to these provisions which expressly mention a "law". Thus, the Court has recognised that the right of access to a court as one of the multiple facets of the right to a fair trial as per Article 6 § 1 of the Convention is not absolute and may be subject to limitations; however, these limitations must be prescribed by a law of a certain quality.[10] The concept of "law" is fairly uniform throughout the Convention.[11]

When Parliament adopts a law which is likely to interfere with the free exercise of Convention rights, the mere existence of this law is not sufficient to make the eventual interferences "legal"; it also has to satisfy a series of minimum quality requirements. Actually there are two basic requirements: in order to be "legal", a "law" must be accessible and foreseeable.

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[9] As to the same logic, but with the reverse result, for the domestic courts, see: Zupančič B.M., op.cit., footnote 73 at p. 381.

[10] See, e.g.: Liakopoulou v. Greece, No. 20627/04, § 20, judgment of 24 May 2006.

[11] With respect to Articles 5 § 1 and 7 § 1. See, e.g.: Kafkaris v. Greece, No. 21906/04, §§ 116 and 139, judgment of 12 February 2008.

First, the law must be **accessible**. This criterion is the simplest: the law must be objectively accessible to the persons concerned, and in the case of legislative acts this aim is achieved by an official publication thereof.[12]

The second requirement flowing from the expression "prescribed by law" is **foreseeability**. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed.[13]

There are at least three specific facets of foreseeability as defined above. First, the law must be **generally consistent with the constitutional system** of the State concerned. As, by virtue of the same principle of subsidiarity, it is primarily for the national authorities to interpret and apply domestic law, the ECHR will invoke this condition only in very exceptional cases, where the action of the legislator has been grossly and obviously arbitrary.[14] Second, the law must be **generally applicable**; only in exceptional circumstances can the Court accept an act of Parliament targeted at concretely identified persons.[15] Third, a rule is "foreseeable" when it affords a measure of **protection against arbitrary interferences** by the public authorities.[16] If the law affecting the exercise of a Convention right delegates the decision-making power to an administrative or judicial authority (as it usually does), then the exercise of this power cannot be left to a general discretion of this authority. On the contrary, the law must set out precise decision-making criteria and procedural rules. Thus, in *Lavents v. Latvia*, the Court found that a provision of the Code of Criminal Procedure allowing a judge to seize and to open the correspondence of the accused in a criminal trial without setting any criteria for the necessity of such measure or any time-limits, did not fulfil the "legality" requirement.[17]

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[12] Silver v. the United Kingdom, judgment of 25 March 1983, §§ 87-88, Series A No. 61.

[13] See, e.g.: Centro Europa 7 S.R.L. and Di Stefano v. Italy [GC], No. 38433/09, § 141-142, judgment of 7 June 2012, with numreous further references.

[14] Kruslin v. France, 24 April 1990, § 29, Series A No. 176-A.

[15] The Former King of Greece and Others v. Greece [GC], No. 25701/94, §§ 80-82, judgment of 22 November 2000.

[16] See, e.g.: Tourancheau and July v. France, No. 53886/00, § 54, 24 November 2005.

[17] Lavents v. Latvia, No. 58442/00, § 136, judgment of 28 November 2002.

Positive and procedural obligations

The classical conception of fundamental rights is that it imposes on the State a duty not to interfere with the exercise of those rights (i.e., a negative obligation). However, this view is too often inadequate to secure the effective exercise of human rights. Therefore the Court's case law has gradually developed a doctrine of **positive obligations**. There is currently no general theory of positive obligations, and the Court considers the question in relation to each particular right. First developed as a "supplement" to the negative obligations contained in the second paragraphs of Articles 8 to 11, this was gradually extended to the rest of the Convention rights, so that virtually all the standard-setting provisions of the Convention now have a dual aspect in terms of their requirements, one negative and the other positive, and the legislator should constantly bear it in mind.[18] There may be three basic levels of a positive obligation. First, the obligation of the State authorities to take steps to make sure that the enjoyment of the right is effective. Second, the obligation to take steps to make sure that the enjoyment of the right is not interfered with by other private parties (this reflects the so-called horizontal effect of the Convention and the doctrine of *Drittwirkung*). These two levels are fairly general to the positive obligations throughout the Convention. However, in some cases there can be a third level, the obligation of the authorities to take steps to make sure that the private persons take steps to ensure the effective enjoyment of the right by other individuals (e.g. in employment disputes where a person has been dismissed from work for having exercised his right to the freedom of speech or religion).[19]

The positive obligations do not end here. Over the years, acting in the spirit of subsidiarity, the ECHR has developed a huge bulk of case-law which has extended the **procedural obligations** of the Contracting States, − often even to the detriment of the substantive aspect. There is indeed a clear and general trend towards a "**proceduralisation**" of the Convention obligations.[20] The starting point was Article 13 of the Convention which, read in conjunction with the exhaustion rule of Article 35 § 1, obliges the States to provide, in their domestic legal system, an "effective remedy" for everyone whose rights and freedoms as set forth in the Convention have been violated. Then, under Articles 2 and 3 of the Convention, the Court declared that right to life and prohibition of torture also included a procedural aspect, meaning an obligation for the State authorities to effectively investigate all possible infringements of these articles, even committed by private individuals.[21] However, the Court has

[18] Akandji-Kombe J.-F. Positive obligations under the European Convention on Human Rights, Human Rights Handbooks, No. 7. Strasbourg: Council of Europe Publishing, 2007, p. 8.

[19] Harris D. J. and others. Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights, 2nd ed., Oxford: Oxford University Press, 2009, p. 342. For a good practical example, see: Schüth v. Germany, No. 1620/03, §§ 55 and 57, 23 September 2010.

[20] Dubout E. La procéduralisation des obligations relatives aux droits fondamentaux substantiels par la Cour européenne des Droits de l'Homme. In: Revue trimestrielle des droits de l'homme, No. 70, 2007, pp. 397-425.

[21] See, e.g.: Al-Skeini v. the United Kingdom [GC], No. 55721/07, § 163, judgment of 7 July 2011, with further references.

also identified a similar procedural aspect in other Convention rights, such as respect for private life or freedom of religion. **The State therefore has an obligation to set up adequate and effective decision-making procedures and remedies, in order to prevent possible violations of the Convention from happening at the domestic level.** According to the principle of subsidiarity, the Court looks more and more often not at the allegations of a substantive violation, but rather at whether the domestic authorities have duly examined all the facts of the case, duly heard the applicant's arguments and duly weighed all the conflicting interests in the case. As to the substantive aspect, it is left to the prudent decision of the national authorities (and especially judges). In other terms, **the Court seems to be more and more willing to accept the substantive decision of the domestic authorities, provided that it has been taken and checked by means of a fair and thorough procedure.**[22] Here the task of the national legislator becomes extremely important, because by setting up effective administrative and judicial procedures the State can avoid a condemnation by the ECHR.

What should Parliament do?

The Brighton Declaration, mentioned above, the High Level Conference has expressly recommended "[i]mplementing practical measures to ensure that policies and legislation comply fully with the Convention, including by offering to national parliaments information on the compatibility with the Convention of draft primary legislation proposed by the Government"[23] Applying the *de facto erga omnes* effect explained above, the legislator should indeed **regularly monitor the development of the case-law of the ECHR** and to decide what legislative amendments would be necessary in order to avoid a judgment finding a violation in the future. This is perhaps the most delicate task, because it consists, first and foremost, in correctly deciding which legislative amendments would be required. In the case of Central and Eastern European countries like Latvia this might be still more delicate because of the language barrier: the official languages of the Court are English and French, the official versions of all the judgments are delivered in either or both of these two languages, and a complete understanding of a judgment would require a good knowledge of the legal terminology thereof. For example, between 2000 and 2008 the majority of Court's judgments against Latvia were delivered in French (except some which were bilingual, such as Grand Chamber judgments), and the author of this article has repeatedly heard bitter complaints to this effect from his Latvian compatriots, largely unacquainted with Molière's tongue. It seems, however, that the situation has very much improved over the past decade.

Generally speaking, in this respect it would be prudent if each of the national Parliaments had at least one competent senior lawyer intimately acquainted with the case-law of the Court, having a good command of both English and French, and

[22] See, e.g.: Lombardi Vallauri v. Italy, No. 39128/05, § 46, judgment of 20 October 2009.

[23] See: High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, op.cit., para. 9 (c)(ii).

willing and able to follow its developments. Of course, in these times of economic hardships this could raise legitimate concerns about the financial implications of such a post for the State budget. However, if this helps to reduce the sums of damages and costs and expenses to be eventually paid in the future according to a judgment of the ECHR, the long-term financial benefit seems to be obvious.

Thus, in presence of an ECHR ruling against another State finding a violation of the Convention and also revealing a *prima facie* problem in the domestic system, the legislator should carry out a **differential diagnosis.**[24] First, the existing precedent of the ECHR must be abstracted from differential specifics of the particular case and the domestic legal system, and second, the meaning of the judgment must be meaningfully transposed into the relevant situation of the domestic legal system. The legislator has to determine whether the problem really stems from the positive law of the respondent State and not from the individual application thereof in the particular context of that State. In any case, one has to evaluate, on a case-by-case basis, to what extent a legislative change is really indispensable. In this respect, Parliament's task has been greatly alleviated by the recent pro-active attitude of the ECHR, which sometimes indicate to national authorities (by an extensive application of Article 46 of the Convention) what general measures would be required in order to comply with the judgment and to prevent similar violations in the future. Of course, such indication formally binds only the respondent State, but in case of similar legal systems relevant conclusions can also be drawn by the legislatures of other States.[25]

Let us hope that this modest overview of the legislator's role in the application of the principle of subsidiarity will trigger a fruitful discussion and generate ideas for further development.

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[24] For the proper monitoring methodology to be followed in the course of the legislative drafting, see Evans C. Evaluating the human rights performance of legislatures. In: Human Rights Law Review, Vol. 6, No. 3, 2006, pp. 545-569.

[25] See, e.g.: Kurić and Others v. Slovenia [GC], No. 26828/06, §§ 415-416, judgment of 26 June 2012.

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LATVIAN LEGAL SYSTEM AND LEGISLATOR'S CRITICAL FAILURES

Keywords: Lon Fuller, legislative failure, quality of legal acts, amendments to legal acts.

Complaints about the shortcomings of Latvian legal systems are heard constantly – it is said that "there are gaps in legislation and legislation should be aligned." Such talks can partly be justified by the fact that Latvian legal system had to undergo transformation from the system belonging to the circle of Soviet law to the system of law belonging to the circle of Romano-Germanic law within a short period of time, in addition to that it had to adapt to existence within the field of the European Union law. However, such transformation cannot continue forever, thus today there are no longer any grounds to use transformation process as a pretext for absence of alignment in the legal system.

The aim of this brief presentation is to provide a general overview, identifying, whether Latvian legal system exhibits signs of such problems in the quality of legal acts, which would pose a critical threat to effective functioning of Latvian legal system. To achieve this aim, the features identifiable in Latvian legislative process over the last ten years, which conform to legislative failures recognised by the theory of law, are analysed. The legislator in this presentation should be understood not only as the Saeima [the Parliament], but also other institution that have been granted the rights to adopt external regulatory acts.

The science of law recognises that it is impossible to draft a perfect provision of law. A law provision must be put in a concrete verbal form; and thus made concrete, it immediately becomes partially imperfect. Thus, it is the task of everybody, who is applying the legal provision, to find the true meaning of it. However, the drafting of a written provision of law can be of good or of poor quality. A poorly drafted legal provision will sooner or later turn into a legal problem; it is not applied at all or is applied incorrectly or inconsistently. Like in a living organism, there is nothing incidental or redundant in a legal system. Each legal provision is connected with numerous other legal provisions, and one legal provision of poor quality leaves an impact upon the application of all other connected legal provisions.

Each system allows a certain number of failures, unless it is exceeded, the system is able to continue functioning. However, if the amount of failures within the system exceeds the critical limit, the system no longer functions. The laws still remain in force, but alternative and more effective ways for dealing with interpersonal relations are sought.

Lon Fuller, one of the most outstanding law theorists of the 20th century, considers that there are eight failures of the legal system, which lead to the internal destruction of the legal system. "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a lega1 system at all [...]."[1] Thus, identification of any of these shortcomings is a very serious signal to everybody, who deals with the quality of legal acts in Latvia.

First error: No valid rules at all, every issue must be decided on an ad hoc basis.[2] This failure means that there is no written or common law, and it is impossible to form even an approximate impression of what kind of behavioural norms should be observed in relations with the state and other persons. Latvia is a country with written law, and, seemingly, this problem does not apply to Latvia at all. However, the legislator decides numerous issues on an ad hoc basis, as if the legal norms, which solve the respective situation, were nonexistent. There are more than 400 laws and 1300 Cabinet regulations in force in Latvia, however, the totality of valid legal provisions is not perceived as whole and reciprocally integrated system. Each atypical case, as it were, discovers that laws are imperfect and the legislator has neglected to regulate another atypical case. Thus, for example, it became apparent that the laws did not envisage such cooperation between the state and a private partner, which was needed to introduce the so-called "speed cameras project". Therefore on 9 September[3] amendments were introduced to Road Traffic Law, supplementing it with Section 437, which defines a special model of cooperation between the state and a private person specifically for road traffic monitoring. This is a typical example, because the existing regulation was not perceived as such, which did not envisage this model and cooperation, and, thus, impossible within Latvia's system of legislations, but as "a gap" or a forgotten possibility to envisage another cooperation model between the state and a private person. Likewise, following the tragic incident at a cinema, it became apparent that legal acts contained very incomplete regulation on the procedure for issuing and annulling permits for carrying weapons, therefore amendments should be introduced to Law on Handling Weapons and Special Means.

Second failure: Laws are not publicised or otherwise made known to the parties, who are expected to observe them[4]. In Latvia the publication of a legal act in the official journal is considered to be the pre-condition allowing the legal act to come into force. Thus, the legal acts are made known to those, who are expected to observe them. For the convenience of users, before coming into force they are published in one concrete journal – "*Latvijas Vēstnesis*"; and only the publication in it is considered as the official promulgation of the act.

However, exceptions exist. Section 3, part one of the Law on Official Publication and Legal Information provides that the local governments' binding regulations shall be published in the amount envisaged by the law "On Local Governments". Section

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1 Fuller L. The Morality of Law. Revised edition. New Heaven: Yale University Press, 1969, p. 39.

2 Ibid.

3 Grozījumi Ceļu satiksmes likumā [Amendments to Road Traffic Law]: LR likums. *Latvijas Vēstnesis* 2009. 23. septembris, Nr. 151.

4 Fuller L. The Morality of Law. Revised edition. New Heaven: Yale University Press, 1969, p. 39.

45, part five of the law "On Local Governments" provides that only the binding regulations of a republic city council shall be published in "*Latvijas Vēstnesis*", but the binding regulations of the regional council are published in other publications. Thus, it is presumed that the local inhabitants can gen acquainted with the binding regulations adopted by their local government. And yet, the binding regulations of local governments are generally binding legal acts, binding not only to the inhabitants of the local government territory, who can read in the local newspaper the binding regulations adopted by the local government, but to all persons in the territory of the local government. Formally all legal acts are publicised; however, the way in which binding legal acts of local governments are published significantly differs from the way laws and Cabinet of Ministers regulations are promulgated. Everybody is entitled to receive free-of charge and in a convenient way not only laws, but also the binding regulations of any local government, since these are external legal acts binding to all. This nuance in the publication of legal acts may be assessed as a failure of the legislative system.

Third failure: Laws are adopted retroactively[5]. Latvian legal system does not recognise retroactive adoption of laws, and, thus, it is presumed that Latvia has no laws like that, except the cases, when the retroactive force of a law is justified with a special, legitimate aim. However, sometimes laws with retroactive force are adopted in Latvia due to the legislator's failure. Thus, for example the amendments to the Civil Procedure Law, promulgated on 2 June 2011, came into force in 1 June 2011. In this case the legislator made a technical error, miscalculating the publishing date for the law.

Fourth failure: Adoption of incomprehensible laws[6]. If the legal provision is too vague or, on the contrary, – too concrete, it is difficult for the addressee of the provision to perceive it. Attempts to draft accurate and concrete legal provision are a problem in Latvia. It is sometimes said, that a causuistical legal provision is exactly as imprecise, as it is precise. Therefore, a legal provision, which has been drafted in great detail, is not always a clear legal provision. In Latvia, unfortunately, the addressee and his level of special knowledge on the application of legal provisions is seldom taken in consideration in the drafting of legal provisions. Legal provisions that are difficult to understand are especially frequent in legal acts regulating the field of taxation and accountancy. For example, how should an accountant understand the following legal provision? "A copy (in electronic form or a print-out) of a document prepared for payment by the recipient of the goods (services) can also be used as external corroborative document, which has been sent electronically in a scanned form or via fax, as well as a paper form (print-out) of a copy of an electronic document, the accuracy of which has not been certified in accordance with legal acts on the procedure for drafting and presenting documents, if the provision referred to in the second or third part of Section 71 of Law on Accountancy has been complied with."[7]

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5 Fuller L. The Morality of Law. Revised edition. New Heaven: Yale University Press, 1969, p. 39.

6 Ibid.

7 2003. gada 21. oktobra Ministru kabineta noteikumu Nr. 585. "Noteikumi par grāmatvedības kārtošanu un organizāciju" 8.3. punkts: LR Ministru kabineta noteikumi. *Latvijas Vēstnesis*, 2003. 23. oktobris, Nr. 151.

The fact that the addressees of the law not always understand, what kind of action is expected of them is proven by the Law on the Natural Persons' Declaration of Material Status and Undeclared Income, uncertainty regarding the correct application of this law lead to extensive public response.

Fifth failure: Enactment of contradictory rules[8]. "Amendments to the laws are not always done in complex way, taking into consideration the necessity to amend also other linked laws. Thus, the effectiveness of the legal system decreases, as more time is needed to find the provisions applicable to the concrete relationship and to ensure uniform application of provisions."[9] The author came to this conclusion about situation in Latvia more than 10 years ago. Unfortunately, one has to conclude that situation has not changed over the years. According to the information collected by the Ministry of Justice[10], one of the most frequent errors in the prepared draft legal acts is their incompatibility with other valid legal acts. Unless these errors are detected timely, during the drafting process, later they are reflected in the legal provisions that are in force and amendments must be made to the law later, to correct the error.

Sixth failure: Rules that require conduct beyond the powers of the affected party[11]. It is impossible to image that in the legislation process of a democratic state, which involves not only persons authorised to take decisions, but also a number of experts, the legislator would make an error by placing an obligation to do something totally impossible. Most probably this occurs, because the logical connection of the legal provision with other legal provisions, its integration into the system of law is not examined. A couple of examples of this kind can be found in Latvia's system of legislation. Section 9 of Personal Identification Documents Law sets the mandatory obligation to receive a passport or a personal identification document, Section 186 of Latvian Administrative Violations Law envisages a punishment for living without a valid passport as a monetary fine in the amount of 25 lats. However, to receive a passport a state duty in the amount of 20 or 40 lats must be paid.[12] A person just has to choose – to pay the state duty or the fine, but it is impossible to fulfil one's obligation as a citizen to receive the passport without some sort of payment.

Seventh failure: Introducing frequent changes to the rules[13]. More than 10 years ago E.Levits already wrote: "Latvia lacks both legal competence and competence in the specific sector to ensure an optimum text of the law already during the process of drafting laws and other legal norms. As the result laws are often amended, responding

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8 Fuller L. The Morality of Law. Revised edition. New Heaven: Yale University Press, 1969, p. 39.

9 Strupišs A. Tiesiskā regulēšana un tās efektivitāte. In: Mūsdienu tiesību teorijas atziņas, Rīga: Tiesu namu aģentūra, 1999, 140. lpp.

10 Tiesību aktu projektu trūkumu raksturojums. Statistika par 2011. gadu. Tieslietu ministrija, Normatīvo aktu kvalitātes nodrošināšanas nodaļa. Nepublicēts materiāls.

11 Fuller L. The Morality of Law. Revised edition. New Heaven: Yale University Press, 1969, p. 39.

12 Ministru kabineta 2012. gada 21. februāra noteikumi Nr. 133 "Noteikumi par valsts nodevu par personu apliecinoša dokumenta izsniegšanu": LR Ministru kabineta noteikumi. *Latvijas Vēstnesis*, 2012. g. 28. februāris, Nr. 33.

13 Fuller L. The Morality of Law. Revised edition. New Heaven: Yale University Press, 1969, p. 39.

to concrete needs. This does not promote legal certainty and predictability."[14] The statistical data reveal frequent changes to Latvia's system of legislation. Thus, for example, in 2009 476 laws and 1680 Cabinet regulations were adopted, in 2010 – 415 laws and 1259 Cabinet regulations, in 2011. gadā – 255 laws and 1063 Cabinet regulations.[15] Latvian Administrative Violations Code is, traditionally, amended several times per year, in 2007 – even nine times in one year, in total it has had more than 140 amendments. Frequent amendments to legal acts are not only an existing feature of Latvian legal system, but even a feature characterising it.

Eighth failure: Failure of congruence between the text of the rule as announced and the result of their actual administration[16]. It must be noted that this could be considered as the failure of the party applying the law, not the legislator's failure, except for the case, if as the result of the above mentioned legislator's failures, the legal provision has such shortcomings that it is difficult to reproach the party applying the law for errors in application. Rather accurate and grammatical adherence to the text of the law is typical of law administration in Latvia. However, the fact that sometimes the legal provisions that are in force are simply ignored, must be noted as a separate problem, i.e., the legal provisions define a certain procedure for action, however, it is known that in practice everybody acts differently and such actions are reciprocally approved. For example, almost none of the delegated tasks of state administrations has been delegated and supervised in the way defined by the State Administration Structure Law.[17] Even though Law on Taxes and Duties and Law on Budget and Financial Administration provides definitions of a tax, a state duty and a service for a fee, the analysis of legal acts leads to the conclusion that these definitions are not taken into consideration and that are clear border-line between a tax, a ad duty and service for a fee can no longer be identified.[18] Thus, there is no certainty that the text of the law defines the forms of regulated legal relationships in practice; the text of law may create a misleading impression of the practical solutions to the respective legal issues.

Unfortunately, one must conclude that all the critical failures of the legislator, enumerated by Lon Fuller, can be identified in Latvian system of legislation. Each of them, however seldom it is made, is a dangerous signal as regards the effectiveness and, most importantly, credibility of the legal system. Because of laws that are not objectively understandable, cannot be implemented and are not publicly accessible citizens cannot rely upon certain legal regulation, since legal provisions are simply inapplicable. A case, when an unexpected and sudden event highlights shortcomings

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[14] Levits E. Pārdomas par Latvijas tiesību sistēmas transformācijas problēmām. In: Mūsdienu tiesību teorijas atziņas, Rīga: Tiesu namu aģentūra, 1999, 8. lpp.

[15] Data obtained according to relevant data selection parametres from the site www.likumi.lv

[16] Fuller L. The Morality of Law. Revised edition. New Heaven: Yale University Press, 1969, p. 39.

[17] Valsts pārvaldes uzdevumu nodošanas analīze un rekomendācijas. Gala ziņojums., Advokātu biroja "Eversheds&Bitāns" veikts pētījums ESF finansēta projekta ietvaros, 2011. gada 29. jūnijs. Available: http://petijumi.mk.gov.lv/ui/DocumentContent.aspx?ID=3826 [viewed 5 April 2012].

[18] Koncepcijas projekts "Par valsts nodevu un maksas pakalpojumu nošķiršanu un valsts nodevu plānošanas, uzskaites un kontroles sistēmas pilnveidošanu". Available: http://www.mk.gov.lv/lv/mk/tap/?pid=40190900 [viewed 6 April 2012].

of a valid legal act and that the legislator must respond to such an event by introducing amendments to the legal act cannot be excluded. However, such an action should be a special exception to the legislative practice, not a habitual order of things. It is inadmissible that few scandals regarding the parliamentary deputies' inconsistent voting on the appointment of high-level officials lead to amendments to the Satversme [Constitution] of the Republic of Latvia regarding the form of open and closed parliamentary vote. The referendum on granting the status of the official state language to Russian caused amendments to the legal acts that define the procedure for organising referenda. Thus, a common practice has developed that each resounding event in the life of the state highlights existing and often – imaginary – shortcomings in the legislative system and ends with amendments to a couple of laws. An impartial observer might form an impression that none of the significant issues has been duly regulated within Latvian legislative system. Such conclusions increase lack of trust in Latvian law and nihilistic attitude towards our legislative system.

Frequent amendments to the laws (and other legal acts) must be noted especially as a feature typical of Latvian legislative system. Not only an ordinary citizen, but even a practical lawyer finds it difficult to follow the amendments introduced to legal acts. Sometimes amendments come in "cascade" – amendments are introduced to the amendments of the respective law, which have not come into force yet. Law On Taxes and Duties was amended 8 times in 2010, 4 times in 2011.[19] Such a number of amendments to the law, which defines the natural persons' mandatory payments into the sate budget, significantly infringes the legal certainty of private persons to rely upon certain consistency of law and stability of requirements that the state sets for a private person. That leads to disturbing recollection of Fuller's note that if any of the legislator's failures becomes specially pronounced, a certain system of law ceases to exist as an effective and functioning instrument. These frequent amendments to legal acts can be partially justified by the transposition of directives, an obligation shared by all European Union states. However, frequent amendments of laws as such leads to adverse consequences, irrespectively of causes for amendments. Already Xenophon, philosopher of ancient Greece, noted that frequent change of law decreases trust in and respect for the law: "Laws are regulations that the citizens have recorded in writing, agreed upon what should be done and what should be shunned. But how can these be taken seriously and observed if they are frequently revoked and changed by the very same people, who passed them?"[20] Frequent amendments to laws facilitates nihilistic attitude towards law. While legislating institutions rush to introduce regular amendments to the law, people no longer "take this law seriously". To avoid the collapse of Latvian legislative law under the burden of amendments to legal acts, responsible officials should introduce all possible measures to decrease the number of amendments to legal acts and improve their legal quality.

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[19] Par nodokļiem un nodevām: LR likums, *Latvijas Vēstnesis*, 1995. g. 2. februāris, Nr. 26 [the number of amendments can be viewed on the site http://www.likumi.lv/doc.php?id=33946].

[20] Ksenofonts. Saruna ar sofistu Hipiju par taisnības jēdzienu In: Netveramais Sokrāts. Rīga: Liesma, 1987, 140. lpp.

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Ministru kabineta 2012. gada 21. februāra noteikumi Nr. 133 "Noteikumi par valsts nodevu par personu apliecinoša dokumenta izsniegšanu": LR Ministru kabineta noteikumi. *Latvijas Vēstnesis*, 2012. g. 28. februāris, Nr. 33.

Tiesību aktu projektu trūkumu raksturojums. Statistika par 2011. gadu. Tieslietu ministrija, Normatīvo aktu kvalitātes nodrošināšanas nodaļa. Nepublicēts materiāls.

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ROLE OF THE CONSTITUTIONAL COURT IN IMPROVING THE QUALITY OF REGULATORY ENACTMENTS

Keywords: jurisdiction of Constitutional Court, constitutional control, principle of separation of power, legislator.

Introduction

[1] Article 64 of the Constitution of the Republic of Latvia (hereinafter – the Constitution) establishes that "The Saeima (the Parliament), and also the people, have the right to legislate, in accordance with the procedures, and to the extent, provided for by the Constitution".[2] This constitutional provision in line with the numerus clausus principle determines those subjects representing the legislative power, who are entitled to issue legal enactments. Nevertheless, it must be pointed out that the legislator's power is not absolute, it is restricted by the Constitutional provisions and principles.[3] However, one cannot exclude the possibility that by implementing the vested power, the legislator might exceed the limits of freedom to act, thereby infringing the fundamental rights of persons as stipulated by the Constitution or by violating the principle of separation of powers. Such a situation can form both as a result of deliberate legislator's conduct, thereby implementing the political will,[4] or by undeliberate conduct – due to the legislator's lack of knowledge or oversight of Constitutional provisions. Hence, a necessity arises to control the legislator's conduct to ensure that it complies with the Constitution, because "in a democratic republic, the parliament must comply with the constitution and other laws, including those adopted by the parliament itself".[5] The reasoning behind this statement lies in that

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1 All opinions voiced in this paper is the personal opinion and conviction of the author unrelated to any institution or organisation, in which the author is active.

2 Latvijas Republikas Satversme [Constitution of the Republic of Latvia]: LR likums. *Latvijas Vēstnesis*, 1993. gada 1. jūlijs, Nr. 43.

3 See, for instance: Judgment of 19 December 2011 adopted by the Constitutional Court in the case No. 2011-03-01, Paragraph 15.4.

4 Likumprojekta "Par valsts pensiju un valsts pabalstu izmaksu laika periodā no 2009. gada līdz 2012. gadam" anotācijas II sadaļa. [Annotation of Draft Law on Payment of State Pensions and State Allowances from 2009 until 2012] Available: http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/0BEB9E49A7761574C22575D6003F8248?OpenDocument [viewed 12 June 2012].

5 Satversmes tiesas 2002. gada 22. februāra spriedums lietā Nr. 2001-06-03, Secinājumu daļas 4. Punkts [Judgment of 22 February 2002 adopted by the Constitutional Court in the case No. 2001-06-03, Operative Part, Paragraph 4], *Latvijas Vēstnesis*, 26.02.2002. Nr. 31 (2606).

the restrictions established for a certain branch of the state power per se do not mean anything, if there is no effective mechanism in place for annulling an enactment violating legal provisions of more supreme legal effect.[6]

[2] The Constitutional Court is the constitutional control body of the Republic of Latvia. First of all, it implements control over the compliance of adopted laws with the Constitution. Article 85 of the Constitution grants exclusive jurisdiction to the Constitutional Court to recognise laws and other enactments or parts thereof as ineffective. In legal science, the rights of constitutional courts to recognise legal provisions as ineffective are equated to the legislator's functions.[7] However, taking into account the fact that the constitutional court can only cancel a legal provision instead of adopting a new one, it is referred to as "negative legislator".

[3] Even though the Constitutional Court does not feature the legislative function in its classic understanding, nevertheless, the impact of the Constitutional Court judgments on the effective regulatory legal system in a country and on the judicial reality is significant and it is targeted also at improving the quality of regulatory enactments. To wit, the Constitutional Court has a certain impact on the legislator's freedom of conduct. However, the creation of regulatory legal enactments is solely the legislator's competence. Hence, it is necessary to establish the boundaries of jurisdiction of the Constitutional Court, in order for it not to be able to unjustly restrict the legislator's freedom of conduct, by taking over implementation of the legislator's functions. Therefore, it is necessary to analyse the rights of the Constitutional Court to impose an obligation on the legislator to adopt a legal provision (enactment) of certain content. Within the framework of this study, the extent of the said rights is to be established, along with their contents and form. In conducting the study, comparative and descriptive study methods have been employed, as well as inductive and deductive conclusions deriving from legal provisions, legal doctrine, and court practice. The study is based on the work of Latvian and foreign legal scientists, national regulation, and a study of case-law of the Constitutional Court.

A constitutional court within the framework of the principle of separation of powers

[4] The entitlement of the Constitutional Court to impose an obligation on the legislator to adopt a legal provision is to be considered within the framework of the principle of separation of powers. Separation of powers presumes the rights and obligation of each constitutional body to supervise other constitutional bodies and to cooperate with them, thus forming a mechanism of reciprocal control and balance between the

[6] Гамильтон А. Федералист № 78. Available: http://grachev62.narod.ru/Fed/Fed_78.htm [viewed 12 June 2012].

[7] Jekabsons G. The principle of supremacy and national constitutional law. Riga, Graduate School of Law; Copenhagen Business School, 2002.

branches of power.[8] Hence, separation of powers is an indisputable constitutional principle. Its importance is manifested in division of political influence between the three branches of power, in order to achieve a balanced model of realisation of state power.[9] The state power is not only separated functionally, namely, into legislation, state administration, and adjudication, but also institutionally – depending on the competence of each institution. Moreover, the functional and institutional division of the state power is not identical. The competence of institutions does not always fit into one of the three branches of state powers. In order to ensure effective functioning of a state as well as the creation of a "balance and counterbalance" system of the three branches of state power, deviations are permitted – parallel to implementation of functions of one branch, another competence (duty) in realisation of functions of another branch can be envisaged for a certain institution. Separation of the state power at an institutional level does not exclude delegation of functions of one branch of power to institutions, which are included in another branch of state power.[10]

[5] The Constitutional Court, in realising the constitutional control function, is performing an examination of regulatory enactments. Upon detecting non-conformity of a legal provision subject to constitutional control (hereinafter – the contested provision) to the Constitution, the Constitutional Court recognises the contested provision as inconsistent with the Constitution and therefore – null and void. Thus, the Constitutional Court, which is an institution of the judicial branch,[11] "excludes" the legal provision from normative regulation and thus encroaches upon the legislative function. Therefore, institutionally, the Constitutional Court belongs to the judicial power, but functionally – to the legislative power.

[6] Professor Hans Kelsen has pointed out the peculiar position that a constitutional court holds in the system of separation of powers, emphasising that "This is exactly why the annulment of non-constitutional enactments must be delegated to an institution that is independent of the parliament and hence – of any other state power, namely, to the court or constitutional tribunal".[12] Hans Kelsen has introduced a concept of "negative legislator"[13] in the constitutional law theory. On the grounds of the concept

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[8] Satversmes tiesas 2010. gada 22. jūnija spriedums lietā Nr. 2009-111-01, 29.1. punkts [Judgment of 22 June 2010 adopted by the Constitutional Court in the case No. 2009-111-01], *Latvijas Vēstnesis,* Nr. 100 (4292), 28.06.2010.

[9] Satversmes tiesas 2000. gada 24. marta sprieduma lietā Nr. 04-07(99) secinājumu daļas 3. Punkts [Judgment of 24 March 2004 adopted by the Constitutional Court in the case No. 04-07(99), Paragraph 3 of Operative Part], *Latvijas Vēstnesis,* Nr. 113/114 (2024/2025), 29.03.2000.

[10] Satversmes tiesas 2006. gada 20. decembra spriedums lieta Nr. 2006-12-01, 14.punkts [Judgment of 20 December 2006 adopted by the Constitutional Court in the case No. 2006-12-01, Paragraph 14], *Latvijas Vēstnesis,* Nr. 206 (3574), 28.12.2006.

[11] Pursuant to Section 1 of the Constitutional Court Law, the Constitutional Court is an independent judicial authority, which adjudicates matters within the framework of jurisdiction established in the Constitution and the Constitutional Court Law.

[12] Kelsen H. La garantie jurisdictionnalle de la Constitution. Revue de droit public et de la science politique en France. Paris, 1928, N. 2. p. 198. Cited from: Pleps J., Pastars E., Plakane I. Konstitucionālās tiesības. Rīga: Latvijas Vēstnesis, 2004, 593. lpp.

[13] The concept was introduced in 1928. It first appeared in the article "La garantie jurisdictionnalle de la Constitution" in the magazine Revue de droit public et de la science politique en France.

developed by him, the parliament is "the positive legislator", which adopts legal provisions. The constitutional court, for its part, is "the negative legislator", which can cancel these provisions. In line with this concept, the constitutional courts cannot formulate a legal provision or give overly elaborate suggestions to the legislator,[14] or replace the legislator and meddle with the realisation of the legislator's functions.[15] If constitutional courts did that, the principle of separation of powers would be infringed upon and the constitutional court would in fact become "a positive legislator".[16]

[7] When considering the jurisdiction of constitutional courts, the concept of "negative legislator" developed by Hans Kelsen is based on the opinion that a constitutional court complements the parliament in implementing the constitutional legislative function. Meanwhile, in practice, the constitutional court often encroaches upon the competence of the constitutional legislator, when deciding matters of constitutional law for the legislator.[17] It can be explained with the fact that nowadays, the role of constitutional courts and their place in a democratic state subject to the rule of law, and the complex nature of the cases to be settled therein, divert them from the classic model of a constitutional court as proposed by Kelsen. Over time, the constitutional courts through expressing activity, often from "a negative legislator" turn into "a positive legislator",[18] thus generating discussions about the place of a constitutional court in the mechanism of separation of powers. Constitutional courts, when implementing constitutional control, increasingly more often in judgments formulate direct indications as to the contents of regulatory enactments to be adopted by the legislator, in order to prevent the non-conformity of the contested provisions to the constitution. It undoubtedly narrows the boundaries of the legislator's freedom of conduct. Thereby, constitutional courts in Europe exceed the border, which, according to Kelsen's conception, should be observed by the constitutional court in capacity of "the negative legislator".[19] Therefore, it is important to mark the boundaries of jurisdiction of the Constitutional Court, thus allowing to avoid unjustified interference with the legislator's competence, all the while ensuring constitutional supremacy, as well as would foster adoption of qualitative normative enactments.

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[14] Kovaļevska A. Satversmes tiesas kompetence likuma neesamības gadījumā. In: Ultra vires doktrīna konstitucionālo tiesu praksē. Lietas ierosināšana Satversmes tiesā. Satversmes tiesas 2007. gada konferences materiālu krājums. Rīga: TNA, 2008. 176. lpp.

[15] Несмеянова С. О возможном влиянии Конституционного Суда Российской Федерации на законодателя. In: Актуальные вопросы конституционного правосудия. Москва, Волтерс Клувер, 2011. С. 171-172.

[16] Klucka J. The role of the Constitutional Court with regard to the Legislator. Available: http://www.venice.coe.int/docs/2001/CDL-JU(2001)032-e.asp [viewed 13 June 2012].

[17] Pleps J. Satversmes iztulkošanas konstitucionāli tiesiskie un metodoloģiskie problēmjautājumi. Promocijas darbs Latvijas Universitātē, Rīga, 2010. 192. lpp. Available: https://luis.lanet.lv/pls/pub/luj.fprnt?l=1&fn=F130724837/Janis Pleps 2010.pdf [viewed 12 June 2012].

[18] Smith E. Constitutional Courts as "Positive Legislators". Available: http://folk.uio.no/giudittm/IACL_10_Courts%20as%20positive%20legislators.pdf [viewed 10 June 2012].

[19] Pinelli C. Concept and Practice of Judicial Activism in the Experience of Some Western Constitutional Democracies. Available: http://www.venice.coe.int/docs/2007/CDL-JU%282007%29029-e.pdf [viewed 10 June 2012].

Rights of the constitutional court to impose an obligation on the legislator to adopt a legal provision (enactment) of certain content

[8] Opinions of the Constitutional Court are formulated in a certain procedural form – in a judgment, which is binding on the Constitutional Court itself and on the legislator. If non-conformity of the contested provision to the Constitution is found, the court recognises such provision as null and void. Constitutional Court opinions expressed this way are generally binding and it is the legislator's duty to take them into account. The legislator must avoid their prior errors to which the Constitutional Court has drawn attention, thereby improving also the quality of normative regulation.

[9] Exclusion of the contested provision from normative regulation can lead to various consequences. It can improve the legal regulation, but also a situation can form, which is even worse than the previous regulation (contested provision), because there is no regulation whatsoever. Therefore, the Constitutional Court in its judgments carefully evaluates the consequences, which can be caused by the annulment of the provision.[20] The court in its practice has applied various methods to solving such situations:

(1) when annulling a provision, the court points to the regulation applicable in legal relations:

- by directly applying a legal provision of a higher legal effect,[21]
- by applying the anti-constitutional provision until amendments are made, all the while bearing in mind the Constitution[22] and the opinions voiced in the judgment,[23]
- by applying a previously existing regulation;[24]

(2) the court sets a date, by which the provision continues being effective, thus giving time for the legislator to adopt regulation conformant to the Constitution;

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[20] See more in: Кутрис Г., Спале А. Правовые последствия решений Конституционного суда в укреплении конституционного порядка: практика Конституционного суда Латвийской Республики. In: Almanac: Constitutional Justice in the New Millenium, Yerevan, NJHAR, 2011, C. 99-104.

[21] Satversmes tiesas 2003. gada 6. novembra spriedums lietā Nr. 2003-10-01, secinājumu daļas 7. punkts [Judgment of 6 November 2003 adopted by the Constitutional Court in the case No. 2003-10-01, Operative Part, Paragraph 7], *Latvijas Vēstnesis,* Nr. 157 (2922), 07.11.2003.

[22] Satversmes tiesas 2006. gada 23. novembra spriedums lietā Nr. 2006-03-0106, 35.2. punkts [Judgment of 23 November adopted by the Constitutional Court in the case No. 2006-03-0106, Paragraph 35.2], *Latvijas Vēstnesis,* Nr. 192 (3560), 01.12.2006.

[23] Satversmes tiesas 2007. gada 11. aprīļa spriedums lietā Nr. 2006-28-01, 22. Punkts [Judgment of 11 April 2007 adopted by the Constitutional Court in the case No. 2006-28-01, Paragraph 22], *Latvijas Vēstnesis,* Nr. 62 (3638), 17.04.2007.

[24] Satversmes tiesas 2005. gada 16. decembra spriedums lietā Nr. 2005-12-0103, 25. punkts; Satversmes tiesas 2007. gada 4. janvāra spriedums lietā Nr. 2006-13-0103, 13. Punkts [Judgment of 16 December 2005 adopted by the Constitutional Court in the case No. 2005-12-0103, Paragraph 25; Judgment of 4 January 2007 adopted by the Constitutional Court in the case No. 2006-13-0103, Paragraph 13], *Latvijas Vēstnesis,* Nr. 203 (3361), 20.12.2005.

(3) the court sets a date, on which the provision is to become null and void, if a certain condition is not met (what are known as conditional judgments).[25]

[10] The legislator's duty to adopt a new legal provision, by introducing amendments in legal provisions or adding to the normative regulation, is closely linked to the enforcement of the judgment. Enforcement of the judgment is one of the stages of constitutional litigation, however the Constitutional Court Law (unlike the laws governing the procedure of constitutional courts in other countries), it is not prescribed expressis verbis. It does not necessarily mean that this procedural stage is left out from the Constitutional Court process. On one hand, this can cause certain problems, but, on the other hand, it enables the Constitutional Court in the specific case, upon assessing the case conditions, already in the judgment determine a mechanism of its execution. Thus, the orders for the legislator, included in the Constitutional Court judgments are firstly targeted at execution of the Constitutional Court judgment. Such orders are usually included at the end of the conclusions of a Constitutional Court judgment, and in some cases – also in the operative part. Section 32 of the Constitutional Court Law, inter alia, establishes that the judgments and the interpretation of the relevant legal norm provided therein are obligatory. Thus, also the opinions of the Constitutional Court on that certain normative regulation is necessary are of binding effect, because they are expressed by revealing the content of Constitutional provisions. In this respect, it must be pointed out that the rights to determine the matters related to enforcement of the judgment derive from Article 1 and 85 of the Constitution, namely, from the principle of constitutional supremacy.

[11] When determining the rights of the Constitutional Court to give binding orders to the legislator for normative regulation adoption with regard to the content and scope, it must be taken into account that it is exclusively the competence of the legislator to adopt legal regulation in a country. It means that the legislator assesses whether and what legal relations require normative regulation, as well as determines the content of such normative regulation. The Constitutional Court has pointed out that "from the viewpoint of the Constitution, the legislator's duty reaches so far, as it ensures that legal regulation does not infringe legal provisions of higher legal effect, and firstly, the Constitutional requirements".[26] Thus, the requirement on the need of legal regulation or even specific contents thereof can derive from regulatory enactments of higher legal effect and is not restricted solely with the legislator's will. Therefore, the Constitutional Court exercises its right to impose an obligation in amending or adopting a legal provision only within the framework of constitutional control, because the Constitution and general legal principles restrict the jurisdiction of the Constitutional Court.

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[25] Satversmes tiesas 2003. gada 29. oktobra spriedums lietā Nr. 2003-05-01, nolēmumu daļa [Judgment of 29 October 2003 adopted by the Constitutional Court in the case No. 2003-05-01, Operative Part], *Latvijas Vēstnesis,* Nr. 152 (2917), 30.10.2003.

[26] Satversmes tiesas 2010. gada 7. oktobra spriedums lietā Nr. 2010-01-01, 15.2. punkts [Judgment of 7 October 2010 of the Constitutional Court in the case No. 2010-01-01, Paragraph 15.2], *Latvijas Vēstnesis*, Nr. 161 (4353), 12.10.2010.

[12] As pointed out by the president of the Constitutional Court Gunārs Kūtris: "In order to avoid a situation, in which as a result of constitutional examination, the principle of separation of powers is violated, the Constitutional Court in its judgments must avoid formulating legal provisions or establishing how the legislator should formulate them".[27] When analysing the Constitutional Court judgments, it can be concluded that the Constitutional Court employs several methods that are targeted at improving the normative regulation and that impose an obligation on the legislator to amend it. Firstly, upon assessing the contested provision, the Constitutional Court can recognise that it is not a provision, but only a part of it does not conform to the Constitution, and therefore becomes void.[28] Thereby, the non-compliance with legal provisions of higher legal effect is prevented and at the same time, the existing normative regulation is maintained, thus providing the legislator with more freedom to act. Secondly, the Constitutional Court in the ruling can prescribe a condition, in the case of occurrence whereof, the contested provision complies or does not comply with the Constitution. Section 32(3) of the Constitutional Court Law establishes the general principle of the contested provision losing effect, "if the Constitutional Court has not established otherwise".[29] Initially, the words "has established otherwise" was manifested in practice only as a different point in time, when the contested provision loses effect, for instance, "from the moment of passing the enactment". However, more recent practice of the Constitutional Court proves that the wording "has established otherwise" is interpreted also in a way that it includes a specific condition.[30] The Constitutional Court most frequently uses judgments with a condition when recognising a certain provision as inconsistent with legal provisions of a higher legal effect. It encourages the legislator to seek solutions, because otherwise, the provision will lose effect.[31] In some cases, a judgment with a condition is included in combination with conformity of a provision.[32] Namely, the court recognises the contested provision as conforming to the Constitution with a remark that a specific condition is met. However, it must be admitted that such formulation of a judgment is not very successful, as it does not encourage the legislator to introduce proper order in legal regulation. Therefore, this form could be applied only in those cases,

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[27] Kūtris G. Likumu robi un Eiropas konstitucionālās tiesas. Eiropas konstitucionālo tiesu konferences XIV kongress. *Jurista Vārds,* 2008. g. 1. jūlijs, Nr. 24

[28] See, for instance: Satversmes tiesas 2005. gada 14. septembra spriedums lietā 2005-02-0106, nolēmumu daļa [Judgment of 14 September 2005 of the Constitutional Court in the case No. 2005-02-0106, Operative Part], *Latvijas Vēstnesis,* Nr. 148 (3306), 16.09.2005.

[29] Satversmes tiesas likums [Constitutional Court Law]: LR Likums. *Latvijas Vēstnesis*, Nr. 103(588), 14.06.1996.

[30] See: Satversmes tiesas 1998. gada 27. novembra spriedums lietā Nr. 01-05(98), nolēmumu daļa [Judgment of 27 November 1998 of the Constitutional Court in the case No. 01-05(98), operative part], *Latvijas Vēstnesis*, Nr. 355/356 (1416/1417), 01.12.1998.

[31] See: Satversmes tiesas 2003. gada 29. oktobra spriedums lietā Nr. 2003-05-01, nolēmumu daļa [Judgment of 29 October 2003 of the Constitutional Court in the case No. 2003-05-01, operative part], *Latvijas Vēstnesis,* Nr. 152 (2917), 30.10.2003.

[32] See, for instance: Satversmes tiesas 2003. gada 25. marta spriedums lietā Nr. 2002-12-01, nolēmumu daļas 1. punkts, *Latvijas Vēstnesis,* Nr. 47 (2812), 26.03.2003 [Judgment of 25 March 2003 of the Constitutional Court in the case No. 2002-12-01, operative part, Paragraph 1].

when the contested provision in effect complies with the Constitution, however, proper interpretation and application thereof cause problems. Such a ruling, in effect, indicates to that the provision conforms to the Constitution only in interpretation of the provision as suggested by the court.[33] Thirdly, the Constitutional Court in its rulings uses wording "insofar as the provision does not envisage … it does not comply with the Constitution".[34] Therefore, the contested provision loses effect only in the part, in which inadequate or incomplete normative regulation exists, moreover, the court also establishes a time period, by which the legislator must introduce changes. In such a situation, the Constitutional Court does not give direct instructions, but instead only indicates that the court takes into account the fact that in order to prevent a violation of fundamental rights, the legislator must examine several possible solutions and must determine, which of them is the most suitable one. The considered methods are to be regarded as indirect instructions for the legislator.

[13] However, in some cases, the Constitutional Court in its judgments still include direct instructions for the legislator regarding the need to introduce amendments to normative regulation and even prescribe the contents of such regulation.[35] Such activity of the court is observed in cases, in which the court finds a shortcoming contrary to the objective of the law. The given examples prove the active position of the Constitutional Court, namely, the court specifies the content of the Constitutional provision so far that the legislator, when adopting the regulatory provision, no longer has the opportunity to interpret the respective provision. In essence, the Constitutional Court in the specific case reduces the possibilities for the

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[33] See, for instance, Satversmes tiesas 2006. gada 6. februāra spriedums lietā Nr. 2005-17-01, nolēmumu daļa [Judgment of 6 February 2006 adopted by the Constitution Court in the case No. 2005-17-01, operative part], *Latvijas Vēstnesis,* Nr. 24 (3392), 09.02.2006.

[34] See, for instance, Satversmes tiesas 2008. gada 9. maija spriedums lietā 2007-24-01, nolēmumu daļa [Judgment of 9 May 2008 adopted by the Constitutional Court in the case No. 2007-24-01, operative part], *Latvijas Vēstnesis,* Nr. 73 (3857), 13.05.2008.

[35] For example, when assessing the entitlements for the prisoners to keep religious items, the Constitutional Court pointed out that "normative regulation must give an option for the administration of imprisonment authority on a decision or prohibition for the prisoners to keep religions items, taking into account individual conditions of each case, and at the same time, it must be achieved that the practice is based on uniform principles." (Judgment of 18 March 2011 of the Constitutional Court in the case No. 2010-50-01, operative part). However, in the judgment of the case No. 2010-44-01, the Constitutional Court imposed an obligation on the legislator to amend a specific legal provision: "The Saeima has an obligation to adopt Clause 1 of Section 7(5) of the Law on the Procedures for Holding the Detained Persons in new wording. This provision must prescribe the minimum guarantees for the protection of privacy of detained persons, which would be justly balanced with measures of preventing threat to security of other persons and of the society" (Judgment of 20 December 2010 adopted by the Constitutional Court in the case No. 2010-44-01, Paragraph 17). The Constitutional Court, even when pointing to the legislator's freedom to act in adopting normative regulation, emphasises that if the legislator decides to regulate the relevant issue: "legal enactments, whereby guarantees of the protection of data of persons are prescribed, must comply with the principles of the sphere of data protection. They must envisage a clear aim, because of which information about a patient is to be provided, and must determine maximally clear objective of processing this information, as well as the scope and type of information to be given" (Judgment of 14 March 2011 adopted by the Constitutional Court in the case No. 2010-51-01, Paragraph 18).

constitutional authority to interpret the Constitution to the minimum. Undoubtedly, the Constitutional Court rulings in some cases places constraints on the legislator, by imposing an obligation to adopt a certain regulatory enactment or to include certain content therein. However, attention must be paid to the aspect that within the framework of constitutional control, the Constitutional Court with these types of recommendations does not provide specific regulations for the legislator, but instead indicates to possible restrictions in future, because the orders included in a court judgment to introduce amendments in normative regulation may not restrict the legislator's freedom to act in choosing the most suitable solution.[36]

[14] The cases, when the Constitutional Court orders refer to a time period from the day of the judgment taking effect until the new regulation is adopted, must be considered separately. Usually, the court in these instances point to direct application of the Constitution or to application of the contested forms in line with the Constitution or with opinions expressed in the judgment. However, when adjudicating the case of reducing old-age pensions for a certain time period,[37] the Constitutional Court recognised the contested provisions as inconsistent with the Constitution and ineffective as from the moment of their adoption and included a range of conditions that the legislator should observe. When preparing the ruling, it was clear that a considerable amount of additional funds will be necessary in the state budget for enforcing the judgment. Therefore, the court included a type of mechanism[38] in the judgment, indicating that "It is the duty of the Constitutional Court, within the framework of its jurisdiction, to care for maximally effective protection and reinstatement of violated fundamental rights of persons". At the end of the part of conclusions of the judgment, the Constitutional Court emphasised that the act of determining the procedure of repayment of withheld pensions is the duty of the Saeima, but at the same time, it indicated also the conditions that the Saeima should take into account when elaborating such procedure. Additionally, the Constitutional Court determined that if the legislator does not adopt such a procedure, then the withheld pensions are to be repaid in compliance with opinions expressed in the conclusions of the judgment. Meanwhile, the operative part included a paragraph, whereby the Saeima was given a task to develop adequate regulation within a period of three months.

In the given judgment, transitional provisions in fact were included, which should have been developed by the legislator. An analysis of this judgment leads to thinking that in the respective case, the Constitutional Court prima facie has acted ultra vires, namely, it has infringed upon the principle of separation of power. The author believes that the judgment in the case No. 2009-43-01 is not a typical one, because the opinions included therein must be looked at in connection with the situation

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[36] Котоков А. Обязательность решений Конституционного суда. In: Актуальные вопросы конституционного правосудия. Москва, Волтерс Клувер, 2011, С. 503.

[37] Constitutional Court case No. 2009-43-01.

[38] Satversmes tiesas 2009. gada 21. decembra spriedums lietā Nr. 2009-43-01, 35.3. punkts [Judgment of 21 December 2009 adopted by the Constitutional Court in the case No. 2009-43-01, Paragraph 35.3], *Latvijas Vēstnesis,* Nr. 201 (4187), 22.12.2009.

effective at the time in the country. This ruling is closely linked to overcoming the economic crisis. Therefore, the Constitutional Court had a responsibility, insofar as it was possible, to take into account the consequences of economic recession, which led to violation of fundamental rights of persons, and at the same time – to make sure that the legislator eliminates the violation of fundamental rights as soon as possible.

[15] There is an opinion in legal science that the Constitutional Court, when interpreting the Constitution and the Constitutional Court Law, has chosen the "golden mean", while trying not to narrow or expand its jurisdiction too much".[39] The scope of jurisdiction of the Constitutional Court to give binding instructions to the legislator is established by the principle of separation of powers. The analysis of judgments of the Constitutional Court allows drawing a conclusion that the Constitutional Court respects the legislator's freedom of conduct, meanwhile, the legislator takes into account the opinions expressed as a result of constitutional examination. Hence, "mutual respect"[40] exists.

Conclusion

1. As the Constitutional Court recognises a regulatory enactment or a part thereof as inconsistent with the Constitution, it is to be regarded as "a negative legislator". Meanwhile, as the Constitutional Court recognises an enactment as anti-constitutional and calls for a need to adopt new enactments or additional laws, the Constitutional Court influences the legislator.
2. The Constitutional Court exercises its rights to impose an obligation on the legislator to amend or adopt a legal provision only within the framework of constitutional control, because the jurisdiction of the Constitutional Court is restricted by the Constitution and general legal principles.
3. Only the legislator determines whether and what legal relations require normative regulation, as well as determines the content of such normative regulation. However, rulings previously made by the Constitutional Court restrict the legislators' rights in the process of creation. Thus, the legislator's obligation to adopt a new legal provision, when introducing amendments in normative regulation or supplementing it, is closely linked to the execution of the Constitutional Court judgment.
4. In some cases, the requirement for a need of a legal regulation or even specific content thereof derives from regulatory enactments of a higher legal effect and is not restricted solely with the legislator's will. In such cases, the Constitutional Court in its judgment can impose an obligation on the legislator to adopt a legal provision.

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[39] Nikuļceva I. Satversmes tiesas pieci gadi: ieskats tiesas jurisprudence. *Likums un Tiesības,* 2001, Nr. 12.

[40] Kūtris G. Likumu robi un Eiropas konstitucionālās tiesas. Eiropas konstitucionālo tiesu konferences XIV kongress. *Jurista Vārds,* 2008. g. 1. jūlijs, Nr. 24.

5. The Constitutional Court exercises its rights to impose an obligation on the legislator to develop normative regulation only in one procedural form – in a judgment of the Constitutional Court, which is binding on the legislator. The Constitutional Court is entitled to determine only the framework of the necessary normative regulation (i.e. the core principles), and not its detailed contents.

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EU CRIMINAL JUSTICE – DEVELOPMENT TRENDS AND IMPACT IN LATVIA

Keywords: Criminal procedure, EU criminal justice, procedural guarantees; right to interpretation and translation; Letter of Rights; legal advice.

Introduction

In 2004 Latvia became a full-fledged EU member state. The issue of the content, significance of the EU law and its impact upon Latvian law and its application was important during the accession process, it continues to be and will be one of the most topical questions. Initially the field of criminal justice did not attract the greatest attention in the EU, however, the focus upon it increases.

A book, published in 2008, entitled "EU Criminal Law and Justice" begins with a question "Why EU Criminal Law and Criminal Justice"? It is hard not to support the opinion provided as an answer to this question. "Within the confines of legal commentary on the EU institutions dealing with what become known as EU Justice and Home Affairs (JHA) law, it can perhaps seem unduly limitative to restrict the ambit of present book to EU criminal law and justice. However, there are two reasons why we feel that this approach is justified. First, the legislative achievements of the EU in the specific field of criminal law and justice are now significant both in scope and in depth and are in many ways revolutionising the day-to-day practice of criminal law in EU. A field of such growing importance deserves separate and dedicated treatment. Second, there never was a logical or analytical necessity to link those topics dealt with within the confines of EU JHA law."[1]

This report aims to provide an overview of the novelties in the field of criminal justice – by asking the questions "What is happening to the criminal justice provisions in the EU?", linking the answer predominantly with the second question "How does that influence or will influence Latvia?".

General characteristics of the development trends in the EU criminal justice and their impact upon Latvian criminal justice

As the time for the presentation is limited, I shall not provide an overview on the historical development of the EU criminal justice, as sufficiently extensive and

[1] Fletcher M., Loof R., Gilmore B. EU Criminal Law and Justice. Cornwall:Edward Elgar Publishing, 2008, p. 1

detailed descriptions of it are found in sizeable publications[2]. One can agree that while prolonged and heated discussions prohibit adoption of a united EU Criminal Law and Criminal Procedure Law, "EU criminal legislation can add, within the limits of EU competence, important value to the existing national criminal law systems"[3].

The EU activities in the legal regulation of criminal procedure issues can be, conditionally, subdivided into two directions – the field of legal cooperation and influencing the procedural order and form of the so-called "national" criminal procedure. The field of legal cooperation covers ensuring legal cooperation among the EU Member States, as well as the EU cooperation with third countries. The implementation of the so-called minimum standards in criminal procedure takes place basically with regard to two groups of parties to the procedure – the persons entitled to defence and victims.

Two trends can be outlined in the field of ensuring legal cooperation – the traditional legal assistance (mutual legal assistance), based upon a request submitted by a competent institution of a member state, and the application of a more contemporary institution of mutual recognition (mutual recognition of judgements and judicial decisions). It must be admitted that development in this field in the EU has been fast. The same applies to the impact of various EU legal acts upon the development of criminal procedure provisions in Latvia.

The implementation of the EU Framework Decisions has been the basis for introducing several amendments to the Criminal Procedure Law[4]. In view of the growing necessity for cooperation within the EU space, this trend must be recognised as being sufficiently significant. However, since separate publications have already been devoted to it[5], on this occasion I'll focus more upon the second trend in the development of the EU criminal justice – enshrining the minimum standards in the field of the rights of individual parties to the proceedings and ensuring them. The first trend is more typical of situations, when international legal cooperation is required, this, in its turn, creates the basis for assessing the so-called local procedure and its legal regulation. However, it must be admitted that the impact of the current

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[2] See, for example: Fletcher M., Loof R., Gilmore B. EU Criminal Law and Justice. Cornwall: Edward Elgar Publishing, 2008; Klip A. European Criminal Law. An Integrative Approach, 2nd edition.[n.p.]: Interesentia, 2012.

[3] Criminal law policy. Available: http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm [viewed 11 June 2012].

[4] Kriminālprocesa likums: LR likums. *Latvijas Vēstnesis*, 2005. gada 11. maijs, Nr. 74 (ar grozījumiem, kādi spēkā 11.06.2012.) [Criminal Procedure Law. With Amendments in force on 08.06.5005]. Available: http://www.likumi.lv/doc.php?id=107820 [viewed 11 June 2012].

[5] See, for example: Strada-Rozenberga K. Savstarpējās atzīšanas princips starptautiskajā kriminālprocesuālajā sadarbībā Eiropas Savienības telpā – teorija un prakse. [The Principle of Mutual Recognition in International Criminal Procedural Cooperation within the European union Space – Theory and Practice] In: Eiropas Savienība un tiesiska valsts: Latvijas pieredze. Rakstu krājums Rīga, Rīgas Juridiskā augstskola, 2009., 159.-173. lpp.; Melnace I. Top apjomīgi grozījumi Kriminālprocesa likuma C daļā [Sizeable Amendments to Part C of the Criminal Procedure Law in Drafting]. *Jurista Vārds,* 14.02.2012. Available: http://www.juristavards.lv/index.php?menu=DOC&id=243967 [viewed 11 June 2012].

EU activities upon criminal justice in Latvia thus far has been relatively small. This is proven by the annotations to the amendments introduced into CPL[6], references to those EU legal acts, which define the aforementioned procedural guarantees, are not common.

As indicated before, the implementation of minimal standards with regard to parties of the criminal proceedings with different statuses, it mainly applies to victims and persons entitled to defence. The activities with regard to persons enjoying the right to defence have been more intense; I'll take this up at the end of my presentation. However, the work in the field of protection of victims should not be overlooked, but because of the limited scope of this presentation I'll not deal with it, promising to return to in the nearest future.

The minimum procedural guarantees to persons entitled to defence

Before providing an overview of concrete EU legal acts, a question needs to be asked – what could be the basis of the requirement for common minimum legal standards in the legal regulation applying to those parties of criminal proceedings, who enjoy the right to defence? The aim in setting such basic requirements is sufficiently succinctly, but also exhaustively defined on the home page of the European Commission: "The EU works towards achieving common minimum standards of procedural rights in criminal proceedings, to ensure that the basic rights of suspects and accused persons are protected sufficiently. Common minimum standards are necessary for judicial decisions taken by one EU country to be recognised by the others, according to the principle of mutual recognition. For mutual recognition to operate well there must be measures promoting mutual trust."[7]

The issue of minimum procedural guarantees has been relevant in the EU already for a longer period of time. Activities resulted both in Green Paper from the Commission – Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union[8] of 2003, and in some other legislative proposals, which will not be examined in greater detail in this presentation.[9] Currently several outcomes in the activities of the EU institutions in the field of ensuring the minimum procedural rights of persons, who are suspect or accused, can be regarded as significant and relevant, and in the following part of my presentation I'll examine them in greater detail.

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[6] Annotations reviewed, using references from the portal likumi.lv

[7] Rights of suspect and accused. Available:http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm [viewed 11 June 2012].

[8] Green Paper from the Commission – Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union. Available:http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2003&nu_doc=75 [viewed 11 June 2012].

[9] More detailed examination of this isue in Latvian found in: Dundurs Z. Eiropas Savienības procesuāļās tiesības kriminālprocesā. *Jurista Vārds,* 16.08.2011. Available: http://www.juristavards.lv/index.php?menu=DOC&id=234351 [viewed 11 June 2012].

In October 2009 the Council of European Union agreed on the general approach on a package of documents aimed at strengthening procedural rights of suspected or accused persons in criminal proceedings, including resolution on a roadmap to identify the main areas on which legislative initiatives were desirable.

The Resolution of the Council on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings proposes five legislative measures on a "step by step" basis:

- the right to interpretation and translation (Measure A);
- the right to information about rights (Letter of Rights) (Measure B);
- legal advice, before and at trial (Measure C);
- the right for a detained person to communicate with family members, employers and consular authorities (Measure D);
- protection for vulnerable suspects (Measure E).

It has also been asked to put forward a Green Paper on pre-trial detention[10] (in some sources called Measure F[11]).

Closer examination of the measures clearly shows that currently concrete legal acts have been adopted in the framework of implementing Measure A and Measure B, a draft Directive in the framework of implementing Measure C has been elaborated, a brief overview of it will be provided in the continuation of this presentation. Regarding Measure F, in its turn, all readers can obtain detailed information about its implementation from the web page of the European Commission.[12]

Measure A

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings[13] can be identified as the legal instrument with regard to this Measure This Directive lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings with a view to enhancing mutual trust among Member States. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 October 2013.

In providing a brief overview on the provisions of this Directive, the following important points for consideration can be singled out:

- Persons, to whom the rights included in the Directive, apply.

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[10] In greater detail, see: [b.a.] Procedural rights in criminal proceedings. Available: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/110740.pdf [viewed 11 June 2012].

[11] Procedural safeguards. Available: http://www.ecba.org/content/index.php?option=com_content&view=category&layout=blog&id=65&Itemid=44. [viewed 11 June 2012].

[12] Available: http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm [viewed 11 June 2012].

[13] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. Available: http://eur-lex.europa.eu/Notice.do?val=525265:cs&lang=lv&list=525265:cs,507743:cs,507035:cs,&pos=1&page=1&nbl=3&pgs=10&hwords=&checktexte=checkbox&visu=#texte [viewed 11 June 2012].

The Directive provides that these rights apply to all suspected or accused persons. However, the Directive does not contain an explanation of these terms, so one can support the opinion that, in applying the terms used in Latvian CPL, the rights set out in the Directive should be applicable to all persons entitled to defence[14], from the moment they have been informed about their status up to the moment when the final ruling in the proceedings enters into force.

- The stage of criminal proceedings, in which the rights included in the Directive should be ensured.

It must be recognises that the requirements included in the Directive should be ensured throughout the criminal proceedings, from the moment, when the person has been informed about his or her status as person entitled to defence, up to the moment when the final ruling with regard to this person comes into force. Likewise, the relevant requirements must be ensured also in the procedure for examining issues connected to application and enforcement of the European Arrest Warrant.

- Types of translation, the necessity to ensure them.

The Directive contains the right to two types of translations – to oral interpretation and written translation. With regard to interpretation the following essential requirements have been set for the Member States:

- o Interpretation to the relevant persons must be ensured in all communication linked with criminal proceedings, including communication with a lawyer.
- o Interpretation must be provided without delay.
- o A mechanism for verifying, whether interpretation is needed, must be ensured.
- o A possibility to contest the decision that interpretation is not necessary must be ensured.

The following essential requirements with regard to written translation are set for the Member States:

- o Translation shall be provided of all those documents, which are essential for ensuring defence and fair court proceedings. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect. An oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.
- o Such translation shall be provided within reasonable time.

[14] Dundurs Z. Eiropas Savienības procesuāļās tiesības krimināļprocesā [The European Union Criminal Justice in Criminal Procedure]. *Jurista Vārds,* 16.08.2011. Available: http://www.juristavards.lv/index.php?menu=DOC&id=234351 [viewed 11 June 2012].

- Any waiver of the right to translation of documents shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily.
- A possibility to contest the decision that translation is not necessary must be ensured.

- Translation and interpretation in practice, its quality control
  - Member States shall make an effort to set up a register of adequately qualified interpreters and translators.
  - Interpreters and translators shall observe confidentiality.
  - Quality of translation and interpretation and procedural possibilities to verify it shall be ensured.
  - The possibility to complain about inadequate quality of translation and interpretation shall be ensured.
- Covering the costs of translation and interpretation.

Under the provisions of Article 4 of the Directive Member States shall meet the costs of interpretation and translation irrespective of the outcome of the proceedings.

Comparison of the positions included in the Directive and the CPL provisions that are in force allows concluding that the requirements included in the Directive at present are only partially implemented in Latvia. In general, translation and interpretation is provided, possibilities to complain about the refusal to provide translation and interpretation and about its quality are envisaged.

The following aspects that need improvement can be identified – the need to review the range of cases when the provision of a written translation is mandatory, also specifying the provision of interpreter's services in communication with the lawyer. This applies directly to criminal proceedings. The need to ensure interpreters, who provide high quality service, is an aspect ensuring the general quality of court proceedings, fast and significant improvement of their professional capacity is needed.

Measure B

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[15] may be identified as the legal instrument with regard to this Measure. It lays down common minimum standards to be applied in the field of information about rights and about the accusation to be given to persons suspected or accused of having committed a criminal offence, with a view to enhancing mutual trust among Member States. Member States shall bring

[15] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. Available: http://eur-lex.europa.eu/Notice.do?val=679519%3Acs&lang=en&list=679519%3Acs%2C678164%3Acs%2C643686%3Acs%2C643701%3Acs%2C&pos=1&page=1&nbl=4&pgs=10&hwords=&checktexte=checkbox&visu= [viewed 11 June 2012].

into force the laws, regulations and administrative provisions necessary to comply with this Directive by 2 June 2014.

In a brief overview of the provisions included in this Directive the following most essential points for consideration can be identified:

- Persons, to whom the rights set out in the Directive apply, and the stage in the proceedings, when these rights must be ensured.

Like in the Directive examined before, the rights set out in this Directive also apply to persons entitled to defence. Similarly these rights must be ensured from the moment the person has been informed about his status as a person entitled to defence, up to the moment when the final ruling in the proceedings enters into force.

- Minimum standards on providing information envisaged in the Directive.

The rights envisaged by the Directive can be examined in several larger blocks; the Articles of the Directive have also been drafted accordingly. A brief overview on each of them will be provided.

o Right to information about rights

The right to be informed about one's rights has been and probably will remain a subject for discussions both among theoreticians and practitioners. Opinions and approaches chosen by various states differ. The book, published in 2010, "An EU-Wide Letter of Rights. Towards Best Practice"[16] can be recommended as significant informative material to all readers interested in this issue.

Notwithstanding differences in opinions, the text of the Directive contains minimum requirements for ensuring these rights. To present the information on the scope and form of information to be provided in a more visible form, these positions are included in a table.

[16] Spronken T. An EU-Wide Letter of Rights. Towards Best Practice. Interesentia, 2010.

	In all proceedings	Proceedings, during which a person is deprived of liberty
Minimum scope of rights to be informed about	• the right of access to a lawyer; • any entitlement to free legal advice and the conditions for obtaining such advice; • the right to be informed of the accusation, • the right to interpretation and translation; • the right to remain silent.	• the right of access to the materials of the case; • the right to have consular authorities and one person informed; • the right of access to urgent medical assistance; and • the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority. • basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.
Type of informing	In simple and accessible language	
	Orally or in writing	With a written Letter of Rights (An indicative model Letter of Rights is set out in Annex I). Member States shall ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons shall be informed of their rights orally in a language that they understand. A Letter of Rights in a language that they understand shall then be given to them without undue delay.

The Directive also stipulates informing on rights in applying EAW, envisaging an indicative model Letter of Rights, which is set out in Annex II.

o Right to information about the accusation

The following can be singled out as the main aspects of this procedural guarantee set out in the Directive:

- suspects or accused persons shall be provided with information about the criminal act they are suspected or accused of having committed;
- that information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence;
- suspects or accused persons who are arrested or detained shall be informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed;

- at the latest on submission of the merits of the accusation to a court, detailed information shall be provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person;
- suspects or accused persons are informed promptly of any changes in the information given

o Right of access to the materials of the case

A table is useful to characterise also this guarantee.

	Any proceedings	Proceedings, during which a person is deprived of liberty
Minimum scope of case materials to which access must be ensured	At least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.	Documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, shall be made available to arrested persons or to their lawyers.
Term	In due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court.	Without delay, to exercise these rights efficiently.
Possibility to refuse access to case materials	provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. A decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.	Not envisaged.

- Practical aspects in ensuring the right to information

Two major conclusions can be pointed out in this respect

- o Provision of information shall be recorded.
- o A person's right to appeal the refusal to provide information set out in the Directive must be envisaged.

Comparison of the positions included in the Directive with the CPL provisions that are currently in force leads to the conclusion that also in this case the requirements

included in the Directive are only partially implemented in Latvia. In general, access to case materials is ensured when the case is forwarded to the court. The possibility to complain about refusal to provide access to information or not providing it in full is envisaged. CPL also provides the right to get acquainted with the decision on recognising a person to be a suspect and with the charges included in this document. However, the practical application of these provisions calls for improvement. It is clear that full implementation of the provisions of the Directive will require updating the CPL. Special attention must be paid to the procedural guarantees to persons, who are detained or arrested, including the necessity to inform them or their counsels about those case materials, which justify the application of such coercive measure. The introduction and the content of the Letter of Rights will also demand more accurate definitions in the law and significant changes, improvements in the practical implementation.

Measure C

The European Commission has adopted a proposal for a Directive on Measure C of the Roadmap – Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest[17]. This Directive manifests the wish of the EU institutions to set common minimum standards on the right of access to a lawyer, access to legal assistance and the right to inform third persons about their detention or arrest for persons entitled to defence. It is planned that this Directive will include provisions on the need to ensure access to a lawyer, possibility to meet him, confidentiality of talks. It is also planned to include provisions on the lawyer's rights to participate in various investigative activities. It is planned to define the rights of person, who has been deprived of liberty during criminal proceedings, to inform third persons about this fact. The content of the Directive at the moment is quite unclear, significant discussions are a proof of that, and essential changes to the text of the Directive are possible. It is clearly illustrated by the fact that on 9 March 2012 the Council of the European Union Presidency published a revised text of the Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. [18] And on 11 April 2012 the Presidency published a further draft of the Directive, which contains a significantly narrower range of guarantees, compared to the initial draft Directive. One can assume that extensive and tense discussions about the text of this Directive can be expected, which is proven by, for example, the Joint Statement (7 May 2012), prepared by nine civil society organizations (Open Society Justice Initiative, European Criminal Bar Association, Fair Trials International, Justice, Irish Council for Civil Liberties,

[17] Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0326:FIN:EN:PDF. [viewed 11 June 2012].

[18] Revised text of Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. Available: http://www.ecba.org/extdocserv/projects/ps/20120309_measureCrevtext.pdf. [viewed 11 June 2012].

Hungarian Helsinki Committee; Helsinki Foundation for Human Rights in Poland, Greek Helsinki Monitor, Human Rights Monitoring Institute (Lithuania)) addressing the Council of the European Union's revised text of the Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest[19]. The need to amend criminal procedure provisions in Latvia in connection with the future implementation of this Directive will be directly linked with the final wording of this Directive. It should be admitted that also at present Latvian CPL envisages sufficiently extensive rights to a lawyer and his participation in the criminal proceedings. Thus, it is predictable that implementation of this Directive will not require essential amendments to CPL. Perhaps only some nuances will require adjustments. The adoption of the Directive could have a greater impact in practice, possibly, paying grater attention to the actual provision of right to a lawyer, which is already now set out in the CPL.

In conclusion of this brief overview of the Directives, it is important to remind that the Directives contain only the requirements on the minimum procedural guarantees. Neither the legislator, nor parties enforcing the law should forget the disclaimer, usually included in the Directive – "Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards enshrined in the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and Fundamental Freedoms, other relevant provisions of international law or the laws of any Member State that provides a higher level of protection."

Conclusion

- Within the EU legal space increasingly more attention is focused upon issues of criminal justice and criminal law. These and other considerations allow concluding that there are grounds for talking about an independent legal field – the EU Criminal Justice.
- Two basic lines of activities of the EU institutions can be identified in the field of criminal justice – legal cooperation and implementation of the minimum standards of procedural guarantees.
- The issue of procedural guarantees is mainly examined in connection with two groups of parties to criminal proceedings – persons entitled to defence and victims.
- Two Directives have already been adopted and one draft Directive has been elaborated in the field of procedural guarantees for persons entitled to defence.
- The Directives contain the minimum requirements regarding procedural guarantees, and their provisions is not a ground for limiting the procedural guarantees already envisaged in the Member States' laws.

[19] Joint statement on the Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, 07.05.2012. Available: http://www.ecba.org/extdocserv/projects/ps/20120507_JointResptoCouncilRevtextMeasureC.pdf [viewed 11 June 2012].

- It must be admitted that the majority of requirements enshrined in the Directives are already ensured. However, in some cases amendments to the CPL text will be necessary.
- One can expect that the implementation of the Directives in Latvia will leave a more significant impact upon ensuring in practice the guarantees defined in the Directives, this could require significant financial investment, as well as implementation of organisational and technical measures.

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VERSATILITY OF EFFECTS OF LEGAL PROVISIONS

Keywords: effectiveness of legal provisions, legislative process planning, legal policy, sociology of law.

The objective of the article is to give a concise insight into an issue that is topical in the modern-day European science of law, but theoretically it has been scantily examined – versatility of effects of legal provisions. By employing the analytical method and the historically comparative method, the article in detail examines and critically analyses the division of the effects of legal provisions offered in the modern legal science, as well as considers their topicality in Latvia. By the use of the said scientific methods, the article proposes a schematic model of analysis of effects of legal provisions for performing empirical and theoretical studies in sociology of law, by analysing the legislator's work.

Introduction

Each implemented creative activity of legal provisions generates a greater or lesser impact on the existing legal and judicial system: "by amending or adding to certain legal provisions, the legislator affects and transforms the entire legal system."[1] The adoption and amendments of laws indicate to advancing the legal system in a certain direction and to the fact that laws nowadays cannot be autonomously perceived, but most frequently they are to be considered and interpreted only in a broader context. Legal provisions simultaneously create many effects, the detection and study of which, depending on the study objectives and extent thereof, can lead to unexpected and useful results for the improvement of further conduct of the legislator.

Evaluation of laws comprises not only finding out to what extent a provision meets the criteria "effective, useful, and efficient"[2], but also determining all of those effects that this provision creates in the society and which describe their functional qualities. In Europe, the versatility of effects of legal provisions has been most widely studied by law scholars of France, Germany, the Netherlands, and Switzerland, whose works have been used in this paper. The contemporary sociology of law offers several "pairs"

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[1] Osipova S. Sabiedrība tiesību socioloģijas skatījumā. *Likums un Tiesības,* 2006. Aprīlis, Nr. 4., 100. lpp.

[2] See more on criteria for evaluating effects of legal provisions: Šulmane D. Tiesību normu efektivitātes jēdziena problemātika mūsdienu tiesību socioloģijā. Monograph: Juridiskās zinātnes aktuālās problēmas. Rakstu krājums. Rīga: Zvaigzne ABC, 2012, 281.-296. lpp.

of legal provisions[3] (mostly – opposites), alleviating their methodological analysis. Several types of effects of legal provisions in the legal science of Latvia have been little studied up to now.

In analysis of the academic writings dedicated to sociology of law and political analysis of Europe, it can be established that since the seventies of the 20th century, a trend has developed to academically and critically assess the legislator's activities in the field of legal policy. In sociology of law, theories of legal provision effectiveness (J. Carbonnier) were developed and legisprudence studies (P. Noll), which are topical in our time, took shape. Despite the ideological background, also the theoretical work of Soviet law scholars in the study of the effectiveness of law is to be considered as an important contribution in the European legal science. For instance, the scheme of legal impact proposed by the world-renown Czech scholar of law V. Knapp,[4] in which the changes (P) caused by a provision are achieved, by establishing certain legal relations (S) affected by the provision (N) in interaction with the adverse manifestations of the provision (R), was significantly enhanced by the Soviet legal scientists. It was established that the provision (N) is affected not only by its adverse manifestations (R), but also by other provisions and positive manifestations (L), as well as that the consequences of legal impact do not set in immediately, instead along with persons getting involved (emphasising the importance of legal awareness), thereby including in the V. Knapp's scheme the attitude of a range of legal subjects (N1–Nn) and their impact on the process of implementation of law. Furthermore, the changes (effects) triggered by the provision can be not only positive and desirable (P), but also unexpectedly positive (P1) or unexpectedly negative (P2). [5]

A similar theoretical distinction between the effects of legal provisions has been proposed by the Swedish scholar E. Vedung, considering that legislative effects are divided into the expected and unexpected,[6] which, for their part, are divided into the positive (main outcome) or negative effects of the target group and in effects of other spheres (positive side-effects or negative side-effects).[7]

Based on the problematic nature of the need to evaluate effectiveness of law that became topical during the last few decades of the 20th century, several types of study of legal effects were developed, and they can be referred to as traditional parameters of effects of legal provisions.

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[3] Mader L. RIA course Lisbon. Ex post analysis and experimental analysis. Berne, 6 December 2010. Available: www.icjp.pt/system/files/files/2010_2011/AIL/Luzius%20Mader.pdf. [viewed 22 May 2012]. Prof. L. Mader is the president of the International Association of Legislation.

[4] V. Knapp is considered to be the forefather of application of cybernetic methods in law science. See, for example: Knapp V., Vrecion V. The possibility of applying cybernetic methods to law and administration. International Social Science Journal, 1970. Vol. XXII, No. 3, pp. 495-501.

[5] See more: Кудрявцев В. Н. Никитинский В. И, Самощенко И. С., Глазырин В. В. Эффективность правовых норм. Москва: Юридическая литература, 1980, с. 44-48.

[6] Or "desirable and undesirable effects".

[7] Vedung E. Public Policy and Program Evaluation. New Brunswick, N.J. and London: Transaction Publishers, 1997, p. 141.

Expected and Unexpected Effects

The criterion of successful implementation of each reasonable contemporary legislator's work is the ability to predict the effectiveness of implementation of a particular legal provision. The question on whether the legislator can always expect the consequences of their decisions, becomes topical in situations, when the results of a legal provision takes the society or the legislator by surprise. This aspect is to be viewed in relation to understanding the effectiveness of a law. At times, an undesirable effect is regarded as insignificant or it even was predictable, but it has not proven to be sufficiently important counter-reasoning for not adopting the provision.

In many European countries, over the last decade, the number has not been decreasing of those cases, in which the society and the mass media warn the legislator about that the adoption of a provision will fail, that it would not achieve the legislator's expected effect (for instance, imposing the increased 21 % value added tax rate on books in 2009, the application of what is known as "service vehicle tax" in Latvia in 2010, or introduction of "the radio listening fee" and then discussions on its cancellation in 2012); quite the contrary – this number keeps increasing. The practice often proves the true nature of these expectations. The legislators in European countries try avoiding many unexpected effects by introducing and elaborating pre-legislative (ex ante) evaluation.[8]

Desirable and Undesirable Effects

The problems of efficiency of a legal provision are directly related to the achievement of desirable goals with the help of a law as the employed means. It is necessary to analyse whether the found consequences and impact is desirable and whether it existed in the legislator's intent, when creating the text as it is, which generated the consequences as they are (for instance, whether the goal "to promote participation of private entities in state administration" as established in the Law on Submissions is achieved)[9]. The study of desirable and undesirable effects from the stance of sociology of law emphasizes political analysis, thus employing theories of political sciences. Nowadays, the law effectiveness studies serve as a policy instrument, because it helps the legislator choose and find their way, as well as plan the adoption of laws so that the majority of the society perceived it as the right direction. It is proven by the theories developed in sociology of law of the 20th century, as well as by the modern-day political analysis theories, which can no longer be regarded as political theories, but instead legal theories impacted by politics. For instance, one of the novelties is the

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[8] See more: Larouche P. Ex ante Evaluation of Legislation Torn among its Rationales. In: Verschuuren J. (ed.) The impact of legislation: a critical analysis of ex ante evaluation. Netherlands: BRILL, 2009, pp. 39-62. Available: http://arno.uvt.nl/show.cgi?fid=94877 [viewed 29 April 2012].

[9] Iesniegumu likums [Law on Submissions]: LR likums. *Latvijas Vēstnesis*, 2007. 11. oktobris, Nr. 164. Concerns regarding conformity of the effects that this law can cause with the legislator's *expressis verbis* given objectives have been voiced by the lawyer M. Ruķers. See: Igaune S. Diskutē par eparaksta vietu saziņā ar valsti. *Dienas Bizness*, 2012. g. 23. februāris.

development of legisprudence in legal science, thereby more intensively analysing the relation of the legislator's political aims and the achieved results.[10] Undesirable effects of legal provisions serve as the basis for adopting new amendments to laws or for changing the political course. It is important to distinguish between the undesirable effects of legal provisions, which can be prevented only by political decisions, and such undesirable effects, which can and should be improved by the court for the sake of justice. The issue of what the boundaries of the judicial branch and legislative branch are has become very topical under the modern-day democracy conditions, in which often tension is observed between judges and politicians.[11]

Direct and Indirect Effects

Distinction between direct and indirect effects of legal provisions traditionally is the most wide-spread, and legal sociologists unanimously admit their existence, however precise identification of these effects in practice is challenging. The legislators most often predict, forecast, and expect the direct effects.[12] They can be considered as obvious consequences to specific conduct – passing a law. Before passing a law, the legislator rarely forecasts the indirect effects, and even then – they are portrayed in positive light. The indirect effects are special with that they cannot be fully anticipated, because their manifestations are affected by the events taking place in the society and in the state. These conditions can be, for instance, social movements, which originated after the adoption of a law or, for instance, a rapid change in the habits of social groups resulting from state-imposed bans or restrictions (e.g., increase in the consumption of illicit alcohol or more "salaries in envelopes" in Latvia). Hence, indirect effects can be detected by stepping outside the boundaries of the classic conformity evaluation of a law, and they demonstrate the variety of responses that initially might not be associated with the consequences of the law.

Concrete and Symbolic Effects

The classification into concrete (material, instrumental) and symbolic (expressive) effects plays an increasingly more important role in modern democracies. If the

[10] See more on the development of legisprudence as a new theory of legal sciences: Šulmane D. Leģisprudence – jēdziens un problemātika tiesību sociologa skatījumā. Monograph: Daugavpils Universitātes Starptautiskās Zinātniskās konferences "Valsts un tiesību aktuālās problēmas" referātu izdevums. Daugavpils: Akadēmiskais apgāds "Saule", 2011, 35.-40. lpp.

[11] See more: Canivet G. Francijas Konstitucionālās tiesas tiesnesis, runa Augstākās tiesas konferencē 2005. gada 7. oktobrī. "15 Years of Independence: Is It a Reason to Celebrate?" Available: www.at.gov.lv/files/docs/conferences/Canivet.doc [viewed 3 July 2011].

[12] In Latvia, such evaluation is formally performed by adding annotations to draft laws; and it is mostly performed already in the ministries. The evaluations include answers to questions contained in annotations, for instance, in Part II "What can be the impact of the regulatory enactment on development of the society and national economy", in Part III "What can be the impact of the regulatory enactment on the state budget and local government budgets", and in Part IV "What can be the impact of the regulatory enactment on the effective system of legal provisions".

impact of an effective regulatory enactment can be specifically identified (statistically, growing/decreasing parameters), then that is a specific effect. Conversely, if it affects mostly the mood in the society, the spiritual attitude, then the provision generates only a symbolic effect. By adopting a decision, the legislator confirms a symbolic value or condemnation to a certain existing practice, tradition, value or phenomenon in the society. A symbolic effect will be manifested in a form of inspiration, encouragement, showing respect, condemnation, etc.[13]

The symbolic effect often is characterised with the change in individuals' attitude. Symbolic values (for example, the aesthetic value of a lawn in parks, refraining from smoking in public spaces) are turned into spheres that can be governed by regulatory provisions. This type of reasoning is very frequently used to justify the creation of new punitive provisions, thereby causing legislative inflation.

Symbolic laws create an illusion about the binding essence of the formal legal effect of a law. It has been observed that also in Latvia symbolic laws are adopted with minimum practical importance, however the social and political importance is immense.[14] The majority of symbolic laws in essence are legally formulated political programs, visions, plans, and requirements of groups of interests. It causes belief that the law protects these visions and plans, and that the idea of a judicial state is being implemented in practice.

Several examples from the recent German and Latvian legislation illustrate the conditions and consequences of adopting symbolic laws. For instance, in 2005, the German legislator introduced amendments in the law governing gatherings, in order to prevent Neo-Nazis from assembling in certain parts of a city, thereby expressing a bank on the activity of extreme rightist organisations. Since Article 8 of the Constitution of Germany prescribes freedom of assembly, then the application of this law in practice proves to be marginal and it becomes symbolic. [15]

The modern theories of sociology of law have been supplemented by a range of formerly little studied and recognised effects of legal provisions, which have expressly sociological origin. The legislator often cannot forecast such effects of legal provisions,

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[13] See more: Mincke C. Effets, effectivité, efficience et efficiacité du droit: le pôle réaliste de la validité. Revue interdisciplinaire d'etudes juridiques, 1998, No. 40. p. 117.

[14] The author believes that one of the most pronounced examples of the symbolic effects of a legal provision is the amendments introduced in the Constitution in 2005 regarding strengthening marriage "between a man and a woman". The Parliament adopted the amendment of the Constitution, thereby symbolically forbidding same-sex marriages on the grounds of considerations like morale, family strengthening, improving birth rates, and on the opinion dominating in the society (from the legislator's point of view) about legalisation of homosexual relationships. This amendment had no legal load because the already effective Civil Law stipulated that a marriage can be entered into only between a woman and a man. Please, see: Dupate K. Ģimene, homoseksualitāte un cilvēktiesības Eiropā. Referāts diskusijā "Ģimene, laulība un sabiedrības vienotība dažādības un neiecietības kontekstā" 2005. gada 15. novembrī. Available: http://www.politika.lv/temas/cilvektiesibas/5385/ [viewed 28 June 2012].

[15] Amendatory Act, 24.3.2005., Bundesgesetzblatt I (Federal Law Gazette Germany), 969. Please, see: Enders C, Lange R. Symbolische Gesetzgebung im Versammlungsrecht? JuristenZeitung, 2006. 105. et seq. Cited from Siehr A. Symbolic Legislation and the Need for Legislative Jurisprudence: The Example of the Federal Republic of Germany. Legisprudence, 2008. Vol II, No. 3, p. 280.

which can be generated by future changes of the social structure of the society or, for instance, the trends of globalisation and migration. Further on, the article is dedicated to concisely considering new and little-studied types of effects of legal provisions, which have been addressed in their studies by a range of legal sociologists (D. Nelken, R. Cotterrell, R. Banakar, among others).

Immediate and Deferred Effects

In the dynamic pace of modern life, regardless of highly developed planning technologies and the high level of competence in state administration, it is even more difficult for the legislator to adopt such laws, the planned implementation or impact of which is expected after a longer time period, e.g., several years later. Provisions that prescribe fulfilment of a specific law as of a certain date (tax legislation, road traffic) allow drawing conclusions already at an early stage of implemantion of law fulfilment. What concerns the laws, which prescribe fostering certain processes (for instance, birth rates, use of the state language, naturalisation, alcohol consumption decrease), then the results can be analysed only after a longer time period. It must be recognised that the longer period for "the expected effect" has been envisaged by the legislator, the lesser is the possibility of its fulfilment in the form as expected by the legislator. Normally, the legislator nowadays, just like in general in the society, finds himself in a position of urgency. The effect of a law starts immediately after it comes into force, as well as the state expects that the specific provisions start functioning immediately and to full extent.

Not infrequently, only several years later, the deferred effect of laws can be observed, which most often are not expected by the legislator and are undesirable. Special manifestations of deferred effect in Latvia are observed with respect to regulations of the Citizenship Law[16] adopted in 1994 regarding the so-called "naturalisation windows". Such procedure in the Citizenship Law was established in 1994 because there were concerns that too many non-citizens will immediately want to obtain citizenship of the Republic of Latvia and the Naturalisation Board will not be able

[16] Pilsonības likums [Citizenship Law]: LR likums. *Latvijas Vēstnesis*, 1994. g. 11. augusts, Nr. 93.
"Section 14. General Procedures of Naturalisation.
(1) Applications of persons for admission to Latvian citizenship in accordance with the provisions of Section 11 and 12 of this Law, are examined in the following sequence:
1) from 1 January 1996 – applications by persons, who were born in Latvia and at the time of submitting the application are 16 to 20 years old;
2) from 1 January 1997 – applications by persons, who were born in Latvia and at the time of submitting the application are up to 25 years old;
3) from 1 January 1998 – applications by persons, who were born in Latvia and at the time of submitting the application are up to 30 years old;
4) from 1 January 1999 – applications by persons, who were born in Latvia and at the time of submitting the application are up to 40 years old;
5) from 1 January 2000 – applications by other persons born in Latvia;
6) from 1 January 2001 – applications by persons born outside Latvia and moved to Latvia when they were minors;
7) from 1 January 2002 – applications by persons born outside Latvia and moved to Latvia before the age of 30;
8) from 1 January 2003 – applications by other persons."

to evaluate all applicants properly. This effect to be expected in a long-term – fully completed naturalisation by 2000 – was not achieved. The legislator, in a way, ended up being a hostage in this situation, because the expected number of those willing to obtain citizenship fell significantly short of the planned number, and thus the law ended up being ineffective and did not stand the test of time. It turned out that the non-citizens were not only negatively disposed towards the essence of the law and did not expect that the state will allow them to become naturalised, but in the recent years they have even decided to adopt the Russian citizenship, while staying to reside in Latvia. Thus, the "naturalisation windows" introduced with the Citizenship Law have caused delayed but stable and adverse consequences in the non-citizens' attitude towards the state of Latvia and towards the efforts to implement integration policy.

Premature and Retrogressive Effects

Sociologists of law have studied the phenomenon of the effect of legal provisions (or merely planned reforms) before the official coming into effect. The society, knowing that a certain planned law is to take effect, is rushing to use the time to manage legal activities under the conditions of "the old order" (they are mostly related to economic gains, because normally, inflation and price increase is typical for the economics and taxation). Thus, it is not the provision itself, but the information about its coming into effect that generates specific legal consequences. For instance, in 2005, there was uproar regarding the plan to stop selling salt without iodine in Latvia caused by adoption of a certain draft regulation in the government.[17] Regardless of the fact that there were no specific regulatory enactments adopted, many residents of Latvia acted and made salt reserves.

However, luckily, there are cases when the society's concerns about the premature effect of a law prove to be unjustified. Before 1 November 2010, when the restrictions on what are known as "mothers' salaries" were to set in, it was expected that the number of "C-sections" would increase in the last few days before the law took effect. However, the concerns were not valid and mothers-to-be did not try to artificially stimulate the arrival of babies into this world in order to be able to fit in within the term, when it was possible to get higher allowances.[18]

Opinions might differ with respect to whether it is necessary to distinguish between premature or retrogressive effects caused by legal provisions, as proposed by the legal scientist L. Mader.[19] Possibly, a part of legal experts could believe that it is more

[17] Latvijā varēs tirgot tikai jodētu galda un vārāmo sāli. [Only food salt with iodine and common salt will be allowed to be sold in Latvia] Portal: TVnet.lv, 27 June 2005. Available: http://www.tvnet.lv/zinas/latvija/207357-latvija_vares_tirgot_tikai_jodetu_galda_un_varamo_sali [viewed 22 May 2012].

[18] Dzērve L. Būtiski apcirps pabalstus bērniem, kuri būs dzimuši pēc 2. novembra. [Significant cuts to allowances for babies born after 2 November] Diena, 26 October 2010. Available: http://www.diena.lv/sabiedriba/politika/butiski-apcirps-pabalstus-berniem-kuri-bus-dzimusi-pec-2-novembra-754851 [viewed 22 May 2012].

[19] Mader L. RIA course Lisbon. Ex post analysis and experimental analysis. Berne, 6 December 2010. Available: www.icjp.pt/system/files/files/2010_2011/AIL/Luzius%20Mader.pdf. [viewed 22 May

appropriate to categorise the aforementioned effects to the immediate and deferred effect group, thereby emphasising the manifestation of these effects in time: before or after the law takes effect. Nevertheless, the author supports distinction between certain premature effects, emphasising the role of legal consciousness and culture in the modern-day society, particularly analysing the situations, in which a legislator has merely spread information regarding a plan to adopt a specific law.[20]

Visible and Latent Effects

This distinction of effects of legal provisions is possibly the most controversial and least studied in practice. It is important to differentiate this pair of effect types from "concrete and symbolic effect" type, because latent effects of legal provisions can often remain unknown to the researchers and can "emerge" only by chance. The latent legal provision effects are most directly related to the legal consciousness of the society and with the country's political culture. The difference between the visible (or manifested) and latent effect properties is often linked to the choice of the text of a law and to the choice of relevant legal conditions (it is only in 2012, when after many years of discussions in Latvia, the Lobby Law will be railroaded for consideration in the Saeima (the Parliament), which in the opinion of the authors of the law will restrict this tendency), which at times can contrary to formal openness and equivalence prescribe "special conditions for special persons". For instance, in the seventies of the 20th century, in the Federal Republic of Germany, it was forbidden that "persons, who are unfaithful to the constitution" filled positions in public administration. Besides the manifested function, which showed that extremists are excluded from work in public administration, there was also an undeclared function: by allowing to discriminate communist party members, to strengthen the positions of "institutionally accredited" political forces represented in the parliament.[21]

Improving and Distorted Effects

As pointed out by the Belgian scholar C. Mincke, legal provisions sometimes can be better and more correctly implemented than planned, and likewise, they can be implemented completely inappropriately or in a distorted manner.[22] These effects can be regarded as subgroups of unexpected effects, because the law generates an effect, but not an effect that the author had expected. The legislator sometimes does not even hope that the legal provision will bring such good results or that the text

2012].

[20] The study of such phenomena is performed mostly within the framework of sociology, anthropology and political sciences.

[21] Ferrari V. Il diritto in funzione del potere: il Berufberot nella Republica Federale Tedesca. Sociologia del diritto, 1977, I, p. 75-87.

[22] Mincke C. Effets, effectivité, efficience et efficiacité du droit: le pôle réaliste de la validité. Revue interdisciplinaire d'etudes juridiques, 1998, Nr. 40, p. 121.

of the law will be more forward-looking than the legislator himself. However, more often, the legal provision is interpreted and applied in real life completely differently (negatively) than the legislator would have wished for. Viability of a law is endangered if there are "interferences in the functioning of the social order code".[23] In France, the attention of sociologists was particularly attracted by social protection laws, which were employed by many for dishonest ends. The state, when solving the problem of distributing finances for those in need (and in particular payments for the poor), in practice generated what is known as "Matthew effect"[24], which has turned into a typical example in the French law. The system of allowances for low-income families introduced by the state and local governments also allows the "Matthew effect" to spread, because at times the formal compliance with the low-income person status does not mean that this person in practice actually needs, for instance, discounts for utilities payments in order to survive.[25]

In order to enable proper use of the division of various types of legal provision effects not merely in empirical study of effectiveness of legal provisions and in the process of developing legal policy, but also in legal theory, it is recommended to create a model describing the effects of legal provisions, by promoting the approaches of the modern legal sciences (in particular, legisprudence and sociology of law) as the key criteria in an analysis of legal phenomena. The author proposes the following distinction of effects of law depending on the objective, methods, and approach of the scientific study:

Approach (model) of assessing legal effects	*Effects of legal provisions to be studied*
Instrumental model	Direct and indirect effects; desirable and undesirable effects; expected and unexpected effects; concrete and symbolic effects.
Sociological model of law	Immediate and deferred effects; premature or retrogressive effects; visible and latent effects; improving and distorted effects.

[23] Savatier V. L'inflation législative et l'indigestion du corps social, Dalloz, 1977. Chronique V, p. 43.

[24] In social sciences, the concept "Matthew effect" was introduced by the prominent American sociologist (Robert K. Merton). See article: Merton R.K. The Matthew Effect in Science. Science, 1968. Vol. 159, pp. 56-63. Available: http://www.garfield.library.upenn.edu/merton/matthew1.pdf [viewed 22 May 2012]. The origin of the said concept is linked to the phrase found in the New Testament, Gospel of Matthew (Chapter 13, verse 12): "Whoever has will be given more, and he will have an abundance. Whoever does not have, even what he has will be taken from him". The concept "Matthew effect" in the modern-day sociology of law defines a tendency of persons or groups of persons to increase their dominance to solidify the dominant position, existing privileges, or resources available to them.

[25] There was extensive response from the society regarding the situation when a well-paid employee of the Bank of Latvia received "mother's salary" calculated according to his income. See: Latvijas māmiņalgu rekordists pērn ticis vēl pie 10 000 latu pabalsta. [The mother's salary record-keeper of Latvia last year received another 10 000 lats in allowances] Diena.lv, 17 April 2012. Available: http://www.diena.lv/latvija/latvijas-maminalgu-rekordists-pern-ticis-vel-pie-10-000-latu-pabalsta-13942333 [viewed 22 May 2012].

The choice of an approach (a model) of assessing the legal effects depends on what is the specific study object of implementation of the legal provision (institute). If it is *ex ante* evaluation of the legislator's chosen policy direction, then the instrumental model will be the most suitable one (it is normally implemented in practice by the state administration). However, the sociological model of law is focused on *ex post* critical assessment of the adopted provision, determining the effects of the adopted provision in the society and their impact on legal consciousness and how it fosters/delays development of various processes. The effects of legal provisions analysed within the framework of both proposed models are to be viewed within a general context, realising that the legislator's successful planning and precise forecasting of the effects of legal provisions is not a campaign-type process, but instead – it is a continuous need, in which not merely state administration officials are involved, but also sociologists of law, political scientists, and experts of other social sciences are participating.

Conclusion

1. In many European countries, the legislators widely employ the insights of the sociology of law and legisprudence in the process of drafting laws and in the study of practice of their implementation (experience of *ex ante* and *ex post* evaluation of legal provisions in Germany, the Netherlands, Switzerland, France). However, the study of specific legal provision effects and broader analysis thereof not only in Latvia, but also in Europe up to now theoretically and practically has been considered only fragmentarily.
2. Unlike the final decades of the 20th century, when the instrumental division of effects of legal provisions dominated (e.g., expected and unexpected, positive and negative), nowadays, more recognition is gained by effects of legal provisions that can be established through an analysis of more complex social processes (e.g., visible and latent effects, improving and distorted effects), thereby confirming the post-modernism expressions of this time also in law.
3. Nowadays, the study of symbolic effects of legal provisions has become even more important in democratic countries, thereby raising the issue on the role of "ideological education" not merely in authoritarian regimes, but also in countries, in which freedom of speech and liberalism are emphasised not only formally, but also in practice.
4. What is known as the "Matthew effect" is alien in science of law of Latvia – it implies distorted use of legal provisions for vested interests (in particular in the field of social benefits). Western sociologists of law have analysed this phenomenon of deformed legal consciousness only with specific examples, but they have developed a concept, borrowed from the Bible, widely recognised in social sciences.

5. Detection and in-depth analysis of premature, as well as of deferred effects can provide important information to the legislator regarding the limits of application of a legal provision in capacity of an instrument regulating the society's behaviour and about the link to the legal consciousness of the society, in particular, by introducing amendments in regulatory enactments with the aim to promote or prevent the development of certain processes in the society (for example, promoting the use of the state's official language, restrictions of smoking).
6. The author suggests dividing the effects of legal provisions found in the Western law science depending on the objective, methods, and approach of the scientific study: historically, the instrumental model formed, focusing on the legislator's perspective in a rational legislative process. The second model widely used in the modern-day social sciences is the sociological model of law, which emphasises the effectiveness of the adopted provisions in general and in developing or delaying specific social processes.

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TRENDS OF DEVELOPMENT OF OBJECTIVE OF PUNISHMENT IN CRIMINAL LAW

Keywords: reinstatement of justice, Criminal Law, resocialization, objective of punishment, punishment.

Legal definition of the concept of a punishment and its objective nowadays is provided in relatively few countries. Thus, for instance, in the criminal codes of Austria[1], Belgium[2], Switzerland[3], Federal Republic of Germany[4], the Netherlands[5], Italy[6], the concept of a punishment and the objective of a punishment is not provided. The criminal law of several foreign countries defines only the objective of punishment (for instance, Bulgaria[7]). Sometimes, the legislator does not name the objectives of punishment explicitly, however they are included in criminal laws relating to other institutes. For instance, the Criminal Code of Belarus[8] refers to the objectives of criminal liability instead of objectives of punishment; the Criminal Code of Poland[9] does not list the objectives of punishment, but instead they are mentioned only within context of general principles of determining punishment. Likewise, there are a number of countries, in which the objectives of punishment are introduced only in doctrine.[10] For instance, in the Federal Republic of Germany, the proponents of absolute theories recognise repayment as the main objective of punishment, while those in favour of relative theories believe that the main objective is to deter. Such objectives as prevention and resocialization also have a major role. Among the practicians, the

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1 Austrijas krimināl kodekss. In: Krastiņš U., Liholaja V. Salīdzināmās krimināltiesības. Latvija, Austrija, Šveice, Vācija. Rīga: Tiesu namu aģentūra. 2006, 239.-336. lpp.

2 Beļģijas krimināl kodekss. Krastiņš U., Liholaja V. Salīdzināmās krimināltiesības. Rīga: LU Akadēmiskais apgāds, 2008, 149.-274. lpp.

3 Šveices krimināl kodekss. In: Krastiņš U., Liholaja V. Salīdzināmās krimināltiesības. Latvija, Austrija, Šveice, Vācija. Rīga: Tiesu namu aģentūra. 2006, 337.-430. lpp.

4 Vācijas Federatīvās Republikas krimināl kodekss. In: Krastiņš U., Liholaja V. Salīdzināmās krimināltiesības. Latvija, Austrija, Šveice, Vācija. Rīga: Tiesu namu aģentūra. 2006, 431.-573. lpp.

5 Nīderlandes krimināl kodekss. Krastiņš U., Liholaja V. Salīdzināmās krimināltiesības. Rīga: LU Akadēmiskais apgāds, 2008, 347.-493. lpp.

6 Уголовное право зарубежных стран. Общая и Особенная части. Учебник. Под ред. И.Д.Козочкина. 3-е издание, переработанное и дополненное. Москва: Волтерс Клувер, 2010, с. 502.

7 Уголовный кодекс Республики Болгария. Минск: Тесей, 2001.

8 Уголовный кодекс Республики Беларусь. Минск: Тесей, 2001.

9 Уголовный кодекс Республики Польша. Минск: Тесей, 1998.

10 Додонов В. Н. Сравнительное уголовное право. Общая часть. Москва: Издательство "Юрлитинформ", 2010, с. 259.

use of mixed theories is gaining ever more popularity.[11] Nowadays, the scope of recognised objectives of punishment is rather broad – reinstatement of social justice; implementation of the justice principle; correction (rehabilitation) of the convict; resocialization of the convict; general and special prevention; punishing; prevention of crime; expressing public condemnation, etc.[12] Another noteworthy opinion expressed in legal writings is that "… the key objective of punishment is to decontaminate a person, who has committed an offence, to give a life lesson"; punishment cannot cause more suffering than is necessary for that person's rehabilitation.[13]

In philosophy, the understanding of an objective includes also the outcome towards which the process has been directed. The term "objective" in philosophy most often means – "end", "conclusion",[14] something that is desirable to implement, achieve.[15] The objective of punishment is the desirable social result that the state wants to achieve, by imposing criminal punishment.[16] Moreover, the determination of objectives of a punishment bear massive importance, because they portray the country's policy in fighting the crime; they help determining the optimum type and scope of punishment for a specific case; they are parameters of effectiveness of a punishment.[17]

Section 35(2) of Criminal Law[18] stipulates that the objective of punishment is to punish the offender for the committed criminal offence, as well as to achieve that the convicted person or other persons comply with the law and refrain from committing criminal offence.

Concept of Criminal Punishment Policy[19] approved with Decree No. 6 of 9 January 2009 of the Cabinet of Ministers elaborated with the aim to prepare conceptual proposals for changes in the system of criminal punishment, which would be used when drafting the necessary amendments to the Criminal Law and other regulatory enactments, the adoption of which would foster more effective application of

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[11] Уголовное право зарубежных стран. Общая и Особенная части. Учебник. Под ред. И. Д. Козочкина. 3-е издание, переработанное и дополненное. Москва: Волтерс Клувер, 2010, с. 443.

[12] See, for instance: Додонов В. Н. Сравнительное уголовное право. Общая часть. Москва: Издательство "Юрлитинформ", 2010, с. 259.-263.

[13] Мальцев Т.В. Месть возмездие в древнем праве. Москва: НОРМА ИНФРА-М, 2012, с.523.

[14] Словарь философских терминов. Научная редакция провессора В. Г. Кузнецова. Москва: ИНВРА-М, 2007, с. 659.

[15] Благов Е.В. Наказание и иные меры уголовно – правового характера. Москва: Издательство "Юрлитинформ", 2011, с. 5.

[16] See Reigase A. Kriminālsoda – piespiedu darba – saturs un mērķis. *Jurista Vārds*. 2008. g. 9. septembris, Nr. 34. Available: http://www.juristavards.lv [viewed 9 June 2012].

[17] See Reigase A. Mantiskie sodi Latvijas krimināltiesībās. In: Tiesību harmonizācija Baltijas jūras reģionā 20.-21. gadsimta mijā. Starptautiskā zinātniskā konference. Rīga: Latvijas Universitātes Juridiskā fakultāte, 2006, 327.-337. lpp.; Уголовное право Российской Федерации. Общая часть. Учебник. Санкт-Петербург: Издательство Р.Асланова "Юридичесий центр Пресс", 2005, с. 233.-234.

[18] Krimināllikums [Criminal Law]: LR likums. *Latvijas Vēstnesis*, 1998. 8. jūlijs, Nr. 199/200.

[19] Par Kriminālsodu politikas koncepciju [On Concept of Criminal Punishment Policy]: Ministru kabineta rīkojums Nr. 6. *Latvijas Vēstnesis*, 2009. g. 13. janvāris. Nr. 6. Available: http://polsis.mk.gov.lv [viewed 27 May 2012].

legal means for the achievement of objectives of criminal punishment policy;[20] the indicated objectives of criminal punishment are as follows:

(1) to reinstate justice;

(2) to prevent reoffending (special prevention);

(3) to protect public safety;

(4) to prevent other persons from committing criminal offences (general prevention);

(5) resocialize the convicted person.

It is intended to express the objective of punishment in the draft law "Amendments of Criminal Law" as follows: "(1) to protect safety of society; (2) to reinstate justice; (3) to punish the offender for the committed criminal offence; (4) to resocialize the convicted person; (5) to achieve that the convicted person and other persons abide by the law and refrain from committing criminal offences".[21]

Based on the stipulations of the Concept of Criminal Punishment Policy and of the draft law "Amendments of Criminal Law, it can be concluded that expansion of the objective of punishment is recognised as necessary, by including such objectives which up to now were not separately stipulated within the framework of Section 35(2) of Criminal Law – to protect safety of society, to reinstate justice, to resocialize the convicted person (of these, the article will touch upon reinstatement of justice and resocialization of the convicted person).

A. Judins reasonably points out that the special prevention (to achieve that the convict abides by laws and refrains from committing criminal offences) and general prevention (to achieve that other persons abide by laws and refrain from committing criminal offences) portrays the desire to protect important interests of the society and individuals, to prevent from committing new crimes, and this is understandable and acceptable; these objectives are pragmatic; moreover, there are no differences in opinion among lawyers and in the society.[22]

The objective – to punish – is rather controversial. A person is subject to compulsory influence of a punishment (restrictions, suffering) according to the nature of the offence and the caused harm.[23] Criticism is voiced with respect to this objective.[24] The author believes that the opinion voiced by E. Banga is substantiated, namely, that the objective of punishment "to punish" is more of a tautology (idem per idem),[25] as

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[20] Krimināsodu politikas koncepcija (informatīvā daļa) [Concept of Criminal Punishment Policy (informative part)]. Available: http://polsis.mk.gov.lv [viewed 5 June 2012].

[21] Grozījumi Krimināllikumā [Amendments to Criminal Law]: Likumprojekts. Available: http://titania.saeima.lv [viewed 6 June 2012].

[22] Judins A. Atjaunojošā justīcija nepilngadīgo noziedzības kontekstā: Baltijas valstis Eiropas dimensijā. Pētījums. Providus, 2010, 16. lpp. Available: www.at.gov.lv [viewed 11 June 2012].

[23] Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Vispārīgā daļa. Trešais papildinātais izdevums. Zinātniskais redaktors prof. U. Krastiņš. Rīga: TNA, 2008, 338. lpp.

[24] See: Judins A. Atjaunojošā justīcija nepilngadīgo noziedzības kontekstā: Baltijas valstis Eiropas dimensijā. Pētījums. Providus, 2010, 17. lpp. Available: www.at.gov.lv [viewed 11 June 2012].

[25] Banga E. Sodu politika kā brīdinājums. *Jurista Vārds,* 2006. g. 3. janvāris, Nr. 1. Available: http://www.juristavards.lv [viewed 9 June 2012].

"to punish" already derives from the essence of punishment. The stance of legislators of other countries differs. For instance, Article 43(2) of the Criminal Code of the Russian Federation stipulates the objectives of punishment (punishment is imposed with the objective to reinstate social justice, as well as to rehabilitate the convicted person and to warn against committing new crimes) and it does not include an objective – to punish.[26] Meanwhile, Section 41(2) of the Criminal Code of the Republic of Lithuania[27] recognises the following as the objectives of punishment – to prevent persons from committing criminal offences; to punish a person for the committed offence; to remove or to restrict the possibility for a convicted person to reoffend; to influence persons having served a sentence to ensure that they abide by laws and refrain from reoffending; to guarantee implementation of the principle of justice.

Reinstatement of justice is explained as satisfying (receiving satisfaction) the social need for repayment (retaliation) with regard to harm inflicted as a result of the criminal offence.[28] By committing a criminal offence, a person is acting unjustly towards another person, the society, or the state. To reinstate the former status, basically, is impossible (it is expressly manifested, for instance, in destruction of property and other cases). However, justice is reinstated with imposition of punishment in the meaning that the committed harm transforms into a restriction or deprivation of certain rights and freedoms.[29]

The inclusion of resocialization of convicted persons into an objective of punishment cannot be regarded unequivocally. Explanation of resocialization is provided in various sources. As justly pointed out by Škavronska, understanding of resocialization in various target audiences can be different.[30] It can be explained relatively generally – as, for instance, resocialization is repeated socialization, which takes place throughout the life of an individual; resocialization is manifested as changes in the individual's set goals, norms, and values of life.[31] V. Zahars explains resocialization as a process of education, which gives the convicted person to increase his opportunities of communication and social good.[32] The main elements of resocialization include socially valuable work, educational measures, and generally educational and professional training.[33] Explanation of resocialization can also be expanded by emphasising it as a rather broad complex of legal and moral education, pedagogical, psychological, and medicinal assistance, and organisational measures under the influence of which the

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[26] Уголовный кодекс Российской Федерации. Москва: Проспект, 2012.

[27] Lietuvas Republikas krimināl̦kodekss. In: Krastiņš U., Liholaja V. Salīdzināmās krimināltiesības. Igaunija. Latvija. Lietuva. Rīga: Tiesu namu aģentūra, 2004, 241.-352. lpp.

[28] Благов Е.В. Наказание и иные меры уголовно – правового характера. Москва: Издательство "Юрлитинформ", 2011, с. 6.

[29] Ibid.

[30] Škavronska D. No Taliona principa līdz resocializācijai. *Jurista Vārds,* 2010. g. 14. decembris, Nr. 50 Available: http://www.juristavards.lv [viewed 9 June 2012].

[31] Resocialization. Available: http:/en.wikipedia.org/wiki/Resocialization [viewed 6 June 2012].

[32] Zahars V. Krimināl̦sodu izpildes tiesības. Vispārīgā daļa. Rīga: Zvaigzne ABC, 31. lpp.

[33] Ibid., 33. lpp.

individual reinstates a link with the society, accepts the set of norms and moral values and the model of behaviour dominating in the society, giving him an opportunity to function as a full-fledged member of the society without violating the law.[34] V. Zahars also recognises that the process of resocialization is creative, all of its possible forms cannot and do not have to be included in regulatory enactment provisions.[35] Likewise, A. Reigase points out that when applying the most suitable punishment for the relevant offender's offence, personality, and conditions of the case and when the punishment is effectively enforced, it can be achieved that the convicted person's personality changes positively, and in future, reoffending is not permitted.[36]

In the "Concept of resocialization of persons sentenced with deprivation of liberty" approved with Decree No. 7 of 9 January 2009 of the Cabinet of Ministers, resocialization is explained as a set of measures of correction of social behaviour and social rehabilitation targeted at promoting a model of lawful behaviour, forming understanding of socially positive values in the convicted person, and at achieving the objective of the punishment of deprivation of liberty. The concept of resocialization indicated in Section 611 of the Sentence Execution Code of Latvia[37] is explained similarly to the aforementioned explanation.

It must be concluded that the essence of resocialization is manifested in a set of various measures with the objective to reinstate the link with the society. A question to evaluate is whether the currently existing means are sufficient for qualitatively ensuring and implementing resocialization as an objective of punishment.

With regard to such types of punishment as deprivation of liberty, community service, probation supervision, taking into account their contents, the respective regulation in regulatory enactments, resocialization can be successfully achieved. However, doubt arises as to whether, for instance, confiscation of property, which according to the provisions of the draft law "Amendments of Criminal Law" will be maintained as an additional punishment, taking into account its contents, can achieve its objective – resocialize the convicted person? It must be pointed out that in legal writings confiscation of property is reasonably recognised as a type of punishment that does not match the spirit of this time and it has historically become obsolete.[38]

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[34] Teivāns – Treinovskis J. Probācijas sistēma Latvijā: tendences, problēmas, perspektīvas. Daugavpils: Daugavpils Universitātes Akadēmiskais apgāds "Saule", 2009, 116. lpp.

[35] Zahars V. Krimināsodu izpildes tiesības. Vispārīgā daļa. Rīga: Zvaigzne ABC, 36. lpp.

[36] Reigase A. Krimināsoda – piespiedu darbs – saturs un mērķis. *Jurista Vārds,* 2008. 9. septembris, Nr. 34. Available: http://www.juristavards.lv [viewed 9 June 2012].

[37] Latvijas sodu izpildes kodekss [Sentence Execution Code of Latvia]: LR likums. Available: http://www.likumi.lv [viewed 2 June 2012].

[38] Reigase A. Jā vai nē – mantas konfiskācijai. In: Piespiedu līdzekļi kriminăltiesībās. Palīgmateriāls studijām. Sast. A. Reigase. Rīga: [b.i.], 2006, 102.-108. lpp.

Conclusion

1. The objective of punishment – to punish – is rather debatable. In the author's opinion, "to punish" already derives from the essence of punishment.
2. As the objectives of punishment stipulated in Section 35 of the Criminal Law are uniform for any type of penalty envisaged in the law, then, taking into account, for instance, the contents of confiscation of property, the ability to achieve the expected objective – to resocialize the convicted person – is to be evaluated unequivocally.

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Škavronska D. No Taliona principa līdz resocializācijai. *Jurista Vārds,* 2010. g. 14. decembris, Nr. 50 Available: http://www.juristavards.lv [viewed 9 June 2012].

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ORGANIZATION OF WORK OF LOCAL AUTHORITIES AND PARISH COURTS IN LATGALE AT THE BEGINNING OF FORMATION OF THE LEGAL SYSTEM OF THE REPUBLIC OF LATVIA

Keywords: Head of the Latgale region, commandant, provisional administrative institutions, zemstvo, parish authorities, parish courts.

The author has set the aim to find out how the organization of the work of local self-governments and parish courts was started in Latgale. The main objectives of this study is to study the basis of legal acts, on which the work of local institutions was organized, how the head of Latgale region demonstrated legal creativity, what information about the organization of local authorities was given in the commandants' reports and what were the most serious problems in the work of *zemstvo* institution. This study is carried out using mainly the historical, logical and sociological method.

The Principal Legal Acts for the Organization and Starting the Work of Municipalities

On December 4, 1918, the People's Council adopted the interim law of Parish Constitution of Latvia[1], where in Article 53 it was stipulated that in Latgale, till passing a special order, work will be continued by the same local authorities (*zemstvo* of parishes and districts) which were elected on the basis of the law on local authorities, passed by the Russian Provisional Government, i.e. the law on local authorities, passed by the government, headed by Alexander Kerensky (*Александр Керенский*, 1881–1970)[2] in 1917.[3] However, during the war, democratic local authorities, including parish

[1] Latvijas Pagastu Satversmes pagaidu likums [Temporary Law on Constitution of Parishes of Latvia]. Latvijas Pagaidu valdības likumu un rīkojumu krājums, 1919. g. 15. jūlijā, Nr. 1, 7.

[2] Kerensky Alexander – Russian politician. After the February Revolution of 1917, he was the Prime Minister of the second Russian Provisional government. See: Latviešu konversācijas vārdnīca. 9. sēj. Rīga: A. Gulbja apgāds, 1933, 16521.-16523. sl.; Latvijas padomju enciklopēdija. 51 sēj. Rīga: Galvenā enciklopēdiju redakcija, 1984, 86. lpp.

[3] О волостном земском управлении. Право. 25 июля 1917 г. № 29-30, с. 1131-1149; Об изменении действующаго положения о губернских и уездных земских учреждениях впредь до издания нового о них положения. Право 25 августа 1917 г. № 33–34, с. 1236–1254.

courts, did not function at all.[4] On February 12, 1919, the Provisional Government passed a decision on declaring state of war. On February 11, 1919, Regulations on the state of war were passed, where in Article 8 it was stipulated that the main action in maintaining the state system and internal security is given to the state military authorities and officials. In Article 10 of the Regulations, the military authorities were given the rights to issue instructions for local administrative institutions regarding the ensuring of state system and public order, as well as given the rights to annul the orders of local administrative institutions, notifying the direct supervisors of the respective institution about their orders. On February 12, 1919, the Provisional Government passed the decision on declaring a state of war.

The largest part of population of Latgale still for a long time knew nothing about the events on November 18 and legal acts, passed by the People's Council, because already in December Latgale was occupied by *Bolsheviks* (*большевики*) and stayed under their regime the longest.[5] All the territory of Latvia, including Latgale, was taken over by the People's Council and the Provisional Government, formed by it,[6] only after January 13, 1920, when the government of the Soviet Latvia terminated its activity.[7] During the complete vacuum of information, on January 28, 1920 some persons on behalf of the Latgale Land Council[8] circulated a proclamation "Latgališi!", explaining the political situation and state system and stressing: "Latgolas pilsoni! Jyusu pīnokums ir aizstowet un apsorgot sowas tīseibas, sowu breiweibu. Naklausīt

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[4] Noteikumi par kara stāvokli [Regulations on State of War]. Latvijas Pagaidu valdības likumu un rīkojumu krājums, 1919. g. 30. jūlijā, Nr. 3, 49.; Pagaidu valdības lēmums par kara stāvokļa izsludināšanu [Decision of Provisional Government on Announcing State of War]. Latvijas Pagaidu valdības likumu un rīkojumu krājums, 1919, 30. jūlijā, Nr. 3, 50. On February 7, 1921, Government declaration was passed about the state of war, which stipulated that in Riga, Liepaja and Daugavpils, from February 15, 1921, the state of war was prolonged for six months, but in the rest of Latvia's territory, a state of increased security is enforced for six months. See: Valdības paziņojums par kara stāvokli [Government Announcement on State of War]. Latvijas Pagaidu valdības likumu un rīkojumu krājums, 1921. g. 22. martā, Nr. 6, 41.

[5] Šilde Ā. Latvijas vēsture. 1914–1940. Stokholma: Daugava, 1976, 281. lpp.; Bērziņš P. Latvijas brīvības cīņas. Rīga: A. Gulbis, [B. g.], 9. lpp.; Latvijas PSR vēsture. No vissenākiem laikiem līdz mūsu dienām. 2. sēj. Rīga: Zinātne, 1986, 52. lpp.

[6] Blūzma V. Latvijas Republikas valsts nodibināšana un nacionālās tiesību sistēmas veidošana (1918–1922). Monograph: Latvijas tiesību vēsture (1914–2000). Prof. Dr. iur. D. A. Lēbera red. Rīga: LU žurnāla "Latvijas Vēsture" fonds, 2000, 158. lpp.

[7] Declaration of the government of the Soviet Latvia about termination of its activity and handing over its functions to LKP CK. Monograph: Padomju varas atjaunošana Latvijā un Latvijas PSR iestāšanās PSRS sastāvā: Dokumenti un materiāli. Sast. A. Spreslis, Ē. Žagars. Rīga: Zinātne, 1987, Nr. 38., 68.-69. lpp.

[8] After the February Revolution in Russia, Latgale Land Council was elected by the congress of Latgalians in April, 1917. Latgale Land Council had elected the Latgalians faction in the People's Council. Although after the liberation of Latgale, the Land Council and its board did not hold any more meetings, at the beginning of March, 1920, the decision about its. dissolution was not yet passed. The proclamation, mentioned by the Interior Ministry and circulated on behalf of Latgale Land Council, caused confusion and resulted in investigation, whether such a council really existed, and if it did, then on what legal basis and who were its members. LVVA 3723. f., 1. apr., 572. l., 10., 29. lp.

nūperktūs par cara rublīm komunistu aģitatoru runu (kū dewe jums komunisti, jau labi zynot). Pacītit tūs gryutumus, kuri saistīti ar kara apstōklim, jo Latgolā pašlaik ir fronts. Bet tys byus nailgi. Pabolstit sowu Pagaidu Waldību, kura ryupējas par Jums un aizstow Jyusu tīseibas."[9] ("Citizens of Latgale! Your duty is to protect and guard your rights, your freedom. Do not listen to the speeches of Communist agitators, bought by the Tsar's roubles (you well know what the Communists gave you). Tolerate the hardships, caused by the state of war, as the frontline now goes over Latgale. But it will not be for long. Support your Provisional Government which takes care of you and protects your rights.")

The Provisional government paid special attention to the arrangement of work of local authorities in Latgale. Under the subordination of the Interior Ministry, the Department of Latgale Affairs was established, the activity and competences of which were regulated by the Regulations of the Department of Latgale Affairs until complete liberation of Latgale and establishment of government authorities of Latgale.[10] Considering the wartime situation, at the beginning of 1920, the postal service work still was not arranged in Latgale, there were insufficient number of newspaper distribution points, and as a result the functioning of local authorities was complicated, but the population did not receive information about the activities of the Provisional Government. Therefore, the Minister for the Interior Arveds Bergs (1875–1941)[11] applied to the Transport and Work Ministry with a request to ensure urgent solution of the postal service issue and establishment of newspaper distribution points in Latgale parishes and villages.[12]

The extreme wartime situation, negligent attitude towards the specific culture and language of Latgale[13], already in a few months caused the population's dissatisfaction with the new local authorities. At the beginning of 1920, Deputy Minister for the Interior Francis Trasuns (1864–1926)[14] after visiting Latgale, indicated in a report to the Interior Minister that, having evaluated the appointed parish heads, the parish administration in Latgale cannot be called well-arranged with regard to its staff. F. Trasuns stressed that in several parishes, for example, Viļāne (Viļēni), Korsova (Kārsava), Kreslava (Krāslava), Lipna (Liepna) and Bolvi (Balvi) parishes, people

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[9] LVVA 3723. f., 1. apr., 572. l., 9. lp. The proclamation was written in the time, when the Latgalian writing was still in its formation stage, therefore the language may not correspond with the Latgalian orthography, approved in 1929. (Author's note).

[10] Noteikumi par Latgales lietu departamentu [Regulations on Department of Latgale Affairs]. Papildinājums pie likumu un valdības rīkojumu krājuma, 1921, Nr. 22; Valdības rīkojumi un pavēles. Noteikumi par Latgales lietu departamentu. *Valdības Vēstnesis,* 1919, Nr. 92.

[11] Arveds Bergs – entrepreneur, lawyer, and politician. See Treijs R. Latvijas valsts un tās vīri. Rīga: Latvijas Vēstnesis, 1998, 138.-144. lpp.; Dokumenti stāsta. Latvijas buržuāzijas nākšana pie varas. Rīga: Zinātne, 1988, 39. lpp.

[12] LVVA 3723. f., 1. apr., 572. l., 7. lp.

[13] Briška. B. Latgale muna Tāvzeme. [B. v.]: P/s Latgaļu izdevnīceiba, 1984, 72.-81. lpp.; Stafecka A. Latgales rokraksta grāmatniecības piemineklis Andriva Jūrdža "MYUŽEYGAYS KALINDERS". Monograph: Ai, māte Latgale. Atskati Latgales vēsturē un kultūrvēsturē. Rīga: Annele, 2001, 272.-287. lpp.

[14] Latgaliešu politiķi un politiskās partijas neatkarīgajā Latvijā. Sast. Ē. Jēkabsons un V. Ščerbinskis. Rīga: Jumava, 2006, 127.-129. lpp.

are seriously dissatisfied with the fact that Vidzemians[15] are appointed as parish heads instead of local, Latgalian people. Moreover, in some parishes, people with questionable abilities and reputation were appointed as officials. In order to eliminate this situation, the Minister for the Interior ordered the head of the Latgale region[16] to gather more detailed information about the appointed parish officials with the help of district authorities, and to issue orders about dismissing unsuitable officials and appointing new ones. Order was given that this would be the responsibility of the region head till the passing of law about the elections of Latgale local government institutions.[17]

Zemstvos of districts, parishes and villages had to carry out their functions under very difficult conditions, when schools were destroyed, roads and bridges – demolished, peasants lacked tools and seed grain, epidemics were raging, authorities had no funds to finance shelters, to help poor people and orphans. However, the authorities themselves admitted that the greatest problem in the local government's work is the lack of instructors, who could explain to the local authorities their scope of responsibilities.[18] Therefore, according to the Regulations about the state of war, until the beginning of March, 1920, the work of district *zemstvos* was organized by well-educated officers of the Latvian army, who also assumed the responsibility of the authorities' work. For example, Lieutenant Pēteris Grišāns[19] of the 4th artillery division, 3rd battery, and lieutenant Sebastjans Pabērzs of the 7th artillery division, 1st battery, worked at Daugavpils district *zemstvo* before sending to the front at the beginning of March.[20]

Legal Creativity of the Head of Latgale Region in the Formation of Provisional Administrative Institutions and Parish Courts

One of the most important tasks of the head of Latgale region, according to Order No. 81377 of February 28, 1920 of the Ministry of the Interior, was to form provisional administrative institutions in the frontline zone, where the frontline

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[15] Vidzemians or Balts – so the Latgalians called all non-Latgalians – people from Kurzeme and Vidzeme regions of Latvia.

[16] On February 6, 1920, the Cabinet of Ministers appointed Andrejs Bērziņš as the head of Latgale region, who worked till the liquidation of this post on November 1, 1920. Available: Šī diena Latgalē. 6. februāris. Events: http://Latgales dati.du.lv/2 [viewed 12 April 2012]. Region heads were subordinated to the Minister for the Interior. Their responsibilities and rights were to ensure order in the region, pass commands and regulations for keeping order, observation of sanitary norms and fighting diseases. See: Instrukcija apgabalu priekšniekiem. Latvijas Pagaidu valdības likumu un rīkojumu krājums, 1919. g. 10. augustā, Nr. 7, 115.

[17] LVVA 3723. f., 1. apr., 572. l., 3. lp.

[18] Ibid, 37. lp.

[19] Pēteris Grišāns (1896–1961) graduated gymnasium in Petersburg and started studies in Petersburg faculty of law. See: LKOK Nr. 3/109: Grišāns, Pēteris. L. K. o. k. biogrāfija. Available: http://www.lkok.com/detaill1.asp?ID=499 [viewed 12 April 2012].

[20] LVVA 3723. f., 1. apr., 572. l., 37. lp., 86.-88. lpp.

coincided with the ethnographic border above Ludza. For this purpose, the head of Latgale region Andrejs Bērziņš, after reception of the relevant permissions from divisions' commanders, from early March started to visit the local authorities personally. After those inspection trips, A. Bērziņš in his reports to the Minister for the Interior described the geography of parishes, number of inhabitants, national and religious composition, economic situation and political disposition. During his visits to parishes, A. Bērziņš explained the system of parishes' local authorities, learned about problems, explained the basic principles of office work and even appointed policemen.[21] The head of Latgale region found out that in Višgoroda parish, a parish authority, which was appointed by the Baltinova commandant, was already working. Although the activity of this parish authority was no more than the recognition of *šķūtniekī*[22] and issuing of certificates, the head of Latgale region praised it as very good, indicating that the parish head was a Latvian man Teodors Belsons from Jaunlaicene who had been working as a miller in that parish already for 20 years. The parish head's assistant Aleksandrs Gailītis and the filing clerk both knew the Latvian language. In Višgoroda parish the local parish authority system was discussed and a decision was made to appoint 16 parish deputies. The post of the senior policeman was entrusted to the investigation unit soldier Ulpis who accompanied the region head on this visit. The parish authority had to report to the district head about the two junior policemen candidates.[23]

Opočka district, Pokrova parish authority, already appointed by Korsovka (Kārsava – auth.) borough commandant, was left in office, adding to it one *stārasts* (parish head) from each of two parishes, added by the region head. It was ordered that after the formation of the deputies' staff, the candidates list would be submitted to the region head for approval. The region head banned the activity of the elected parish court provided for this parish. The reason of such a decision is not clear from the region head's report. There was only indicated that the court secretary or filing clerk was a young Latvian man who never before had worked in the parish or office, therefore the parish lacked record books and protocols. During his visit the region head explained the essential basics of record-keeping and pointed out in his report to the Minister that instructors must be sent to the Višgoroda, as well as to Pokrova parish. Soldier Freibergs was left there to serve as the senior policeman. Both in Višgoroda and Pokrova parish simultaneously with the formation of police structure, instructor Salmiņš who accompanied the region head explained how to establish the parish *aizsargi* (guards) units,[24] handed out blanks and ordered to make lists of *aizsargi* candidates till the region head's next visit.[25]

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[21] LVVA 3723. f., 1. apr., 572. l., 41.-43. lp.

[22] In 1921, a law was passed, stipulating that state officials, travelling on business, have the rights to use šķūtis, i.e. to request from the local authorities local inhabitants' horses and carts with a driver for a certain payment. See: Likums par šķūtīm [Law on Šķūtis]. Likumu un valdības rīkojumu krājums. 1921. g. Nr. 7, 61.

[23] LVVA 3723. f., 1. apr., 572. l., 41. lp.

[24] Already on March 20, 1919, Regulations about the aizsargi [guards] units in parishes were issued. Latvijas Pagaidu valdības Likumu un Rīkojumu krājums, 1919. g. 9. augustā, Nr. 5, 75.

[25] LVVA 3723. f., 1. apr., 572. l., 42., 43. lp.

Although the head of Latgale region wrote about the Pokrova parish that there "the people are not yet addressed by their surname, but only by their Christian name and father's name", he nevertheless stressed that they do not have any particular national feelings and "any hate towards the Latvians is out of the question, and they are very grateful for ridding them of Communists". Just like in other parishes, also in Pokrova, people wanted to know about the elections of the Constitutional Assembly, and the region head explained at great length, "why they cannot yet vote, why cannot completely join the state and social life of Latvians".[26]

On arrival in the Drisa district, the Latgale region head noticed that in the town Drisa a town council operated, recognized by the Polish authorities, because the Poles had left in office all councillors, elected before the *Bolsheviks* invasion. Nevertheless, it was not yet possible to explain to the people of Drisa their future legal position or the state where their district would be included.[27] Polish-appointed *zemstvo* authority operated in the Piedruja parish of Drisa district as well, and the region head allowed it to continue its activity for the time-being. The Latgale region head appointed a senior special mission official in Drisas district, who would be equal with the district head, choosing for this post an ex-colonel of the Russian army Birih who knew that district very well, spoke fluent Russian, German and Polish, as well as could read and write in Latvian. Two junior special mission officials were appointed as his assistants – lieutenants Knof and Juktščinski whose posts were equal to district head's assistants. There officials were given the task to organize provisional police in all parishes of Drisa district, as well as to check whether the officials, appointed by Polish commandants, can remain in their offices.[28]

It can be concluded that during the war the region head or commandants formed provisional (till the establishing of legitimate or democratic institutions) local government institutions, parish authorities, parish *zemstvos*, appointed policemen and helped to organize *aizsargi* units. A significant part in the organization of local authorities' work was played by former army officers or soldiers who were appointed in responsible positions and entrusted with important tasks to ensure normal functioning of local government institutions. Local authorities in spring and summer of 1920 were formed also in the eastern parishes of Latgale, regained from

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[26] LVVA 3723. f., 1. apr., 572. l., 42., 87. lp.

[27] At that time, the situation still was politically complicated. According to the peace treaty of August 11, 1920, only two parishes of the Drisa district, Pustiņa and Piedruja, were included in the territory of Latvia and joined to the Daugavpils district. It must be noted also that at the beginning of 1920, the Poles were completely in command of the situation in a large part of Latgale, and the Latvian side, including the commandant's office, had to take that into consideration. See: Jēkabsons Ē. Piesardzīgā draudzība: Latvijas un Polijas attiecības 1919. un 1920. gadā. Rīga: LU Akadēmiskais apgāds, 2007, 102-103. lpp.; Kapenieks K. Latvijas armijas darbība Drisas apriņķī 1920. gadā, 17. lpp. Available: http://www.karamuzejs.lv/lejupielade/08kapenieks.doc [viewed 12 April 2012]; LVVA 3723. f., 1. apr., 572. l., 86. lp.

[28] LVVA 3723. f., 1. apr., 572. l., 88. lp.

the *Bolsheviks*, which, according to the peace treaty, concluded later between Latvia and Soviet Russia on August 11, 1920, were not included in the territory of Latvia.[29]

At the end of April, 1920, in Suškova parish of Drisa district, a parish court worked; it continued to examine cases even at ten o'clock at night when the Latgale region head arrived there. In his report to the Minister for the Interior he gave a very vivid description of this parish court: "This court sitting convinced me that cases are tried, based on emotions, and that these citizens of Suškova, not excluding the parish clerk, in no way can be the judges and makers of justice." The region head stopped the work of this court and ordered to keep all cases till the moment when legitimate courts would start to operate. In Sarjana parish[30] a parish court functioned as well; it was appointed by the Polish commandant's office, which had a lot of work. The Latgale region head replaced it with arbitration commission. The parish authority maintained only one of the office records – incoming documents register.[31]

These described examples demonstrate that, according to the Instruction to the region heads, published in the newspaper *Valdības Vēstnesis* on August 2, 1919, the region head worked creatively, giving local orders. During the wartime, such orders, including the aforementioned decisions in Višgoroda or Pokrova parishes about the appointment of parish deputies, acted as special legal provisions. In such cases, the continuity of legal provisions can be spoken of only conditionally, as, for example, in Latgale, such parish self-government institution as deputies' staff or such parish court as arbitration court had never before existed.

After the evaluation of the situation in Latgale parishes, the region head reported to the Minister for the Interior that the newspaper *Valdības Vēstnesis* must be sent to the parishes, starting with the very first issue, and a state land inspector and forest supervisor must be appointed, "but not a Pole or Russian, as it is in Latgale, because it causes great inconveniences". Apparently, by that, such problems were implied, which could arise in record-keeping and communication with authorities or state institutions, if a Polish or Russian official would not know the Latvian (Latgalian) language. It can be concluded that, carrying out the staff policy in Latgale, the person's national origin or language skills were very important.[32]

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[29] Miera līgums starp buržuāzisko Latviju un Padomju Krieviju. Monograph: Dokumenti stāsta. Latvijas buržuāzijas nākšana pie varas. Rīga: Zinātne, 1988, 259.-272. lpp. The territory of Latvia included Kurzeme province, southern part of the Vidzeme province (Riga, Cesis, Valmiera districts and the largest part of Valka district), north-western part of the Vitebsk province (Daugavpils, Ludza and Rezekne districts, two parishes of the Drisa district) part of the Pleskava province Ostrova district. See: Bērziņš P. Latvijas brīvības cīņas. Rīga: A. Gulbis, [B. g.], 90.-91., 92. lpp.; Latvijas PSR vēsture. No vissenākiem laikiem līdz mūsu dienām. 2. sēj. Rīga: Zinātne, 1986, 66., 78.-79. lpp.

[30] As it was already pointed out, neither Sarjana, nor Suškova parish later was included into the territory of Latvia.

[31] LVVA 3723. f., 1. apr., 572. l., 87. lp.

[32] Ibid., 42. lp.

Commandants' Reports about the Organization and Work of Local Authorities and the Local Population's Political Disposition

Parallel to the Latgale region head who was subordinated to the Minister for the Interior and formed and controlled local administration, also the borough commandants, subordinated to the War Ministry, became independent and important local officials in the wartime. At the beginning of 1920, after the liberation of Latgale from the *Bolsheviks*, commandants, who were appointed for keeping order in certain boroughs, had to appoint local authorities' officials. Over time, participating in the solution of all kinds of questions, they became very independent officials in their activities.[33] Borough commandants solved not only issues, connected with the organization of local authorities, but also learned about the local situation and the people's political disposition. We can learn about the conditions in which the Provisional Government had to start work and formation of local administration in the eastern part of Latgale, for example, from the report of the borough commandant to the Daugavpils district commandant. The report is written in March, 1920, after the first month of work. It describes the main directions of the commandant's office's work, characterizes the situation in the borough and indicates problems and urgent steps to be taken for the facilitation and development of authority.[34] Krāslava district commandant found out that almost none of the peasants in the Krāslava borough spoke Latvian. Under the influence of Catholicism and the church, greatest part of the population looked suspiciously at everything connected with the Latvian nation, identifying it with Lutheranism and trying to avoid it. Although the Polish army robbed villages, plundering on roads, local people tolerated everything and did not go to complain about Catholic Poles to "Lutherans". Educated Polish people completely ignored the power of the Latvian army commandant, but Jews, sensing that Poles still held the actual power, took a wait-and-see position towards the authorities.[35]

While in other parts of Latvia the battles of political parties and propaganda before the elections of the Constitutional Assembly had already started, people in Krāslava town and borough in March, 1920, lived in total ignorance, unable even to understand the purposes of the Constitutional Assembly. They thought that there will be voting about the district belonging to some country – Russia, Poland or Latvia. Moreover, the local population was not favourably disposed towards the Republic of Latvia, which manifested most acutely in discussions about citizenship question.[36] In parishes, situated in the Krāslava commandant's borough, open distrust to the Latvian government was expressed, especially regarding the government's attitude towards those people who had repressed the peasants during the *Bolshevik* times, and now openly campaigned for Communism. A large part of Latgale peasants had not the remotest idea about democratic institutions, and they considered only the

[33] LVVA 3723. f., 1. apr., 572. l., 123. lp.

[34] Ibid., 49.-51. lp.

[35] Ibid., 49. lp. Complicated relations with Lithuania, Estonia and Poland was described also by assoc. prof. Ēriks Jēkabsons. See: Jēkabsons Ē. Piesardzīgā draudzība. Latvijas un Polijas attiecības 1919. un 1920. gadā. Rīga: Akadēmiskais apgāds, 2007.

[36] LVVA 3723. f., 1. apr., 572. l., 50. lp.

Polish power honest and right. Evaluating the situation, the Krāslava commandant admitted that it is hard to convince the population and to explain something to them.[37] It can be concluded that the negative attitude towards the state authorities of the Republic of Latvia of the inhabitants of certain regions of Latgale was caused both by russification, carried out during the Tsarism times, Orthodoxy propaganda and keeping people illiterate, as well as active *Bolshevik* propaganda and the Latvian government's inability to effectively combat it.

A different mood reigned in ten parishes of the Drisa district, where information was gathered by the Latgale region head A. Bērziņš at the end of April, 1920, during his visit to the district, accompanied by an official, first lieutenant Preisbergs and a military topographer. In Samošana and Pustina parishes, inhabited by Latvians, as well as in other – Catholic or Orthodox Byelorussian parishes – people hated both *Bolsheviks* and the Poles. The region head wrote: "I am completely convinced that in a plebiscite each and every man would vote for Latvia... The Poles earned such hatred with their senseless and brutal behaviour which in the Drisa district was as disgusting as in Latgale."[38]

After the liberation of Latgale from *Bolsheviks*, in spring, before sowing time, the unsolved question of land gained priority.[39] The *Bolshevik* period had left an inheritance for the Latvian government in Latgale – countless number of applications with complaints about infringement of private property rights, but local authorities lacked competent employees who would ensure protection of people's rights and interests, therefore these questions frequently were solved rather superficially by the military commandant's office.[40]

The staff members of local authorities often were completely unsuitable for work in local government. The borough commandant found out that, for example, in Krāslava town and Izvalta parish the local authorities based their decisions not on the principle of common good, but still on the old principle that "it is convenient, and the citizen N or citizen X wants it". Moreover, for example, the Izvalta parish authority was headed by a totally illiterate man who could barely sign his name, and the question of the Constitutional Assembly was a complete mystery to him.[41]

Work of the local authorities was complicated because of lack of coordination between the activities of military institutions – commandant's offices – and civilian institutions. The representatives of the military institutions learned about the government's decisions not from military institutions, but from the local authorities or even had to gather from them the necessary information themselves.[42] The activities of hierarchically unadjusted civilian and military institutions often led to incidents, when a person, dissatisfied with a decision of civilian authorities, secretly applied

[37] LVVA 3723. f., 1. apr., 572. l., 50. lp.
[38] Ibid., 87. lp.
[39] Ibid., 50. lp.
[40] Ibid.
[41] Ibid., 51. lp.
[42] Ibid., 50. lp.

to a military institution which sometimes passed unlawful orders which completely contradicted the government's regulations.[43]

Problems in the Work of Peculiar Latgalian Local Authorities – *Zemstvos*

Lack of coordination was a problem not only of the military and civilian authorities, but also of district *zemstvos*. In order to align the activities of *zemstvos* with local needs, a meeting of *zemstvo* authorities of the Latgale region districts was called on March 12, 1920.[44] It should be stressed that this meeting set the direction towards the formation of democratic self-government institutions. It was decided that the parish executive committees and similar formations must be replaced with parish *zemstvos* and administrative authorities which should work according to the law of the Russian Provisional Government on the formation of *zemstvo* institutions. It can be concluded that at this meeting on March 12, 1920, the implementation of the provisional law on the Constitution of Parishes of Latvia, passed by the People's Council on December 4, 1918, was discussed. It was stressed at the meeting that, according to this law, for decision of all the most important and economic questions the provisional assembly of parish *zemstvo* must be elected.[45] It was admitted at the meeting of *zemstvo* authorities that for the alignment of the work of parish self-government institutions or parish *zemstvo* authorities, one instructor must be employed in each district. It was also decided that in villages with more than 5000 inhabitants, village self-government institutions must be formed.[46] The meeting decided on the number of *zemstvo* authorities in districts, indicated that they must include five persons – a chairman and four members.[47] On April 30, 1920, the provisional regulations of the constitution of parishes of Latgale were adopted,[48] which equalized Latgale to the rest of Latvia, regarding the structure of self-government institutions, parish functions and supervision.

Already in the first months of work of the Provisional government's institutions in the first half of 1920, care was taken to demand the use of the Latvian (Latgalian) language in the record keeping of self-government institutions, district and parish *zemstvo* authorities. It must be pointed out that because of lack of employees it could not be ensured at once.[49] Such a situation had formed as a result of the policy of

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[43] LVVA 3723. f., 1. apr., 572. l., 50.-51. lp.

[44] Ibid., 77. lp.

[45] Ibid., 77.-78. lp.

[46] Only on November 15, 1920, the Cabinet of Ministers passed the Provisional Regulations about villages. See: Likumu un valdības rīkojumu krājums 1920. g. 29. decembrī, Nr. 14, 243. These Regulations were annulled in 1928, when 16 villages were awarded town rights and villages as a form of municipality were liquidated. See: Likums par pilsētu piešķiršanu 16 miestiem [Law on Granting Town Rights]. Likumu un Ministru kabineta noteikumu krājums. 1928. g. 28. februārī, Nr. 4, 39.

[47] LVVA 3723. f., 1. apr., 572. l., 78. lp.

[48] Latgales pagastu satversmes pagaidu noteikumi [Provisional Regulations of Constitution of Latgale Parishes]. Papildinājums pie likumu un valdības rīkojumu krājuma. 1921. g. Nr. 66.

[49] LVVA 3723. f., 1. apr., 572. l., 59., 66. lp.

russification, consistently carried out by the tsarist Russia,[50] but the government of the Republic of Latvia had to fight its consequences.

On May 15, 1920, the Latgale region head reported to the Ministry of the Interior that the parish authorities of Latgale could not fulfil the tasks, entrusted to them. In parts of the Ludza, Rēzekne, Daugavpils districts along the border with Russia, only very few Latvians worked as heads or secretaries of parish *zemstvo* authorities. For reading a written text, a translator was sought, and months passed till an answer was received. The region head asked the Ministry of the Interior to provide at least one clerk's assistant who knew the state language or the local Latgalian language.[51] The answer of the Local-government Department of the Ministry of the Interior about the solution of the described problem must be characterized as bureaucratic, even cynical and arrogant. It was pointed out that "for instance, in Riga, there is no lack of educated employees" and the region head himself together with districts and towns authorities must take care of training or attracting employees. The Ministry will support exact and useful propositions for the elimination of lack of employees, but "first of all, care must be taken of sufficient remuneration of employees and entering of the officials staff into budgets".[52] It must be stressed that this answer was written in economically very hard times for Latgale, when all inhabitants of the nearby villages were involved in the installation of frontline barricades and digging of trenches,[53] not to mention the disastrous economic situation, even total devastation, experienced by Latgale, of which the Ministry was very well aware. To a large extent, due to such officials' negligence, even at the end of 1920, in several parishes, e.g., Dagda and Osūna (Asūne – auth.) parishes, record keeping was very poor or was not implemented at all.[54]

Conclusion

1. After the proclamation of the Republic of Latvia, even till March of 1920, democratic self-government institutions, including parish courts, did not function. The regulations about the state of war stipulated that the main activity in maintaining the state system belongs to state military institutions and officials.
2. Instructors of the organization of the local-government work were lacking, therefore the commandant's offices involved also officers of the Latvian army in the work of district *zemstvos*.
3. The extreme wartime situation, negligent attitude towards the specific culture and language of Latgale caused dissatisfaction of Latgalians with the new local government organization at the beginning of 1920.

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[50] Stalšans K. Latviešu un lietuviešu austrumu apgabalu likteņi. Čikāga: Jāņa Šķirmanta apgāds, 1958, 192.-205. lpp.; Puisāns T. Latgale. Vēsturiskas skices. Toronto: [B. i.], 1988, 147-163, 180. lpp.

[51] LVVA 3723. f., 1. apr., 572. l., 93. lp.

[52] Ibid., 141. lp.

[53] Kapenieks K. Latvijas armijas darbība Drisas apriņķī 1920. gadā, 12. lpp.

[54] LVVA 3723. f., 1. apr., 572. l., 195. lp.

4. The head of the Latgale region was given orders in the period till the passing of the law about the elections of Latgale local-government institutions, to dismiss the unsuitable officials and appoint new ones, as well as to organize provisional authorities in the frontline zone.
5. In Latgale parishes in the frontline zone different provisional authorities, parish *zemstvos*, provisional administrative bodies, executive committees, as well as parish courts operated, which were elected or recognized by Latvian or Polish commandants (elected before the *Bolshevik* times). Their work was evaluated and accepted or they were dismissed and formed anew by the region head.
6. According to the Instruction of 1919 for the region heads in passing local orders, the region head demonstrated legal creativity. During wartime such orders functioned as special legal provisions. In such cases, the continuity of legal provisions can be spoken of only conditionally, as, for example, in Latgale such parish self-government institution as deputies' staff or such parish court as arbitration court had never before existed.
7. Local institutions lacked qualified employees. Therefore for the protection of the people's rights and interests, various questions were rather superficially decided on by the military commandant's office, whose activity often was not coordinated with civilian institutions. Military institutions passed also unlawful orders which completely contradicted the government's regulations.
8. Local self-government in spring of 1920 was organized also in those parishes in the eastern part of Latgale, which were recovered from the *Bolsheviks*, which later, according to the peace treaty, concluded by Latvia and Soviet Russia on August 11, 1920, were not included in the territory of Latvia.
9. For the alignment of the *zemstvos* work with local needs, the meeting of *zemstvo* authorities of the Latgale region districts was called on March 12, 1920, which decided on the formation of democratic local-government institutions.
10. When implementing the staffing policy in Latgale, a great importance was given to a person's national origin or the Latvian (Latgalian) language skills. The policy of russification, consistently carried out by the tsarist Russia, had caused a situation where qualified employees were lacking. Therefore in 1920, not everywhere in Latgale it was possible to ensure the record-keeping of self-government institutions in the Latvian language.

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QUALITY ASPECTS OF AMENDMENTS TO THE CIVIL LAW

Keywords: amendments of the Civil Law, civil law system, modernisation of the Civil Law, obligation law, family law.

Introduction

The Civil Law (CL) is one of the most important laws in Latvia in that it is the cornerstone for the civil law system in our country. The system of laws in Latvia would be incomplete without this law, and Latvia could not be seen in that case as a country where the rule of law prevails. The Civil Law speaks to general civil law norms which are applied to all legal relations among subjects of the law with equal rights, provided that the specific civil law relationship is not to be discussed in accordance with special private law norms that are enshrined in other laws. The preamble to the law and its norms related to family, inheritance and case law are applicable to all kinds of material and non-material relationships.

The Civil Law is one of the codes that are in force in Latvia. More than 2,400 sections of the law speak to codified and important civil law norms. In comparison to other laws in Latvia, this one has a long history. It was adopted in 1937, but in terms of content even then, it was not a completely new set of norms. There were modern elements in it, but the law also included norms from the1864 Civil Law of the Russian Empire, also known as the set of local laws for the Baltic provinces. That law, in turn, was based on the pandect legal norms of Roman civil law. Since the restoration of Latvia's independence in 1991, the Civil Law has been amended and supplemented several times with the purpose of modernising it. Along with norms which originate in Roman law, the Civil Law includes ones which relate to legal institutions that have been created in the modern age. The scope, content and structure of the Civil Law

mean that it is not easy to amend or supplement. The legislature must make sure that changes are compliant with the overall system of the Civil Law, and it must also take other important legal aspects into account. This paper offers a look at amendments to the Civil Law that have been instituted in recent years, evaluating the quality of their content and considering the way in which the new regulations fit in with the overall system of the law.

A general description of amendments to the Civil Law in the legislative context

Given the importance and unique role of the Civil Law in Latvia's legal system, amendments to it have been implemented fairly seldom. Mostly that has happened in order to improve the law. Each attempt at reform has usually involved amendments to a larger number of Civil Law norms. This is not a normative act which the legislature can amend each time that it seems that there are necessary changes. Amendments and supplements to the law are unadvisable unless there is a true need to amend the relevant regulations. When the legislature opens up a law for purposes of amendments, that often encourages legislators to include not just objectively necessary legal norms, but also ones in which certain interest groups are interested. Amendments to the Civil Law require a particularly careful approach on the part of the legislature, because norms which are not of an adequate level of quality and have not been considered carefully can mess up the Civil Law system that has been established very carefully. Legal literature devoted to the modernisation of the Civil Law points out that there must be careful consideration of whether proposed norms will fit in with the overall system, as well as that legislators must avoid the temptation of regulating all issues down to the final detail.[1]

Because the drafting of legislation is a complicated process, those who author it must be well familiar with the regulated sector, and they must also be able to describe the legal norms so that those who use the law can understand and implement it.[2] This also applies to amendments to the Civil Law. There is an emphasis in legal literature on the fact that back when the Civil Law was being prepared, much attention was devoted to the style of language and the quality of formulations so that the law would be understandable to everyone.[3] Norms in the Civil Law have a high degree of abstraction. They cover broad areas and can be applied to similar life situations in which the factual circumstances are varied. The level of abstraction in Civil Law norms makes it far easier to apply them. The absolute majority of the norms are

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[1] Torgāns K. Eiropas jurisprudences vērtības civiltiesībās: pārņemt vai nogaidīt [Values from European Jurisprudence in Civil Law: Should They be Adopted or Delayed?]. *Jurista Vārds*, No. 49, 20 November 2007, p. 19.

[2] Krūmiņa V., Skujiņa V. Likumu un valdības rīkojumu krājums. Normatīvo aktu izstrādes rokasgrāmata [Handbook on Drafting Normative Acts]. Rīga: State Chancery, 2002, p. 12.

[3] Švarcs F. 1937. gada 28. janvāra Civillikums un tā rašanās vēsture [The Civil Law of January 28, 1937, and its History]. Rīga: Courthouse Agency, 2011, p. 266.

sufficiently modern and timely for the present day. For these reasons, there are few occasions on which there is a need to amend or supplement the Civil Law. It may turn out over the course of time that some of the norms are no longer appropriate in regulating legal relationships in society, and that means that from time to time there is a need to modernise the civil law institutes that are regulated in the Civil Law; in some cases, they must be replaced with new ones.

Since the Civil Law was reinstated, Latvia's legislature has substantially modernised the section on family law. Fairly major amendments have also been made to rules on inheritances. Lesser in scope, but fundamentally important have been changes related to obligation rights. The section on case law has been amended only in a few cases. At the same time, however, when the Civil Law was reinstated in 1992 and 1993, entire chapters had to be adapted fully or partly to the legal realities of the late 20th centuries. Amendments to the Civil Law since its full reinstatement have mostly affected specific and individual civil law elements which have had to be modernised. Since 1993, when the law was fully reinstated, the legislature has amended the law 10 times – in 1994, 1997, 1998, 2002, 2005, 2006, 2009 and 2010.

The aim of this paper is not to review all of the amendments to the Civil Law. Instead it is to evaluate the latest changes. The author will analyse changes in the obligation law section of the Civil Law, as adopted by the Saeima on June 4, 2009.[4] Changes were made to those sections of the law which regulated the conclusion of contracts, the scope of contractual fines, and prerequisites for the compensation of losses. On October 28, 2010, the law was amended[5] in relation to family law – rules on divorce, allowing people in certain cases to divorce one another in the presence of sworn notaries. Another fundamental reason for reform of the Civil Law was a ruling handed down on December 27, 2010, by the Latvian Constitutional Court on Case No. 2010-38-01. The court ruled that Sections 358 and 364 of the law would be unconstitutional beginning on January 1, 2012. This meant that the legislature had to establish a constitutional set of regulations related to the limitation of the right to act of adult individuals.

Amendments to the section of the Civil Law relating to obligation law

In 2009, the Saeima amended the section of the Civil Law which deals with obligation law, making small but essential changes to several of the general rules which apply in this area. Section 1537 of the law was amended to say that when a contract is entered into between absent parties, it is to be regarded as complete at such time as the party to whom the offer has been made has informed the party which has submitted the offer that it is being accepted unconditionally (the so-called "mailbox principle"). In relation to that section, Section 1668 was amended to clearly and

[4] See: *Latvijas Vēstnesis*, No. 94, 17 June 2009.

[5] See: *Latvijas Vēstnesis*, No. 183, 17 November 2010.

understandably regulate the legal consequences which occur if the other party accepts a delay in the fulfilment of obligations without objection. Also of great importance in the amendments is Section 1724.[1], which contains an *expressis verbis* rule to say that a person who is paying a contractual fine can ask that the fine be reduced to a sensible level. The legislature also amended several norms related to damages and compensation for same. Section 1776 of the law says that the party which has suffered damages must take sensible steps in response to this and that the violator of rights may ask for the compensation for damages to be reduced to the level at which the suffering party could have avoided the damages by observing sufficient carefulness in this regard, but only if the violation of rights has not been based on malicious intentions. A new section, 1779.[1] was added to the civil law to offer more precise rules on the amount of compensation for damages that must be paid when contractual obligations are not satisfied. They say that the party causing the damage must pay compensation for damages which could sensibly be foreseen when the transaction was concluded in terms of consequences that might occur if the obligations are not discharged, unless the failure to satisfy obligations was caused by maliciousness or gross negligence. One of the main impulses for these amendments was a set of principles enshrined in the Draft Common Frame of Reference of the European Union.[6] The overall model of contractual law in Europe was drafted by European legal specialists with the aim of encouraging the modernisation and harmonisation of civil law in member states.[7]

The aforementioned amendments to the obligation-related section of the Civil Law must be viewed positively from the perspective of the quality of the content and the goals to which it relates. The focus is on the modernisation of legal institutions which are of particular importance in the area of obligation law as part of the system of the Civil. It must be noted here that initially, in 2007, the Justice Ministry proposed more extensive amendments to obligation issues in the Civil Law.[8] The ministry's draft law spoke to a trend that exists in modern European civil law – easing up the *pacta sunt servanda* principle that is included in Section 1587 of the Latvian Civil Law. On the one hand, the draft law would have preserved the general principle which says that a legally concluded contract obliges parties to fulfil relevant promises without allowing one party to abrogate the agreement even if compensation is paid to the other party. At the same time, however, the amendments to Section 1587 that were prepared by the Justice Ministry did provide the possibility to abrogate or amend an agreement when objective changes in circumstances make it too difficult to implement the terms thereof. The proposed amendments said that in such cases, parties to the contract must engage in negotiations on amending or abrogating the agreement. If agreement on this cannot be reached in a sensible period of time, each party would have the right to ask a court to determine the date upon which

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[6] See: Jarkina V. Ceļā uz Latvijas Republikas Civillikuma modernizāciju [On the Road Toward Modernisation of Latvia's Civil Law]. *Jurista Vārds*, No. 25, 19 June 2007, p. 10. See also: Jarkina, V. "Vai Sabiedrība ir gatava grozījumiem Civillikumā?" [Is Society Prepared for Amendments to the Civil Law?]. *Jurista Vārds*, No. 45, 1 November 2007, p. 15.

[7] See: Balodis K. Ievads civiltiesībās [Introduction to Civil Law]. Rīga: Zvaigzne ABC (2007), p. 68.

[8] The draft law can be found at http://www.tm.gov.lv/objs/tm_project/project_68978.doc [viewed 11 June 2012].

the agreement can be abrogated or amended, also determining losses caused by the changes in circumstances and ensuring a just distribution of losses and gains.

Opponents to this new version of Section 1587 of the Civil Law argued that the amendments would allow parties to contracts to abrogate virtually any agreement, and so amendments to the *pacta sunt servanda* principle would not be sensible and would not be in line with the economic situation.[9] The legislature rejected the draft amendments, even though they were clearly related to efforts to modernise the law. An interesting paradox here is that rules similar to those of the draft version of Section 1587 were later included in the Commerce Law in relation to franchising agreements. Section 478 of the Commerce Law allows parties to a contract to abrogate a franchising agreement unilaterally if the fulfilment of obligations has become too difficult because of objective changes in circumstances or if, before the conclusion of the franchise agreement, the other party has provided false information about circumstances that are of essential importance in the franchising process. This means that franchising agreements are the only agreements which, in terms of Latvian law, a party can abrogate on the basis of legal foundations which the legislature in the past refused to apply to all agreements. Legal norms which are essentially applied to all agreements really must be included in the Civil Law, not the Commerce Law, so that the civil law system is rational and does not fall into chaos.[10]

Amendments to laws related to divorce

One of the most important amendments to the Civil Law relates to uncontested divorce cases that can be handled by sworn notaries. The amendments were approved in October 2010 with the purpose of easing up the workload of the courts, and they took effect on February 1, 2011. Before that only courts could hear divorce cases. Section 69 and other sections of the law were amended, but not to a particularly large extent. Procedures related to divorce are regulated in greater detail in the law on notaries.[11] The first sentence of Section 69 of the Civil Law states that divorces can be approved by a court or a notary. The first sentence of Section 69.3 of the law states that divorces can be based on procedures enshrined in the law on notaries, provided that both of the married people agree to the divorce. It must be noted that a notary can dissolve a marriage only of the couple has no minor children or joint property and if the married partners have, before filing for divorce, agreed on contacts with the minor children, on child support payments, and on the distribution of joint property.[12]

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[9] Vai un cik lielā mērā grozāms Civillikums: ekspertu diskusija 'Civillikums ceļā uz modernizāciju' [Should the Civil Law Be Amended and to What Extent: Expert Debates on 'the Civil Law on the Road to Modernisation]. *Jurista Vārds*, No. 17, 29 April 2008, p. 13.

[10] Balodis K. "Jaunais komercdarījumu regulējums un tā piemērošana" [New Regulations on Commercial Transactions and Application of Same]. *Jurista Vārds*, No. 21, 26 May 2009, p. 13.

[11] For amendments to the law. See: *Latvijas Vēstnesis*, No. 183, 28 October 2010.

[12] Rušeniece D. Pārmaiņas bezstrīdus laulības šķiršanas lietu izskatīšanā [Changes to Rules on Uncontested Divorces]. *Jurista Vārds*, No. 32, 10 August 2010, p. 17.

A positive element in these amendments is that uncontested divorced are handled by sworn notaries, as opposed to registry offices.[13] If competence related to uncontested divorces were divided up between notaries and registry offices, that would not conform to the principle of separation of powers.[14] It has to be said that the amendments to the Civil Law which enabled the handling of uncontested divorces by notaries were developed quite successfully from the perspective of legal technique. The necessity for such amendments, however, can be questioned. Under conditions of a critical demographic situation, the state, in accordance with Section 110 of the Constitution, is expected to strengthen marriage and families as legal institutes, as opposed to making it easier for them to collapse.[15] If the amendments are considered on the basis of the broader interests of the state and society, as opposed to monetary utility, then it is hard to commend them.

Reforms to the capacity of individuals

On December 27, 2010, the Latvian Constitutional Court handed down a ruling on Case No. 2010-39-01, in which it was asked to rule on the constitutionality of Sections 358 and 364 of the Civil Law in reference to Section 96 of the Constitution, which speaks to the right to a private life.[16] The court declared both articles to be unconstitutional and nullified them as of January 1, 2012. Section 358 of the law said that people with mental disorders who have lost all or most of their mental capacities are to be declared incapacitated, which means that they are not able to represent themselves in legal terms or to manage their own property. In such cases, the law said, such people must be placed under foster care. The Constitutional Court ruled that this section of the law did not make it possible to find a gentler solution for such individuals. Section 364 of the law allowed only courts to rule on the restoration of full capacity or the preservation of full incapacity. The Constitutional Court ruled that the state must implement mechanisms on the limitation of capacity which include individual evaluation of each situation and the selection of the most appropriate limitations in the concrete situation.

This ruling meant that the Civil Law had to be amended in an all-encompassing way so that issues related to people with mental disorders would be regulated in a constitutional manner. The amendments had to ensure that the capacity of a person is limited to the necessary extent, as opposed to being invalidated entirely. The legislature, however, did not implement the Constitutional court ruling in a timely

[13] Rušeniece D. Aizvadīts pirmais gads, kopš zvērināti notāri šķir laulību [One Year Since Sworn Notaries Have Approved Divorces]. *Jurista Vārds*, No. 10, 6 March 2012, p. 27.

[14] Bērtaitis S. Kompetences dalījums starp notāriem un dzimtsarakstu nodaļām [Division of Competences Between Notaries and Registry Offices]. *Jurista Vārds*, No. 10, 9 March 2010, p. 27.

[15] Mucenieks J. Reformas reformu pēc jeb kāpēc notāri nedrīkstētu šķirt laulības [Reforms for Their Own Sake: Why Notaries Should Not Be Authorised to Approve Divorces]. Available: http://www.delfi.lv/news/comment/comment/janis-mucenieks-reformas-reformu-pec-jeb-kapec-notari-nedrikstetu-skirt-laulibas.d?id=33208895 [viewed 14 June 2012].

[16] Available: http://www.satv.tiesa.gov.lv/upload/spriedums_2010-38-01.htm [viewed 15 June 2012].

way. When this paper was being written in June 2012, Parliament had not finished work on the relevant amendments to the Civil Law. Regulations concerning the capacity of individuals have proven to be among the greatest and most complicated problems in improving the Civil Law. The text of the law on second reading speaks to major amendments to rules concerning the capacity of individuals, particularly in relation to family and obligation law.[17] The extent to which regulations concerning the capacity of individuals have been reformed confirms the tight linkage between norms of the Civil Law that are in a unified system. The ruling of the Constitutional Court on striking two sections of the Civil Law has had a domino effect in that the legislature must amend or supplement many legal norms which relate to the components of the capacity of both parties – the ability to act and the capacity to commit illegalities. It is already clear that these amendments will affect not just people with mental disorders, but also adults who have been subject to foster care because of careless or wasteful lives. The amendments will also apply to certain aspects of the capacity of juveniles. The completion of such major reforms will pose a substantial challenge to the legislature.

Conclusion

Although the Civil Law is amended via the same legislative procedures as those which apply to other laws, the fact is that amendments to the Civil Law are often much more complex than is the case with other normative acts. From the perspective of legal technique, as well, the drafting of high-quality norms for the Civil Law is not easy. Particularly complex is the implementation of major reforms to the law. This applies, too, to issues related to the capacity of individuals – those which arose while this paper was being written. This has to do with the specific nature of the Civil Law. It is a unified code of general human rights norms. The norms of the Civil Law tend to be fairly abstract, which makes it easier to apply the norms and reduces the need to amend the law too often. Thoughtless changes to the Civil Law might mess up the system of the law, and that is why the legislature must be particularly careful when amending it. Yes, the Civil Law has been put to effective use since its reinstatement, but the fact is that occasionally it needs improvements. There can be doubts about the legal and political utility of some of the amendments to the Civil Law that have been approved in recent years, but in most cases the amendments have been justified and appropriate for the system of the law. Amendments and supplements to the Civil Law have not been implemented too often, and this has ensured the peaceful evolution of the law in accordance with contemporary civil law thinking, as well as with the legal realities which exist in the present day.

[17] Available: http://www.titania.saeima.lv/LIVS11/saeimalivs11.nsf/0/9C8E549181F9F755C2257A1D004CAF93?OpenDocument [viewed 15 June 2012].

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"SAME" ACT – DIFFERENT SCOPE: THE "INTERNATIONAL [ARBITRATION]" CRITERION IN THE ARBITRATION LAWS OF THE EURASIAN UNCITRAL MODEL LAW – COMPLIANT JURISDICTIONS

Words differently arranged have a different meaning, and meanings differently arranged have different effects.
Blaise Pascal

Keywords: UNCITRAL Model Law; International [Arbitration]; Substantive Scope of Application; Foreign Economic Activity; Foreign Trade Activity; Connecting Factor; Closest Connection; Party Autonomy.

Abstract: The article discusses approaches used in determination of the international [character] of arbitration reflected in the UNCITRAL Model Law [1985] – compliant arbitration laws of the 4 Eurasian states – the Russian Federation, Ukraine, Azerbaijan and Belarus. Being one of the criteria of substantive applicability of the said laws, the "internationality" is assessed from both – theoretical and practical perspectives, inter alia, demonstrating the influence of the deviations from the model, reflected in Art. 1 of the Model Law, on the ultimate outcomes of the relevant proceedings carried out in the Eurasian states concerned.

UNCITRAL Model Law: a Brief Recap

UNCITRAL Model Law, adopted in 1985[1] and later revised[2], being the first UNCITRAL legal harmonization project, is playing a major role in creating a coherent high quality arbitration-related legal framework in multiple states globally.

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[1] Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (U.N. document A/40/17) Annex I (reproduced in UNCITRAL Yearbook, Vol. XVI:1985, part three, chap. I), hereinafter – the UNCITRAL Model Law.

[2] According to the concise summary provided by the UNCITRAL, Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006.

Currently, over 60 jurisdictions are deemed to be Model Law – compliant[3], while an ever-increasing number of states have evidently considered the text of the Model Law in drafting their arbitration-related statutes.

The drafters of the instrument recommend "to follow the model as closely as possible since that would be the best contribution to the desired harmonization and in the best interest of the users of international arbitration, who are primarily foreign parties and their lawyers"[4]. Nevertheless, the text is flexible in allowing adjustments to the national legal order, at times – explicitly. For instance, the provisions determining the court competent to provide assistance to arbitration as well as to handle the post-award phase proceedings were purposefully left blank, following a reasonable anticipation that the states concerned would have varied approaches to the issue[5]. Consequently, the strong point of the Model Law is its higher level of integration to the national legal order, which makes reliance thereon a more "comfortable" exercise for all – parties, tribunals and courts concerned, in both – procedural and substantive aspects.

The "Internationality" Test and Interference therewith

Without addressing the benefits of the Model Law, which, undoubtedly, are numerous, this paper is aimed at dwelling on one of the gateway issues – the "international [arbitration]" criterion, which [frequently] determines the substantive scope of the law's application. As is obvious from the text of the Model Law proper, the intention of the drafters was to give the Law the widest possible scope of application, inter alia, via the broadly-phrased by virtue of five different variations definition of "internationality", which the latter incorporates in its Art. 1.[6] Nevertheless, since the states adopting the Model Law as their own, are authorized to make modifications thereto to their convenience, the definition of the "international [arbitration]" as well as the pertinent tests are often subject to adaptation. The discussion below will be devoted to the scrutiny of the definitions of the "internationality" in the arbitration laws of the four Eurasian states, as well as the approaches to the same issue adopted by their courts, where possible, exploring their implications.

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[3] The status of the instrument could be checked at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [viewed 12 July 2012].

[4] Explanatory Note to the Model Law of the UNCITRAL Secretariat. Available: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf [viewed 12 July 2012]. The same was reinstated by the Resolution of the General Assembly of the United Nations No. 40/72 in December 1985.

[5] See, inter alia: UNCITRAL Model Law, Art. 6.

[6] See also the drafting history of the Model Law. Available: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_travaux.html [viewed 12 July 2012].

The Model-Law compliant laws of the Eurasian States Incorporating the "International [Arbitration]" Criterion

Azerbaijan, Belarus, Russian Federation and Ukraine are the only Eurasian Model Law [1985] – compliant states[7] that have incorporated the "internationality" criterion in their arbitration legislations. The other two Eurasian states, Armenia[8] and Georgia[9], both having adopted the Model Law in a more advanced version – already after the 2006 amendments, – albeit being deemed Model Law-compliant as well, do not distinguish between international and domestic arbitration, this way making the scrutiny of their texts for the present purposes baseless.

"International [Character]" in the Substantive Scope of Application – the Theory

The text of the Model Law suggests alternative reliance on five different connecting factors in order to ensure application of the instrument. The "list" commences with the location of the places of business of the parties in different states –by far the most popular (and most efficient in bringing the new legal relations in[10]) connecting factor. Yet, to be sure, the Model Law further adds the other four "links":

- Closest connection of the subject matter of the dispute to a third state[11];
- Seat of the arbitration in a third state;

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[7] The states are mentioned as the Model Law Compliant states at the relevant UNCITRAL web page. In addition, the EBRD Model Law compliance assessment, conducted in 2007, recognized the legislation of Armenia, Azerbaijan, Russia and Ukraine as highly compliant with the Model Law, while that of Belarus – meeting the medium compliance threshold. It is rather likely that all newly-adopted laws were largely based on the Russian language version of the Model Law, Russian still being a lingua franca in the region. While the two earliest laws, Russian and Ukrainian, are strikingly similar, even identical in their wording, the other laws concerned are more varied in their approach. For instance, the law of Azerbaijan is often closer to the language of the Model Law proper, with slight modification, possibly at the cost of translation. The Belarusian law is more creative, including "extra" provisions devoted to the principles of arbitration and its tasks, establishment and functioning of an arbitration institution, establishment of the content of the foreign law, etc. See Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (U.N. document A/40/17) Annex I (reproduced in UNCITRAL Yearbook, Vol. XVI: 1985, part three, chap. I).

[8] Law of Republic of Armenia "On Commercial Arbitration", adopted on December 25, 2006. Unofficial translation of the Law into English available at: http://www.aua.am/aua/masters/law/pdf/Law%20of%20the%20RA%20on%20Commercial%20Arbitration.pdf [viewed 12 July 2012].

[9] Law of Georgia on Arbitration, dated June 19, 2009, No. 1280. Unofficial translation of the Law into English by Ms. Sophie Tkemaladze, LL.M. Available: http://www.arbitrations.ru/userfiles/file/Law/Arbitration%20acts/Law%20of%20Georgia%20on%20Arbitration%20_English_.pdf [viewed 12 July 2012].

[10] The 2012 UNCITRAL Model Law Case Law Digest confirms that "The vast majority of situations commonly regarded as international will meet the criterion referred to in article 1 (3) (a)" [e.g. places of business of the parties located in different states].

[11] E.g. the state different than that/those of the arbitrating parties.

- Performance of the substantial part of the obligations in the third state;
- Party autonomy – based "*opt-in*" (designation by the parties of their proper arbitration as an international one).

In its turn, the scope of application of each of the national laws concerned is briefly summarized in the Table 1 below. As compared to the definition incorporated into the text of the Model Law, their respective scopes could be referred to as both – narrow and sui-generis. Taking the fact that the states concerned have adopted their arbitration laws at rather early stages of the transition, it could be presumed that one of the reasons for such "modesty" could be traced back to the approach adopted by the USSR, marked by an ab initio reluctance to extend the application of the Model Law to the proceedings involving the nationals/ companies doing business in the same state, inter alia, for the arbitrability concerns.[12] Otherwise, the lack of experience of the newly independent states (except the Russian Federation) with international arbitration could also play a role, in making their legislators somewhat cautious towards the development.

[12] Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration, Report of the Secretary-General, UNCITRAL, Eighteenth session, 3-21 June 1985, A/CN.91263, p. 9. Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V85/241/24/PDF/V8524124.pdf?OpenElement [viewed 12 July 2012].

Table 1: The scope of application of the arbitration laws of the Russian Federation, Ukraine, Azerbaijan and Belarus: International [Character]

Connecting Factor	UNCITRAL Model Law (1985)	Russian Federation[13]	Ukraine[14]	Azerbaijan[15]	Belarus[16]
	Arbitration is deemed international if:				
Subject matter [substance]	-[17]	Disputes arising out of contractual and other civil law foreign trade and other foreign economic relations [AND]		-	Disputes arising out of civil law relations in the course of carrying out of foreign trade and other types of foreign economic relations [AND]
Subject matter [closest connection][18]	the place with which the subject-matter of the dispute is most closely connected is in the state other than that/ those of the parties [OR]	-	-	-	-
[Interstate] Party content	places of business of the parties are in different states at the point of conclusion of the arbitration agreement [OR]	at least one of the parties has its place of business outside of the Russian Federation / Ukraine (*the relevant assessment point in time is not indicated*) [OR]		Same[19]	If one of the parties has its place of business outside of Belarus (*the relevant assessment point in time is not indicated*) [OR]
	[Clarifications in re the "places of business in different states" criterion]				
	if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;	Same	Same	Same	-
	if a party does not have a place of business, the reference is to be made to his habitual residence.	Same	Same	Same	-

[13] Federal Law of the Russian Federation "*On International Commercial Arbitration*", No. 5338-I, dated July 7, 1993 (hereinafter – the "*Arbitration Law of the Russian Federation*", Art. 1.

[14] Law of Ukraine "*On International Commercial Arbitration*", dated 24.02.1994, No. 4002-XII (hereinafter – the "*Ukrainian Arbitration Law*"), Art. 1.

[15] Law of the Republic of Azerbaijan "*On International Commercial Arbitration*", dated 18 November 1999 (hereinafter – the "*Azeri Arbitration Law*"), Art. 1.

[16] Law of Republic of Belarus "*On International Arbitration Court*", N 279-3, dated July 9, 1999 (hereinafter – the "*Belarusian Arbitration Law*"), Art. 4. As noted above, the Belarusian Arbitration Law, even though being Model Law – based, contains a number of additional provisions, thus, unlike in the case with its Russian, Ukrainian and Azeri counterparts, the order/ numbering of the provisions therein is not following the Model Law pattern,

[17] No comparable provision is available.

[18] The connecting factors recognized in the text of Art. 1 of the Model Law are put down in bold.

[19] The provision is identical in its language to that of the UNCITRAL Model Law.

Connecting Factor	UNCITRAL Model Law (1985)	Russian Federation[13]	Ukraine[14]	Azerbaijan[15]	Belarus[16]
	Arbitration is deemed international if:				
Party content [Foreign Element]	-	Disputes involving foreign investment enterprises, established in the Russian Federation / Ukraine, international associations and organizations, established in the Russian Federation / Ukraine		-	-
The place (seat) of arbitration	the place of arbitration if determined in, or pursuant to, the arbitration agreement is in the state other than that/ those of the parties [OR]	-	-	Same	-
The place of substantial performance of obligations	the place where a substantial part of the obligations of the commercial relationship is to be performed is in the state other than that/ those of the parties [OR]	-	-	Refers to the "main" rather than "substantial" part of the obligations	-
Party Autonomy [subject matter]	express agreement between the parties stipulates that the subject-matter of the arbitration agreement relates to more than one country	-	-	Adds an adjective "*manifestly*" to the Model Law language	-
Party autonomy [international arbitration]	-	-		-	The parties agreed to submit their disputes [not meeting the criteria indicated above] to international arbitration and the law of Belarus does not preclude such a submission.

As is visible from the Table 1, in the Russian Federation and Ukraine, the two, alternative, internationality tests are introduced. Under the first, two-prone, test the substantive characteristic of the subject matter (the requirement that the dispute shall arise out of an exercise of foreign economic activity), is complemented by the requisite of the location of the place of business of [at least] one of the parties in a different state than the Russian Federation/ Ukraine. The second, somewhat simpler, test deals with a necessary presence of a foreign element (ownership/ investment) in one of the parties, in the case both/all parties are established in the Russian Federation/ Ukraine. This second test is completely strange to the language of the Model Law proper.

Similarly, the law of Belarus also relies on a two-prone test in joining the substantive subject matter (foreign trade or other foreign economic activity) test and the location of the place of business of [at least one of] the parties outside Belarus. In addition, however, the Belarusian Arbitration Law introduces an additional, specific party-autonomy based connection, in allowing the parties (unless a different national law provides to the contrary) to refer their "other" (e.g. those not arising out of the foreign trade or other foreign economic activity) disputes to international arbitration upon agreement to this effect. The peculiarity of this "opt-in" clause, as compared to that suggested by the Model Law itself, is in its emphasis on the direct contractual designation of the dispute settlement mechanism ("international arbitration") rather than on the contractual characterization of the subject matter of the arbitration agreement as an international one, which would call for the international arbitration as a result[20].

Importantly, distinctly from the Model Law, no critical point in time is set in Russian, Ukrainian or Belarusian Arbitration Laws for the determination of the location of the relevant place of business of the party. The lack of an [arguable] Model Law presumption of continuous validity of the arbitration agreement, should the "places of business in different states" criterion be met at the moment of its conclusion[21], might cause unpredictability and confusions, since the state, where the place of business of the party is located, might change between the point of conclusion of an arbitration agreement and commencement of arbitration proceedings, this having a fatal effect on this substantive applicability criterion[22].

As far as the foreign trade/economic activity is concerned, it might be argued that certain "foreign" element within the subject matter of the transaction (beyond the "international" party content) is required, at least in the legal frameworks of the Russian Federation[23] and Belarus[24]. Ukrainian law seems to be somewhat more flexible on this particular point[25].

Unlike its western neighbors, Azerbaijan, rather closely following the Model Law approach, introduces four alternative tests, omitting only the "closest nexus with

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[20] UNCITRAL Model Law, Art. 1(3)(c).

[21] Id., Art. 1(3)(a).

[22] See: the discussion pertaining to the "ICE-BS" LL.C. (Russian Federation) v. CJSC "Refbalttehnik" (Russian Federation) case in the next part of this paper.

[23] According to the Federal Law of the Russian Federation "On State Regulation of Foreign Trade Activity", dated October 13, 1995, No. 157-ФЗ, foreign trade activity is an "Entrepreneurial activity in the sphere of the international exchange of goods, services, works, information, results of intellectual activity, including exclusive rights thereto (intellectual property)".

[24] Law of Republic of Belarus "On State Regulation of Foreign Trade Activity", dated November 25, 2004, No. 347-3, in its Art. 1 defines foreign trade activity as an "Activity of foreign trade of goods and/or services and or objects of intellectual property".

[25] The Law of Ukraine "On Foreign Economic Activity", dated April 16, 1991, No. 959-XII, in its Art. 1, defines the latter as "the activity of the participants of the economic activity of Ukraine and foreign participants of the economic activity, based on their mutual relations taking place both in Ukraine and abroad". This definition seems to put an emphasis on the party composition of the relationships, rather than on their substantive content.

the subject matter" criterion. Nevertheless, either as a matter of translation, or purposefully, the two slight modifications are introduced into the performance- and party autonomy – based assessments. Namely, in the former case, the Azeri Arbitration Law refers to the performance of the "main" rather than the "substantial" obligation, while, in the latter situation, it complements the conditions of the party agreement designating their arbitration as an international one with the adjective "manifestly". The two replacements, even though not yet, in the knowledge of the author, explored by practice, might have different significance. The "substantial" – "main" switch might, at times, change an assessment due to the variations in the meaning of the two terms. In particular, while the adjective "significant" refers to something "of considerable importance, size, or worth; important in material or social terms; concerning the essentials of something", "main" is defined as "chief in size or importance"[26]. Thus, "main" would always be "substantial", but not necessarily otherwise. For instance, should the contract call for the performance of the two equally important obligations and one of them is to be performed in the third state, the "substantial" criterion might be met, however, not necessarily the "main". On the other hand, the addition of "manifest" to the party autonomy – based factor does not seem to change the situation distinctly, rather, solely emphasizing that the respective agreement of the parties, designating their dispute as an international one, should be clear and unambiguous.

"International [Character]" in the Substantive Scope of Application – the Test by Practice

The four cases originating from Ukraine, Russian Federation and Belarus will demonstrated the peculiarities of application of the "internationality" test in the chosen jurisdictions, demonstrating that, overall, it is rather rigorously observed, at times – to the detriment of international arbitration.

To start with, in "ICE-BS" LL.C. (Russian Federation) v. CJSC "Refbalttehnik" (Russian Federation), the dimensions of the internationality, as set forth in the arbitration law of the Russian Federation, deprived the parties of a chance to proceed with the ICC arbitration agreed on. The arbitration clause initially contained in the contract concluded between Polish production, trade and service company "ELPLAST" and Russian "Refbalttehnik" LL.C, provided for the resort to the ICC arbitration in case of disputes. The contract was later assigned from "ELPLAST" to another Russian company –"ICE-BS" LL.C. Soon after the assignment, "ICE-BS" addressed the Arbitrazh Court of Kaliningrad Region, seeking to recover some RUR 186652.67 (US$ 6602.5) from "Refbalttehnik". The court satisfied the claim of "ICE-BS" in full[27]. Upon the challenge, the appellate instance of the Arbitrazh Court of Kaliningrad Region quashed the decision of the lower court, referring the parties

[26] Oxford British and World English dictionary online: http://oxforddictionaries.com [viewed 12 July 2012].

[27] Decision of the Arbitrazh Court of Kaliningrad Region, dated 26.12.2000.

to arbitration[28]. Ultimately, the decision of the Appellate instance itself, was quashed by the Federal Arbitrazh Court of the North-Western Circuit[29]. The latter noted that the necessary precondition for the referral of the parties to arbitration was not met, since "the parties to the present dispute are the representatives of the one single state, while the necessary precondition for the jurisdiction of an international arbitration [tribunal] is a permanent location of the legal entities in different states"[30]. Evidently, the conclusion reached by the court could had been different, should the time of the conclusion of the arbitration agreement (and not the time of commencement of the arbitration) be chosen as a reference point for assessment, since, at the time when the arbitration agreement was concluded, the parties thereto had their places of business in two different states – Poland and the Russian Federation.

Yet, as demonstrated in the other case originating from the Russian Federation, should a foreign interest (and not necessarily foreign location) of one of the parties be present, the referral will necessarily take place, even in case the foreign economic character of an interaction between the parties is otherwise not ensured. In CJSC "Mosenka" v. OJSC "Rinako Plus" (both – Russian Federation)[31], the Russian courts, despite the allegations of "Rinako Plus", that the dispute between the two Russian parties (one being a foreign investments-based enterprise), the subject matter of which involves no foreign element[32], belongs to the exclusive jurisdiction of the Russian courts and cannot be submitted to arbitration, referred the parties to the SCC arbitration, on which they have expressly agreed in the arbitration clause[33].

In OJSC "Strojtrest A" (Belarus), Branch Company JSC "B" (Russian Federation) v. JSC "B" (Belarus), "Strojtrest A" opposed recognition and enforcement of the award, rendered by the ICAC of Russian Federation in Belarus[34], inter alia, on the basis of the invalidity of the arbitration agreement under the law of Republic of Belarus, which does not allow the domestic entities to submit their disputes to the international arbitration. In granting recognition and enforcement of the award, the

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[28] Decision of the Appellate Instance of the Arbitrazh Court of Kaliningrad Region, dated 27.07.2001 in the case No. 4362.

[29] Decision of the Federal Arbitrazh Court of the North-Western Circuit, dated 3 October 2011, in the case No. 4362. The text of the decision in Russian is available at http://spbarbitr.ru/practic/arbitr/4362/ [viewed 12 July 2012].

[30] Id.

[31] The case is reported in Муранов А.И., Павлов А.Е., "Арбитражная оговорка как средство процессуальной защиты (ЗАО "Мосэнка" против ОАО "Ринако Плюс", 1999 г)", Московский Журнал Международного Права, 3/1999. Available: http://www1.mzs.ru/_data/vmzs/0000110/file.pdf [viewed 12 July 2012].

[32] The dispute has arisen out of a failure of "Rinako Plus" to comply with its obligations under the contract dealing with the office premises lease in Moscow, Russian Federation.

[33] The arbitration clause, namely, provided:

If the Russian jurisdiction is not exclusively competent to consider the dispute to arise, all disputes, arising out of the contract or in connection thereto, shall be finally settled by arbitration in Stockholm, in accordance with the effective Arbitration Rules of the Arbitration Institute of Stockholm Chamber of Commerce by the arbitrator or arbitrators, selected in accordance with the said Rules.

[34] Award of ICAC of Russian Federation, dated May 27, 2004, in case No. 161/2003.

Higher Economic Court of Republic of Belarus noted, that the reference of "Strojtrest A" to Sec. 5 of the Decree of Plenum of Higher Commercial Court of Republic of Belarus No. 3, providing, that

> *The effective law does not provide the parties, located or residing in Republic of Belarus, with a possibility of concluding an arbitration agreement and selecting foreign international commercial arbitration court as an institution, competent to consider their dispute, while such an international commercial arbitration agreement, if concluded between such parties, is invalid due to the spread of the jurisdiction of the economic courts of Republic of Belarus over the whole territory of the country,*

is not relevant to the relationships in question, as the contract was concluded not only by the two parties, located (being registered and having their main places of business) on the territory of Republic of Belarus, yet, between the three parties, one of which had its place of business in Russian Federation[35]. Upon the challenge, the result had been confirmed by the Cassation College of the same court[36]. Hence, the courts have, essentially, agreed that, while indeed, the Belarusian parties do not have a necessary capacity to enter into valid [international] arbitration agreement to resolve the disputes between themselves only, the presence of the Russian party in the relationship at stake was decisive in providing it with the international "flavor".

The last case concerned with the referral (and not post-award) phase of the proceedings, demonstrate, overall, the same approach, adopted by the courts of the Ukraine. In CJSC "Bahmutgyps and LLC "Soledar-Servise" (both – Ukraine), the central issue of the case – i.e., validity of the arbitration clause calling for arbitration the arbitration according to the rules of the ICAC of Ukraine, – reached the Higher Commercial Court of Ukraine. After analyzing the arbitration clause, the court remanded the case for reconsideration, mandating the lower court to inquire into the identities of the parties, as well as to clarify the meaning of the arbitration agreement, which provided:

> *[the] disputes are to be resolved by ICAC at the respondent's place of business and the substantive law of Ukraine has to be applied to the merits*.[37]

The court, relying on the Art. 1(2) of the Law of Ukraine on International Commercial Arbitration – which requires at least one of the parties to be foreign or have foreign interest (bear foreign investments) to "qualify" for international commercial arbitration with a seat in Ukraine – phrased out its concern about the necessity to clarify the presence of the "foreign" element within the corporate structure of at least one of the parties, both of which were the legal entities established in Ukraine.

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[35] Decision of the Higher Economic Court of Republic of Belarus, dated October 11, 2004, in case No. 5-6Ип/2004.

[36] Decision of the Cassation College of Higher Economic Court of Republic of Belarus, dated May 3, 2005, in case No. 5-6Ип/2004/106К.

[37] Decision of the Higher Economic Court of Ukraine, in Case 1/4, dated 12 October 2006.

Conclusion

As a matter of a conclusion, a brief assessment undertaken above has demonstrated that the Eurasian states concerned adopt a particular approach in shaping their "internationality" tests. These tests, being, in general, narrower than the one suggested by the Model Law, in the meantime are marked by several unusual "extensions" of applicability of the respective instruments, such as the extension of their substantive scope to arbitrations involving the national entities having certain foreign interest within, even if no other foreign element is involved (in the Russian Federation and Ukraine) and a specific party-autonomy based extension, providing a possibility of the direct submission of the non-international dispute to international arbitration upon the parties' agreement (Belarus). While, in the light of some restrictive language present in the respective provisions, it would not be completely fair to suggest that the approach to the definition of "internationality", adopted by the Eurasian states under the scrutiny, is balanced, neither it is one-sided or contra-arbitration. More flexibility could be expected as the relevant case law, being rather scarce so far, develops.

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THE QUALITY OF PART 78 OF THE LATVIAN CIVIL PROCEDURE LAW AND ITS IMPORTANCE IN RECOGNIZING AND ENFORCING THE FOREIGN ARBITRAL AWARDS

Keywords: Foreign Arbitral Awards, enforcement and recognition, Civil Procedure law.

Part 78 of Civil Procedure Law of the Republic of Latvia[1] sets the national procedural rules for recognition and enforcement of the foreign arbitral awards. In practice it shall serve as supplementary instrument for New York Convention On Recognition and Enforcement of Foreign Arbitral Awards (further: New York Convention).[2] However, recent developments in international arbitration as well as latest case law on recognition and enforcement of foreign arbitral awards in Latvia showed the legal gaps in the law that shall be fulfilled by correct interpretation of this part or legislation shall be changed.

The aim of this paper is to identify those main legal gaps in Part 78 of Civil Procedure Law. In order to accomplish this aim, the following tasks will be set: to elaborate on the deficiencies in the law and the conflicting national case law, to consider the inclusion of new trends of international arbitration in Part 78 of Civil Procedure Law and to suggest the relevant changes in the legislation.

Introduction

Current version of Part 78 "Recognition and Enforcement of Foreign Arbitral Awards" of Civil Procedure Law was adopted only in 2004. It is part of Chapter F "International Civil Procedure Law"[3] and consists only of seven articles. The case law has showed that the wording of the relevant part of Civil Procedure Law is

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1 Civilprocesa likums. 14.izdevums. Rīga: TNA, 2010.

2 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 330 UNTS 38, 1958. Latvia ratified the convention on 11 March 1992, it became in force in Latvia at 13 July 1992.

3 Law dated 7 April 2004, LV 64 (3012), 23.04.2004. The Chapter includes following parts: part 77 "Recognition and Enforcement Foreign court adjudications", part 771 "Matters regarding Unlawful Movement of Children across Borders to a Foreign State or Detention in a Foreign State", part 772 "Matters regarding the Unlawful Movement of Children across Borders to Latvia or Detention in Latvia'; part 78 "Recognition and Enforcement of Foreign Arbitral Awards", part 79 "International Legal Co-operation"; part 80 "Application of Foreign Laws to Adjudication of Civil matters." There is no separate law on international private law issues in Latvia.

considerably inconsistent thus raises problems of interpretation. In this paper author will deal only with two main challenging issues – right to appeal the court's decision on recognition and enforcement (or non-recognition and non-enforcement) and possibility to recognize and enforce foreign arbitral decisions.

Appeal of Latvia's court decision on recognition and enforcement of foreign arbitral award

Section 5 of Article 649 of *Civil Procedure Law* provides: "a complain[4] can be submitted regarding the court's decision to recognize or not to recognize the arbitral award".

This Section does not specify either such complain can be submitted regarding 1st instance's decision only or also regarding the 2nd instance's. Such ambiguous clause in law raises the conflicting decisions of the courts.[5] For example, in one case the parties have gone through the three tier appeal system – the application for recognition and enforcement was heard in the first, the second and the third instance (Supreme Court)[6], however, in other – recent case – Supreme Court refused to accept the complain of 2nd instance's court decision stating that decision on non-recognition and non-enforcement of foreign arbitral award can be reviewedly in two instances only.[7]

Therefore, it raises the questions: how correctly Section 5 of Article 649 should be interpreted and applied? How many instances can hear the decision of the Latvian court on recognition and execution of the foreign arbitral award?

Firstly, it is nationally[8] and internationally acknowledged that law "cannot base itself on a purely grammatical interpretation of the text"[9]; it shall be reviewed also in the light of the aim and system of the law. Therefore, the text of the discussed section shall be filled with content giving appropriate meaning, especially, if the wording is not clear enough.

Secondly, considering the historical development of relevant norms, it is evident that until 30 April 2004 there were joint norms and procedure for recognition and enforcement of foreign arbitral and court judgments.[10] Mirror rule of current Section

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4 Blakus sūdzība – in Latvian, appeal on procedural aspects.

5 The views and opinions expressed in this article are those of the author. The outcome of each court case depends upon many factors, including the facts of the case, evidence and legal reasoning etc, thus the cases at hand are analyzed in light of interpretation of Article 649 only.

6 Supreme Court of Republic of Latvia decision in case No SKC-395/2010 [2010], available in Latvian: http://www.at.gov.lv/lv/info/archive/department1/2010/ [viewed 10 April 2012].

7 Supreme Court of Republic of Latvia decision in case No SKC – 953/2012 [2012], not published.

8 Meļķisis E. Iztulkošanas metodes. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā (E. Meļķiša zin.red.). Riga: Ration iuris, 2003, p. 116.

9 ICSID case No. ARB/08/15: Cemex Caracas Investments BV et all v, Bolivarian Republic of Venezuela, Decision on Jurisdiction § 103. Available:http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1831_En&caseId=C420 [viewed at 25 June 2012].

10 Article 636 of Civil Procedure Law: "Recognition and enforcement of the judgments of foreign courts and arbitrations (further: foreign courts) shall be conducted in accordance with this Law and international agreement binding to the Republic of Latvia." Civil Procedure Law edition

5 of Article 649 was included in Section 5 of Article 638 stating that a complain can be submitted regarding the court's decision on recognition the foreign court or arbitral judgments. Due to Latvia's accession to EU the national procedurals laws was harmonized, inter alia with Brussels I Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[11] in result the chapters concerning the recognition and enforcement of foreign court judgments and arbitral awards was separated. Now Part 77 of Civil Procedure Law provides for the detailed procedure on recognition and enforcement foreign court judgments including the three thier appeal system for the decision of the court as required by the Regulation (Article 641 of Civil Procedure Law), however, the norms on the recognition and enforcement of arbitral awards basically was left the same as before. Unfortunately legislator did not modernized and harmonized also this part of law.

Thirdly, and most importantly, the discussed Section shall be read systematically. Namely, recognition and enforcement of arbitral awards is a part of the international civil procedure thus the Part 78 is included in the Chapter F of Civil Procedure Law. Hence, the subject matter of the international civil procedure is entirety of national rules correlated to procedural legal relations involving foreign element.[12] Moreover, the international civil procedure establishes particular forms for the implementation of international legal norms in the national process, thus they help to provide assistance in the cases with international element. Therefore international civil procedure norms in the Civil Procedure Law are lex specialis.

Besides, recognition and enforcement of foreign judgments itself involves multistage procedure unemployed in the pure domestic process, that is, the court shall comply not only with procedural aspects of recognition and enforcement but also shall evaluate the grounds for non-recognition, i.e, decide whether it can accept (recognize) the foreign judgment or award in its legal system.

Therefore the legal norms included in the Chapter F are exceptional and shall be read autonomously from the norms setting the domestic civil procedure as the national procedure is not part of international civil procedure and it does not involve multi stage assessment. For example, Section 5 of Article 649 of Civil Procedure Law shall not be reviewed in the light of national proceedings of the submission of the (ancillary) complaints enshrined in Part 55.[13] In opposite, this Section shall be interpreted systematically with the norms included in the Chapter F "International Civil Procedure", more specifically with norms included in Article 641 of Part 77 "Recognition and Enforcement of Foreign Court Adjudications" providing clear three

as from 10 March 2004 to 30 April 2004 available in Latvian at http://www.likumi.lv/doc.php?id=50500&version_date=10.03.2004 [viewed 1 July 2012].

[11] Regulation (EC) No. 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters replacing the Brussels Convention of 1968, JO C 27.

[12] Шак Х. Международное гражданское процессуальное право: Учеб.: Москва, 2001, ст. 4.

[13] For example, such complains can be submitted against decision on non-prolonging procedural terms (Article 53, part 4), decision to leave a claim unadjudicated (Article 221, part 1), decision to refuse to accept an appellate complain (Article 421), decision refusing to issue a writ of execution in the national arbitration process (Article 535, part 3) etc.

tier system of appeal.[14] Such interpretation is justified as Article 641 and 649 are part of international civil procedure therefore has the same aim.

In addition, recognition and enforcement of foreign judgments are based on the principle of more favorable right[15] and this right is also incorporated in Article VII (1) of New York Convention. The rationale of the more-favorable-right provision is to allow interested parties to rely on more favorable regime available inter alia in national law thus if national civil procedure law allows, even by analogy, to apply three-tier appeal system for the decision to recognize arbitral awards then it shall be used.

Such interpretation would give also certainty what should be decided in the court's decision. For example, in result of interpretation of Section 5 of Article 649 in light of the national procedure on submission of ancillary complains the second instance, even several times, can return the case to the first instance for re-adjudication of the matter and then the case on recognition and enforcement of arbitral award can be lengthy carousel of re-deciding. For the sake of clarity and efficiency of the process each instance shall only decide to recognize and enforce the foreign arbitral award as similarly provided in the provisions of law on recognition and enforcement of foreign court judgments.[16]

In the author's opinion the three-tier appeal system is absolutely necessary for the recognition and enforcement of arbitral awards as the Supreme Court as the highest instance is the developer of judicature and there is necessity for clear and unified interpretation of the New York Convention and international civil procedure law.

Enforcement of foreign arbitral decisions

Article 636 of the Civil Procedure Law provides that "an adjudication of a foreign arbitration is a binding adjudication made by a foreign arbitration court irrespective of its designation". Misleadingly this norm suggests that both foreign arbitral decisions and awards can be enforced in Latvia. Namely, reading Article 636 in conjunction with next article providing that "the foreign arbitral adjudications (both awards and decisions) shall be recognized in accordance with Civil Procedure Law and binding international treaties," it may be concluded that only arbitral awards can be enforced for the reason that Latvia has become party only to the conventions that do not regulate the recognition and enforcement of arbitral decisions. For example, European Convention on the International Commercial Arbitration[17], Latvia is also part of,

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[14] Section 1 of Article 641 reads: "In respect of a decision by a first instance court in an adjudication of a foreign court recognition matter, an ancillary complaint to the regional court may be submitted, and a decision by the regional court in respect of an ancillary complaint may be appealed to the Senate by submitting an ancillary complaint".

[15] Шак Х. Международное гражданское процессуальное право: Учеб.: Москва, 2001, ст. 32.

[16] Section 1 of Article 642 provides: A regional court and the Senate in adjudicating an ancillary complaint have the right to: 1) leave the decision unamended, and reject the complaint; 2) set aside the decision fully or a part thereof and decide the issue of the recognition of the adjudication of the foreign court; or 3) amend the decision.

[17] European Convention on International Commercial Arbitration. 484 U.N.T.S. 364, 1961. In Article Vi (4) it is only provided that "a request for interim measures or measures of conservation

does not cover matters connected with the recognition and enforcement of arbitral awards or decisions. Even thought the debate exists whether the arbitral tribunal's decisions can be enforced in accordance with New York Convention[18], however "the prevailing view, confirmed also by case law in some States, appears to be that the Convention does not apply to interim awards."[19]

But in practice, the parties can delegate the arbitral tribunal to apply provisional or interim relief[20] in their arbitration agreement. Moreover, in many jurisdictions both the arbitration rules[21] and arbitration acts[22] provide that the arbitral tribunals are competent to take such decisions.[23] But the tribunal's decision on interim measures is not self-

addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court."

[18] See: Pietro D. What Constitutes an Arbitral Award Under the New York Convention? In: Gaillard E., Pietro D. [Ed.]. Enforcement of Arbitration Agreements and International Arbitral Awards. Cameron May, 2008, p. 139 et seq.

[19] Note by the Secretariat on Possible future work in the area of international commercial arbitration. UN Doc A/CN.9/460, 6 April 1999, p. 30, § 121.

[20] Article 17 of UNICTRAL Model Law provides that "an interim measure is any temporary measure [..] by which [..] arbitral tribunal orders a party to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute. 1985 UNCITRAL Model Law on International Commercial Arbitration. U.N. Doc A/40/17, Annex I, adopted by the United Nations Commission on International Trade Law on June 21, 1985.

[21] Article 28 of ICC Arbitration Rules. Available: http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf [viewed 11 June 2012]; Article 25 part 1 of LCIA Rules. Available: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article25 [viewed 11 June 2012].

[22] UNCITRAL Model Law on International Commercial Arbitration adopted in many countries provides that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures (Article 17, part 1). See also Article 25 (4) of Swedish Arbitration Act. Available: http://www.sccinstitute.com/?id=23746 [viewed 11 June 2012]; Article 39 of English Arbitration Act. Available: http://www.legislation.gov.uk/ukpga/1996/23/section/39 [viewed 11 June 2012]; Article 1041 of German Arbitration Act. Available: http://www.dis-arb.de/scho/51/materials/german-arbitration-law-98-id3 [viewed 11 June 2012].

[23] With the Law dated 17 February 2005 Latvia' s legislator deleted the Article "Interim measures" in the Latvian Civil Procedure Law providing the right of arbitral tribunal to award the interim measures.
Article 23 of Rules of Arbitration attached to the Latvian Chamber of Trade and Industry as only institution provide that the arbitral tribunal on its own initiative or pursuant request of one of the parties can issue decision on interim measures in arbitral proceedings or other interim decisions taking into consideration principles of international arbitration process. Available: http://www.chamber.lv/doc_images/regl/rules_of_arbitration.doc [viewed 11 June 2012].
Taking into consideration above mentioned legal norms another discussion may be raised: if the parties have agreed that the arbitral tribunal may grant interim relief but *lex arbitri* is Latvian, does parties' autonomy prevail over *lex fori* or tribunal shall take into consideration kind of transnational rules to justify its competence to award interim measures?! Prof. Born suggest that hereby Article V (1) d of New York Convention shall be taken in account providing that awards may be denied recognition if the arbitral procedures were not in accordance with the parties' agreement to arbitrate and Article II (1) obligating Contracting States to recognized agreements to arbitrate. Born. G.B. international Arbitration. Cases and Materials. Wolters Kluwer, 2011, p. 558, § 5.

enforceable, i.e., if the party does not comply with tribunal ordered interim relief; the interested party shall turn to the court for compulsory enforcement of such decision. National laws "do not typically address enforcement of a foreign tribunal's interim orders,"[24] however, in Germany[25] and England [26] it is included in the national law.

Nevertheless, as the interim measures of protection were increasingly being found in the practice of international commercial arbitration it was acknowledged that there is need for a uniform regime in this field[27] thus the new – 2006 revisions of UNCITRAL Model Law on International Commercial Arbitration[28] was adopted inter alia dealing with the enforcement of tribunals- ordered provisional matters. Part 1 of Article 17H provides:

> *An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.*

Even though Latvia is not considered the Model Law country, it is suggested that at least the Part 78 on enforcement and execution of foreign arbitral awards of the Civil Procedure Law shall be harmonized with the Model Law, also as regards the recognition and enforcement of decisions on interim measures. Namely, the special sub-part on recognition and enforcement shall be developed, to include not only cited Article 17 H but also specify the grounds for refusing recognition and enforcement of such decisions (Article 17 I of Model Law). It is important also set the procedure for review of such decision in the court. For example, currently, Article 649 Section 1 of Civil Procedure Law provides that application for the recognition and enforcement of the arbitral adjudication shall be reviewed in the court hearing notifying the parties about that. Such procedure would not be suitable for the recognition and enforcement of foreign arbitral decisions on interim measures as the respondent may take the relevant actions to escape the real enforcement till court hearing therefore, it is suggested that following today's trends Part 78 of Civil Procedure Law shall be amended providing ex parte hearing on recognition and enforcement of foreign arbitral decisions.

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[24] Born G. B. international Arbitration. Cases and Materials. Wolters Kluwer, 2011, p. 845, § 7.

[25] Article 1062 of German Civil Procedure Law. Available: http://www.trans-lex.org/600550 [viewed 11 June 2012].

[26] Article 44 of English Arbitration Act. Available: http://www.legislation.gov.uk/ukpga/1996/23/section/39 [viewed 11 June 2012].

[27] Report of the Working Group on Arbitration on the work of its thirty – second session. Doc A/CN.9/468, 10 April 2000, p. 13 et seq, § 60 et seq.

[28] 1985 UNCITRAL Model Law on International Commercial Arbitration. U.N. Doc A/40/17, Annex I, adopted by the United Nations Commission on International Trade Law on June 21, 1985.

Conclusion

1. International civil procedure is set of rules relating to legal relations with foreign or international element. In other words, those are national rules helping to implement international legal norms and international obligations taken by the state via international conventions. In Latvia international civil procedure norms are incorporate in the Section F of Civil Procedure Law. Because of the special nature of those rules they should be interpreted separately from national civil procedure.
2. Legislator of Latvia shall establish unambiguous procedural environment in recognition and enforcement of the foreign arbitral adjudications in order to provide legal certainty and reach the aim of international civil procedure law.
3. Accordingly, Part 78 of Civil Procedure Law on recognition and enforcement of foreign arbitral awards shall be re-drafted, especially amending the norms concerning:
   - the procedure of appeal of the court's decision on recognition and enforcement of the foreign arbitral awards and allowing the three tier appeal system
   - recognition and enforceability of foreign arbitral decisions.
4. Whereas new amendments are not made, Part 78, especially Section 5 of Article 649 providing that "a complain can be submitted regarding the court's decision to recognize or not to recognize the arbitral award", shall be interpreted autonomously from the national civil procedure and in compliance with other norms included in chapter F "International Civil Procedure" providing rules for appeal of decision on recognition and enforcement of foreign court judgment. Namely, Section 5 of Article 649 shall be read in such way that it allows to appeal the second instance's decision on recognition or enforcement of arbitral award also in Supreme court (third instance) since:
   a. this norm shall be interpreted in way so that it achieves the goals determined by international civil procedure considering the spirit and purpose of this provision;
   b. *New York Convention* guarantees that parties can rely on the most favorable right rule and in this case the most favorable rule by analogy is found in Article 641 Civil Procedure Law;
   c. Supreme Court is the main developer of judicature and it is important that the third instance gives its unified and final examination of applicability of *New York Convention* and international civil procedure law;
   d. recognition and enforcement of foreign judgments shall not be more advantageous than recognition and enforcement of arbitral awards as both procedures form integrated international civil procedure;
5. New trends in international arbitration law demonstrate that more often arbitral tribunals make a decisions on interim measures but as those decisions are not self-executive and might be enforced in foreign country the Civil Procedure Law shall provide:
   a. for possibility to recognize and enforce of foreign arbitral decisions;
   b. for procedure *ex parte* to decide on such decisions.

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TRANSFER OF CAPITAL SHARES TO THE THIRD PERSONS

Keywords: Legal form of capital shares, transfer of capital shares, alianability of capital shares, ownership of capital shares.

Notion of capital share and its substance

The Commercial Law of Latvia does not define the notion of capital share but its substance follows from the third paragraph of Section 186 of the Commercial Law of the Republic of Latvia[1] that stipulates that "a share gives a shareholder rights to take part in the administration of the company, in the distribution of profit and in the division of property in the case of the liquidation of the company, as well as to other rights provided for by law and the articles of association". From the substance of the mentioned section it follows that a capital share is intangible item since it grants certain rights to the subject of the rights.

Apart from the quoted Section 186 of the Commercial Law, legal definition of capital share can be also inferred from the Financial Instrument Market Law[2], whose paragraph 30 of Section 1 defines the notion of "capital securities", as well as paragraph one of Section 226 of the Commercial Law which defines the notion of the stock. Although the Financial Instrument Market Law and Section 226 of the Commercial Law are not related to limited companies and capital shares are not to be considered as securities[3], yet the definition of the notion of capital securities may be used to clarify the contents of the notion of capital share. As set out in Section 226 of the Commercial Law "stocks are securities which certify the stockholder's participation in the equity capital of a company and grant them the right, in conformity with the relevant category of stock, to take part in the administration of the company, to receive dividends and, in the case of the liquidation of the company, a liquidation quota", while according to the Financial Instrument Market Law capital securities are "shares and transferable securities equated to them that guarantee participation in the capital of a capital company, as well as any other form of securities which as a result

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1 Komerclikums [Commercial Law]. Latvijas Vēstnesis, 158/160 (2069/2071), 04.05.2000. *Ziņotājs*, Nr. 11, 01.06.2000.

2 Finanšu instrumentu tirgus likums [Financial Instrument Market Law]. Latvijas Vēstnesis, 175 (2940), 11.12.2003. *Ziņotājs*, Nr. 2, 29.01.2004.

3 See also: Likuma "Par valsts un pašvaldību kapitāla daļām un kapitālsabiedrībām" [Law on State and Municipal Capital Shares and Capital Companies, Section 22] 22. pantu. Latvijas Vēstnesis, 149 (2724), 16.10.2002. *Ziņotājs*, Nr. 21, 14.11.2002.

of their conversion or by use of rights allocated to them grant the right to acquire all the above securities under the condition that these securities have been issued by the issuer of shares to which they relate, or by capital company that is part of the mentioned issuer's enterprise".

While the Terminology Commission of the Academy of Sciences of Latvia defines the notion of capital share as follows: "one of the shares of the company's capital. It determines the scope of participation of the owner of this share in the company and is issued to the owner as a certificate. In England and Canada the word "share" is considered to be a synonym for the American variant "stock". The indivisible part of the company with which are associated the rights as defined in the company's rules of association and regulations"[4]. The quoted definition is not precise and only partly describes the notion of capital share.

According to Section 841 of the Civil Law capital shares are to be considered as intangible items while the item as legal institution designates the subject of law that has a certain material value. Capital shares as items are objects administering civil justice that can be alienated from another person, pledged and so on. That means that capital shares as items are subject to the legal authority of the subjects of civil law, that is, a subject of rights is operating with them and handling them and by themselves they cannot be embodiment of rights and duties[5]. Considering that intangible items cannot be the object of property, they have two main characteristic elements – a) they may be the object of commercial rights (the subject of the rights has the authority to handle them) and b) they are subjective rights that the subject has that have material value (the subject of rights gains material benefit from the item itself)[6]. One of the subjective rights of the capital shares is, for example, the rights to receive dividends and participate in voting and so on.

Analysing the above given definitions and substance of provisions, as well as Section 186 of the Commercial Law, it is to be concluded that a capital share can be defined as an item whose legal administrator is the recipient of benefit of the material rights of the commercial company (undertaking[7]) and it provides the rights to its administrator to participate in the management of the company implementing all the tangible and intangible rights as set out by law.

Although the Commercial Law of the Republic of Latvia does not define these tangible and intangible rights (benefits) to which the administrator of the capital shares is entitled, they can be still clearly identified. By analysing the regulation of the Commercial Law of the Republic of Latvia[8], it is possible to enumerate several

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[4] Available: http://termini.lza.lv/term.php?term=kapit%C4%81la%20da%C4%BCa&list=kapit%C4%8 1la%20da%C4%BCa&lang=LV [viewed 9 September 2011].

[5] Balodis K. Ievads civiltiesībās [Introduction to Civil Law]. Rīga: Zvaigzne ABC, 108. lpp.

[6] For comparison with legal status of shares see: Tihonovs V. Ieskats akciju piederības jautājumā [Insight into Share Ownership Issue]. *Jurista Vārds,* 2012. g. 22. maijs, Nr. 21 (720), 12.-13. lpp.

[7] The notion "undertaking" is used here as defined by Section 18 of the Commercial Law.

[8] For the purposes of analysis also Article 15 and 16 of Lihuanian Commercial Law have been used. Available: http://www.litlex.lt/Litlex/eng/Frames/Laws/Documents/ 169.HTM [viewed 9 September 2011].

tangible and intangible rights inherent to the legal administrator of the capital shares. Tangible rights of the capital shares:

1) rights to receive dividends;
2) rights to receive liquidation quota in the case of liquidation of the company;
3) rights to receive equity capital quota in the case of its reduction;
4) rights to receive parts of the additional capital if the company is increasing its equity capital from its own financial resources;
5) basic rights to acquire the property of newly issued capital shares or the existing shares if they are alienated;
6) rights to bequeath capital shares to any person of legal capacity;
7) rights to alienate and pledge capital shares to any person possessing legal capacity;
8) rights via court proceedings to protect the rights of the participant following from the capital shares against the third persons;
9) rights to turn to the court on separate occasions against the management of the commercial company for remuneration of the losses inflicted on the commercial company.

While the intangible rights are as follows:

1) rights to participate in the shareholders' meetings and to vote;
2) rights to receive information about the performance of the commercial company;
3) rights to dispute the decisions of the share holders' meetings in court;
4) rights to elect an independent auditor or controller and so on.

As can be seen from the above enumeration, capital shares grant to the subject of the rights considerable tangible and intangible rights. Yet despite the wide scope of rights that capital shares encompass, their alienation (transfer) and legal protection from unauthorized alienation, given their intangible form, quite often is complicated.

Procedure of capital share transfer

Section 27 of the Law on Register of Enterprises of the Republic of Latvia[9] stipulates that the Commercial Register shall be kept by the Enterprise Register in accordance with this law, the Civil law and other regulatory enactments. One of the tasks of the Enterprise register is to register changes in the membership of shareholders if the respective application from the commercial enterprise has been submitted. Section 136 of the Commercial law provides that a shareholder is a person who owns one or more shares in the company while a person shall acquire the status of shareholder from the date when they are registered in the register of the company's shareholders (stockholders), if the does not specify otherwise. The mentioned Section defines

[9] Par Latvijas Republikas Uzņēmumu reģistru [Law on the Enterprise Register of the Republic of Latvia]. *Ziņotājs*, Nr. 49, 06.12.1990.

the moment when a person acquires the status of a shareholder in regard to the company but it does not define the moment when the person becomes the owner a capital share in relation of the capital share alienor. In order to identify the moment of alienation of capital shares one has to apply provisions of the Civil Law of the Republic of Latvia[10] about registration of property rights to movable property. One should add here though that such a reference is not quite consistent from the perspective of theory because it follows from Section 842 of the Civil Law that only tangible property can be dividend into movable and immovable property[11]. Yet both paragraph three of Section 846 of the Civil Law[12], as well as separate laws[13] put intangible items in the category of movable items by their legal consequences, hence there is substantial grounds to relate the provisions on transfer of property rights to movable items also to the transfer of capital shares as long as law does not provide otherwise.

Although capital shares are intangible items (rights), still it follows from Section 188 of the Commercial Law and from Section 2002 of the Civil Law that capital shares can be alienated, including on the grounds of a purchasing agreement. With alienation of a capital share the acquiring company grants (delivers) to the acquirer complete control over the item[14] (capital share), which in the sense of legal consequences and by substance is similar to transfer of property rights. Since alienation of capital shares includes complete transfer of their rights, one has to abide by the chapter Acquisition of Ownership of the Civil Law provisions concerning the preconditions of acquiring property rights. Section 987 of the Civil Law provides that "the alienation of a property by its owner is not of itself sufficient for the right of ownership in the property to pass to its acquirer, if in addition to this, another mandatory provision is not complied

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[10] LR Civillikums [Civil Law of the Republic of Latvia]. *Ziņotājs*, Nr. 1, 14.01.1993.

[11] See also: A study on updating necessity of Section 1, 2 and 3 on Property rights of the Civil Law. Available: www.tm.gov.lv/lv/documents/petijumi/civillikuma_modernizacija.doc [viewed 14 September 2011].

[12] Paragraph 3 of Section 846 of the Civil Law: When intangible property is treated as a constituent part or appurtenance (Section 850) of tangible property, then it assumes the characteristics of the latter and in accordance therewith, shall be considered either moveable or immovable, having regard to the class of tangible property it belongs to.

[13] Par preču zīmēm un ģeogrāfiskās izcelsmes norādēm [Law on Trademarks And Indication of Geographical Origin]. Latvijas Vēstnesis, 216 (1676), 01.07.1999. *Ziņotājs*, Nr. 14, 22.07.1999. Paragraph 11, Section 4: The right to a trade mark, derived from its registration or from the filing of an application thereof, shall confer the same legal status as the rights to a moveable property within the meaning of the Civil Law, but it shall not be regarded as an object of property claims. This right may be transferred to other persons (successors in title) and may be inherited; Autortiesību likums [Copyright Law]. Latvijas Vēstnesis, 148/150 (2059/2061), 27.04.2000. *Ziņotājs*, Nr. 11, 01.06.2000, Paragraph 6, Section 2: Copyright shall be governed by the same legal rights as personal property rights within the meaning of the Civil Law, but it may not be an object of property claims.

[14] Subjective property right that grants to the person direct, comprehensive and exclusive legal authority over property. Civil Law of the Republic of Latvia, Section 927. See more: Grūtups A., Kalniņš E. Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. Otrais papildinātais izdevums [Comments on the Civil Law. Part three. Property Rights. Property]. Rīga: Tiesu namu aģentūra, 2002, 16. lpp.

with, namely, the delivery of such property to the new acquirer". Although it follows from the Section that complete property rights to an item (including a capital share) are passed on from the moment of transfer, still the question – how an intangible item can be passed over remains. In view of the fact that a capital share is a right that cannot be physically passed over, then any transaction act testifying to the transfer of the rights can serve as a transfer fact.

From paragraph 6 of Section 187 of the Commercial Law it follows that a precondition for registration of transfer of shares is a corrected copy of the company register of shareholders that reflects the capital share transfer (the fact of transfer). But it does not mean that the moment of capital share transfer is the moment of signing the corrected copy of company shareholders. Such a conclusion follows from paragraph 6 of Section 188 of the Commercial Law which provides that "acquirer of the share shall notify the company about acquisition of the share by submitting the alienor and acquirer joint application or the deed of transaction. An entry about it is made in the company shareholders register according to provisions of Section 187 of the given law and provisions of paragraph four of Section 187: "Further entries in the company register of shareholders shall be made not later than on the next day after the board of directors has received information about changes which have occurred in the information referred to in Paragraph two of this Section". Thus the corrected shareholders' register only states the fact that has already occurred – transfer of capital shares but is not the precondition for its completion. Up to the moment when the corrected list of shareholders has not been signed, the acquirer of the shares has rights to them but he cannot operate with them fully in relations with the commercial company since there is no recognition received from the board yet.

Thus it follows from Sections 136, 187 and 188 of the Commercial Law that the person acquires rights to the capital share from the moment when the mentioned capital share has been alienated from the specific person but not at the moment when the transfer of the capital share has been registered. In other words, the fact that a capital share transfer is registered at the commercial company or the commercial register does not make this transfer dependant on the registration fact, i.e., tangible and intangible property rights are not acquired with the moment of registration but at the moment of alienation. At the same time it must be noted that if legal obstacles exist during the process of alienation of the capital share, there can be a situation that the acquirer of the capital share is unable to realize his rights that are entitled by the capital share, because the board of the commercial company has not recognized acquisition of the mentioned rights. Only after the fact of recognition has taken place (making of entry in the register of shareholders of the commercial company) the person acquires a shareholder's status and all the rights ensuing from that. Such a control by the board is justifiable because of the condition that the board verifies the legality of alienation of the capital share, apart from anything else it inspects if provisions of legal acts or rules of association have not been violated.

But not in all the cases signing of the alienation contract grants rights to the capital shares. Thus, for example, if the capital shares are acquired on the basis of a purchase contract then the precondition for obtaining rights to the capital shares, as laid down in Section 2034 of the Civil Law, is the fact of making the payment. At the same time

it must be noted that in case the payment for the capital shares has not been made but the seller has signed the corrected register of shareholders without any reservations then the rights to the capital shares pass over to the purchaser despite the fact that payment has not been made since signing of the corrected shareholders register from the seller's side is to be considered as an extension of payment term. In case if the remuneration payment term has not been separately contracted in the contract the payment default by the purchaser as set out in Section 1652 of the Civil Law with all its consequences sets in by itself if the purchaser has not made payment in thirty days since the moment of acquisition of rights to the capital shares.

Although there are not many court cases[15] about execution of transactions connected with alienation of capital shares, from theoretical perspective a situation is possible that the court would protect interests of the new capital shares acquirer even if a precise capital share register has not been signed or the board refuses to make changes in it. By protection one should not understand the ruling of a court that the purchaser's rights to the capital shares are recognized, because such rights in accordance to Section 1050 of the Civil Law cannot be put into effect[16]. By protection one should understand the court's conclusion that the acquirer has acquired rights to capital shares also without signing of a special, corrected shareholders' register (e.g., transfer of shares follows from the conditions of the alienation contract or the actual circumstances of the case), which is sufficient grounds for introducing changes in the commercial register or quite the opposite – the acquirer has not acquired rights to capital shares because the alienation contract has internal deficiencies that revokes the transfer[17] and restores the previous state of affairs.

Hence it can be concluded that in case of capital share alienation there are three situations in which the rights and duties of the parties to the alienation transaction are different:[18]

Steps	**Actual activities**	**Legal consequences**
1.	Signing of alienation (transaction) deed	Acquisition of rights to capital shares in relation to alienor
2.	Shareholders' list corrected by the board (signing)	Acquisition of rights (implementation prerequisite) to capital shares in relation to commercial company
3.	Registration of shareholders in the commercial register	Declarative entry that does not change acquirer's legal status[18]

[15] See: Judgement of Civil Cases department of the Senate of the Supreme Court of February 25, 2009. in the case No. SKC – 69; Does not recognize the property rights of the state to 23% of LMT equity capital shares. Available: http://www.tiesas.lv/index.php?id=2059 [viewed 14 September 2011].

[16] See also: Grūtups A., Kalniņš E. Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums [Comments on the Civil Law. Part three. Property Rights. Property]. Otrais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2002, 229. lpp.

[17] See, for example: European Court of Justice ruling of July 2, 2009 in the case Nr. C-111/08 SCT Industri AB i likvidation vs. Alpenblume AB. Available in internet: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0111:LV:HTML [viewed 14 September 2011].

[18] With registration of a capital share in the commercial register person is recognized as participant also from the side of the state, but it does not change private legal relations.

Looking from the perspective of third persons', alienation of capital shares becomes public only with the third step – registration of shareholders in the commercial register. But since this information in the commercial register has only declarative significance and the change of shareholders is not to be considered as information in the understanding of Section 8 of the Commercial Law then the third persons are not protected and they have no grounds to rely on the fact that information in the commercial register about ownership of shares corresponds to the actually existent situation. As far as this uncertainty concerns the shareholders who are not merchants, regulation in the Commercial Law is not essentially detrimental to the third persons, but as far as the existence/absence of status concerns shareholders-merchants, the representation of the actual situation in the commercial register is essential. Particularly in view of the fact that capital shares as assets can be invested in the equity capital of another commercial company. Considering that one of the principles of the Commercial Law is protection of the third persons then the question is arguable whether uncertainty of the fact of capital share transfer is not an undesirable obstacle for secure administering of civil justice – looking from the interests of both the alienor and the benefactor.

Such preferential procedure for defining the fact of capital share dependant only on the will of private subjects does not only create problems in administering civil justice but also serves as grounds for dealing with capital shares in bad faith in the name of another person. On the one hand paragraph 6 of Section 187 of the Commercial Law sets as an obligation to the board to submit a corrected copy of commercial register of shareholders and even provides for liability in case such activities are failed to be accomplished[19], but on the other hand there is no legal basis for the third persons to rely on accurateness of information in the commercial register. The more so that pursuant to Section 8 of the law On the Register of Enterprises the competence of the Enterprise register does not include verification of the actual decision making circumstances at a company (enterprise).

Such a situation creates legal insecurity for the potential purchasers of capital shares who, in order to avoid legal risks, must perform in-depth verification of the facts before signing alienation transaction contract, including verification of the fact if the person who wishes to alienate capital shares possesses such rights[20].

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[19] Latvijas Administratīvo pārkāpumu kodekss [Latvian Administrative Violations Code]. *Ziņotājs*, Nr. 51, 20.12.1984. Section 166.3: In the case of failure to submit to the Enterprise Register information or documents specified by the regulatory enactments within the time period specified in the regulatory enactments or failure to comply with lawful decisions of the officials of the Enterprise Register in the specified time period or its partial completion – a warning shall be issued or a fine shall be imposed from LVL 20 up to LVL 100. If the same violations are recommitted within a year after the imposition of an administrative sanction, or in the case of providing false information to the Enterprise Register – a fine in an amount from LVL 100 up to LVL 200 shall be imposed.

[20] See: Section 988 of the Civil Law of the Republic of Latvia: Only a person who has the right to alienate the property being transferred, in his or her own or in the name of another person, and together therewith an intention to transfer the property to the ownership of another, may deliver it.

Although an opinion has been expressed in legal literature that it is not understandable what are the benefits for third persons from an entry in the commercial reģister that a specific person is a participant or shareholder in a specific company[21], one cannot in fact fully agree to this opinion because there are several cases when insufficient regulation of capital share registration can create different legal problems to third persons. As far as this regulation concerns interests of capital companies, there are no problems, because owners of capital shares do not represent the company in relation to the third persons, yet in some other cases when third persons are involved in alienation or encumbering of capital shares, problems of legal nature may be created due to uncertainty which person genuinely owns property rights or full right of control over the item (capital share)[22].

For this purpose several European countries have introduced regulations that are more aimed at protection of third persons. Pursuant to Germany's new law on limited liability companies[23] much bigger attention is devoted to the shareholders' register and its linkage with the judicial consequences for the third persons[24]. In Germany the person is regarded as capital share owner if the person has been duly registered in the commercial register, thus making in some cases the commercial registry entry in regard to composition of participants constitutive. Introduction of such a principle means that the transfer of capital shares will be considered and legal and fait accompli even if it turns out later that the participant registered in the commercial register before that would have already sold capital shares to another person, it also introduces the status of acquirer in good faith that is protected by law in the interests of administering civil justice. Regulation in Germany actually provides for definition of belonging presumption, namely, that any third person in good faith can rely on the information in the commercial register, that the registered owner of capital shares is the genuine owner or in other words – the acquirer can acquire a capital share by way of legal transaction from an illegal person[25].

Secondly, unlike in Latvia, in Germany transfer of capital shares can be done only if the alienation deed (transaction) has been compiled in a notarial form, thus eliminating a possibility for a third person with counterfeit documents to become the legal administrator of capital shares. The direct consequences of non-compliance with

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[21] Lošmanis A. Tiesību jaunrade šoreiz ir lieka [Creating New Laws today is Redundant]. *Jurista Vārds,* Nr. 47 (694) Otrdiena, 2011. g. 22. novembris.

[22] Separate problems have also been indicated in: Strupišs A. Dalībnieku un akcionāru reģistra vešana: problēmas un risinājumi [Register of Participants and Shareholders: Problems and Solution]. *Jurista Vārds,* Nr. 47 (694), 2011. g. 22. novembris.

[23] Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen-MoMiG. Available: http://www.rechtliches.de/info_Gesetz_zur_Modernisierung_des_GmbH-Rechts_ und_ zur_Bekaempfung_von_Missbraeuchen.html [viewed 14 September 2011].

[24] Fillman A. The New German Limited Liability Company Act. EuroWatch. Volume 21, Number 6. March 31, 2009, p. 2.

[25] See: Paragraph 3 of Article 16 of German Commercial Law. GmbH Gesetz. Available: http://www.gmbh-gesetz.de [viewed 14 September 2011].

notarial form requirements are identical to those in Latvia, i.e., alienation contracts are not in force[26].

Unusual regulation can be seen in the Republic of Estonia. Similarly to Germany, in Estonia the alienation contract must be signed in a notarial form[27], but it is related only to alienation of capital shares of such a capital company whose capital shares are not registered in the Central securities register of Estonia[28]. As for alienation of capital shares that are registered in the mentioned securities register, the Commercial Law of Estonia does not prescribe a special form of transaction. Taking into account different mechanisms of registration of capital shares there are also certain differences in recording the status of the acquirer of capital shares. Two main aspects should be distinguished here – in the first case, i.e., when capital shares are not registered in the central securities register of Estonia, alienation of capital shares and acquisition of owner of the capital shares takes place like in Latvia, i.e., the purchaser acquires rights to capital shares from the moment when through legal procedure a transaction document is signed, but in relation to capital company – from the moment of recognition by the executive body[29]. As for the second case (when capital shares are registered in the Central securities register of Estonia) – the new acquirer of capital shares is considered to be even as such when transfer of capital shares is registered in the above mentioned register[30] (although the rights to capital shares in relation to his party to the contract the acquirer set in from the moment of signing the transaction (enforcement).

In Latvia registration of the legal owner of capital shares[31] depends entirely on the board of the capital company. In view of the fact that there is no specific system for re-registration of capital shares (in the context with legal consequences) and there are no specific (more stringent) regulations about the form of the capital share alienation contract, the existing regulation in Latvia is not aimed at ensuring high degree of protection of capital share owners.

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[26] Beinert D., Burmeister F., Tries H-J. Mergers and Acquisitions on Germany. Verlag C. H. Beck. München. 2009, p. 56.

[27] See: Paragraph 4 of Article 149 of Estonian Commercial Code. Available: http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0001K17&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%E4riseadustik [viewed 16 September 2011].

[28] Este Vaartpaberukeskus. Available: https://www.e-register.ee/et [viewed 16 September 2011].

[29] See: Paragraph 1, Article 150 of Estonian Commercial Code: The transfer of a share is deemed to be effected and a shareholder is deemed to have changed with respect to the private limited company after notification of the transfer of the share and certification of the transfer of the share. Available: http://www.legaltext.ee/et/andmebaas/ tekst.asp?loc=text&dok=X0001K17&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%E4riseadustik [viewed 2011, 19 September].

[30] Dornseifer F. Corporate business forms in Europe: a Compendium of Public and Private Limited Companies in Europe. European Law Publisher GmbH. Munich. 2005, p. 122.

[31] Although the designation "owner of capital shares" is not correct from perspective of civil law theory since there can be no rights to rights, still the notion here and elsewhere in the text has been used for the sake of convenience to designate a person who has exclusive and comprehensive tangible and intangible property rights following from the capital share.

The existing procedure of transfer of capital shares can be represented in the following chart:

Figure No. 1 "THE EXISTING PROCEDURE OF EQUITY CAPITAL SHARES"

Possible improvements in regulation of capital share transfer

Since the change of capital share owners in many countries is more stringently regulated and the recent events have facilitated a discussion[32], whether protection of capital share owners should not be strengthened, in particular in view of Constitution

[32] Dalībnieku un akcionāru reģistra vešana: problēmas un risinājumi [Keeping the Register of Participants and Shareholders: Problems and Solutions]. *Jurista Vārds*, Nr. 47 (694), 2011. g. 22. novembris.

of the Republic of Latvia[33] Article 105, a topical issue is what could be effective legal mechanisms for improvement of the existing regulation.

As an inefficient means should be considered the requirement to introduce a written form of alienation transaction since such a requirement would not facilitate improvement of control over legal alienation of capital shares. In view of the fact that it is not in the competence of the Enterprise Register of the Republic of Latvia to verify if the written transaction contract is not fictitious (illegal) such a demand would not achieve the desirable result. It would be only a document to be submitted in addition to the existing corrected participant or shareholder register and it would not provide additional protection.

As a theoretically possible solution for improvement of the regulation would be introduction of notary control during the process of alienation of capital shares.

Taking into account that at present when alienating capital shares there is no mandatory requirement to submit an alienation contract to the Enterprise Register then setting a requirement that the capital share alienation contract is to be written in a notarial form would not achieve the desired result. In order to create a legal effect it is necessary to lay down more stringent requirements concerning those documents that pursuant to the Commercial Law at present are to be submitted to the Enterprise Register of the Republic of Latvia for implementing changes. Hence as a possible solution to improve the control over legality could be the proposal to amend the second sentence of paragraph 6 of Section 187 of the Commercial Law of the Republic of Latvia setting out the provision "if shares are alienated a copy of the register of the participants is notarially signed also by the alinator of shares and the acquirer of shares or alienation contract in a notarial form is enclosed that confirms the share transfer". It is clear that introducing such a procedure would increase bureaucratic obstacles both to fast administering of civil justice, and would create additional costs. As for the costs, it must be noted that some countries (for example, Francs and UK) have introduced a provision that in cases of alienation of capital shares a state duty must be paid, which depends on the sum of the transaction and consequently the existence of administrative costs when alienating capital shares is nothing extraordinary. For instance, in France in addition to direct costs for drawing up a transaction, there is a state duty 1% from the transaction sum but not more than 3049,00 Euro[34]. In the UK the duty is 0.5% from the transaction value but without limitations[35].

Taking into consideration that there is no obligation to pay a state duty dependant on the sum of transaction (and introduction of such a duty would not be advisable), then notarial costs associated with certifying of the transaction are not to be considered comparatively high. It should also be noted that notarial involvement in transfer of capital shares would be sufficient with the so-called verification of authenticity of

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[33] Latvijas Republikas Satversme [Constitution of the Republic of Latvia]. *Latvijas Vēstnesis*, Nr. 43, 01.07.1993. Stājas spēkā 07.11.1922.

[34] Dornseifer F. Corporate business forms in Europe: a Compendium of Public and Private Limited Companies in Europe. European Law Publisher GmbH. Munich. 2005, p. 182.

[35] See at: http://www.direct.gov.uk/en/MoneyTaxAndBenefits/Taxes/TaxOnSavingsAnd Investments/DG_10013514 [viewed 16 September 2011].

signatures[36], without requiring drawing up of the transaction documents in a notarial form that would raise the total costs too much.

There is no doubt that introduction of notarial forma at one of the capital share alienation stages would improve the level of legal protection. Among legal scholars and practitioners an opinion has also been expressed that introduction of notarial form might be considered[37]. Yet as negative effects of introducing notarial form would encumber the speed of administering civil justice, besides the number of identified illegal capital share cases is comparatively insignificant[38] to introduce so comprehensive changes.

Summing up the above said concerning introduction of notarial form in the cases of alienation of capital shares, several "pros and cons" can be singled out for such changes.

The following arguments are in support of the notarial form:

- the positive example of Germany and Estonia;
- a higher degree of security;
- notarial form already exists in registration of commercial pledges and is to be recognized as effective mechanism of legality control

The following arguments are against introduction of notarial form:

- additional costs;
- additional bureaucratic burden;
- at present the Commercial Law of the Republic of Latvia does not prohibit to the participants to use notarial form optionally (yet it is not controlled by the Enterprise Register).

In view of the fact that value of capital shares may comprise several millions of lats it would be necessary to revise the existing regulation about the change of owners of capital shares, laying down in law higher requirements for the cases of capital share alienation. Already now intensive work is being done at the Ministry of Justice of the Republic of Latvia where a Commercial Law amendments working group has been set up that is planning to introduce changes in the regulation of the Commercial Law

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[36] See: Paragraph 3 of Section 108 of Notariate Law on "Restoring in force 1937 Latvian Notariate Law and amendments and addenda to it (Notariate Law)". *Ziņotājs*, Nr. 26/27, 05.07.1993.; *Latvijas Vēstnesis*, Nr. 48, 09.07.1993.

[37] Lošmanis A.: Introducing notarial form would ensure legal credibility of capital share transfer, as well as higher credibility of the information provided by commercial register institution about capital shares movement. Council of Latvian sworn notaries: A. Kaupe, presenting the view of the council of notaries suggested returning to notarial certification of capital shares transfer. Notary Office can provide efficient and fast service of the clients, not slowing down administration of civil justice. Ministry of Justice reports at the business university college "Turība" in 2008 conference on topical issues of commercial law. See: *Jurista Vārds*, Nr. 19 (523), May, 20, 2008.

[38] According to data the average number of forging signatures during the last 5 years is within the range of 0.2-0.5%. Strupišs A. Dalībnieku un akcionāru reģistra vešana: problēmas un risinājumi [Keeping the Register of Participants and Shareholders: Problems and Solutions]. *Jurista Vārds*, Nr. 47 (694), 2011. g. 22. novembris.

shifting the capital share transfer also more towards protection of third persons and involving notariate control for the capital share transfer.

The planned capital share transfer can be represented by the following chart:

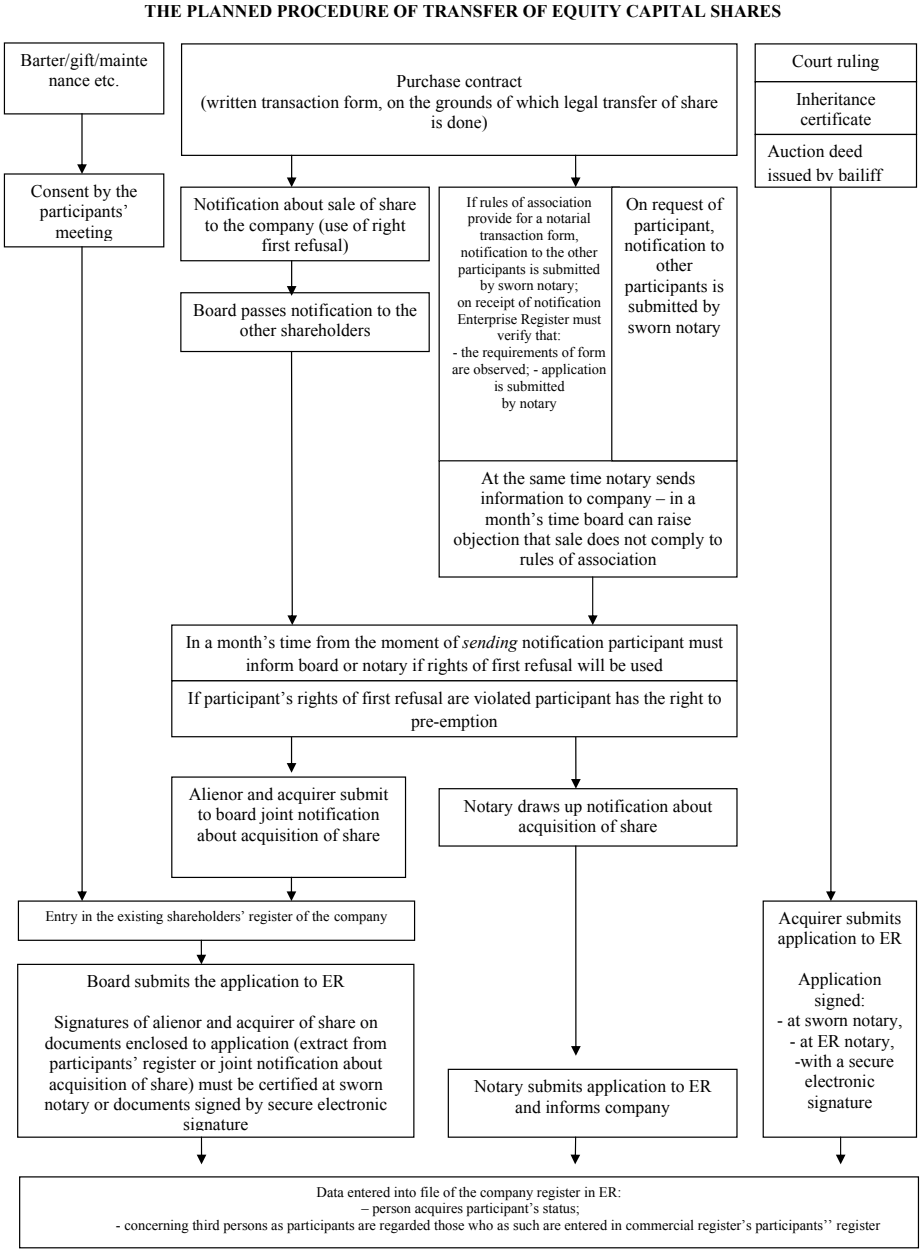

Figure No. 2 "PLANNED PROCEDURE OF TRANSFER OF EQUITY CAPITAL SHARES"

It must be noted that the planned changes are not final and there are still some unsolved issues, as, for example, how to implement the mechanism if a participant notifies other participants his wish to conclude alienation via notary. The choice of the transaction form is the mutual will of the parties unless law does not provide a specific provision imperatively, yet in this case the change of form is left at the discretion of one party. It is possible to find theoretical motivation for such a procedure, for example, by providing that any person including already in the offer that they want to sign the transaction only in a notarial form but the question is provided in the commercial law where all the participants still agree on the basics issues in the rules of association.

Summing up the analyzed status of capital shares in the present article one must admit the necessity of improving legal protection of capital shares in Latvia. Based on the previously done analysis there is a reason to conclude that the first step for increasing protection of capital share owners would be provision in the law that capital share owners (participants) have a right to agree (in rules of association) that alienation of capital shares is done on the basis of notarial form of transaction, at the same time allocating to the entry made in the commercial register about change of participants a constitutive status, including the fact that such an entry in the commercial register is a precondition for the use of rights following from the capital shares and that its entry protects third persons who act in good faith, i.e., introducing presumption of belonging.

With presumptions entrenched in law (e.g., presumption of belonging) legislator can grant to one or another person a higher protection which thus would preventively reduce violations in future. That, among other things, could stimulate inconsistencies between both the register copies[39]. While in order to ensure that participants by alienating their shares are not dependant on activities of the board, a similar provision to that in Germany should be introduced when in the rules of association it is possible to set out that capital share alienation happens in the presence of a notary who subsequently performs registration functions instead of the board[40]. While if this function is performed by the board, in case the board violates their prescribed duties of informing the commercial register, the members of the board as joint debtors are personally responsible with their property to any person whose participation has been changed, as well as for the losses caused to public lenders.

Although the previously mentioned proposals have several counter-arguments[41], yet the aim of the present article, among other things, is to continue the discussion among legal scholars and politicians for the best solution in providing more efficient protection of rights of capital share owners and acquirers who act in good faith.

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[39] Such an opinion has been expressed also in the article: Strupišs A. Dalībnieku un akcionāru reģistra vešana: problēmas un risinājumi (Keeping the Register of Participants and Shareholders: Problems and Solutions). *Jurista Vārds*, Nr. 47 (694), November 22, 2011.

[40] See: German Commercial Law, paragraph 2, Article 40. Available: http://www.gmbh-gesetz.de [viewed 12 January 2012].

[41] Skat. Dalībnieku un akcionāru reģistra vešana: problēmas un risinājumi. *Jurista Vārds*, Nr. 47 (694), 2011. g. 22. novembris.

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THE MAIN FEATURES OF CONTEMPORARY REGULATION OF CIVIL PROCEDURE IN LATVIA

Keywords: Civil Procedure, civil proceedings, civil case, procedural law, public and private rights.

Introduction

Civil Procedure Law (CPL), now in force, was passed by the Saeima (the Parliament) on October 14, 1998, and came into force on March 1, 1999,[1] replacing the Civil Procedure Code of Latvia[2]. It must be pointed out that, according to the principles of drafting laws and regulations, adopted in Latvia[3], the term "Code" is not used in the names of laws,[4] therefore, upon amending the regulation of civil procedure, the new regulatory act was called Law instead of Code.

The purpose of this paper is to analyse the main features of the civil procedure and to define the most important questions. The study was carried out, using both empirical and theoretical research methods. This paper is not a comprehensive analysis of Latvian civil procedure, rather it focuses on some key aspects from the point of view of the author.

Civil Procedure Law System

CPL, now in force, in its original version consisted of 643 sections, set out in 6 (A–F) parts and 15 divisions. The first part (A) – General Provisions; the second part (B) – Court Proceedings in a Court of First Instance; the third part (C) – Appeal of Court Judgments and Decisions; the fourth part (D) – Arbitration Court; the fifth part (E) – Execution of Court Judgments; the sixth part (F) – Final Provisions. There are also two annexes to the CPL, Annex 1. List of Property against which Recovery may not be Directed Pursuant to Execution Documents; Annex 2. Provisions regarding Renewal of Lost Court Proceedings Materials and Execution Proceedings Materials.

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1 Civilprocesa likums: LR likums. *Latvijas Vēstnesis*, 03.11.1998, Nr. 326/330.

2 Latvijas Civilprocesa kodekss: LR likums. *Ziņotājs,* 24.12.1991, Nr. 51.

3 Normatīvo aktu projektu sagatavošanas noteikumi: MK noteikumi Nr. 108, *Latvijas Vēstnesis*, 17.02.2009., Nr. 26 (4012).

4 Neimanis J. Ievads tiesībās. Rīga: zv. adv. J. Neimanis, 2004, 106. lpp.; see also: Balodis K. Ievads civiltiesībās. Rīga: Zvaigzne ABC, 2007, p. 51.

From the point of view of systematization of civil procedure law, it can be seen that the CPL system is uniform and consistent. However it is not difficult to notice that the CPL preparation working group was adhering to a broader vision of the civil procedure and civil procedure law, by including in these concepts not only the court proceedings and provisions, regulating them, but also provisions regulating settlement of disputes at the arbitration court and execution process.[5]

Attributing the provisions regulating arbitration court and execution process to the area of civil procedure is not unambiguous. Although in the Civil Procedure Law of 1938, the execution of a court judgment was included in a separate chapter (Chapter V)[6], nevertheless the concept of transformation of the bailiff institution, adopted in 1997, envisaged a reform of bailiffs, with the aim to separate bailiffs from direct subordination to the court. Law on Bailiffs (TIL)[7] was passed by the Saeima only on October 24, 2002. Although the legislator included provisions about professional, corporate and organizational activity of sworn bailiffs in the TIL, they left the provisions, regulating the relationships, arising in the course of execution process, in CPL. As the legislator delegated the execution process to private persons (lawyers) and separated them from direct subordination to courts (calling them "sworn bailiffs", i.e. persons of a free profession), the law nevertheless prescribed that in the activities of their position the bailiffs are equated to state officials (TIL Sect. 5). Despite that, regardless of how we might regard the civil procedure – whether as united procedural relations, as a system of civil-procedural relations, or as a sum of procedural activities and procedural relations,[8] – a well-grounded question arises: where is the main subject of civil proceedings (a court) in the execution process? There are no civil-procedural legal relations without the participation of a court.[9] It is impossible and it cannot be replaced by sworn bailiffs. Therefore there is no reason to add the execution process to civil proceedings, and provisions regulating the execution of court judgments cannot be considered as civil-procedural provisions, therefore they do not fit into the CPL system. The same applies also to the settlement of disputes at an arbitration court.

The execution process nowadays can be treated as a civil procedure only as a part of civil procedure science. Legal provisions regulating the execution process, as well as provisions regulating notarial and arbitration court activity, need the formation of a separate area within the legal system.

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[5] The prevailing view in the traditional and Latvian legal doctrines is that execution process is the final stage of civil proceedings; see: Juridisko terminu vārdnīca. Sast. aut. kol. I. Krastiņa vadībā. Rīga: Nordik, 1998, 48. lpp.

[6] Civilprocesa likums ar paskaidrojumiem. Sast. F. Konradi un T. Zvejnieks. Rīga, Valsts tipogrāfijas izdevums, 1939, pp. 304-414.

[7] Tiesu izpildītāju likums: LR likums. *Latvijas Vēstnesis*, 13.11.2002, Nr. 165 (2740).

[8] Velyvis S., Višinskis V. Основные черты гражданского процессуального права Литвы (Окончание. Начало см. № 4). Арбитражный и гражданский процесс: научно-практическое и информационное издание. Москва: Юрист. 2009, № 5, pp. 42-44.

[9] Rozenbergs J., Briģis I. Padomju civilprocesuālās tiesības. Rīga: 1. izd. Izdevniecība Zvaigzne, 1978, 2. izd. (facsim. ed.). Zvaigzne ABC, 2010, p. 24.

Notwithstanding that, the legislator's decision to include the arbitration court as a separate part instead of an annex to the Civil Procedure Law, was dictated by the historical aspect, because in the Civil Procedure Law of 1938, the arbitration court regulation was included in a separate chapter, in a sub-chapter concerning the order of reconciliation.[10] In passing the new CPL, the legislator kept this tradition, and the arbitration court institution is regulated in Part D of CPL, and questions about the acknowledgment and execution of adjudications of foreign arbitration courts – in Part F.

It must be pointed out that, similar to Latvia, also in Austria, a necessity arose to improve their regulation in line with the modern-day needs, which resulted in the new arbitration court regulation in Austrian Code of Civil Procedure becoming effective on July 1, 2006.[11] Nevertheless the position of the Latvian Ministry of Justice favours the necessity for a separate law.[12] Why a new (separate) law, what are our traditions?[13] The justification of that cannot be found in the annotation of the prepared draft law.[14] Such action must be grounded with legal arguments, and it must be consistent.

Terms of Trial and Hearing of Cases

The objective of a civil procedure is the protection of subjective property rights of persons, whose rights and legally protected interests are infringed or are being challenged, as well as faster re-establishment of legal peace between the parties of a lawsuit. These objectives are achieved not only with the help of civil procedure

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[10] Civilprocesa likums ar paskaidrojumiem. F. Konradi, T. Zvejnieks (Comp.). Rīga, Valsts tipogrāfijas izdevums, 1939, 436.-443. lpp. See also: Bukovskis V. Civīlprocesa mācības grāmata. R., 1933, 568-579. lpp.

[11] Austrian Code of Civil Procedure (Zivilprozeßordnung; ZPO), as last amended by law of December 6, 2005 (in effect 1 July, 2006); an English translation is available at http://arbitration-austria.at/dokumente/CivilProceduralCode.pdf [viewed 18 June 2012]. See also: Хегер С. Комментарий к новому австрийскому арбитражному законодательству. М.: Волтерс Клувер, 2006, с. viii-xiii.

[12] Ministry of Justice is planning to evaluate the activities to be undertaken to improve work of arbitration courts and quality of their decisions, reviewing the laws and regulations, regulating the activity of arbitration courts, thus promoting trust into the arbitration court institution as the alternative to state courts in the settling of disputes. See.: LR Ministry of Justice informative report of 08.11.2011: 'Par tiesu praksi attiecībā uz termiņiem, kādos tiek izskatītas lietas" ("About court practice regarding terms of hearing cases"), p. 8. Available: http://polsis.mk.gov.lv/LoadAtt/file17904.doc [viewed 7 June 2012].

Draft Law on Arbitration Courts. Available: http://www.mk.gov.lv/lv/mk/tap/?dateFrom=2007-10-17&dateTo=2008-10-31&text=%C5%A1%C4%B7%C4%ABr%C4%93jtiesu&org=0&area=0&type=0 [viewed 15 June 2012].

[13] Kronis I. Šķīrējtiesu regulējuma attīstības tendences un perspektīvas Latvijā. *Jurista Vārds,* 16.06.2009., Nr. 24/25 (577/578); See: Juristu biedrība diskutē par jauno Šķīrējtiesu likumu. *Jurista Vārds,* 16.09.2008, Nr. 35 (540), 15. lpp.

[14] Šķīrējtiesu likums: likumprojekta anotācija. Available: http://www.mk.gov.lv/lv/mk/tap/?dateFrom=2007-10-17&dateTo=2008-10-31&text=%C5%A1%C4%B7%C4%ABr%C4%93jtiesu&org=0&area=0&type=0 [viewed 15 June 2012].

principles, secured in CPL (CPL Sections 1–15.), but also with terms of hearing cases.

Initially the legislator abandoned the exact term for the hearing of a case, and this circumstance destabilizes not only the court, but also the parties of the case. We must agree with the famous expression of William Gladstone: "Justice delayed is justice denied".[15]

Nevertheless, regarding the terms of trial and hearing of cases in courts, it must be pointed out that, although the laws and regulations do not stipulate an exact term for comprehensive and objective hearing of case, the judge in the hearing of case must observe the principle of procedural economy, set forth in Section 28 of the law "On Judicial Power"[16], which stipulates that the judge must adjudicate a matter as fast as possible. The matter of what is to be considered a reasonable, as short as possible term of hearing a case, is up to the court (the judge) to determine, taking into account the extent of the specific case, the juridical complexity, number of procedural activities, the attitude of persons involved in the process towards the fulfilment of their obligations and other objective circumstances, whose evaluation is done solely by the judge, who is in charge of the particular case.[17]

Certain exceptions to the aforementioned are provided for in the procedural law provisions regarding the hearing of certain categories of cases (e.g., see: CPL, Sect. 149, p. 8–10), as well as provisions, secured in special laws, stipulating what cases must be heard in courts through an urgency procedure. However, the cases that do not fit into any categories of priority cases, prescribed in laws and regulations, are scheduled for courtroom hearing basically in the sequence of their reception.[18]

At the same time, in order to secure expedited hearing of a case, a party thereof can apply to the court with a request to schedule a case hearing sooner, by indicating special circumstances, justifying the expedited hearing of that case. As the first part of Section 33 and the first part of Section 40 of the law "On Judicial Power" stipulate that the work of a regional court is managed by a Chief Judge concurrently with the fulfilment of the judge duties, a person can apply with such request also to the Chief Judge. Therefore a case can be deemed a priority also when it does not fit into any of the categories of priority cases, prescribed in laws and regulations. However the practice indicates that in similar and even identical circumstances, courts make differing decisions in this aspect, which accordingly does not build trust in court and creates ground for speculations.

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[15] Cited from: http://en.wikipedia.org/wiki/Justice_delayed_is_justice_denied.

[16] Par tiesu varu: LR likums. *Ziņotājs,* 14.01.1993, Nr. 1.

[17] LR Ministry of Justice informative report of 08.11.2011"Par tiesu praksi attiecībā uz termiņiem, kādos tiek izskatītas lietas" ("About court practice regarding terms of hearing cases"), p. 5. Available: http://polsis.mk.gov.lv/LoadAtt/file17904.doc [viewed 7 June 2012].

[18] Ibid.

Novelties in the Civil Procedure

It must be noted that there are some novelties in CPL, which help the courts focus on their main function – resolution of disputes. Amendments were made in several legislation acts, releasing the courts from dealing with such cases which do not contain a dispute – provisions were made for the delegation of certain court functions to sworn notaries. Since February 1, 2011, in order to reduce the workload of courts and reduce terms of hearing cases, a new procedure was adopted, according to which marriage can be annulled without disputes by a sworn notary instead of a court. Therefore, a sworn notary has the rights to annul a marriage, based on both spouses' application, if they do not have disputes regarding division of property, custody over children, visiting rights and alimony. If the spouses have not mutually agreed on the divorce or on any of these questions, affecting their joint minor child or joint property, marriage can be annulled only by a court.

Also, since law amendments of July 21, 2011, Land Register departments are included within the district (city) courts, in addition to the previous function delegating the hearing of several categories of out-of-court cases. Since January 1, 2012, according to Part 11 of Section 30 of the law "On Judicial Power", Land Register department oversees not only Land Registers, but also deals with applications about:

1) noncontestable enforcement of liabilities;
2) noncontestable enforcement of liabilities with the warning procedure;
3) confirmation of auction acts *(dealing with these applications will be delegated to the Land Register department judges after making the respective amendments in the Civil Procedure Law)*.

Changes in the court system, reviewing the institutional affiliation of the Land Register department judges and expanding their scope of work, are made in order to more efficiently utilise the existing resources of judges both in Land Register departments and in general jurisdiction courts of first instance, to equalize the courts' workload and reduce the terms of hearing cases.[19] Applications on noncontestable enforcement of liabilities, on enforcement of liabilities with the warning procedure and hearing of cases in the procedure of special litigation make a large part of the workload of district (city) courts judges.

Attention should be paid to the fact that, for example, the Lithuanian Civil Procedure Code has given up the criterion separating the claim proceedings from a special litigation procedure.[20] As we know, the existence of a dispute about rights in a claim procedure and its absence in a special litigation procedure is regarded as such a

[19] LR Ministry of Justice informative report of 08.11.2011"Par tiesu praksi attiecībā uz termiņiem, kādos tiek izskatītas lietas" ("About court practice regarding terms of hearing cases"), p. 7. Available: http://polsis.mk.gov.lv/LoadAtt/file17904.doc [viewed 7 June 2012].

[20] Velyvis S., Višinskis V. Основные черты гражданского процессуального права Литвы (Окончание. Начало см. № 4). Арбитражный и гражданский процесс: научно-практическое и информационное издание. Москва: Юрист. 2009, № 5, pp. 42-44.

criterion.[21] It is stipulated in the Civil Procedure Code of Lithuania that cases, which are ascribed by the legislator to the special litigation procedure, must be heard without regard of whether a dispute about rights has arisen or not. As it is pointed out, here the influence of German concept of special litigation procedure is demonstrated not attributing any significance to the presence or absence of a dispute in special litigation procedure cases.[22] According to Section 258 of CPL of Latvia, if a dispute about rights arises in a special litigation procedure case and this dispute must be settled in a claim procedure, the court, depending on the content of the dispute, leaves the application without consideration or stops the proceedings till the settlement of dispute. Therefore, the position of not attributing significance to the presence or absence of a dispute in special litigation procedure cases should be considered.

At the same time, in order to speed up and improve the progress of lawsuits, a new regulation is introduced for claims of small amount (less than 1500 lats) about the collection of money or alimony, which significantly reduces the terms of hearing for a sizable part of all cases in the court's competence. The same applies to the CPL amendments to expand the use of written proceedings in the hearing of civil cases.

Considering the fact that the parties of a lawsuit must be first of all interested into the right outcome of the case, a general provision is secured in the CPL that the parties must prove the circumstances on which their claims and objections are based, but the court is allowed to gather evidence only in exceptional cases, which are specifically defined in the law. This provision fully conforms to the content of the principle of disposition and adversarial principle.

Also such provisions are subject to the objective of hearing a case in the court as fast as possible, which regulate the procedural activities, carried out in preparing the case for hearing. CPL gives a detailed description of activities, which must be carried out at this stage.

Introduction of Mediation in the Civil Procedure

As the objective of the process is faster achievement of legal peace between the parties, the procedure of reconciliation of the parties is mandatory at this stage of the process.[23]

In order to introduce some other forms besides reconciliation, the concept "Introduction of Mediation in Latvia" was developed.[24] As it is pointed out in this concept, if mediation is not introduced in Latvia and developed as an independent

[21] See: Civilprocesa likuma komentāri. Trešais papildinātais izdevums. Autoru kolektīvs. Prof. K.Torgāna vispārīgā zinātniskā redakcijā. Rīga: Tiesu namu aģentūra, 2016, p. 400.

[22] Velyvis S., Višinskis V. Основные черты гражданского процессуального права Литвы (Окончание. Начало см. № 4). Арбитражный и гражданский процесс: научно-практическое и информационное издание. Москва: Юрист. 2009, № 5, p. 42-44.

[23] See: Kronis I. Civiltiesisko strīdu alternatīvs risinājums. Rīga: Latvijas Vēstnesis, 2007.

[24] Concept "Introduction of Mediation in Latvia" Available: http://polsis.mk.gov.lv/LoadAtt/file65116.doc [viewed 15 June 2012].

method of settling disagreements, the use of the most effective method that is most satisfying for parties for settling disagreements will not be promoted, and accordingly the lawsuit will still be considered the most suitable solution of any disagreements. It must be admitted that the introduction of pure mediation (in Latvian – vidutājdarbība or vidutājība[25]) in Latvia is still at a very early stage of development. Nevertheless, at the same time, work goes on in the determination of the basic principles and basic rules of a unified mediation process, which is planned to be implemented with the prepared draft "Mediation Law".[26] As it can be seen from the very name of this draft law, the Ministry of Justice work group significantly deviates from the Latvian equivalents of words mediator and mediation, thus ignoring the basic requirements of the Latvian language.

According to the concept, at present, the group works on the court-derived mediation, when mediation is carried out by a certified mediator at the suggestion of a court (judge), and court proceedings are stopped for the time of mediation. Court-derived mediation is to be considered as the initial and primary model for ensuring an effective connection between the court proceedings and mediation processes (interaction). As a result of successful court-derived mediation, a part of conflicts could be solved already before the hearing of the dispute in court on merits, thereby significantly reducing the courts' workload.[27]

Qualitative Side of the Content of the Civil Procedure Law Provisions

As it was already pointed out, in general the new CPL system is rather consistent and unified. However the same does not apply when referring to the qualitative side of the Content of CPL provisions. During its 13 years of use in practice, several shortcomings of CPL have emerged. Of course, Latvia, as well as any other European Union member state is significantly influenced by the development of European legal enactments, which is to be considered as an improvement of the civil procedure. Still, it must be admitted that the effectiveness of the CPL is determined not only by the precision of the wording of legal provisions, but also by its quality.

First of all, it must be stressed that since the CPL coming into force and till May 2012, the legislator has passed several laws (a total of 31), with which amendments are introduced in the CPL. CPL is affected also by several judgements of the Constitutional Court. For example, the CPL provision about the state fees (Section 34) was amended as much as 11 times, which can hardly be considered an improvement of law. If CPL

[25] LZA Terminoloģijas komisijas sēdes protokols Nr. 4 (1069) no 06.06.2006. par vārdu mediators un mediācija latviskajiem ekvivalentiem. Available: http://termini.lza.lv/article.php?id=196 [viewed 15 June 2012].

[26] LR Ministry of Justice informative report of 08.11.2011"Par tiesu praksi attiecībā uz termiņiem, kādos tiek izskatītas lietas" ("About court practice regarding terms of hearing cases"), p. 7. Available: http://polsis.mk.gov.lv/LoadAtt/file17904.doc [viewed 7 June 2012].

[27] Ibid, p. 8.

in its initial wording consisted of 643 sections, then by 2012, the law with its addenda has grown up to about 860 sections. It must be pointed out that in total almost 760 sections of the CPL have been amended. Although some amendments affected even 160 sections, still the opposite situation also can be observed, when the Saeima poorly utilizes its resources, by simultaneously passing two laws "Amendments of the Civil Procedure Law" on the same day (12.06.2009), because the total number of amendments in both laws[28] was only 5. A justified question arises – where to look for causes of such amendments? Why the CPL must be amended every year and several times? Has the CPL in its most part turned out to be of poor quality and unsuitable for the regulation of public relations in the process of protection of subjective rights and legally protected interests? It is not easy or maybe even not possible to find a well-grounded answer to these questions. In such a situation, one cannot help doubting the quality of the prepared draft laws. As the Professor K. Torgāns points out, with the help of various amendments and addenda to the law, several shortcomings and even errors of the regulation of the hearing of civil disputes and execution of decisions have been eliminated, thereby only confirming the lack of quality.[29]

Conclusion

Concluding this review of the Latvian contemporary civil procedure law, it is to be hoped for that the regular amendments and addenda of the CPL will embody progressive scientific procedural law and law-creative ideas, as well as the experience of court practice of recent years, and that CPL will become a strong instrument of the protection of rights and interests, taking into consideration the law-forming and law-enforcing traditions, the established national confidence about the role of law and court in the society.

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[28] Grozījums Civilprocesa likumā: LR likums. *Latvijas Vēstnesis*, 30.06.2009., Nr. 100 (4086).

[29] Civilprocesa likuma komentāri. I daļa (1.-28.nodaļa). Sagatavojis autoru kolektīvs. Prof. K. Torgāna zinātniskā redakcijā. Rīga: Tiesu namu aģentūra, 2011, 14. lpp.

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USE OF THE CONCEPT OF "INTELLECTUAL PROPERTY" IN THE LAW

Keywords: Intellectual property, concept, law.

Introduction

The issue that is considered in this paper is a simple one. Many readers will believe that they are already fully familiar with it. And yet the selection of the topic was not accidental. Discussions about what the words "intellectual property" really mean have been occurring among our own lawyers here in Latvia, as well as in other countries. Materials which this author has studied contain a very limited number of legal acts which use the words "intellectual property." These are words used in everyday conversation, but they are seldom used in the law. It does have to be added here that Latvia's legislature has worked quite productively in this area, though not always more efficiently than could be expected. Why is there a difference between everyday language and the terminology of laws which relate to intellectual property? The author will try to answer that question in this paper.

Intellectual property

Lawyers seldom use the words "intellectual property," because those words often involve different content and do not always mean one and the same thing. Professor Juris Rozenfelds, for instance, has defined intellectual property thus: "This is a form of property rights which regulates rights to incorporeal things – products of a spiritual nature, awarding the owner monopoly rights to these products of a spiritual nature, also setting out the boundaries of these monopoly rights."[1] Professor Rozenvalds goes on to quote a foreign author in arguing that "intellectual property can also be characterised as the right to things which are created as the result of intellectual activities by individuals – ideas, inventions, literary compositions, designs, etc."[2] Professor Alexander Sergeev, for his part, has stressed the dual nature of the concept of "intellectual property" – on the one hand it is the result of creativity, while on the other hand it represents the right to intellectual property.[3] He notes that intellectual

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1 Rozenfelds J. Intelektuālais īpašums [Intellectual Property]. Rīga: Zvaigzne ABC (2004), p. 9.

2 Ibid.

3 Sergeev A. P. Право интеллектуальной собственности в Российской Федерации [Intellectual Property Law in the Russian Federation]. Moscow: Prospekt (1996), pp. 13-14.

property relates to *sui generis* rights which are granted to authors, inventors, patent holders, etc. These are not part of classical civil law. The professor argues that there are no concrete boundaries between material and non-material rights.[4] This author agrees with Professor Sergeev in that each form of creativity has specifics which basically cannot be subject to a single definition. This creates a situation in which the development of legal terminology and understandings about intellectual property can change the aforementioned definitions. That, in turn, would mean that the creation of new types of intellectual property or new understandings about same would require amendments to the relevant laws.

Professor Rozenvalds has written that "traditionally included among incorporeal things are (..) 2) objects of intellectual property...".[5] He has also argued that "... incorporeal things must be seen as rights...", but these statements do not correspond to the graphic illustration which the professor has presented in the same book to separate between corporeal and incorporeal things.[6] This author would, therefore, argue that Professor Sergeev's explanation is more acceptable and all-encompassing, because he has not tried to define the words "intellectual property."

The World Intellectual Property Organisation (WIPO) defines the term as follows: "Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, name, images, and designs used in commerce."[7] This explanation once again creates a whole series of questions which have to do with the use of authored work for non-commercial purposes, domain names, and other types of intellectual property which do not really apply to the given explanation. Other international agreements and documents which use the words "intellectual property" usually contain explanations as to what exactly the words mean. Thus, for instance, Section 2 of the first chapter of the TRIPS agreement on intellectual property rights states that "for the purposes of this Agreement, the term 'intellectual property' refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II." A look at those sections shows that the term is applied to copyright and related rights, trademarks, indications of geographic origin, industrial design, patents, the design of integral schemes (topography) and legal protection for undisclosed information.[8]

The next document which we should review in this context is Directive No. 2004/48/EC of the European Parliament and Council of April 29, 2004, which speaks to intellectual property rights. Although the title of the directive contains the words "intellectual property," Article 1.1 of the directive explains that "this Directive concerns the measures, procedures and remedies necessary to ensure the enforcement

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4 Sergeev A. P. Право интеллектуальной собственности в Российской Федерации [Intellectual Property Law in the Russian Federation]. Moscow: Prospekt (1996), pp. 13-14.

5 Rozenfelds J. Lietu tiesības [Property Law]. Rīga: Zvaigzne ABC (2011), p. 13.

6 Ibid., p. 11.

7 What is Intellectual Property? Available: http://www.wipo.int/about-ip/en [viewed 11 June 2012].

8 Agreement on Trade-Related Aspects of Intellectual Property Rights, WIPO. Available: http://www.sto.rog/english/tratop_e/trips_3/t_agm0_e.htm [viewed 11 June 2012].

of intellectual property rights. For the purposes of this Directive, the term 'intellectual property rights' includes industrial property rights."[9]

Another explanation can be found on the homepage of the Latvian State Revenue Service.[10] The page says that "intellectual property is a universally accepted term which, during the latter half of this century, has designated the totality of copyright, ancillary rights and industrial property rights. To put it more precisely, the term 'intellectual property' refers to rights which relate to intellectual rights, including literary, artistic and scientific work, performances by performers, phonograms, broadcasts, inventions, sample designs, trademarks and service marks, commercial names and commercial instructions, the right for protection against dishonest competition, as well as any other and similar rights in the areas of science, literature and art." This is just a brief review of how the combination of words is interpreted by various authors and how it is used in various sources which have to do with intellectual property rights.

Given all of this, it does seem that the use of the words "intellectual property" in laws is very complicated. A study of how this happens in other countries shows that the words are not used in words and subordinate normative acts, because they are so broad that they cannot always offer a precise description of all of the areas of intellectual property rights, because each area has its own specifics. This applies not just to the obtaining, but also the protection of rights. This is not an easily addressed issue in some cases which shall be reviewed in this paper. One specific of Latvia is that many attorneys in our country find it necessary to enshrine absolutely everything in laws, even though that is not possible, as has been seen in Germany. This author believes that the words "intellectual property" should not be included in laws or subordinate acts in Latvia which refer to material rights.

Another essential issue is education for the population via the provision of precise information – something that is not always evident even on the homepages of government institutions.[11] All of this means that recipients of information can come up with fairly diverse ideas about the rights and obligations which are faced by people who plan to use or do use the benefits that are afforded by different types of intellectual property.

The text of normative acts

The author has already discussed the way in which the words "intellectual property" are used in international agreements, EU directives, reports from scholars, and government institutions on their homepages. Next the author will turn to those cases in which the words "intellectual property" are utilised in the normative acts of the Republic of Latvia.

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[9] Official Journal, L 157, 30 April 2004, pp. 0045-0086. Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048:LV:HTML [viewed 12 June 2012].

[10] Available: http://www.vid.gov.lv/default.aspx?tabid=9&id=996&hl=1 [viewed 14 June 2012].

[11] See, e.g.: the aforementioned homepage of the State Revenue Service, op. cit.

Making it easier to do this is a separate section on intellectual property on the Likumi.lv portal.[12] This is a descriptive section which should, but does not, provide a look at all of the laws and normative acts which discuss intellectual property and its protection. This is because of the specifics of the database and software, of course, but the fact is that the portal does not offer a complete look at all of those documents in which the words "intellectual property" are found. This applies to important documents such as EU regulations which, like international agreements, are in force. Someone who is not involved in this area of the law may find it very hard to determine that the relevant issue can be addressed via the use of other normative acts which are not included in the aforementioned database.

It is for that specific reason that analysis of documents must begin with regulations which are obligatory for Latvia and all other EU member states. In the area of customs issues, these are:

1) Council Regulation No. 1383/2003 (July 22, 2003), which refers to customs operations related to products about which there are suspicions of a violation of intellectual property rights and speaks to steps to be taken when such products are identified,[13]
2) Commission Regulation No. 1891/2004 (October 21, 2004), which speaks to the way in which the aforementioned Council regulation 1383/2003 is applied,[14]
3) Commission Regulation No. 1172/2007 (October 5, 2007), which amends the aforementioned Commission regulation 1891/2004.[15]

We can see that these regulations all include the concept of intellectual property. The texts of the regulations show that the words are only used in those cases in which all types of intellectual property can be included. As soon as it comes to specific issues related to indications of geographic origin, copyright, or other rights related to intellectual property, the texts speak to specific types of property. An example is Section 2.1 of Regulation No. 1891/2004.[16] It is clear to see that the European

[12] This is the portal of legal acts maintained by the newspaper *Latvijas Vēstnesis* [viewed 14 June 2012].

[13] Official Journal, L 196, 02 August 2003, pp. 0007-0014.

[14] Official Journal, L 328, 30 October 2004, pp. 0016-0049.

[15] Official Journal, L 261, 6 October 2007. Available: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2007:261:SOM:LV:HTML [viewed 14 June 2012].

[16] "1. If an application for action within the meaning of Article 5(1) of the basic Regulation is lodged by the right-holder himself, the proof required under the second subparagraph of Article 5(5) shall be as follows:
(a) in the case of a right that is registered or for which an application has been lodged, proof of registration with the relevant office or proof that the application has been lodged;
(b) in the case of a copyright, related right or design right which is not registered or for which an application has not been lodged, any evidence of authorship or of the applicant's status as original holder.
A copy of registration from the database of a national or international office may be considered to be proof for the purposes of point (a) of the first subparagraph.
For protected designations of origin and protected geographical indications, the proof referred to in point (a) of the first subparagraph shall, in addition, consist in proof that the right-holder is the producer or group and proof that the designation or indication has been registered. This subparagraph shall apply mutatis mutandis to wines and spirits."

Union understands that it is not possible to apply a unique legal norm to all types of intellectual property, and so each type of intellectual property is addressed separately.

This practice was initially implemented in Latvian law when it came to laws with respect to which this was seen as necessary. One example is the Civil Law[17] which, in its 2004 version, had Section 100.3 – it listed specific types of intellectual property. In practice, however, the application of this procedural norm and a literal reading of the law crated problems with types of intellectual property that were not listed. The legislature amended the law to replace the list with the words "intellectual property." This shortcoming was not permitted when Section 30^2 was added to the law on the subject o cases related to the violation and protection of intellectual property rights. The text shows that the words "intellectual property" can and should be used in laws in a comparatively successful way when they relate to procedural norms that are essentially as generalised as possible. They also can and should be applied to issues related to the protection of intellectual property.

A very different situation exists when the words "intellectual property" are utilised in relation to material rights. Here it must be said that the situation is not equal in all laws. Legislation related to various areas of intellectual property rights undergoes ongoing changes and development, and it is also true that certain types of intellectual property are addressed not just in special laws, but also in ones which can be applied to intellectual property only to a certain extent (energy issues, for instance). In such cases it is very complicated to find an all-encompassing and precise explanation of how the specific issue must be defined. Sometimes it is quite impossible, indeed.

This is seen in Directive 2004/48/EC of April 29, 2004, on the protection of intellectual property rights.[18] Article 2 of the preamble states that "the protection of intellectual property (..) should also allow the widest possible dissemination of words, ideas and new knowhow. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet. Interestingly, Article 14 of the preamble steps back from this rule: "The measures provided for in Articles 6(2), 8(1) and 9(2) need to be applied only in respect of acts carried out on a commercial scale." This first glance, however, may prove to be and, indeed, does prove to be misleading if one does not read the topic of the directive, which seriously narrows the application of it in relation to the concept of intellectual property. As noted previously, Article 1 states that "this Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term 'intellectual property rights' includes industrial property rights." This shows that the directive mostly applies not to material rights, but instead to procedures which cannot be equalised in this specific case with respect to all types of intellectual property. This example precisely shows that in many cases it is not possible to implement unified procedural activities to precisely define in laws the way in which various types of intellectual property are to be protected.

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[17] See: *Latvijas Vēstnesis*, No. 326/330, 1998. Available: http://www.likumi.lv/doc.php?id=50500 [viewed 14 June 2012].

[18] Official Journal, L 157, 30 April 2004, pp. 0032-0039.

The fact that the words "intellectual property" are not broadly used in norms related to material rights is also evidenced by Latvian legislative practice. An example is the law on scientific activity,[19] which very much has to do with the creation of various types of intellectual property. It includes just one section which is of great importance in characterising this system of rights – Section 39[1].[20] The essential element here is the last sentence in the section – "taking into account rules referred to in normative acts which regulate intellectual property." This makes it quite clear that the most important thing here is the specific type of intellectual property, from which rights and obligations emerge. The author would like to note, however, that the Cabinet of Ministers has not always kept this principle in mind. Regulation No. 1001 on the procedure and criteria for awarding doctoral degrees[21] is a good example of this. Section 16.5 of the regulation states that "at least two weeks before the defence of the doctoral dissertation, the defence shall be announced in the newspaper *Latvijas Vēstnesis* and in *Zinātnes Vēstnesis*. Upon providing the said information to the newspaper *Latvijas Vēstnesis*, the university shall ensure the public availability of the dissertation on the Internet and at the university's library." There can be no objections against the first sentence, but the second one, which obliges universities to release dissertations publicly, does not really satisfy the requirements of the copyright law, which states that only the author has the right to determine when and how the work is to be distributed. This example shows how easy it is for the executive branch of the government to approve regulations which are very questionable in terms of whether they conform to the law. This author approached the Justice Ministry about this matter several years ago and was told that the Ministry of Education and Science was responsible for the specific regulation. The request for an explanation was forwarded to the ministry, but no response was given, and the Cabinet regulation remains in force to this very day. This suggests to the author that the words "intellectual property" in laws and subordinate acts should be utilised only in those cases in which each and every type of intellectual property is unambiguously covered.

Conclusion

This research makes possible several conclusions that could be utilised in drafting new legislation and in practical contacts:

1) The concept "intellectual property" is too broad to use in laws without further explanation unless all types of intellectual property are covered. The same applies to conversational language. The concept of intellectual property should not be

[19] See: *Latvijas Vēstnesis*, No. 70, 5 May 2005.

[20] Titled "The right of the state's scientific institutions to utilise the protection of intellectual property," the section states that "a state scientific institution shall have the right to utilise intellectual property that has been created as the result of scientific activities that have been financed by the state. The Cabinet of Ministers shall determine the procedure and rules for the use of such property by the state scientific institution, taking into account rules referred to in normative acts which regulate intellectual property."

[21] See: *Latvijas Vēstnesis*, No. 201, 30 December 2005.

utilised anytime that someone wants to. Before using the words, there should be a statement about which type or types of intellectual property are being covered by the term.

2) The term "intellectual property" should be used in a generalised way, as opposed to specific types of creativity. In the latter case, a specific type must be applied, with all of the resulting consequences.

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Zinātniskās darbības likums, *Latvijas Vēstnesis*, Nr. 70, 05.05.2005.

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THE MEASURE OF QUALITY OF MUTUAL LEGAL ASSISTANCE TREATIES

Annotation

The aim of this article is to measure the levels of quality of international legal assistance treaties, meaning – to answer the question, whether international legal assistance treaties fall in line with the developments of international private law and the topicalities arising in the EU.

Keywords: legal assistance treaties, cross-border civil matters, recognition and enforcement of decisions, legalization, European Union.

Introduction

The development of international private law in Latvia in early 90's resulted in a success in the form of entering into several standard legal assistance treaties with such countries as – Russia, Ukraine, Belarus, Uzbekistan, Kyrgyzstan, Moldova, Lithuania, Estonia and Poland. The scope of legal assistance treaties includes both civil and criminal law matters. The civil law covers such matters as jurisdiction, applicable law, recognition and enforcement of judgments, service of documents, taking of evidence.

It should be noted, that the application of legal assistance treaties still has high importance and is quite intensive[1] since there aren't many international conventions covering third states in matters of judicial cross-border cooperation in civil and commercial matters that would also include rules on jurisdiction and enforcement and recognition of judgments in civil matters. The result is that these treaties are applied successfully and in principle are the only legal instruments available when solving international civil cases between the respective countries. It should also be noted that Latvia has not entered into any treaties with the United States of America, Australia or Canada, and in such cases the national law of each country must be applied thus resulting in a heavier process in courts when international elements are introduced to the case from a country with whom Latvia haven't agreed on legal assistance regulation.

However not everything works as well as it appears. First of all, since the treaties were concluded in early 90's nowadays, almost 20 years later, many topics covered by these treaties should be revised through the prism of modern international law developments. Also several treaties have met a problem of ambiguity in legal interpretation, so there is an actual need to improve on these issues.

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[1] Look – Annex 1.

Second – after becoming a member of the European Union Latvia has obligations to apply the regulations of the EU. It is clear that the laws of the EU greatly influence the national rules of the international private law.[2]

Improvement of the legal assistance treaties to ensure uniform interpretation

Legal assistance to the non-citizens of a member state

Looking at the first articles of legal assistance treaties it appears as if only the citizens of the member states are protected, since Article 1 of all eight treaties refers to "citizens" of a member state. For example Article 1 of the Treaty between the Republic of Latvia and the Republic of Poland on Legal Assistance and Legal Relation in Civil, Family, Labour and Criminal Matters[3] states that the citizens of one member state enjoy the same level legal protection of their personal and property rights as citizens of other member state. Therefore a question arises whether Latvian non-citizens that have sealed contracts or have other obligations towards the citizens of another member state will enjoy the legal protection that is provided for in the legal assistance treaties between the countries, for example – are non-citizens limited by the national law and during a process of recognition and enforcement cannot use the institute of Central Authority to acquire assistance when sending such a request aiming to speed up the procedure of recognition and enforcement of a judgment.

Uncertainties recognizing and enforcing decisions issued by judicial authorities of other member states

Currently the rules of legal assistance treaties relating to recognition and enforcement of foreign judgments have caused several discussions. However that is not surprising if we consider the large amount[4] of the legal assistance requests concerning recognition of foreign judgments and the influence of this process to the international legal environment. As it is acknowledged in legal doctrine, "in the modern world, where so much commerce is international in nature, the international community has a general interest in ensuring that judgments operate as a form of international currency. If judgments were only valid and enforceable in the country of origin, international trade would be an even more hazardous enterprise."[5]

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[2] Kucina I. Private International Law in view of the European Union. The University of Latvia Press, 2011, p. 91 (Latvian version).

[3] Treaty between the Republic of Latvia and the Republic of Poland on Legal Assistance and Legal Relation in Civil, Family, Labour and Criminal Matters. *Latvijas Vēstnesis*, February 7, 1995. No. 19.

[4] Look – Annex 2. The information concerns only requests of legal assistance, which have been transmitted through Central Authorities.

[5] Hill J., Chong A. International Commercial Disputes. Commercial Conflict of Laws in English Courts. Hart Publishing, 2010, p. 401.

For example a noticeable question is whether state fees have to be paid when a person submits an application for recognition and enforcement of a foreign judgment, which has been issued in a member state of a legal assistance treaty. Article 3 and 4 of the Treaty between the Republic of Latvia and the Republic of Belarus on Legal Assistance and Legal Relation in Civil, Family, Labour and Criminal Matters[6] (further referred to as Latvia – Belarus Treaty) that the legal assistance in civil and criminal matters – while fulfilling procedural and other requirements of the national law the member state[7] addressed with the request requires – shall be performed through a Central Authority[8].

In Latvia it is the Ministry of Justice that performs the functions of a Central Authority. Article 14 under section "General rules" of the Latvia – Belarus Treaty states that a member state addressed with a legal assistance request shall not demand restitution for the legal assistance expenses. The member states should cover all the expenses arising from the legal assistance procedures, save expenses arising from an expert examination. At the same time Article 54 and 55 under section "Special rules", provide that the court expenses connected with the enforcement of a judgment, shall be repaid in accordance with the law of the member state of enforcement. Also the order of the enforcement procedures shall be governed by the law of the member state of enforcement. As a result the Latvia – Belarus Treaty allows differing interpretation on whether state fee for the recognition and enforcement procedure of a foreign judgment in Latvia must be paid if the judgment was produced in another member state.

One of the possible solutions would be that the state fee is paid always, since Article 54 and 55 of the Latvia – Belarus Treaty allows the application of the national law providing that these articles contain special rules of law against the general rule in Article 14. At the same time Article 14 of the Treaty may be viewed as a special rule against Articles 54 and 55 if the request for recognition and enforcement is sent through the Central Authorities of member states. That would mean that if the applicant submits a recognition and enforcement request to the court on his own and not through the Central Authority of a member state, the state fee should be charged.

Essentially unclear and debatable is the issue of whether such decisions of a member state court which by their very nature do not require the enforcement, and which the interested party wishes to use as proof in a Latvian court or to solve other prejudicial questions, would first need to be recognized in a court of the Republic of Latvia, or contrary – such decisions wouldn't require the said procedure of recognition?

In Latvia, the general rule of recognition and enforcement of foreign judgments can be found in the Civil Procedure Law.[9] The "recognition of a judgment" is understood

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[6] Treaty between the Republic of Latvia and the Republic of Belarus on Legal Assistance and Legal Relation in Civil, Family, Labour and Criminal Matters. *Latvijas Vēstnesis*, February 7, 1995. No. 19.

[7] Article 3 of Belarus Treaty.

[8] Article 4 of Belarus Treaty.

[9] The Civil Procedure Law: the law of the Republic of Latvia. *Latvijas Vēstnesis*, November 3, 1998. No. 326/330.

as a process where a judgment given in one state as a result of the recognition is integrated in the legal system of the recognizing state. It follows from the Part F of the Civil Procedure Law, that decisions of a foreign court that enter proceedings in Latvia in form of related/ prejudicial/incidental questions and which do not require enforcement in Latvia, must first be recognized in courts of Latvia following Article 637 of the Civil Procedure Law. However these rules are applicable only to the extent where the international law or the law of the European Union does not provide for other regulation (Article 5 of the Civil Procedure Law). The legal assistance treaties too provide regulation on recognition and enforcement of judgments between the respective member states. It must be concluded that this regulation is considered special law, however it should also be noted that the procedural order of recognition of a judgment is autonomous only in part. That means that in cases where the process is regulated by a legal assistance treaty, the rules of the Civil Procedure Law are not applicable, but regarding the questions not regulated in a treaty, the Civil Procedure Law applies. Therefore the provisions of the Civil Procedure Law and the provisions of legal assistance treaty are practically applied at the same time. For example Article 50 "Recognition and enforcement of judgment in civil, family and criminal cases, which are related to civil claim for damages", point 2 of the Treaty between the Republic of Latvia and Russian Federation on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (further referred to as –the Treaty with Russia) provides that without making additional records member states will recognize in their territory decisions of authorities responsible for guardianship or trusteeship relations, registering civil status and other authorities in cases relating to civil and family matters, if such decisions by their nature do not require enforcement.[10] On one hand this article could be interpreted so that adjudications of judicial authorities that do not by their nature require enforcement and which the interested party wishes to use as proof in a Latvian court or to solve other prejudicial questions, would first need to be recognized in a court of the Republic of Latvia, by applying Article 50 point 2 of the Treaty with Russia and interpreting the law narrowly by extending the scope of application only to the acts of civil registration and the likes that do not require enforcement in other member states. The basis of such interpretation would firstly be the sovereignty of a state since court adjudication of any other state according to the sovereignty principle are not automatically binding in any other state if no international law system is established between them.[11] Secondly we can find analogies in the legal system of the European Union that support this interpretation. It must be noted that the normative acts of the European Union relating to civil procedures rely on high level mutual trust between the Member States. The main contribution of the principle of mutual recognition, is to bridge disparities in the laws of the Member States.[12]

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[10] Treaty between the Republic of Latvia and Russian Federation on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters. *Latvijas Vēstnesis*, November 30, 1999. No. 394/396.

[11] North P., Fawcett J. J. Private International Law. LexisNexis UK, 2004, p. 405.

[12] Meeusen J. Fifteen Theses on Brusseles I, Rome I and the European Union's Institutional Framework. Enforcement of International Contracts in the European Union. Convergence and divergence between Brussels I and Rome I. Intersentia, 2004, p. 59.

Nevertheless not always, while creating their legal instruments, the Member states of the EU have been able to reach an agreement and abandon the use of the recognition procedures or other control mechanisms for the decisions of Member State courts, which are related/ prejudicial/ incidental questions and which do not require enforcement, or which end up jurisdiction of another Member State – the state of the recognition and enforcement – for the enforcement. Even then when the recognition or declaration of enforceability of a decision given in another Member State is formalized in the legal instruments of the EU, and no party can make any submissions on the application in 1-st instance, however the rights to object the recognition or declaration of enforceability and to refer to the bases of non-recognition are retained in the 2-nd instance.[13] This way the European Union have kept the idea and the control that arise from the principle of sovereignty over decisions given in other Member States that are related/prejudicial/incidental questions and which do not require enforcement, or which end up in a jurisdiction of another Member State – the state of the recognition and enforcement – for the enforcement. However even in cases where Member States of the European Union have abandoned the need for recognition of enforceable decisions[14] and the state of origin is able to issue a document that can be freely circulated in the legal space of the European Union, the defendant will still maintain several legal guaranties to object against an "unjust" decision of the court of the origin during the recognition stage – a defendant whose procedural rights have been violated may demand a review of the decision.[15] It can be concluded that even the Member States of the European Union have not been able to completely abandon one or another form of control over decisions made in other Member States – to allow such decisions to freely enter court procedures or to be submitted to the enforcement authorities. On other hand Article 50 point 2 of the Treaty with Russia on the other hand could be interpreted broadly, presuming that two states have agreed on high enough level of mutual trust to allow free circulation of decisions which do not require enforcement.

Legalization or certification of public documents with Apostille

Another question leading to new discussions is whether a power of attorney issued by a notary needs to be additionally certified (legalization or certification with Apostille)? For example Article 13 of the Treaty between the Republic of Latvia and Ukraine on

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[13] Look, for example, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Published in Spec.ed. of OJ, 2004, Division 19, Section 4, p. 42-64.

[14] For example, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. Published OJ, July 31, 2007, L 199, p. 1-22; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure. Published OJ, December 30, 2006, L 399, p. 1-32; Commission Regulation (EC) No 1869/2005 of 16 November 2005 replacing the Annexes to Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims. Published in Spec.ed. of OJ, 2004, Division 19, Section 7, p. 38-62.

[15] For example, Commission Regulation (EC) No 1869/2005 of 16 November 2005 replacing the Annexes to Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims, Article 19.

Legal Assistance and Legal Relation in Civil, Family, Labour and Criminal Matters (further referred to as –the Treaty with Ukraine) provides that documents formed or proofed by a court or an official authority (notary, permanent translator, expert etc.) acting within their authority and fulfilling the requirements of form and which are stamped with the seal coat of arms, are accepted in other member state territories without any other certification. Documents which are treated as official in one member state have the evidentiary power of an official document in other member states.[16] And again two paths of interpretation are possible – legalization procedures wouldn't be applied to the documents which are sent through the Central Authorities, however documents, submitted by persons without using the assistance of Central Authorities would be obliged to go through such legalization procedures. The Ministry of Justice has discussed said matter, and the interpretation of Article 13 of the treaty between the Baltic states. Till the end of year 2010 every Baltic state had developed a different approach of interpreting Article 13 of the Treaty of the legal assistance between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania – whether a legalization/certification is needed for documents that are issued by state authorities of the member states and which a private person (a physical or a legal person) wishes to submit to the authorities of another member state. After identifying a practical application of the rules in every member state and concluding that generally authorities do not require any additional certification of documents, and also taking into account close cooperation, historical links and geographical boundaries, Latvia, Lithuania and Estonia reached an agreement in December 2010 on support of a liberal order of issuing documents between the member states. Therefore Latvia, Lithuania and Estonia have agreed upon, that further Article 13 of the said Treaty is applicable so documents issued in one member state and which a physical or legal person wishes to submit to an authority of another member state, or when authorities of member states exchange documents between themselves, can be accepted without any certification (legalization or certification with Apostille).[17] It should be noted that Latvia have not reached similar agreements with other member states of other treaties on legal assistance and legal relation, so the issue still persists.

Adaptation of a legal assistance treaties to the requirements of the European Union

It is important to remember that regulations of the European Union will prevail over the conventions entered into by one or more Member States and which fall into the scope of application of regulations.[18] In case of Latvia that means that regulations to a great extent will replace the three sided Treaty of November 11, 1992 of the legal assistance between the Republic of Latvia, the Republic of Estonia and the Republic

[16] Treaty between the Republic of Latvia and Ukraine on Legal Assistance and Legal Relation in Civil, Family, Labour and Criminal Matters. *Latvijas Vēstnesis*, June 28, 2001. No. 100.

[17] The additional information is available on the official webpage of the Ministry of Justice. Available: http://www.tm.gov.lv/lv/jaunumi/tm_info.html?news_id=3673 [viewed 27 June 2012].

[18] Look, for example, Article 59(1) of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000. Published in Spec.ed. of OJ, 2004, Division 19, Section 6, p. 243-271.

of Lithuania and the Treaty of February 23, 1994 between the Republic of Latvia and the Republic of Poland on Legal Assistance and Legal Relation in Civil, Family, Labour and Criminal Matters. That means that the application of these treaties is limited.[19] Regarding such international treaties concluded between the Member States that are not compatible with the law of the European Union, according to Article 351 of the Treaty on the Functioning of the European Union[20] (Article 307 of former Treaty establishing the European Union) Member States shall take all the appropriate steps to eliminate the incompatibilities established, including denunciation of a Treaty. At the moment the two regulations allow the Member States to sign bilateral treaties on civil law matters and to amend existing treaties with the third states – Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, [21] and Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations.[22] However the scope of these both regulations is relatively narrow and applies only determining the applicable law in separate fields and concerning the issues of recognition and enforcement of separate judgments and decisions.

The legal assistance treaties entered into by the Republic of Latvia have a very broad field of application concerning jurisdiction and the applicable law. That means that according to the rules of Regulation 662/2009 and Regulation 664/2009, it is neither possible to bring such broad legal assistance treaties into the framework of the EU law nor generally modernize the rules.

To solve the issues which arise from the compatibility of broad legal assistance treaties and the European Union law in June 29, 2009 Commissions declaration under document 11191/09, provided that the Commission considers it useful for the Member States to negotiate such treaties anew, to avoid all uncertainties and inconsistencies with the European Union law, including the questions of jurisdiction, recognition and enforcement in civil and commercial matters. Commission offers a full cooperation to reach a satisfactory outcome relating to these specific treaties and also views that the results of the said negotiations should be reviewed 8 years after agreeing on a regulation, i.e. till the middle of 2017.[23] That means that the Ministry of Justice is preparing to review and renegotiate the broad legal assistance treaties of

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[19] Mieriņa A. Development of Private International Law in Global World. *Jurista Vārds,* August 3, 2011 No. 34 (Latvian version).

[20] Published OJ, March 30, 2010, C 83.

[21] Published OJ, July 31, 2009, L 200, p. 25.-30.

[22] Published OJ, July 31, 2009, L 200, p. 46.-51.

[23] Available: http://register.consilium.europa.eu/pdf/en/09/st11/st11191-ad01re01.en09.pdf [viewed 27 June 2012].

Latvia, with an aim that when such an treaty is not compatible with Article 351 of the Treaty on Functioning of the European Union, it would not have to be denounced. At the same time it must be taken into account that the exclusive competency of the European Union is dynamic – it consistently changes, new regulations emerge which extend the exclusive external competence, which means that new issues may arise in the future between treaties entered into by Latvia with third states and the law of the European Union.

Conclusion

The author concludes that according to the analysis in this article, legal assistance treaties do not follow the developments of modern international private law and topical issues of the European Union international civil procedure, both regarding the legal unclarities including the interpretation difficulties found in these treaties and the requirements of the European Union to ensure compatibility with the rules of the regulations of the European Union regarding international civil matters.

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Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. Published in Spec.ed. of OJ, 2004, Division 19, Section 6.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Published in Spec. ed. of OJ, 2004, Division 19, Section 4.

Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning

jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations. Published OJ, July 31, 2009, L 200.

Document of June 29, 2009, No. 11191/09. Available: http://register.consilium.europa.eu/pdf/en/09/st11/st11191-ad01re01.en09.pdf

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. Published OJ, July 31, 2007, L 199.

Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure. Published OJ, December 30, 2006, L 399.

Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations. Published OJ, July 31, 2009, L 200.

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Treaty between the Republic of Latvia and the Republic of Belarus on Legal Assistance and Legal Relation in Civil, Family, Labour and Criminal Matters. *Latvijas Vēstnesis*, February 7, 1995. No. 19.

Treaty between the Republic of Latvia and Ukraine on Legal Assistance and Legal Relation in Civil, Family, Labour and Criminal Matters. *Latvijas Vēstnesis*, June 28, 2001. No. 100.

Treaty of February 23, 1994 between the Republic of Latvia and the Republic of Poland on Legal Assistance and Legal Relation in Civil, Family, Labour and Criminal Matters. Latvijas Vēstnesis, February 7, 1995. No. 19.

Treaty of the legal assistance between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania. *Latvijas Vēstnesis*, July 14, 2000. No. 259/261.

The webpage of the Ministry of Justice. Available: http://www.tm.gov.lv/lv/jaunumi/tm_info.html?news_id=3673 [viewed 27 June 2012].

Annex No. 1

The amount of sent and received legal assistance requests in the Ministry of Justice in 2011[24]

RUSSIAN FEDERATION

***Received** requests:*	
Type of request	**Received**
Service of documents and examination	59
Recognition of judgments	7
Require of documents	50
***Sent** requests:*	
Type of request	**Sent**
Service of documents and examination	327
Recognition of judgments	20
Require of documents	41

REPUBLIC OF BELARUS

***Received** requests:*	
Type of request	**Received**
Service of documents and examination	26
Recognition of judgments	18
Require of documents	16
***Sent** requests:*	
Type of request	**Sent**
Service of documents and examination	49
Recognition of judgments	1
Require of documents	1

UKRAINE

***Received** requests:*	
Type of request	**Received**
Service of documents and examination	12
Recognition of judgments	4
Require of documents	12
***Sent** requests:*	
Type of request	**Sent**
Service of documents and examination	43
Recognition of judgments	4
Require of documents	3

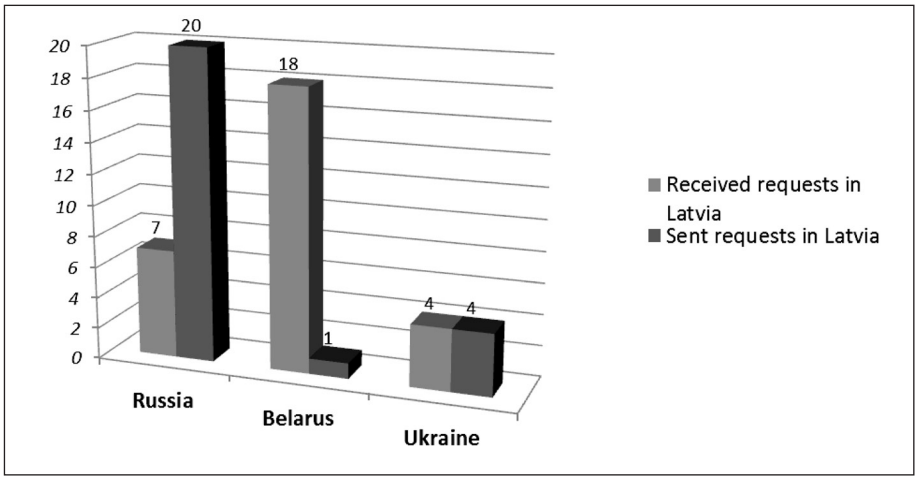
MOLDOVA

***Received** requests:*	
Type of request	**Received**
Service of documents and examination	
Recognition of judgments	
Require of documents	
***Sent** requests:*	
Type of request	**Sent**
Service of documents and examination	20
Recognition of judgments	
Require of documents	

[24] The information provided by the Division of Court's Cooperation of the Department of Judicial Cooperation of the Ministry of Justice.

Annex No. 2

The amount of sent and received legal assistance requests for the recognition and enforcement of foreign judgments in civil matters in 2011



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QUALITY OF LEGISLATION FOLLOWING A TRANSITION FROM REALLY EXISTING SOCIALISM TO CAPITALISM: A CASE STUDY OF GENERAL CLAUSES IN POLISH PRIVATE LAW*

Keywords: quality of legislation, private law, Polish law, general clauses, principles of social intercourse, Socialist Legal Tradition, legal survivals.

Abbreviations

BGB *see* German Civil Code
Dz.U. *Dziennik Ustaw Rzeczypospolitej Polskiej* (until 1952 and after 1990) or *Dziennik Ustaw Polskiej Rzeczypospolitej Ludowej* (1952-1989) [official journal where acts and regulations are published]
k.c. *see* Civil Code 1964
k.r.o. *see* Family Code 1964
k.z. *see* Code of Obligations 1933
SN Sąd Najwyższy [Polish Supreme Court]

Introduction

The metaphor 'quality of legislation', taken from the sphere of goods and services, has recently become a fashionable buzzword[1]. Within the source domain of this metaphor, goods and services are of good 'quality', if they are 'fit for purpose'[2]. Within the target domain, one can also say that legislation is of good quality if it is fit for its purpose, i.e. if it is functional with regard to the goals set in the political process[3]. This, of course, requires to separate the quality of legislation discourse from the political debate regarding the underlying socio-economic choices[4], just like the fitness of goods

* The views presented in this paper are exlusively those of the author and should not be attributed to the European Union or any of its institutions.

1 Voermans W. Concern About the Quality of EU Legislation: What Kind of Problem, by What Kind of Means? Erasmus Law Review. 2009. Volume 2, issue 1, pp. 59-95, at p. 64.

2 This classical rule is enshrined, e.g. in article 2(2)(b)-(c) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, p. 12).

3 Cfr. Voermans, op. cit., p. 63.

4 A different approach, in which (neoliberal) political choices are built into the notion of quality of legislaiton(or, perhaps, disguised by that notion), is represented e.g. in the documents of the Organization for Economic Co-Operation and Development (OECD). Cfr. Voermans, op. cit., p. 67.

for purpose should not be confounded with the choice of purpose itself[5]. Hence, quality of legislation is not about the (politically pre-defined) aims (purposes) but about the legislative means to achieve them (fitness for purpose). Understood in this way, quality of legislation encompasses both the form of legislative acts (their drafting quality) and their substance (normative content). Owing to the obvious fact that 'law is language'[6], those two aspects of legislative quality are interwoven to a degree making them inseparable in practice: even the best normative content will not work in practice if it is expressed in ambigous, unclear and incoherent terms; however, even the most clear, intelligible and logically coherent linguistic form will not improve the normative quality of a flawed legislative mechanism. In order, therefore, to evaluate the quality of a given piece of legislation, it is necessary, first and foremost, to identify its goals. In general, legislative acts can be said to fulfil two types of tasks: instrumental or regulatory (directed towards the socio-economic and political reality, aiming to preserve or change the existing relationships[7]) and ideological (directed towards the sphere of social consciousness)[8].

This paper will analyse the quality of the system of general clauses[9] in Polish private law[10] following a radical socio-economic transformation from Really Existing Socialism to capitalism which occurred at the turn of the 1980s and 1990s. Such a transition always poses a serious callenge to the quality of legislation. As a rule, the legislation inherited from the previous formation had been drafted in order to pursue the goals typical of the ancien régime. This is especially true if the enactment of new legislation is postponed, as it happened in Poland, where the socialist Civil Code of

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5 A sports car is fit for the purpose of driving fast but is not fit for the purpose of driving economically: the choice between conflicting values (irresponsble 'driving pleasure' vs. environmental awareness) is something fundamentally different from the fitness of a particular car for one of those purposes.

6 Vespaziani A. Towards a Hermeneutical Approach to Legal Metaphor. In: Bustamante T., Onazi O. (eds.). Human Rights, Language and Law. Stuttgart: Franz Steiner, 2012, p. 82.

7 This task corresponds to the socio-economic function of legal institutions as defined and analysed by Renner K. The Institutions of Private Law and Their Social Functions. Transl. by Schwarschild A. London-Boston: Routledge & Kegan Paul, 1949, repr. 1976, p. 55ff.

8 This dichotomy is based on Althusser's notion of repressive and ideological state apparatuses; he treats the legal apparatus as fulfilling a double function – repressive and ideological. See Althusser L. Ideology and the Ideological State Apparatuses: Notes Towards and Investigation [1970]. Now in: Althusser L. Lenin and Philosophy and Other Essays. Translated by Brewster B. Delhi: Aakar Books, 2006 p. 96 n. 9. Cfr. Balbus I.D. Commodity Form and Legal Form: An Essay on the Relative Autonomy of the Law. Law and Society Review, 1977. Available: http://www.fd.unl.pt/docentes_docs/ma/ACS_MA_6035.pdf [viewed 1 July 2012], p. 575ff.

9 On the the notion of a general clause See, e.g.: Jauffret-Spinosi, C. Théorie et pratique de la clause générale en droit français et dans les autres systèmes juridiques romanistes. In: Grundmann S., Mazeaud, D. (eds). General Clauses and Standards in European Contract Law, The Hague: Kluwer, p. 23ff.

10 The notion of 'private law' is used here to designate the body of law governing such issues as property, contract, tort, restitution, succession, family relationships and so forth, regardless of whether that body of law furthers the public or private interest. It should be remarked that the term 'private law' was conciously avoided during Really Existing Socialism exactly in order to escape the heavily criticised opposition of public vs. private law, and the term 'civil law' was used instead. However, in English the latter term is usually used to contrast the Anglo-American legal family (common law) and the continental one (civil law) and therefore, in order to avoid confusion, it will not be used here. Cfr. a similar terminological choice (with regard to Soviet private law) made by Gsovski V. Soviet Civil Law. Ann Arbor: University of Michigan Law School, 1948, Vol. I, p. 3.

1964 was not abrogated immediately but rather amended in order to adapt it to the new socio-economic system[11]. Despite numerous amendments regarding specific rules of the Code, the socialist general clause of 'principles of social intercourse' has not, as yet, been removed. However, to complicate matters further, the legislature has, in the meantime, been adding new, parallel general clauses, such as 'equity', 'good morals' and 'reasonableness'. This has led to the creation of an incoherent pluralism of general clauses which constitutes a perplexing patchwork for scholars and judges.

Aims and Methodology

The aims of the present paper are threefold. First of all, to show that the current system of general clauses in Polish private law is incoherent both on the regulatory and ideological level. Secondly, to indicate that this incoherence has lead to a domination of judicial and scholarly indifference towards the linguistic form of general clauses. This indifference (or immunity) is a form of adaptation of the agents of legal culture towards the poor quality of existing legislative acts, in particular the Civil Code. Thirdly, this paper argues that such an immunity towards the divergence of general clauses (treated as interchangeable) can create a risk of undermining a uniform interpretation and application of the future European Civil Code which, quite probably, will contain different general clauses intended by its drafters to denote different standards and methodologies of judicial application.

The methodology deployed in order to achieve the goals of the paper is based primarily on a content analysis of the texts produced by the three principal practices of legal culture – legislation, adjudication and scholarship[12]. The main legislative sources that will be analysed include the Polish codes of private law, as well as certain other legal acts. As regards judicial decisions, the analysis will focus on reported cases of the Polish Supreme Court[13] in which that judicial body dealt with general clauses present in the codes of private law. Apart from legal acts currently in force, the paper will also draw upon the existing drafts – of Book One of the Polish Civil Code and the Draft Common Frame of Reference, i.e. the draft European Civil Code[14].

For the purposes of evaluating the ideological function of general clauses, the latter will be treated as linguistic expressions of underlying conceptual metaphors[15]. On the methodological plane, this will entail a tentantive application of elements of a

[11] See, e.g.: Kempter D. Der Einfluss des europäischen Rechts auf das polnische Zivilgesetzbuch. Badan-Baden: Nomos, 2007, pp. 53-72.

[12] On legal culture and its practices cfr e.g. Mańko R. The Unification of Private Law in Europe from the Perspective of Polish Legal Culture. Yearbook of Polish European Studies. 2007-2008, Vol. 11, p. 112-113 with further references. Also available at SSRN: http://ssrn.com/abstract=2062451 [viewed 16 July 2012].

[13] Sąd Najwyższy, hereinafter referred to as 'Supreme Court' or 'SN'.

[14] References are given below.

[15] See, e.g.: Pasa B. Old Terms for New Concepts in Consumer Contracts? Jean Monnet Working Paper No. 9/07. Available: http://centers.law.nyu.edu/jeanmonnet/papers/07/070901.pdf [viewed 1 July 2012], p. 13.

cognitive approach to legal analysis[16]. However, due to obvious constraints on the scope of the present paper, this aspect, which certainly merits an in-depth analysis, will only be touched upon.

General Clauses under Really Existing Socialism

Until 1950, Polish private-law legislation[17] contained general clauses typical of the Romano-Germanic legal family, such as 'good faith'[18], 'good morals'[19], 'considerations of equity'[20], 'usages of fair dealing'[21] and 'public order'[22]. Those traditional general clauses were succeded by a general clause of Soviet origin[23] – the 'principles of social intercourse', a notion devised by Lenin[24]. According to the Bolshevik leader, such principles were supposed to displace legal rules after the withering away of the state following transition from socialism to communism[25]. From the 1930s onwards, Lenin's concept found its embodiment in Soviet legal acts[26]. Within Polish law, the principles of social intercourse first appeared in the General Provisions of Civil Law 1950 – a statute containing the new general part of Polish private law[27]. The introduction of principles of social intercourse signalled a move from a pluralist towards a monist

[16] On the conceptual metaphor theory in general see especially Lacoff G., Johnson M. Metaphors We Live By. Chicago-London: University of Chicago Press, 2003 [originally published 1980]; Kövecses Z. Metaphor: A Practical Introduction. 2nd ed., Oxford: Oxford University Press, 2010. For a recent application within the legal domain See, e.g.: Larsson S. Metaphors and Norms: Understanding Copyright in a Digital Society. Lund: Lund University, 2011.

[17] In particular the Code of Obligations (rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań, Dz.U. No. 82 item 598). Available: http://isap. sejm. gov.pl/DetailsServlet?id=WDU19330820598 [viewed 1 July 2012] (hereinafter: 'k.z.').

[18] See, e.g.: at. 107, 135, 189 and 269 k.z.

[19] See, e.g.: art. 55 and art. 56 § 2 k.z.

[20] See, e.g.: art. 60, 143 and 149 k.z.

[21] See, e.g.: art. 107 and 189 k.z.

[22] See, e.g.: art. 55 and 56 § 2 k.z.

[23] Stawarska-Rippel A. O klauzulach generalnych w pierwszych latach Polski Ludowej słów kilka [A Few Words on the General Clauses in the First Years of People's Poland]. Miscellanea Iuridica, 2005, Vol. 6, p. 125.

[24] Ibid.

[25] Lenin V. I. The State and Revolution. Translated by Service R. London: Penguin, 1992 [original published in 1918], p. 74, 80, 86-87.

[26] Including the 1936 Constitution of the USSR. Available: http://www.departments.bucknell.edu/russian/const/1936toc.html [viewed 28 May 2012]; a draft Soviet Civil Code (never promulgated) – cfr. Ajani G. Le fonti non scritte nel diritto dei paesi socialisti. Milano: Giuffrè, 1985, p. 81 n. 17; and the revamped private law legislation of the 1960s (see especially Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics. Approved by the Supreme Soviet of the U.S.S.R., December 8, 1961. In: Soviet Legislation and Procedure: Official Texts and Commentaries. Transl. Yuri Sdobnikov. [no date of publication], p. 55ff – art. 5: "In exercising their rights and performing their duties, citizens and organisations must observe the laws, and respect the rules of socialist community life and the ethical principles of the society building communism."

[27] Ustawa z dnia 18 lipca 1950 r. – Przepisy ogólne prawa cywilnego (Dz.U. No. 34, item 311). Available: http://isap. sejm.gov.pl/DetailsServlet?id=WDU19500340311 [viewed 1 July 2012]. Here, the principles of social intercourse fulfilled much more functions than its Soviet model: they became a standard for the evaluation of abuse of rights (art. 3), a standard for the evaluation of validity of legal acts (art. 410, a source of implied terms in legal acts (art. 82) and a benchmark for the interpretation of the will of the parties (art. 47).

system of general clauses[28] and had a strong ideological meaning – it drew a clear line distinguishing the new socialist legal system from the capitalist past[29].

When the socialist Civil Code was finally enacted in 1964[30], all hitherto formally existing general clauses (good faith, good morals, equity etc.) disappeared completely, and their place was taken exclusively by the principles of social intercourse (appearing in the Civil Code 26 times)[31] and, to a lesser extent, by the notion of a 'socio-economic purpose'[32]. Most notably, within the Civil Code the principles of social intercourse became a standard limiting the exercise of private rights[33], their violation resulted in the invalidity of a legal act[34], they served as a guideline for the interpretation of declarations of will[35], became a source of implied terms in legal acts[36], limited the content of the right of ownership[37] and became a standard for the performance of obligations[38]. The general clause 'principles of social intercourse' but also in the Constitution (1952)[39], in the Family Code (1964)[40], in the Labour Code (1974)[41],

[28] Cfr. Ajani, op. cit., p. 82.

[29] Stawarska-Rippel, op. cit., p. 129.

[30] Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 – Civil Code] (Dz.U. No. 16 item 93). Available: http://isap. sejm.gov.pl/DetailsServlet?id=WDU19640160093 [viewed 1 July 2012] (hereinafter: 'k.c.').

[31] Ajani, op. cit., p. 96.

[32] This general clause originated in the Russian Civil Code of 1922. However, unlike the distinctly Leninist 'principles of social intercourse', it can be said to have been inspired by Western legal thought (see L. Rabinowitsch, cited in Ajani, op. cit., p. 76 n. 8; Ioffe O.S. Soviet Civil Law. 1988. Dordrecht-Boston-Lancaster: Martinus Nijhoff, p. 56; Gsovski, op. cit., p. 317-318). The notion was received in Polish law in 1946 ('social purpose' as a limit on the exercise of private rights under art. 5 § 1 the General Provisions of Civil Law [dekret z dnia 12 listopada 1946 r. – Przepisy ogólne prawa cywilnego (decree of 12 November 1946 – General Provisions of Civil Law, Dz.U. No. 67, item 369). Available: http://isap. sejm.gov.pl/DetailsServlet?id=WDU19460670369 [viewed 17 July 2012] enacted that year), disappeared in 1950, and resurfaced again in the Civil Code of 1964 (limit of the exercise of private rights under art. 5 k.c., limit of the scope of property under art. 140 and 143 k.c., limit on the exerice of right of ownership of an immovable under art. 144 k.c.). In the analysis of socialist general clauses the present paper shall be limited to the 'principles of social intercourse'.

[33] Art. 5 k.c.

[34] Art. 58 § k.c.

[35] Art. 65 § 1 k.c.

[36] Art. 56 k.c.

[37] Art. 140 k.c.

[38] Art. 354 § 1 k.c.

[39] Konstytucja Polskiej Rzeczypospolitej Ludowej of 22.7.1952. Available: http://www.trybunal.gov.pl/wszechnica/akty/konstytucja_prl.htm [viewed 30 May 2012] Article 76 stated: 'A citizen of the Polish People's Republic is obliged to comply with the provisions of the Constitution and statutes, as well as the socialist labour discipline, respect the principles of social intercourse, duly fulfil duties towards the state.' This article remained in force until 1997.

[40] Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy [Act of 25 February 1964 – Family and Guardianship Code] (Dz.U. No. 9 item 59) Available: http://isap. sejm.gov.pl/DetailsServlet?id=WDU19640090059 [viewed 1 July 2012] (hereinafter: 'k.r.o.'). See art. 56 § 2 (limit upon right to divorce), art. 144 (basis of alimony claim), art. 179 § 2 (no compensation for curator if her functions corresponded to a duty existing under the principles of social intercourse).

[41] Ustawa z dnia 26 czerwca 1974 r. – Kodeks pracy [Act of 26 June 1974 – Labour Code] (Dz.U. No. 24 item 141). Available: http://isap. sejm.gov.pl/DetailsServlet?id=WDU19740240141 [viewed 1 July 2012], (hereinafter: 'k.p.'). The preamble to the Code stated that labour law is 'consistent with the principles (...) of social intercourse in a people's state' (para. 2) and the Code itself 'is favourable

the Code of Civil Procedure (1964)[42] as well as codes of public law: the Code of Criminal Procedure (1969)[43], the Code of Petty Offences (1971)[44] and even telecommunications law[45].

The case-law on the principles of social intercourse can be roughly divided into two periods. During the first period, encompassing especially in the 1950s, the principles were treated as a question of law, and not only fact, they were applied contra legem[46] and treated as the basis for a parallell (alternative[47]) normative system, comparable to Roman ius honorarium or English equity. This body of judge-made law was intended to bring Polish private law into line with the socio-economic developments of state socialism. New rules were created especially in property law[48], contract

towards (...) the shaping of principles of socialist intercourse in the enterprise' (para. 6). The Labour Code contained a prohibition of abuse of rights modelled on the Civil Code and thus containing both the 'socio-economic purpose' of a right and the "priciples of social intercourse" (art. 8). Enterprises were under a duty to propagate the principles of social intercourse within the enterprise (art 94 and 95) and workers were under a duty to respect them (art. 100 § 1(7)). The principles appeared also in detailed rules regarding appeals against dismissals (art. 62) and ADR (art. 260).

42 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure] (Dz.U. No. 43 item 296) Available: http://isap. sejm.gov.pl/DetailsServlet?id=WDU19640430296 [viewed 1 July 2012] (hereinafter: 'k.p. c.'). Here the principles appeared as a limit to the content of a dispute settlement (art. 184 sentence 2 k.p. c.), a limit to the withdrawal of an action, a renunciation or withdrawal of a claim (art. 203 § 4 k.p. c.), a limit upon the granting of exequatur to an arbitration award (art. 711 § 3 sentence 2 k.p. c.), a plea in law that could be raised against such an award (art. 712 § 1(4) k.p. c.) and which should be taken into account ex officio by a court hearing an appeal from an arbitration court (art. 714 k.p. c.).

43 Ustawa z dnia 19 kwietnia 1969 r. – Kodeks postępowania karnego [Act of 19 April 1969 – Code of Criminal Procedure] (Dz.U. No. 13 item 96). Available: http://isap. sejm.gov.pl/DetailsServlet?id=WDU19690130096 [viewed 1 July 2012]. This code stated that one of the purposes of criminal proceedings is to 'strengthen respect for (....) the principles of social intercourse' (Art. 2. § 1(3) in fine). A prosecutor or court terminating proceedings due to a lack of a criminal act, could, nonetheless if the non-criminal act 'violated (...) the principles of social intercourse' refer the case to a competent body (art. 12).

44 Ustawa z dnia 20 maja 1971 r. Kodeks wykroczeń [Act of 20 May 1971 – Code of Petty Offences] (Dz.U. No. 12 item 114). Available: http://isap. sejm.gov.pl/DetailsServlet?id=WDU19710120114 [viewed 1 July 2012]. See art. 36, 40 and 41.

45 Rozporządzenie Ministra Łączności z dnia 23 czerwca 1986 r. w sprawie ordynacji telekomunikacyjnej [regulation of the Minister of Telecommunications of 23 June 1986 regarding the Telecommunications Ordinance] (Dz. U. Nr 27, poz. 135). Available: http://isap. sejm.gov.pl/DetailsServlet?id=WDU19860270135 [viewed 1 July 2012]. According to § 8(2): 'A telecommunications service may not be executed if the content of the communicated information violates the law, public order or the principles of social intercourse.' The constitutionality of this provision was analysed by the Constitutional Court but before a judgment could be pronounced the rule was abrogated on 29.9.1988 (see order of the Constituitonal Court of 16.7.1988 in Case U 11/88).

46 Ajani, op. cit., p. 82. Stawarska-Rippel, op. cit., p. 126-127, 129.

47 Cfr., for a similar view on the operation of general clauses in Western European legal systems: Hesselink M. Good Faith. In: Towards a European Civil Code. 4th ed., The Hague: Kluwer 2010, p. 642-644. It should be added that in the case of freshly established states of Really Existing Socialism, as Poland, the difference between the 'old law' and 'socialist equity' was not merely formal (enacted code vs. judge-made law based on general clause) or quantitative (more autonomy vs. more solidarity) but rather substantive and qualitative (capitalist law vs. socialist law).

48 Thus, for example, in 1951 the Supreme Court ruled that an owner's action for repossession (rei vindicatio) brough by an informal seller of land against the informal buyer (Polish law required, and still does, a notarial deed to transfer ownership in land; an informal sale contract was,

law[49] and tort law[50], as well as the law of succession[51]. Scholars and judges started working on cataloguing the principles of social intercourse with view of systematising an emerging body of judge-made law[52]. Courts proclaimed specific (individual) principles of social intercourse and even indicated the date of entry into force of a specific principle which could either be prospective or retrospective, depending on whether the court registered an existing social view (retrospective) or acted as an educator of society (prospective)[53].

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and is, incapable of transferring title and technically it does not alter anything in the property relationships) should be examined in the light of the principles of social intercourse and the trial judge must consider, inter alia, such factors as the class membership of the parties (SN decision of 11 December 1951, Case: C 1573/51, LEX No. 207385). In a 1954 decision the Supreme Court established a general presumption according to which a rei vindicatio brought by the formal owner against a long-term possessor violates the principles of social intercourse; such a presumption had to be refuted by the owner, otherwise the claim was dismissed (SN decision of 18 June 1954, Case: I CZ 730/54, LEX No. 118473). This line of case-law began to be reversed only beginning with the 1960s (SN decisions of 11 September 1961, Case: I CR 693/61, LEX No. 105707 and 10 September 1964, Case: III CO 45/64, LEX No. 236). In 1952 the Supreme Court held that a rei vindicatio brought by a private owner against a socialised entity (e.g. a socialised farm) may not succeed if it would threat the fulfilment of the economic plan by the socialised farm (SN decision of 16 October 1952, Case: C 1940/52, LEX No. 292939).

[49] If the landlord was a private party and the tenant a state-owned enterprise, the landlord's right of termination of the lease agreement was limited on the basis of the principles of social intercourse – e.g. in a case decided in 1949, the Supreme Court did not allow a private landlord to end a lease agreement with a state pharmacy in a village where there was no other premises to set up a pharmacy and the local populace would suffer the lack of this facility (SN decision of 7 December 1949, Case: C 1675/49, LEX No. 159802) (technically this case was decided on the basis of the the rule on abuse of right in force between 1946 and 1950 which referred to the 'social purpose' and 'good faith' but not yet to the 'principles of social intercourse'). A commodant could not evict the commodatary from an apartment held by the latter under a contract of commodate (gratuitous lease) if the commodant would gain an excessive living space (SN decision of 15 October 1951, Case: I C 1288/53, LEX No. 196533). The Supreme Court also ruled that a private person may not demand from a unit of socialised economy a rent which would be significantly higher than rent payable to another unit of socialised economy (SN decision of 9 January 1952, Case: C 1270/51, LEX No. 195574). Other areas of contract law where the principles of social intercourse brought about judicial lawmaking was the prohibition of unpaid labour (including unpaid internships and volunteership) (SN decision of 7 November 1950, Case: C 162/50, LEX No. 117060) or the ruling that that citizens may not treat a state-owned enterprise as something completely alien to themselves, hence they may not rely on the fact that the termination of their labour contract was formally vitiated in order to question the validity of the termination of the labour contract (decision of the Polish Supreme Court of 23 September 1958, Case: IV CO 18/58, LEX No. 168954).

[50] The Supreme Court ruled that a claim for monetary compensation for a wrongful death is contrary to the principles of social intercourse (SN decision of 21 April 1951, Case: C 25/51, LEX No. 160157), unless the moral wrong entails also a patrimonial loss (SN decision of 15 December 1951, Case: C 15/51, LEX No. 117056).

[51] The Supreme Court ruled, for instance, that the party entitled to a legitim (pars legitima) may not demand the immediate payment of the legitim if the creditor is in a good financial situation, whereas the debtor would become financially ruined if he satisfied the claim (decision of the Polish Supreme Court of 11 November 1954, Case: I CR 1573/54, LEX No. 118049).

[52] Thus taking an inductive approach towards the general, similar to the approach of the German and Dutch doctrine towards Treu und Glauben and redelijkheid en billijkheid respectively – cfr. Hesselink M. Good Faith. In: Towards a European Civil Code. 4th ed., The Hague: Kluwer 2010, p. 624.

[53] See, e.g.: SN decision of 13 December 1952 SN 1952.12.13, Case: C 1208/52, LEX No. 117610.

In later case-law, roughly from the 1960s onwards, the principles of social intercourse were treated as a question of fact, rather than a question of law. They lost their function of a superior legal rule, capable of derogating from the black-letter rules of the Code. As a consequence, scholars and judges abandoned the idea of proclaiming and cataloguing individual principles of social intercourse[54]. This shift in attitude was not something extraordinary: when the statutory law, especially the Codes, were recodified to take stock of the revolutionary socio-economic changes, the adaptive function of general clauses was no longer necessary[55].

General Clauses After the Restoration of Capitalism

After 1990, the principles of social intercourse met with criticism of legal scholars, may of whom urged that they be abrogated on account of their Soviet/state-socialist origins[56], the fact that they are uknown in Western Europe[57], their alleged vagueness[58] and the fact that they suggest that there exists an extra-legal system of norms to which

[54] Thus, in 1967 the Supreme Court ruled (decision of 28 November 1967, Case: I PR 415/67, LEX No. 4615) that the principles of social intercourse 'can serve as the basis for correcting the evaluation of an atypical case, but they do not serve the purpose of generalisations in typical situations'. In 1970 the Committee of Legal Sciences of the Polish Academy of Sciences – an authoritative body of the Polish legal academia – officially endorsed the view that the the principles of social intercourse have a 'complex' character, and should be applied on a case-by-case basis rather than used to proclaim new legal principles as it used to be done in the 1950s. The academics' view was, in turn, officially endorsed in a Supreme Court resolution (of 17 January 1974, Case: III PZP 34/73, LEX No. 15390) where it found that the principles 'may form the basis for correcting the evaluation of a concrete case which does not submit itself to an abstract legal regulation' but may not be the source of judge-made law: otherwise the court would 'enter[s] into the scope of legislation.' The Supreme Court explicitly departed from its own case-law of the 1950s on the need for cataloguing the principles of social intercourse.

[55] Cfr. Ajani, op. cit., p. 165.

[56] See, e.g.: Safjan M. Klauzule generalne w kodeksie cywilnym (przyczynek do dyskusji) [General Clauses in the Civil Code (A Starting Point of Discussion). Państwo i Prawo, 1990, No. 11, p. 56; Justyński T. Nadużycie prawa w polskim prawie cywilnym [Abuse of Right in Polish Civil Law]. Kraków: Zakamycze, 2000, p. 112-113; Konopacka M., Dobra wiara w prawie umów [Good Faith in Contract Law]. In: Polskie prawo prywatne w dobie przemian. Księga jubileuszowa dedykowana Profesorowi Jerzemu Młynarczykowi, Gdańsk 2005 p. 66-67; Pilich M. Zasady współżycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej [Principles of Social Intercourse, Good Morals or Good Faith? Dillemas of Amending the General Clauses of Civil Law in a European Perspective]. In: Pazdan M. et al. (eds). Europeizacja prawa prywatnego. Warszawa, 2008, Vol. II, p. 169.

[57] See, e.g.: Radwański Z., Zieliński M. Uwagi de lege ferenda o klauzulach generalnych w prawie prywatnym' [De Lege Ferenda Remarks on General Clauses in Private Law]. Przegląd Legislacyjny, 2001, No. 2, p. 20; Pietrzykowski K. In: Pietrzykowski K. (ed.).Kodeks cywilny. Komentarz do artykułów 1-44911. Tom I [Civil Code: Commentary to Articles 1 to 44911. Volume I]. 5th ed., Warszawa: C.H. Beck, 2008, p. 67.

[58] See, e.g.: Rudnicki S. In: Rudnicki S., Dmowski S. Komentarz do kodeksu cywilnego. Księga pierwsza. Częśc ogólna [Commentary to the Civil Code: Book One. General Part] 7th ed., Warszaswa: 2007, p. 249-250.

they refer[59]. Only a small minority of scholars writing on the subject argued for the retaining of the principles[60].

The approach of the legislature towards the principles of social intercourse can be described as piecemeal, inconsequent and erratic. First of all, the legislature has not deleted the principles of social intercourse from any of the rules where they were placed under Really Existing Socialism. Secondly, even new legislative enactments, both within private[61] and public[62] law, have been refering to the principles of social intercourse. Thirdly other legislative enactments which otherwise would mention the principles of social intercourse, contain, instead of them, traditional general clauses

[59] Pilich M., Zasady współżycia..., op. cit., p. 170.

[60] See, e.g.: Janiszewska B. O potrzebie zmiany klauzuli zasad współżycia społecznego (głos w dyskusji)' [On the Need to Chage the Clause of the Principles of Social Coexistence (Voice in Discussion)]. Przegląd Ustawodawstwa Gospodarczego, 2003 Vol. 61, No. 4, p. 7ff; Janiszewska B. Pojęcie dobrej wiary w rozumieniu obiektywnym a zasady współżycia społecznego [The Concept of Good Faith in the Objective Sense and the Principles of Social Coexistence]. Przegląd Ustawodawstwa Gospodarczego, 2003 Vol. 61, No. 9, p. 2ff; Osajda K. In: Izdebski H., Stępkowski A. (eds). Nadużycie prawa. Konferencja Wydziału Prawa i Administracji. 1 marca 2002 roku [Abuse of Right: Conference of the Faculty of Law and Administration, 1 March 2002]. Warszawa: Liber, 2003; Osajda K. Głos w obronie klauzuli zasad współżycia społecznego (głos w dyskusji) [A Voice in Defence of the Clause of the Principles of Social Coexistence (A Voice in the Discussion)]. In: Pazdan M. et al (eds), Europeizacja prawa prywatnego [The Europeanisation of Private Law]. Warszawa: Wolters Kluwer, 2008, Vol. II. The main arguments raised rested upon the fact that they have changed their meaning, that the term 'principles of social intercourse' is semantically widest, that it is endowed with an intuitive meaning and characterised by a larger degree of open-endedness. Other arguments pointed to the society-focused character of that general clause and to the risk of the potential discontinuity in the case-law and reversal of legal development in case of the abrogation of the principles.

[61] See, e.g.: the rule on the freedom of contract (Art. 3531 k.c. introduced in 1990), the rule on rebus sic stantibus (art. 3571 k.c. introduced in 1990), the rule on separation of marriage (art. 611 § 2 k.r.o. introduced in 1999); the rule limiting the right to demand alimony (art. 1441 k.r.o. introduced in 2008), the preventing a guardian from claiming remuneration (art. 162 § 2 k.r.o. as amended in 2008); the rule on worker liability (art. 1212 § 2 k.p.).

[62] See, e.g.: the new Code of Criminal Procedure (ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego, Dz.U. No. 89 item 555) which still provides that criminal proceedings have the aim of strengthening respect for the principles of social intercourse (art. 2 § 1(2)) and if proceedings are terminated for want of criminality, a court or prosecutor may refer the case to a competent body if there is a violation of the principles of social intercourse (but no violation of criminal law) (art. 18 § 2).

(good morals[63], equity[64]) or reasonableness[65] – a new general clause, transplanted from the common law[66] via European private law[67]. This has lead to a legislative mosaic where socialist general clauses coexist with reintroduced traditional clauses as well as with new general clauses of foreign origin, hitherto unknown in Polish legal acts.

Patchwork System of General Clauses and Their Instrumental Function

The currently existing system of general clauses – with two socialist ones ('principles of social intercourse', 'socio-economic purpose'), two traditional ones ('good morals', 'equity') and one common law general clause ('reasonableness') – can be aptly described as a patchwork. This is not only because the general clauses have a different origin (Soviet law, Franco-Germanic legal family, common law) but above all because the same functions within the Code are sometimes fulfilled by one, sometimes by another general clause. For example, abuse of right, immorality of a legal transaction and limits to the freedom of contract are defined by resorting to the principles of social intercourse, whereas unfair competition, unfair terms and culpa in contrahendo – by resorting to good morals. Similarily, non-fault tortious liability is defined either on the

[63] See, e.g.: art. 3 of the Unfair Competition Act (ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji, Dz.U. 47, 211) (definition of an act of unfair competition); art. 705 k.c. according to which a violation of good morals by a tenderer is a ground for the anullment of the contract; art. 72 § 2 k.c. which bases pre-contractual liability on a violation of good morals; art. 3851 k.c. where a violation of good morals is part of the definition of an unfair contractual terms. Incidentally it should be remarked that in other legal systems it is rather good faith and not good morals which are the basis of pre-contractual liability or the definition of an unfair contractual term. On good faith as a basis of culpa in contrahendo in German case-law See, e.g.: e.g. Kessler F., Fine E. Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study. Harvard Law Review, Vol. 77, No. 3, 1964. Available: http://digitalcommons.law.yale.edu/fss_papers/2724 [visited: June 28, 2012], p. 403-404; Cordeiro M. La bonne foi à la fin du vignitième siècle. Revue de droit de l'Université de Sherbrooke. Volume 26: 1996, p. 227; Pilich M. Dobra wiara w konwencji o umowach międzynarodowej sprzedaży towarów [Good Faith in the Convention of International Sales of Goods]. Warszawa: C.H. Beck, 2006, p. 59-62. Good faith, and not good morals, are to be found in the statutory defintions of unfair terms in EU law (art. 3 of the Unfair Terms Directive), German law (§ 307 BGB) and English law (Regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations) and it was on the basis of good faith that judge-made standard term control was established e.g. in Germany, the Netherlands and Greece (Hesselink, op. cit., p. 629).

[64] See art. 4172 k.c. on compensation for damage caused by lawful government action; art. 7612 k.c. on division of commission between previous and current commercial agent; art. 614 § 2 k.r.o. on duty of alimony between separated spouses.

[65] See art. 95 § 4 k.r.o. (amended in 2008) and art. 1131 k.ro. (added in 2008) which use the concept of 'reasonable wishes' of a child. The Draft Civil Code (Book One) makes much wider use of 'reasonableness' as a general clause (see below).

[66] On 'reasonableness' as a functional equivalent of general clause in the English legal system See, e.g.: Whittaker S.Theory and Practice of the 'General Clause' in English Law: General Norms and the Structuring of Judicial Discretion. In: Grundmann S., Mazeaud D. (eds). General Clauses and Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification. The Hague: Kluwer, 2006, p. 70-76. Cfr. Mańko R. Zasady umów długoterminowych. Wprowadzenie i komentarz [Principles of Long Term Contracts: Introduction and Commentary]. Kwartalnik Prawa Prywatnego, 2006, Vol. 15, No. 2, p. 543.

[67] See, e.g.: Art. I.-1:104 DCFR; the notion of reasonableness appeares almost 500 times in the DCFR.

basis of principles of social intercourse [68] or on the basis of equity[69]. Inconsequences are visible also in family law where the Code resorts sometimes to principles of social intercourse and in other cases to equity without following any clear logic[70].

Such a legislative practice runs contrary to the officially declared and accepted principle of good legislation in Poland, according to which:

> 'Identical concepts shall be denoted by resorting to identical terms, whilst different concepts shall not be denoted by identical terms.'[71]

This rule, enshrined in the officially binding Principles of Law-Making Technique (2002), is understood as covering not only a single legislative act (e.g. the Civil Code) but also all legislation in a given field[72] (e.g. all private law legislation). If this rule of good legislative practice – which constitutes a reflection of a communis opinio of Polish legal doctrine[73] – were taken seriously, the 'principles of social intercourse' on the one hand and 'equity, 'good morals' and 'reasonableness', on the other hand, should be understood as terms denoting different concepts. Hence, courts should apply a different standard when controlling whether, on the one hand, a private right was not abused, a legal transaction is not immoral or the limits on the freedom of contract were not exceeded (standard of 'principles of social intercourse'), and, on the hand, a different standard when controlling whether a term in a consumer contract is not unfair, whether a party to negotiations should be subject to precontractual liability or whether a given economic behaviour constitutes an act of unfair competition (standard of 'good morals'). It would not be unreasonable for Polish courts and scholars to develop a certain hierarchy of the several general clauses and to establish

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[68] Liability of a tortfeasor who is incapable of fault (art. 428 k.c.) on account of her age, mental state or physical state; the liability of such a tortfeasor may be triggered if there are no other persons liabile on the basis of the culpa in custodiendo doctrine and such a liability is justifed inter alia by the principles of social intercourse. The principles of social intercourse are also a basis for liability for animals if the holder of the animal is not at fault (art. 431 § 2 k.c.).

[69] Liability of the state damage caused by lawful governmental action (art. 4172 k.c.).

[70] Thus the claim of a child versus her parent;s spouse who is not the child's parent (art. 144 k.r.o.) is based on the 'principles of social intercourse' but the durt of 'mutual support' between separated spouses is based on 'considerations of equity' (art. 614 § 3 k.r.o.).

[71] § 9 of the Zasady techniki prawodawczej [Principles of Law-Making Technique] enacted by rozporządzenie Prezesa Rady Ministrów z dnia 20 czerwca 2002 r. w sprawie "Zasad techniki prawodawczej" [Regulation of the President of the Council of Ministers of 20 June 2002 regarding the 'Principles of Law-Making Technique'] (Dz.U. No. 100, item 908). Available: http://isap. sejm.gov.pl/DetailsServlet?id=WDU20021000908 [viewed 1 July 2012].

[72] Wronkowska S., Zieliński M. Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r. [A Commentary on the Principles of Law-Making Technique of 20 June 2002]. Warszawa: Wydawnictwo Sejmowe, 2004, p. 48.

[73] See, e.g.: Morawski L. Wstęp do prawoznawstwa [An Introduction to Jurisprudence]. 3rd ed. Toruń: TNOiK, 1998, p. 173; Lewandowski S. Logika w wykładni prawa i wnioskowania prawnicze [Logic in Legal Interpretation and Types of Legal Reasoning]. In: Malinowski A. Logika dla prawników [Logic for Lawyers]. Warszawa: LexisNexis 2002, p. 262-263; Stawecki T., Winczorek P. Wstęp do prawnoznawstwa [An Introduction to Jurisprudence]. 4th ed., Warszawa: C.H. Beck, 2003, p. 176; Ziembiński Z. Logika praktyczna [Practical Logic] 26th ed., Warszawa: Wydawnictwo Naukowe PWN, 2004, p. 239.

their respective standards of protection[74]. Such a differentiation of standards would be coherent e.g. with the well-known practice of German courts which have developed a different interpretation of gute Sitten and Treu und Glauben, the first understood as a minimal moral standard in society (a lower standard) and the second as a higher standard between parties already bound by a certain socio-legal relationship (created e.g. by engaging into negotations or the conclusion of a contract)[75].

However, any such attempt would, of course, lead to a clearly untenable interpretation of the codes of private law: it is obvious that the provisions of those codes use various general clauses without following any coherent legislative policy. This has forced the courts to adopt a pragmatic approach, i.e. to treat general clauses interchangeably, and – faced with the legislative chaos within the Codes – develop an immunity against the linguistic form of a general clause.

There subsists a plethora of examples from the case-law demonstrating this particular judicial attitude. Supreme Court decisions are abundant with statements equating the principles of social intercourse with other general clauses formulated in various configurations, such as 'good morals'[76], 'principles of good faith in the objective sense or principles of equity'[77], 'reasons of equity, […] good morals and good faith'[78], 'principles of good faith (in the objective sense) or […] good morals'[79], 'fundamental principles of ethical and honest conduct […] principles of equity, good faith in the objective sense or the principles of honesty'[80], 'honesty (fair dealing) and loyalty'[81], 'fair conduct, good morals, decency, loyalty'[82], 'good morals in legal transactions'[83], 'good morals in economic relationships'[84] or 'principles of equity'[85]. One of the courts of appeal virtually jumped off the dock by stating that principles of social intercourse should be interpreted by resorting to '"principles of equity", "principles of fair dealing", "principles of honesty" or simply […] "Christian values"'[86]. In sum, anything goes, any general clause is equal to any other and they are all equal to the

[74] Cfr. Grundmann S. The General Clause or Standard in EC Contract Law Directives. In: General Clauses…, op. cit., p. 160.

[75] Cfr. Pilich M. Zasady współżycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej [Principles of Social Intercourse, Good Morals or Good Faith? Dillemas of Amending the General Clauses of Civil Law in a European Perspective]. In: Pazdan M. et al. (eds). Europeizacja prawa prywatnego. Warszawa, 2008, Vol. II, p. 175-176; Hesselink, op. cit., p. 635.

[76] SN decisions: of 23 April 2004, Case: I CK 550/03, LEX No. 188472; of 5 August 2004, Case: III CK 332/03, LEX No. LEX No. 174195; of 17 May 2007, Case: III SK 6/07, LEX No. 368997; of 25 May 2005, Case: I CK 744/04, LEX No. LEX No. 152451; decision of the Polish Chief Administrative Court (Naczelny Sąd Administracyjny) of 20 February 2007, Case: II GSK 247/06, LEX No. 321315.

[77] SN decision of 28 April 1995, Case: III CZP 166/94, LEX No. 4232.

[78] SN decision of 15 February 2002, Case: V CA 2/02, LEX No. 53727.

[79] SN decision of 20 July 2006, Case: V CSK 115/06, LEX No. 1044085.

[80] SN decision of 15 November 2006, Case: I BP 12/06, LEX No. 322967.

[81] SN decision of 1 February 2000, Case: III CKN 1135/98, LEX No. 51356.

[82] SN decision of 27 September 2006, Case: I PK 99/06, LexPolonica No. 1240459.

[83] SN decision of 21 June 2001, Case: IV CKN 385/00, LEX No. 52481.

[84] SN decision of 19 October 2006, Case: V CSK 230/06, LEX No. 224589.

[85] SN decision of 2 June 2011, Case: I CSK 520/10, LEX No. 1129076.

[86] Cited in SN decision of 26 February 2006, Case: II CSK 101/05, LEX No. 180197.

principles of social intercourse. The linguistic form does not matter, there is no difference neither in the level of protection nor in the reasoning of the court between, say, 'good faith', 'good morals' or 'fair dealing'[87]. Furthermore, I am not aware of any case in which the court would rule that there is an essential difference between the principles of social intercourse, good morals and equity as regards the standard of evaluation of the behaviour of parties, content of legal acts etc.

Patchwork System of General Clauses and Their Ideological Function

The ideological function of general clauses rests upon their metaphorical nature[88]: they are the linguistic expressions of conceptual metaphors of the social and economic order[89]. Principles of social intercourse clearly stand for the metaphor society is a cooperative community, entailing a communitarian vision, marked by a strong emphasis of the collective interest of society as an entity[90]. Conversely, good faith[91] and fair dealing can be understood as manifestations of the metaphor society as a sum

[87] Sometimes, however, judges try to adopt a more sophisticated and nuanced approach in order to reconcile the letter of the code with the principle of sound law-making, according to which one term denotes one concept. This leads to an interpretation according to which the principles of social intercourse are an umbrella general clause encompassing more specialised general clauses, such as 'good morals', 'trust', 'principles of fair dealing' (SN decision of 12 February 2002, Case: I CKN 902/99, LEX No. 54357), 'the principle of justice' (SN decision of of 9 February 2007, Case: I PK 222/06, LEX No. 400424), 'loyalty' (SN decision in Case: I PK 99/06, loc.cit.) etc., thereby elevating the notion of the principles of social intercourse to an over-arching general clause (SN decision of 26 January 2006, Case: II CK 378/05, LEX No. 172222: 'It is commonly accepted that the concept of good morals is an element of a wider general clause known under the name of principles of social intercourse'). According to other decisions, the principles of social intercourse themselves are seen as part of a wider concept, namely that of the 'legal order' (SN decision of 20 December 2006, Case: IV CSK 263/06, LEX No. 257664), which seems to suggest a multi-level hierarchical system (legal order – principles of social intercourse – other general clauses, e.g. good morals, equity etc.). However, such views are expressed in isolated judicial decisions and do not alter the prevailing view on the interchangeability and indistinctiveness of general clauses.

[88] According to Barbara Pasa, 'general clauses can be seen as metaphors, since their application in judicial rulings implies access to extra-judicial knowledge, to cultural parameters belonging to a certain context; and in a fact a clear interpetation of them (...) comes from their proximity to (or distance from) meta-juridical termms of reference (...)' (Pasa, op. cit., p. 13). For the notion of conceptual metaphor See, e.g.: Larsson, op. cit., p. 49ff.

[89] In this section, following the usages of cognitive linguistics, linguistic manifestations of conceptual metaphors (in this case – general clauses in the Codes) are in italics, whereas the underlying conceptual metaphors are in small capitals.

[90] Cfr. the remarks of Janiszewska B. Pojęcie…, op. cit., p. 6: 'A characteristic feature of the principles of social intercourse is (...) some kind of "socio-centrical" orientation of the evaluation of conduct: designed to take into account the general interest and the appreciation of the social dimension of the behaviour in individual relationships. A concrete conduct is related to a model (...) in a characteristic perspective: human being (...) and society. (...) It seems that in order to find a conduct to be inconsistent with the requirements of "good faith" does not require and even does not realise itself by such a far-reaching reference (...)".

[91] Cfr. Janiszewska, Pojęcie…, op. cit., p. 6.

of competing individuals[92] with all its consequences, especially market competition is a fight/game. On this understanding, fair dealing is playing a game honestly and fairly[93]. Therefore, we speak of fair dealing, unfair terms in contracts, of a level playing field, fair competition, acts of unfair competition and so forth. The general clause of reasonableness – closely linked to rationality[94] and the Western notion of reason with all its entailments[95] – can, in turn, be linked to the metaphor individuals are rational market participants, popular in certain economic theories (e.g. law and economics). Finally, equity presupposes the existence of an objective system of natural justice and thus could be linked to a conceptual metaphor adjudication is the application of eternal principles of natural justice, with the judge's role presented as someone discovering and applying a system of 'natural law' which exists 'out there', and is not created by society or the judge[96].

This cursory attempt at reconstructing the conceptual metaphors behind various general clauses indicates that their ideological message can be quite different. In particular, the principles of social intercourse presuppose a communitarian approach to society, whereas good faith, fair dealing and reasonableness – a more individualistic vision in which people are seen as rational economic actors furthering their own interests rather than members of a collectivity nurturing the commons.

Perspectives for the Future: New Polish and/or European Civil Code and General Clauses

Undoubtedly, the judicial and scholarly immunity against the linguistic form of general clauses is the only way of making any workable use of the legislative texts as they have stood for almost two decades. However, this immunity entails serious side effects for Polish legal culture. Those side effects are not yet visible, as long as the patchwork system of general clauses remains in force. However, once Poland adopts

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92 The latter metaphor is part and parcel of the neoliberal and neoconservative visions and can best summarised by Margaret Thatcher's famous statement that 'there is no such thing as society. There are individual men and women, and there are families'. See Margaret Thatcher, interviewed by Woman's Own magazine (October 31, 1987). Available: http://briandeer.com/social/thatcher-society.htm [viewed 2012. 27 May].

93 Pasa, op. cit., p. 15.

94 Cfr. Troiano S. To What Extent Can the Notion of 'Reasonableness' Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective. European Review of Private Law. 2009, Vol. 17, No. 5, p. 752: 'In this context, reason is not meant to be the abstract "reasoning reason" of formal logic but a pragmatic reason, which is based on experience and experimentation." See also Sartor G. A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review. In: Bongiovanni G. et al. (eds). Reasonableness and Law. Dordrecht et al.: Spinger, 2009, p. 17-18.

95 Cfr. Winter S.L. A Clearing in the Forest: Law, Life and Mind. Chicago-London: University of Chicago Press, 2001, p. 56ff. See especially ibid. at p. 59: "the rationalist model treats reason and emotion as completely dichotomous: Reason is though to involve no feelings; the emotions are believed to have no cognitive content. […] Reason is, in a word, dispassionate."

96 Cfr. Hesselink, op. cit., p. 646 pointing to the Aristotelian and Christian sources of such a conviction. See also ibid., p. 648.

a new Civil Code with a coherent pluralist system of general clauses or, at some indefinite point in the future, a European Civil Code is enacted and Polish judges are called upon to interpret it, the immunity towards the linguistic form of general clauses could prove to be particularly harmful. Should a future Polish or European civil code contain several general clauses, offering different standards of protection[97] and inviting different kinds of judicial reasoning[98], Polish judges, seasoned in the current incoherent patchwork system, will, quite probably, ignore such subtleties and simply treat any vague formulation as an inivtation to unstructured judicial gap-filling, performed on an ad hoc basis.

It seems that this risk is not purely theoretical – a brief analysis of the systems of general clauses both in the recently published draft European Civil Code (officially known as the 'Draft Common Frame of Reference' or 'DCFR')[99]) and the emerging draft Polish Civil Code (at present – only Book One)[100] indicate that a monistic approach to general clauses (as known to the Polish Civil Code of 1964 in its original version) is not the trend of the day. To the contrary, both the European and Polish drafters express a prefence for a coherent pluralist system of general clauses which requires and presupposes a sophisticated and nuanced approach of the judiciary.

Thus, the Draft Civil Code (book one) contains four general clauses: 'equity', 'reasonableness', 'principles of fair dealing' and 'good morals'. The drafters explicitly reject, for reasons which this author finds inconvincing[101], the oldest European general clause, 'good faith'. It must be underscored that the drafters envisage what

[97] As in the well-known German conceptual dichotomy of the minimum standard of gute Sitten and the higher standard of Treu und Glauben.

[98] The various types of structured legal reasoning can include a reasoning by analogy from the general principles of a legal act or the entire legal system, a reasoning based on the accepted social norms of a certain kind, a reasoning based on an evaluation of the parties' subjective intent and so forth. Cfr. Pilich M. Zasady współżycia…, op. cit., p. 174.

[99] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) (2009). Available online at: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf [access: June 26, 2012] (hereinafter: 'DCFR').

[100] Komisja Kodyfikacyjna Praw Cywilnego działająca przy Ministrze Sprawiedliwości [Civil Law Codification Commission attached to the Minister of Justice]. Księga pierwsza kodeksu cywilnego: projekt z uzasadnieniem [Book One of the Civil Code: Motivated Draft]. Warszawa: C.H. Beck, 2009 (hereinafter: 'Draft Polish Civil Code').

[101] According to the drafters, there is a strict opposition between subjective and objective good faith. Therefore, because the two they are allegedly entirely different concepts, they should not be expressed by the same term. See: Księga pierwsza..., op. cit., p. 17. However, according to Pilich 'opposing good faith in the subjective sense to good faith in the objective meaning does not always make sense because both these concepts are frequently interfused' (Pilich M. Zasady współżycia..., op. cit., p. 176). The definition of good faith in the DCFR is particularly instructive as to the close connection between the subjective and objective aspects of bona fides – see art. I:1:103(1) DCFR: 'The expression "good faith and fair dealing" refers to a standard of conduct [objective aspect – R.M.] characterised by honesty, openness and consieeration for the interests of the other party [subjective aspect – R.M.] [...].' Cfr. Mańko R. Zasady umów długoterminowych…, op. cit., p. 543; Konopacka M., Dobra wiara w prawie umów [Good Faith in Contract Law]. In: Polskie prawo prywatne w dobie przemian. Księga jubileuszowa dedykowana Profesorowi Jerzemu Młynarczykowi, Gdańsk 2005 p. 71–72.

they refer to as a coherent system of general clauses, in which each general clause (or a specific pair of general clauses) has a specific function[102]. Namely, the pair of 'reasonableness and equity' has the function of interpretation and supplementation of legal transactions[103], the pair of 'equity and principles of fair dealing' has the function of evaluation of parties' behaviour[104] and 'good morals' have the function of controlling the content of legal transactions[105]. According to the drafters, two of the general clauses refer to morality (equity and good morals)[106], whereas principles of fair dealing should be reconstructed on the basis of social norms regulating the conduct in econonomic relationships[107]. The draft does not give any indications as to the general clause of reasonableness; nevertheless, that clause being a legal transplant it can be reconstructed on the basis of donor legal systems (Netherlands law[108], DCFR, English law, to name but a few). Unlike in German private law, where a general clause – good faith – is used as a means of interpretaton of statutory provisions[109], the drafters of the future Polish Civil Code did not give any general clause such a function[110].

As regards the the current version of a draft European civil code– at least five different general clauses used ('good faith and fair dealing'[111], 'reasonableness'[112], 'fairness'[113], 'equity'[114] and 'morality'[115]). Some of them are specifically defined ('good faith and fair dealing', 'reasonableness' and 'fairness'), others not, however it seems clear that they are expected to be interpreted by the courts as referring to different standards rather than just one uniform standard[116].

Conclusion

After 1989, the approach of the Polish legislature to the issue of general clauses in private law has been piecemeal, incoherent and erratic. As a result, from a monist system with one chief general clause ('principles of social intercourse'), the legal system

[102] Draft Polish Civil Code, p. 102. In many Western European legal systems, however, one general clause (e.g. the Dutch 'reasonableness and equity') fulfils many functions – supplementing, interpetative and limiting (See, e.g.: Hesselink, op. cit., p. 625)
[103] Ibid., art. 78 § 1, art. 85 and p. 102.
[104] Cfr. ibid., art. 5 (abuse of rights).
[105] Ibid., art. 98 § 2 and p. 109.
[106] Ibid., p. 16.
[107] Ibid.
[108] To which the drafters explicitly refer – see: ibid., p. 96.
[109] Pilich M. Dobra wiara…, op. cit., p. 43.
[110] Draft Polish Civil Code, art. 3 (according to which the Code and other statutes are to be interpreted in line with the Polish constitution and EU law).
[111] Defined in Art. I.-1:103 DCFR and appearing in 16 other rules of the DCFR.
[112] Defined in Art. I.-1:104 DCFR and appearing (as '(un)reasobale', '(un)reasonably') almost 500 times in the DCFR. Cfr. Troiano, op. cit., p. 758.
[113] Defined in Art. II.-9:403 to II.-9:405, II.-9:407 and II.-9:410 DCFR.
[114] Not defined; appearing (as 'equitable') 5 times in the DCFR.
[115] Not defined; appearing (as 'moral') only once – in Art. IV. H. – 1:203 DCFR.
[116] Such an intent can be inferred from the drafters' concern with terminological consistency and clarity – see DCFR, p. 29.

has become an incoherent pluralist system with four general clauses ('principles of social intercourse', 'good morals', 'equity' and 'reasonableness'). Incoherence arises not only on account of the different origin of the general clauses (socialist legal family, Franco-Germanic legal family, common law family) but first and foremost due to the fact that different general clauses fulfil the same or similar functions. As a result, courts and scholars are prevented from elaborating a more sophisticated approach to general clauses, such as establishing a certain hierarchy between them and defining their respective standards of protection. In order to come up with a fairly consistent interpretation of the codes of private law, judges are forced to take a pragmatic approach and treat general clauses interchangeably, thus developing an immunity from their linguistic form. This leads not only to a deterioration of the (potential) regulatory function of the codes, i.e. a differentiation of the standards of protection offered by different general clauses, but also conveys an incoherent and blurred ideological message. This is because the principles of social intercourse on the one hand, and other general clauses on the other hand, stand for different visions of the socio-economic order.

Finally, if in the future a new Polish or European Civil Code is adopted, it seems probable, on the basis of existing drafts, that such a legislative act will rest upon the principle of a coherent pluralism of general clauses rather than on the monist principle followed by the socialist Civil Code of 1964 in its original version. The current habit of treating general clauses interchangeably without paying much attention to their linguistic form could lead to an oversimplifying interpretation of such a code.

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PROBLEM QUESTIONS OF INSURANCE CONTRACT REGULATION IN LATVIA

Keywords: insurance contract, obligations law, codification, quality of regulation, shortcomings of regulation, systematic legislative approach.

Introduction

The Law on Insurance contract law[1] of the Republic of Latvia (hereinafter the Insurance Contract Law) was adopted on June 10, 1998 and entered into force on September 01, 1998. Since its entry into force, this law has been amended several times, yet it still contains various significant defects due to its drafting and interrelation with other laws. Notwithstanding the existence of these defects, they have been little discussed in the Latvian legal literature so far, especially in comparison with approaches developed in Europe, including neighbouring countries.

Contradictory and incompletely regulated aspects

Several meaningful aspects of insurance contracts are regulated in the Insurance Contract Law contradictorily and incompletely, which could raise disputes, for instance, a recent insurance case involved an incompletely regulated issue concerning entry into force of an insurance contract[2]. Though due to limits of this article not all of the important shortcomings may be examined, some of them still may be reviewed.

Essential elements

One such shortcoming relates to the lack of clear regulation of essential elements of an insurance contract[3], as an insurance contract (as any other contract) shall be

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1 Par apdrošināšanas līgumu: LR likums. *Latvijas Vēstnesis*, Nr. 188/189. 30.06.1998. [On Insurance contract]. In English available: www.ttc.lv.

2 The judgment of the Senate for the Supreme court of the Republic of Latvia of 12 March, 2010 in case SKC-134/2010 [On the date when an insurance contract enters into force]. Though this case related to the previous wording of the Insurance Contract Law, the current wording does not fully eliminate this shortcoming as discussed further.

3 For essential elements of contracts within formation of contracts by comparative approach, see, for instance, Hogg M. Promises and Contract Law. Comparative Perspectives. Cambridge: Cambridge University Press, 2011, pp. 177-283. For essential elements of insurance contracts in common law jurisdictions, see Jerry R.H., II, Richmond D.R. Understanding Insurance Law. Fourth edition. Lexis Nexis, 2007, p. 201 ff. (for United States of America); Birds J. Birds' Modern Insurance Law. Seventh edition. London: Sweet & Maxwell, 2007, p. 81 ff. (for United Kingdom).

considered to be finally entered into only when the contracting parties have reached complete agreement regarding the essential elements with the purpose of being mutually binding (Art. 1533 (1) of the Civil Law[4]).

The essential elements of an insurance contract could be deduced from the legal definition of an insurance contract which is defined as an agreement between an insurer and policyholder by which the policyholder undertakes a duty to pay insurance premiums in the manner, time periods and amount specified in the contract, as well as to meet other duties specified in the contract, and the insurer undertakes a duty to pay out the insurance compensation to the person indicated in the contract upon the occurrence of an insurable event (Art. 1 (5) of the Insurance Contract Law). Therefore, the essential details specific to an insurance contract would be insurable object, insurable risk, insurable interest, insurance premium and insurance redress,[5] in addition to other pre-requisites for entering the contract into force[6]. In addition, it must be emphasised that the current wording of the Insurance Contract Law does not provide the written form as requirement for the entry into force of an insurance contract and therefore previously expressed opinions on the necessity of the written form for insurance contracts[7] do not relate to the current wording of that law.

On the other hand, Art. 7 (2) of the Insurance Contract Law provides that an insurance contract shall be regarded as concluded on the condition that the insurer and the policyholder have agreed on the provisions of the insurance contract described under Arts. 6 (1) and 55 (1) of this law. Specifically, Art. 6 (2) envisages that the following elements shall be specified in an insurance contract: the place and date of entering into a contract, the date when it comes into effect and term of operation of a contract, information regarding the insurer, insured person (if he or she is not simultaneously a policyholder) and policyholder, insurance risk, insurance object, benefits, insurance premium, time period and procedures for payment thereof, beneficiary of the insurance compensation, time period for the taking of a decision regarding the payment of or refusal to pay insurance compensation, provisions for

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4 Latvijas Republikas 1937. gada Civillikums: LR likums [the Civil Law]. For its English translation, see Latvijas Republikas Civillikums / The Civil Law of Latvia. R.: Translation and Terminology Centre, 2001.

5 Cf. with essential elements of insurance contract in accordance to the similar definition of insurance contract included in the Codification of the Baltic Local Laws, the predecessor of the Civil law: Sinaiskis V. Latvijas Civiltiesību apskats. Lietu tiesības. Saistību tiesības. R.: Latvijas Juristu biedrība, 1996, 225.-226. lpp. (by pointing out such essential elements as complete agreement, insurance aim – i.e., insurable interest, certain event – i.e., insurable risk, insurance redress and insurance premium, insurable object). For the review of the insurance contract regulation in the Codification of the Baltic Local Laws, see Loebers A. Tirdzniecības tiesību pārskats. R.: Valtera un Rapas akc. sab. izdevums, 1926, 420.-443. lpp.; Буковскій В. Сводъ Гражданскихъ Узаконеній Губерній Прибалтійских. Съ продолженіемъ 1912-1914 г.г. и съ разъясненіями въ 2 томахъ. Томъ II, содержащій Право Требованій. Р.: 1914, с. 1913-1920.

6 See: Torgāns K. Saistību tiesības. I daļa. Mācību grāmata. R.: Tiesu namu aģentūra, 2006, 41. lpp.

7 Snipe A. Saistību tiesību komentāri. III.Tiesiska darījuma forma. Jurista vārds, Nr. 16 (419), 2006. gada 18. aprīlis; Kalniņš E. Rakstiska forma kā nosacījums prasības tiesībai uz darījuma pamata. In: Kalniņš E. Privāttiesību teorija un prakse. Raksti privāttiesībās. R.: Tiesu namu aģentūra, 2005, 164.-165. lpp.

termination of the contract, duties and liability of the parties for non-compliance with the provisions of the contract, procedures for settlement of disputes.

Therefore, the regulation for essential elements arising from the definition of the insurance contract included in Art. 1 (5) of the abovementioned law contradicts the regulation included in Art. 7 (1) of that law. The Latvian legal literature admitted such contradiction by pointing out that "all those provisions [contained in Article 7 (1)] cannot be considered as essential elements of a contract, for instance, it cannot be considered that a contract would not enter into force if it will not contain procedure for settlement of disputes or the place of entering into a contract"[8]. As justly observed in this opinion, if any of such requisites contained in the abovementioned Art. 7 (1) were missing, such shortcoming may be eliminated by application of other laws, for instance, the procedure for reviewing disputes is governed[9] by the Civil Procedure Law[10] or termination of a contract (unilateral withdrawing from a contract) is governed both by the Civil Law and the Insurance Contract Law (their interrelation discussed below).

In relation to Art. 7 (1) of the Insurance Contract Law, it shall be noted that this provision confuses an insurance contract with an insurance policy which is a written form of an insurance contract[11]. Such confusion between both these insurance law terms is also contained in other provisions of the Insurance Contract Law[12] which shows the quality of drafting of that law. Here, it would also be worth mentioning that there are also problems with the use of other terms, for instance, in liability insurance, a person who suffered damages by activity of an insured person is named not a victim as it arises from the insurance law terminology (for instance, the Motor Insurance Directive[13] and the last judgment in this regard in case C-442/10[14]) but a third person (Art. 1 (21) of that law[15]) which, in obligations law, is any person who is not a party to a contract; or by definition of insurance terms, for instance, an insurable object in property insurance is defined as "valuable property or interests"

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[8] Torgāns K. Saistību tiesības. II daļa. Mācību grāmata. R.: Tiesu namu aģentūra, 2008, 224. lpp.

[9] This conclusion is supported by Art. 3 (1) of the Insurance Contract Law which provides that disputes related to an insurance contract shall be resolved in accordance with the procedures prescribed by laws and other normative acts.

[10] Civilprocesa likums: LR likums. *Latvijas Vēstnesis*, 1998. g. 3. novembris, Nr. 326/330. Available in English: www.ttc.lv.

[11] Art. 1 of the Insurance Contract Law clearly supports such conclusion by providing that the insurance policy is a document which testifies concluding an insurance contract.

[12] Arts. 6 and 6.1 of the Insurance Contract Law.

[13] Directive 2009/103/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [Codifying Motor Insurance Directive], OJ, L 263, 07.10.2009, pp. 11-31.

[14] Case C-442/10 Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited [2011] ECR I-00000. For its commentary, see Mantrov V. Clarifying the Concept of Victim in the Motor Vehicle Drivers' Liability Insurance: The ECJ's Judgment in Case C-442/10, The European Journal of Risk Regulation,2012, Issue 2, pp. 257-260.

[15] Interestingly, that in motor insurance provided similar term with similar meaning (see Art. 1 (15) of the Compulsory Civil Liability Insurance of Owners of Motor Vehicles Law).

(Art. 1 (7) of that law) simultaneously covering two other insurance types (liability insurance and personal insurance) where a monetary value also exists, i.e. valuable, interests.

Type of contract

There is also an unclear regulation as to whether an insurance contract may be a consensual or real contract (as traditionally distinguished by the Roman law tradition) influencing the entry into force of a concluded insurance contract. As it could be seen from the definition of an insurance contract (Art. 1 (5) of the Insurance Contract Law), it implies a promise to pay the insurance premium which is also supported by Art. 7 (1) of this law which also does not provide for the necessity for payment of the insurance premium for entry into force of an insurance contract. Moreover, Article 7 (2) of this law envisages that a policyholder shall express his/her consent to sign the insurance contract according to an insurer's offer and by paying the insurance premium in the procedure, term and amount as described in the insurer's offer or shall express his/her consent to sign the insurance contract in another way as described in the insurer's offer. Therefore, it would be dependent on the approach taken by the insurer, which in practice turns an insurance contract into a real contract considering that in practice insurers usually request payment of the insurance premium immediately. In addition, Arts. 18 (2) and 19 consistently provide for an insurer's right to terminate the insurance contract if an insurance premium is not paid in the prescribed period (applicable in case an insurance contract is concluded as a consensual contract). Therefore, as justly observed, the Insurance Contract Law allows that an insurance contract may be concluded either as a consensual or real contract depending on terms of a particular insurance contract[16].

On the other hand, Art. 7.2 (1) provides that if the parties agree that the insurance premium or the first part of it is paid after the insurance contract enters into force, then after the insurance premium or its first part is paid within the term defined in the insurance contract, the insurance contract shall enter into force on the enforcement day as specified in the contract. In other words, the latter provision precludes entry into force of an insurance contract without payment of the insurance premium thus contradicting the provisions mentioned earlier.

Such contradiction, in turn, is of essential character when the insured risk takes place between the moment when an insurance contract is concluded and the moment when the insurance premium is paid. In case of consensual contract, the insurance contract is valid and the insured risk is covered even if the insurance premium is not paid at the moment of occurring of the insured risk (with condition that it is paid in due time). However, in case of real contract, the insurance contract is not valid before the payment of insurance premium; consequently, if the insured risk takes place before the insurance premium is paid, it is not covered by the insurance contract as it does not entered into force. Therefore, such contradiction between legal norms included in the Insurance Contract Law may easily lead to impossibility for an insured (victim or beneficiary) to claim an insured redress.

[16] Torgāns K. Saistību tiesības. II daļa. Mācību grāmata. R.: Tiesu namu aģentūra, 2008, 221.-222. lpp.

Ownership regulation

Art. 44 of the Insurance Contract Law regulates how the concluded insurance contract is affected by the change of ownership for an insured object, yet lacks interrelation with other laws.

Art. 44 (1) provides that in case of insured immovable property, an insurance contract shall be in force in favour of the new owner, one month after all documents regarding the change of ownership rights are drawn up. However, such regulation contradicts the ownership rules of the Civil law providing that ownership transfers at the moment of entry of a new owner in the Land book (Art. 994 of the Civil Law), i.e., the ownership right of an immovable object is testified by the record in the Land Book[17]. As a result, the unresolved question is when it could be considered that "all documents are drawn up": whether it is the date when a purchase contract is concluded, documents filed in the Land book or documents received from the Land book. The question at stake is of enormous importance because it influences the expiry of the term of a concluded insurance contract and consequently whether potential occurrence of an insured risk is or not covered by the concluded insurance contract.

Art. 44 (2) of above law provides that, in case of the change of owners of an insured movable property and provided that there is no other agreement in force, an insurance contract shall terminate at the moment of transfer of the movable property to the new owner. This provision shall not apply to motor vehicle drivers' liability insurance where an insurance contract expires on the moment when the application on its alienation is filed to the insurer[18]. Another problem relates to motor insurance considering that the new owner of a motor vehicle is entered into respective state register – if this motor vehicle is insured, the unresolved question remains whether the insurance contract terminates on the moment when the new owner is entered into register or when hand-over takes place after the alienation of that motor vehicle irrespective of its registration within the relevant state register.

Scope

Art. 2 (1) of the Insurance contract law envisages that this law applies to all insurance contracts, unless otherwise provided by law. Such a broad sphere of application of this law is not consistent with the application scope of that law, especially considering that European Union (EU) insurers and non-EU insurers provide insurance services in the territory of Latvia and vice versa, but also in case of a conflict of laws, with the Rome I Regulation[19] providing for applicable rules[20]. Such a broad application sphere therefore should be limited to the risks situated in the territory of Latvia and insured by those insurers which legally provide insurance services in Latvia.

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[17] Rozenfelds J. Lietu tiesības. 4. labotais, papildinātais izdevums. Autora redakcijā. R.: Zvaigzne ABC, 2011, 108. lpp.

[18] Art. 10 (1) (1) of the Compulsory Civil Liability Insurance of Owners of Motor Vehicles Law (Sauszemes transportlīdzekļu īpašnieku civiltiesiskās atbildības obligātās apdrošināšanas likums: LR likums. *Latvijas Vēstnesis*, 2004. 27. aprīlis, Nr. 65. Available in English: www.ttc.lv.)

[19] Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) [the Rome I Regulation]. OJ L 177, 04.07.2008, pp. 6-16.

[20] Art. 7 of the Rome I Regulation provides specific rules for insurance contracts.

Non-regulated aspects

Another problem issue for insurance contract regulation is aspects which are essential for insurance law but are not at all or insufficiently regulated.

Interpretation rules

One of such important missing aspects is the lack of interpretation rules specific to insurance contracts. Their specifics lie in the fact that insurance contracts are drafted in advance and one side, namely, insurers, are professionals in the insurance services' market. Therefore, such specific interpretation rules should exist which provide that any ambiguity of any term of an insurance contract is interpreted against a person who, as a professional, drafted such contract, i.e., against an insurer. Such modern approach is provided in Latvian neighbouring states: in Estonia, in case of doubt in relation to standard terms, standard terms shall be interpreted to the detriment of the party supplying the standard terms[21], in this case: against an insurer; there is also a similar provision in Lithuania[22]. Neither the Insurance Contract law, nor any other law contains interpretation rules for interpretation of standard insurance contract terms drafted in advance by one of parties being a professional in that area, in this case – drafted by insurers.

In addition, in case of consumers[23], Art. 6 (21) of the Law for Protection of Consumers Rights[24] envisages that ambiguous and imprecise terms of a written contract shall be interpreted in favour of the consumer. However, this law does not provide that in case of dispute the standard terms of contracts shall be interpreted in favour of consumers. In respect of persons other than consumers, i.e., legal persons and physical persons – entrepreneurs, the interpretation rules envisaged in the Civil law apply providing for interpretation in favour of the debtor in case of dispute (Art. 1508 of the Civil Law), in this case – in favour of insurers as usually they are debtors in claims for collection of insurance redress. In the latter case, such interpretation rules are highly disputable as they run counter to insurance law specifics as described above.

Therefore, specific interpretation rules shall be provided in respect of insurance (and similar type) contracts with standard terms without distinguishing between natural and legal persons.

Interrelation among insurance laws

Likewise, the Insurance Contract Law does not provide clear guidelines for the interrelation between this law and the Latvian civil codification, namely the Civil Law, and similarly between this law and other laws which contain regulation of

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[21] Art. 39 (1) of the Estonian Law of Obligations Act (Law of Obligations Act; RT I 2002, 53, 336. Available: http://www.legaltext.ee/en/andmebaas/ava.asp?m=022).

[22] Art. 6.193. (4) of the Lithuanian Civil Code (Civil Code of the Republic of Lithuania. Available: http://d.scribd.com/docs/1f4b82egan5qfun516xm.pdf).

[23] Consumers are natural persons who expresses a wish to purchase, purchases or might purchase, or use goods or a service for a purpose, which is not related to his or her economic or professional activity as provided by Art. 1 (3) of the Law for Protection of Consumers Rights (*supra* note 24).

[24] Patērētāju tiesību aizsardzības likums: LR likums. *Latvijas Vēstnesis*, 1999. g. 1. aprīlis, Nr. 104/105. Available in English: www.ttc.lv.

insurance contracts[25], namely, the law On Insurance Companies and Supervision Thereof[26], specifically Arts. 3, 4 and 5.1 of the latter law.

Nonetheless, from Art. 6 (3) of the Insurance Contract law as well as from the fact that the Civil Law is the source for the general regulation of contracts, it can be deduced that the insurance contracts are generally regulated by the Civil law providing general contract regulation but the Insurance Contract law provides specific legal norms in respect of insurance contracts. Such approach is similar also in other states where the insurance contract is regulated separately from the civil codification, as, for instance, in Germany[27]. In such a way, the general contract regulation included in the Civil Law shall be applied to insurance contracts as far as the Insurance Contract law and the relevant provisions of the law On Insurance Companies and Supervision Thereof does not provide different regulation. However, it would be erroneous to consider that both those laws provide regulation for the activity of insurance companies[28], as the Insurance Contract law does not provide such regulation but instead governs the relationships arising from an insurance contract.

Furthermore, in case of motor insurance, the Compulsory Civil Liability Insurance of Owners of Motor Vehicles Law[29] applies by providing specific provisions for motor insurance.

Finally, compulsory liability insurance is provided in specific laws concerning different professions regulating both the compulsory concluding of an insurance contract and minimum requirements for terms of the insurance contract, for instance, the amount of the insurance premium or deductibles[30].

Necessity for more determined approaches

Another non-regulated aspect is that there is a need for more detailed regulation of specific acts concerning insurance contracts which allows more possibilities for parties to derogate from the provided regulation of interests of the insureds (as well as

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[25] Considering that this article is devoted to general regulation of insurance contracts as stated in the beginning of this article, it does not cover and discuss any contractual relations existing in other fields of insurance law such as reinsurance and insurance and reinsurance intermediaries as well as in specific types of insurance such as motor insurance.

[26] Apdrošināšanas sabiedrību un to uzraudzības likums: LR likums. *Latvijas Vēstnesis*, 1998. 30. jūnijs, Nr. 188/189. Available in English: www.ttc.lv.

[27] Steffens T. Review of German Private Insurance Law. In book: Key Aspects of German Business Law. A Practical Manual. Michael Wendler, Bernd Tremml and Bernard Buecker (editors). Fourth edition. Berlin, Heidelberg: Springer, 2008, p. 206 (by stating that "[a]s a special statute of insurance law, the [German Insurance Contract Law] takes precedence over the provisions of the Civil Code (BGB), of which only the general provisions, e.g. with regard to a contract's general terms and conditions [..], and the specific use of language for the interpretation of the [German Insurance Contract Law] are decisive").

[28] Graudiņa A. Apdrošināšanas pamati. R.: LU Akadēmiskais apgāds, 2010, 42. lpp.

[29] Sauszemes transportlīdzekļu īpašnieku civiltiesiskās atbildības obligātās apdrošināšanas likums: LR likums. *Latvijas Vēstnesis*, 2004. g. 27. aprīlis, Nr. 65. Available in English: www.ttc.lv.

[30] See: Rone D. Civiltiesiskās atbildības apdrošināšanas juridiskā problemātika. In: Daugavpils Universitātes 51. starptautiskās zinātniskās konferences materiāli. II sējums. Daugavpils: Saule, 2010, 35.-39. lpp.

beneficiaries and victims). For instance, in case of change of ownership of an insured insurance object (in property insurance) it would be reasonable to provide that the continuation of the insurance contract depends on an acquirer of that object.

On the other hand, the Insurance Contract Law does not specify which provisions contained by that law may be derogated by the agreement of parties as it is provided in other European countries, for instance, the Netherlands[31], Estonia[32] or Germany[33]. Therefore, such provisions shall be adopted for the sake of clarity and elimination of any disputes between parties.

Lack of balance of parties' rights

Though the Insurance Contract Law was amended several times as mentioned above, the changes have not updated the old-fashioned approaches contained in the law such as the lack of adequate balance between rights and obligations for the parties of the insurance contract, specifically, concerning information disclosure duty for policyholders and insureds, on the one hand, and information to be provided by insurers on the other.

In case of insurers, as observed in the legal literature, the Insurance Contract Law provides for the information duty for insurers in two narrow informative cases, namely about the applicable law (Art. 2 (7)) and the out of court complaint reviewing procedure (Art. 3)[34]. In addition, insurers have certain specific duties in case of life insurance contract (Art. 55 (2) of above law and Art. 8.2 (6) of the law On Insurance Companies and Supervision Thereof); duty to inform about their registration place and legal address, vague duty to explain the meaning of deductibles, overinsurance and underinsurance and find out clients' demands (Arts. 8.2 (1) (4) (5) of the law On Insurance Companies and Supervision Thereof).

Moreover, at least as concerns life insurance, there shall be envisaged certain pre-contractual insurer's information duties and insurer's information duties during the term of insurance contract as provided by the Annex III of the Life Insurance Directive[35] and maintained by Art. 185[36] of the Solvency II Directive[37] repealing, among others, the Life Insurance

[31] Art. 943 of the Book 7 of the Netherlands Civil Code.

[32] Art. 427 (1) of the Estonian Law of Obligations Act.

[33] Arts. 18, 32, 42, 52 (2) (5), 67, 87, 98, 112, 129, 171, 175, 191, 208 of the German Insurance Contract Act (Insurance Contract Act of 23 November 2007 (Federal Law Gazette I page 2631), as last amended by Article 6 of the Act of 14 April 2010 (Federal Law Gazette I page 410). Available: http://www.gesetze-im-internet.de/englisch_vvg/englisch_vvg.html).

[34] See: Rone D. Savstarpēja komunikācija kā būtisks pienākums apdrošināšanas tiesībās. Available: http://www.turiba.lv/komunikacijas_2009/pages/Rone_lv.html

[35] Directive 2002/83/EC of the European Parliament and of the Council concerning life assurance. OJ, L 345, 19.12.2002, p. 1-51.

[36] As regards the Solvency II Directive, there shall be mentioned also Art. 186 of that Directive concerning rights of policyholders to cancel individual life insurance contracts on conditions provided by that provision.

[37] Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). OJ, L 335, 17.12.2009, p. 1-155.

Directive. However, the Latvian laws do not envisage those insurer's information duties, as it could be seen from the overview of insurers' duties in the previous paragraph, and in this regard the Latvian law is incompatible with those Directives.

In case of policyholders (insureds), in general the duty to disclose information during pre-contractual and contractual time means to provide all the information regarding the circumstances the insurer has requested, information on which is necessary for the insurer in order to assess the probability of the occurrence of insurance risk and is important for entering into an insurance contract (Art. 5 (1) of the Insurance Contract Law). Such broad and rather vague information disclosure duty does not seem to ensure the balance of parties within the insurance contract because it cannot be expected from a policyholder to distinguish what facts would be material for the insurer. However, as it is justly admitted in the legal literature, "both the pre-contractual duty of disclosure and the obligations during the duration of the policy are usually described as the core of each insurance contract law"[38].

Therefore, it is clear why other European countries such as Germany with its newly adopted German Insurance contract law[39], Spain, Finland, Switzerland, the United Kingdom[40] as well as Principles of European Insurance contract law (PEICL) chose "the questionnaire approach" by refusing to allow insurers to avoid a consumer policy for non-disclosure where no question has been asked[41]. In addition to these states, the Netherlands[42] and Latvia's neighbouring countries such

[38] Ruhl G. Common law, civil law, and the Single European Market for insurances. 55 I.C.L.Q. 888 (2006).

[39] For the questionnaire approach in this new German law as well as about other features of this law, see Steffens T. Review of German Private Insurance Law. In book: Key Aspects of German Business Law. A Practical Manual. Michael Wendler, Bernd Tremml and Bernard Buecker (editors). Fourth edition. Berlin, Heidelberg: Springer, 2008, p. 212-215.

[40] Nonetheless, unlike the mentioned European states, the questionnaire approach in the court practice in the common law jurisdictions does not release a policyholder from the general disclosure duty (see Tarr Julie-Anne, The insured's non-disclosure in the formation of insurance contracts: a comparative perspective, 50 I.C.L.Q. 589-590 (2001)).

[41] See: Heiss H. Insurance Contract Law Between Business Law and Consumer Protection. In book: General Reports of the XVIIIth Congress of the International Academy of Comparative Law/ Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé. Karen B. Brown, David V. Snyder (editors). Springer: Heidelberg London New York, 2012, p. 352.

[42] Art. 928 (6) of Book 7 of the Netherlands Civil code provides that "[w]hen the insurance is concluded on the basis of a questionnaire drafted by the insurer, the insurer may not rely on the fact that questions were not answered or that facts in respect of which no question was raised were not disclosed or that the answer to a question couched in general terms was incomplete, unless there was intent to mislead the insurer" (see The Civil code of the Netherlands. Translated by Hans Warendorf, Richard Thomas, Ian Curry-Sumner. Alphen aan den Rijn: Wolters Kluwer Law & Business, 2009).

as Estonia[43] (whose insurance contract regulation is based on the German Insurance contract law) and Lithuania[44] should also be mentioned.

However, there are European court judgments where it was admitted that the questionnaire approach could be subject to stricter contractual terms for information disclosure duty. Thus, Spanish courts recently ruled that if the insurance contract contained the clause under which "the insured declares that at the time of the entry into force of this insurance there are no circumstances that could give rise to a claim under this policy" the failure to report such obstacles influencing evaluation of a risk to be insured is a breach of disclosure duty[45].

Due to the abovementioned reasons for ensuring the balance of parties' rights, the Latvian insurance contract regulation shall also be based on the questionnaire approach concerning information disclosure duty.

Lack of systematic legislative approach

An insurance contract is one of contracts recognised under obligations law, and insurance law as being one of civil law branches[46], specifically – one of the special civil law branches[47]. According to the civil law tradition of Continental Europe such contracts are regulated in civil codifications. With few exceptions, namely in the case of Germany[48] and Austria[49], most European countries adhering to the civil law tradition provide in their civil codifications[50] for regulation of insurance contracts.

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[43] Art. 440 (1) of the Estonian Law of Obligations Act provides that "[u]pon entering into a contract, the policyholder shall inform the insurer of all circumstances known to the policyholder which, due to their nature, may influence the insurer's decision to enter into the contract or to enter into the contract on the agreed terms (material circumstances). Material circumstances are presumed to be circumstances concerning which the insurer has directly requested information in a format which can be reproduced in writing".

[44] Art. 6.993. (2) of the Lithuanian Civil Code provides that "[m]aterial circumstances about which the insured shall inform the insurer shall be deemed the circumstances indicated in the standard conditions of the insurance agreement (rules of the type of insurance), as well as the circumstances on which the insurer has requested the insured in writing to provided information".

[45] Decision dated May 10, 2011 (JUR 2011/194346) of the Supreme Court of Spain, cited after: David Lewin, Continental European Legislative and Judicial Trends: Supreme Court of Spain Rules on Policyholder's Duty of Disclosure Prior to Conclusion of Contract, 15 November 2011. Available: http://www.gccapitalideas.com/2011/11/15/continental-european-legislative-and-judicial-trends-supreme-court-of-spain-rules-on-policyholders-duty-of-disclosure-prior-to-conclusion-of-contract.

[46] For the place of insurance law within private law in different jurisdictions, see Heiss H. Insurance Contract Law Between Business Law and Consumer Protection. In book: General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé. Karen B. Brown, David V. Snyder (editors). Springer: Heidelberg London New York, 2012, pp. 338-339.

[47] See generally Balodis K. Ievads civiltiesībās. R.: Zvaigzne ABC, 2007, 48.-49. lpp.

[48] *Supra* note 31.

[49] Versicherungsvertragsgesetz [Austrian Insurance Contract Law]. Available in German: http://www.jusline.at/Versicherungsvertragsgesetz_(VersVG).html.

[50] Though there are some initiatives for decodifications (see Aude Fiorini, The codification of private international law: the Belgian experience, 54 I.C.L.Q. 500 (2005)) none of them relates to insurance law.

Specifically, all Latvia's neighbouring countries − Estonia (Chapter 23 of the Estonian Law of Obligations Act), Lithuania (Chapter LIII of the Lithuanian Civil Code), Russia[51] and Belorussia (Chapter 48 of the Belorussian Civil Code[52]) – provide in their civil codifications for regulation of the insurance contract.

Unlike neighbouring countries and most European countries which share the civil law tradition, the insurance contract regulation in Latvia is not included in the civil codifications, namely, the Civil Law, but instead is regulated by a separate law, i.e. the Insurance Contract Law as mentioned above. As a result, the insurance contract regulation contains discrepancies with the general regulation of obligations law including, as discussed above, essential elements of an insurance contract or ownership rules.

As a result, there is a need to step back from the separate law approach in the case of insurance contract regulation in favour of its inclusion in the Civil Law in a separate chapter in the Obligations Law part. Such proposal could be consistent with the previous proposal of the author of those lines to regulate another type of special civil law contracts, namely, intellectual property contracts, also in the Obligations law part[53].

Conclusion

Considering that the Latvian regulation for insurance contracts is self-contradictory, obscure and lacking a consistent and systematic legislative and conceptual approach, it should be included in the Civil law by analogy of majority European Union states, including Latvian neighbouring countries, by revoking the Insurance Contract law and deleting the duplicating norms from the law On Insurance Companies and Supervision Thereof.

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[51] Гражданский кодекс Российской Федерации [Russian Civil Code]. Available: http://www.consultant.ru/popular.

[52] Гражданский кодекс Республики Беларусь от 07 декабря 1998 г. № 218-З [The Belorussian Civil Code]. Available: http://pravo.by/main.aspx?guid=3871&p0=hk9800218&p2={NRPA}.

[53] Mantrovs V. Intelektuālā īpašuma līgumu regulējuma modernizācija Latvijas Republikas Civillikumā [Modernisation of Regulation for Intellectual Property Contracts in the Civil Law of the Republic of Latvia], Latvijas Universitātes žurnāls [Journal of the University of Latvia], Tiesību zinātne / Law, Nr. 2, 2011, 115.-128. lpp.

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INFLUENCE OF THE ECONOMIC FACTOR ON THE VOLUNTARY EXPRESSION OF PATIENT'S WILL

Keywords: patient, will, economic factor, state.

A patient's will in medicine is influenced also by the economic factor[1], because the implementation of any principles, provided for in the normative regulation, demands also a material coverage. On the one hand, it is the state's duty to protect rights from threat, arising from social circumstances[2]. On the other hand, the state, protecting a person's rights, requires certain financial means[3]. Even if a person has certain rights to treatment[4]; still it must be evaluated how far the state's duty goes to reduce the influence of the economic factor on the patient's will.

In the practice of various countries, there are two different interpretations of the state's duty to financially ensure the patient's rights to treatment. First – the progressive approach, where a person's rights to health enjoys complete protection; second – according to a dynamic approach, the patient's rights to health protection depend on the available financial means in the state[5]. The Latvian legal system is based on the

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[1] The economic factor within this paper should be understood as the lack of material means (property), experienced either by the patient him-/herself, or the state, but in the connection with the patient, which accordingly, directly or indirectly influences the patient's will, for example, to choose the person who will treat them or a certain type of therapy, or even the decision whether to carry out the necessary therapy at all.

For example, see: Judgement of the Constitutional Court of the Republic of Latvia of March 14, 2011 in the case No. 2010-51-01. (Para. 2.).

The patient him-/herself is not allowed to misuse his/her rights because of the economic factor. (See: Judgement of the Administrative District Court of the Republic of Latvia (in Riga) of February 13, 2009 in the case No. A42559308 A2403-09/3).

[2] For example, the state's duty to protect the unborn encompasses also protection against threats, arising from social circumstances of the woman's surroundings and her family, which influence the woman's wish to keep the pregnancy (Judgement of Federal Constitutional Court of Germany of May 28, 1993 in the case No. BVerfGE 88, 203. Schwangerschaftsabbruch II. Available: http://www.servat.unibe.ch/dfr/bv088203.html [viewed 11 February 2012]).

[3] Медицинское право. Науч. ред. Дмитриев Ю. А. Москва: Элит, 2006, с. 405.

[4] Pacientu tiesību likums: LR likums. *Latvijas Vēstnesis,* 2009. g. 30. decembris, Nr. 205 (5. p. 1. d.); Der Nürnberger Kodex 1997 (20 August 1997) (Art. 9) Available: www.medizinundgewissen.de/archiv/kodex97.html [viewed 11 February 2012].

[5] Annus T. The Right to Health Protection in the Estonian Constitution. Juridica International: Law Review of University of Tartu, 2002, Vol. 7, I. Available: www.juridica.ee [viewed 11 February 2012].

dynamic approach [6], where the ensuring of a person's rights to health is limited by the economic resources of the state.

The aforementioned limitation is manifested also in a way that the state does not assume the responsibility to ensure the highest possible health level for everybody[7]. Such denial of the state's duty is directed at the efforts to ensure the rights to health for a possibly larger number of persons[8]. It creates the clash between a particular individual's and the society's interests, where the public interests prevail, considering their nature of priority.

It should be considered, in what way the available state funding for the ensuring of a person's rights to health should be divided. There are no universal priority criteria for this distribution at an international level, leaving it at the discretion of each country, stipulating only two minimum principles, limiting the state's freedom of action – (1) the rights to health must be ensured at least at the minimum level[9]; (2) in the distribution of funding, balance must be observed between an individual's rights and interests of all society; despite the fact that the decisions about healthcare funding are "polycentric", encompassing different competing and opposite interests[10].

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[6] Latvijas Republikas Satversme [Constitution of the Republic of Latvia]: LR likums. *Latvijas Vēstnesis,* 1993. 1. jūlijs, Nr. 43 (111. p.); Judgement of the Constitutional Court of the Republic of Latvia of October 22, 2002 in the case No. 2002-04-03 (operative part, Para. 1.); Judgement of the Constitutional Court of the Republic of Latvia of April 23, 2004 in the case No. 2003-15-0106 (Para. 6); Judgement of the Constitutional Court of the Republic of Latvia of December 29, 2008 in the case No. 2008-37-03 (Para. 11.1, 12.1.2); see also: Convention on the Protection of Human Rights and Dignity in Biology and Medicine (April 4, 1997). Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006C0500:LV:HTML [viewed 11 February 2012] (3. p. , 5. p. 2. d.); Glaeske G. Mehr Sicherheit und Gerechtigkeit bei Behandlungsentscheidungen. Der Onkologe, 2008, Nr. 7, S. 660.

[7] Judgement of the Constitutional Court of the Republic of Latvia of October 22, 2002 in the case No. 2002-04-03 (operative part, Para. 1); Judgement of the Constitutional Court of the Republic of Latvia of April 23, 2004 in the case No. 2003-15-0106 (Para. 6); Judgement of the Constitutional Court of the Republic of Latvia of December 29, 2008 in the case No. 2008-37-03 (Para. 11.1, 12.1.1, 12.1.3); Annus T. The Right to Health Protection in the Estonian Constitution. Juridica International: Law Review of University of Tartu, 2002, Vol. 7, I. Available: www.juridica.ee [viewed 11 February 2012].

When studying the LR Constitution and international laws and regulations, one has to conclude that the provisions therein are far from promising well-being in such understanding as the addressee – the general population – would like to interpret them. These provisions contain peculiar wording and disclaimers, which do not allow an individual to directly demand complete healthcare (Torgāns K. Dzīves kvalitāte, deklarācijās un tiesiskajā nodrošinājumā. *Latvijas Vēstnesis,* 2001. g. 15. februāris, Nr. 26, 1., 8. lpp.).

[8] See: Judgement of the Constitutional Court of the Republic of Latvia of December 29, 2008 in the case No. 2008-37-03 (Para. 11.3).

[9] In the court practice of Latvia, the maximum limit of the state funding is set as well (See: Judgement of the Administrative Cases Department of the Senate of the Supreme Court of the Republic of Latvia of July 9, 2010 in the case No. A42491007 SKA-228/2010 (9. pk.)).

[10] Judgement of the Constitutional Court of the Republic of Latvia of December 29, 2008 in the case No. 2008-37-03 (Para. 12.1.3); Conclusions of the Advocate General Ī. Bota of September 9, 2008 in the case: Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung un Oberösterreichische Landesregierung. Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.

Besides, neither legal science nor court practice supports deciding about the criteria of distribution of state funding in court proceedings, considering it unsuitable, because in this way the decision-making of the legislator and the government would be influenced[11]. On the one hand, the priority of the public interests is understandable also in distribution of limited state funding; but, on the other hand, very important private interests, affecting health as a person's basic benefit and a human being as a basic value, are opposed undoubtedly creating complicated legal problems.

Nevertheless, there are three criteria in the Latvian court practice for the distribution of state funding for medicine[12]. First, therapeutic effectiveness. New medical preparations are being created, which are more effective, but also more expensive[13]. And in the distribution, the cheaper variants will be looked for. Second, costs as an economic criterion. It is disputable, how ethically and also how legally adequate it is to position an economic criterion as an argument, where the human dignity cannot be made dependable from any criteria at all[14]. Third, the life expectation indicator, i.e. how much a particular medicine prolongs life, compared to other available treatment methods of the respective disease[15]. Accordingly it can be concluded that it is impossible to avoid the application of these criteria, at least at the present moment, and certain objectiveness for the achieving of the aim, set by the legislator, can be found in these criteria; still, considering the legal problems, connected with them, these criteria have a rather conditional character.

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do?uri=CELEX:62007C0169:LV:HTML [viewed 11 February 2012] (57. pk.); Annus T. The Right to Health Protection in the Estonian Constitution. Juridica International: Law Review of University of Tartu, 2002, Vol. 7, I. Available: www.juridica.ee [viewed 11 February 2012].

[11] Annus T. The Right to Health Protection in the Estonian Constitution. Juridica International: Law Review of University of Tartu, 2002, Vol. 7, I. Available: www.juridica.ee [viewed 11 February 2012]; Judgement of the Constitutional Court of the Republic of Latvia of December 29, 2008 in the case No. 2008-37-03 (Para. 12.4).

[12] See: Judgement of the Constitutional Court of the Republic of Latvia of December 29, 2008 in the case No. 2008-37-03 (Para. 12.2). European position also is in favour of such criteria – Conclusion of the European Economic and Social Committee on the topic Patient's rights. (Para. 3.5.2) (Brussels, 26.09.2007) Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:010:0067:01:LV:HTML [viewed 11 February 2012].

[13] See: Glaeske G. Mehr Sicherheit und Gerechtigkeit bei Behandlungsentscheidungen. Der Onkologe, 2008, Nr. 7, S.667; Мохов А.А. Проблемы судебного разбирательства дел о возмещении вреда, причиненного здоровью или жизни гражданина при оказании медицинской помощи. Available: www.med-law.ru [viewed 11 February 2012].

[14] Annus T. The Right to Health Protection in the Estonian Constitution. Juridica International: Law Review of University of Tartu, 2002, Vol. 7, I. Available: www.juridica.ee [visited February 11, 2012]; Termināli slimā un mirstošā pacienta aizsardzība un specifiskās vajadzības. Eiropas Padomes Parlamentārās asamblejas Sociālo, veselības un ģimenes lietu komitejas ziņojuma rekomendējošās daļas 7.9. pk. In: Andrejevs G. Termināli slimo un mirstošo pacientu cilvēktiesību un cieņas aizsardzība Eiropas Padomes skatījumā. Doctus, 2000, Nr. 3, 37. lpp; Schleger H. A., Reiter-Theil S. "Alter" und "Kosten" – Faktoren bei Therapieentscheiden am Lebensende? Eine Analyse informeller Wissensstrukturen bei Ärzten und Pflegenden. Ethik in der Medizin, 2007, Nr. 2., S. 115.

[15] Judgement of the Constitutional Court of the Republic of Latvia of December 29, 2008 in the case No. 2008-37-03 (Para. 12.2).

Another way of how to ensure treatment for the largest part of population with limited funding, is, implementing an appropriate medicine funding system. Law confirms the patient's duty to pay for the received treatment[16], because it is centred on a patient, who has an interest regarding his/her health[17]. There are three main systems of medicine funding, having two features: (1) they are derived from the patient's duty to pay for treatment services; (2) they have different burden of the patient's payment obligation.

In various countries of the world the following main systems of medicine funding can be found: (1) state system as a historical continuation of charity medicine (e. g., in Cuba, Italy, Great Britain); (2) private or pay system, which historically arose from the medicine of the well-to-do classes of society (e. g., in the USA); (3) on mandatory health insurance based system, which historically formed in late 19th, early 20th centuries (e. g., in France, Germany, Canada, Japan, Estonia, Lithuania, Russia, also in Latvia during the period of the first republic)[18]. When Latvia regained

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[16] For example: Pacientu tiesību likums [Law on the Rights of Patients]: LR likums. *Latvijas Vēstnesis,* 2009. g. 30. decembris, Nr. 205 (Section 15(5)); Law of Obligations Act of Estonia (2002). Available: http://www.legaltext.ee/indexen.htm [viewed 11 February 2012] (§761); Act on the medical treatment contract of Netherlands (Part 5 of the seventh title of Book 7 of the Civil Code) (17.11.1994.). Available: www.healthlaw.nl/wgboeng.html [viewed 11 February 2012] (a.461); indirectly Latvijas Ārstu ētikas kodekss [Code of Ethics of Doctors of Latvia] Para. 15. (Latvijas Ārstu ētikas kodekss [Code of Ethics of Doctors of Latvia]. Available: http://www.medicina.lv/lat/second4.php?page=zakoni&P1=4 [viewed 11 February 2012]); Ārstniecības likums: [Medical Treatment Law] LR 1937. gada 22. decembra likums (Section 71). In: Vīksna A. Slimo kases Latvijā. Rīga: Rīgas starptautiskais medicīnas zinātnes un farmācijas centrs, 1994, 125. lpp.

Limits of medicine service payments must be strictly delineated and the amount cannot change during treatment (judgement of Federal Constitutional Court of Germany of October 25, 2004 in the case No. BVerfG, 1 BvR 1437/02. Available: www.bundesverfassungsgericht.de [viewed 11 February 2012] (I. 17)).

[17] Resolution of the European Parliament about the patients' mobility and the development of healthcare in the European Union (2004/2148(INI)) (52005IP0236). Available: http://eur-lx.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005IP0236:LV:HTML [viewed 11 February 2012] (Para. 41).

[18] Федорова М.Ю. Медицинское право. Учебное пособие для вузов. Москва: ВЛАДОС, 2003, с. 27; Колоколов Г. Р., Косолапова Н. В., Никульникова О. В. Основы медицинского права. Москва: Экзамен, 2005, с. 23-28; Health Insurance Act of Estonia (01.10.2002.) Available: http://www.legaltext.ee/indexen.htm [viewed 11 February 2012]; Law on the rights of patients and compensation of the damage to their health (Lithuania, 03.10.1996). Available: www3lrs.lt/pls/inter2/dokpaieska.showdoc_e?p_id=111935 [viewed 11 February 2012] (a.4.1.); Ārstniecības likums [Medical Treatment Law]: LR 1937. gada 22. decembra likums. Ārstniecības likums Rīga: Valsts tipogrāfija, 1937 (98. p.); Noteikumi par medicīnisko palīdzību slimo kasu dalībniekiem [Regulations on medical aid to members of sickness insurance funds]: LR 1929. gada 2. novembra noteikumi Nr. 19376, Noteikumi aptiekām par zāļu izsniegšanu slimo kasu dalībniekiem un to apgādājamajiem ģimenes locekļiem [Regulations for pharmacies on issuing medicines to members of sickness insurance funds and their dependent family members]: LR 1930. gada 20. augusta noteikumi Nr. 7904, Slimo kasu normālstatūti [Articles of association of sickness insurance funds] (1930. g. 12. sept.), Slimo kasu un ārstu padomes kārtības rullis [Rules of Procedures of sickness insurance funds and doctors' council] (1931. g. 29. okt.), Likums par lauku iedzīvotāju nodrošināšanu slimības gadījumos [Law on providing for rural inhabitants in case of sickness]: LR 1928. gada 5. jūnija likums, Noteikumi par valsts darbinieku ārstēšanu [Regulations on treat-

independence, medicine funding had the features of the state funding system which still are set out in the normative regulation[19]. However, considering the present-day tendencies in the medicine funding, in reality private system features can be found.

Comparing the systems of medicine funding, the most suitable to patient's interests is the system, which is based on mandatory health insurance, because a compromise is achieved between the patient and the state. On the one hand, the patient's participation in the overall funding is rather large, but it does not burden the patient too much in the case of health problems[20]. On the other hand, there is also the state's participation in the funding, but still the main source of funding is the general society, based on the principle of solidarity, which is the essence of the society's humanitarian nature[21]. The idea of introduction of mandatory health insurance in Latvia must be embraced. Moreover, the legal relations between the patient and treatment person / institution are of private law nature in any case[22].

The economic availability of medicine can apply not only to treatment services within the state, but also beyond its borders, i.e. to cross-border treatment. The court practice of the European Union has developed a principle that patients have the right to receive compensation of expenses for such healthcare services, received

ment of state officials]: LR 1931. gada 30. oktobra noteikumi. In: Vīksna A. Slimo kases Latvijā. Rīga: Rīgas starptautiskais medicīnas zinātnes un farmācijas centrs, 1994, 128. lpp.; Conclusions of Advocate General Y. Bot of September 9, 2008 in the case: Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung un Oberösterreichische Landesregierung. Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007C0169:LV:HTML [viewed 11 February 2012] (Para. 54); Wöllenstein H. Der informierte Patient aus Sicht der Gesetzlichen Krankenversicherung. Bundesgesundheitsbl-Gesundheitsforsch-Gesundheitsschutz, 2004, Nr. 10.; Judgment of the Court of Justice of the European Union (form., Communities) of 11 July 2009 in the case: Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik v. AOK Rheinland/ Hamgurg. Available: http://eur-lex.europa.eu/Notice.do?val=496234:cs&lang=lv&list=496234:cs,484897:cs,-&pos=1&page=1&page=1&nbl=2&pgs=10&hwords=pacientu~&checktexte=checkbox&visu=#texte [viewed 11 February 2012] (Para. 24); Zālīte E. Sociālā apdrošināšana Latvijā (1920-1940). Available: www.arhivi.lv/sitedata/ZURNALS/zurnalu_raksti/99-127-VESTURE-Zalite.pdf [viewed 11 February 2012].

[19] Ārstniecības likums [Medical Treatment Law]: LR likums. *Latvijas Vēstnesis,* 1997. g. 1. jūlijs, Nr. 167/168 (Section 17(1),(4), (5), Section 18).

[20] In the case of therapy, the insured patient does not have to make direct payments (See: Judgement of the Constitutional Court of the Czech Republic of June 4, 2003 in the case: Pl. US 14/02. Available: http://angl.concourt.cz/angl_verze/doc/p-14-02.php [viewed 11 February 2012] (II, III)).

[21] The solidarity principle is manifested in two ways: (1) "the healthy pays for the sick"; (2) "the rich pays for the poor" (Колоколов Г. Р., Косолапова Н. В., Никульникова О. В. Основы медицинского права. Москва: Экзамен, 2005, с. 35).

[22] See: Judgement of the Administrative Cases Department of the Senate of the Supreme Court of the Republic of Latvia of June 26, 2008 in the case No. SKA-155/2008; Decision of the Federal Constitutional Court of Germany of November 18, 2004 in the case No. BVerfG, 1 BvR 2315/04. Available: www.bundesverfassungsgericht.de [viewed 11 February 2012](P.25);Horntrich J. Der kranke Mensch: Patient oder Kunde? Available: http://www.aeksh.de/shae/200202/h022052a.html [viewed 11 February 2012]; McLean A. Informed consent and medical law: a relational challenge. Med Law Rev, 2010, Nr. 18, p. 111.

in foreign countries, which they would receive in their home country[23]. Considering the aforementioned case-law, a necessity arose for the normative regulation of this question, introducing the following two main ideas: a) the patient's rights are provided to receive compensation of expenses for treatment in another country; b) new institutions are established, in order to facilitate cooperation in the European Union in healthcare area (European reference centres network; European medical technologies evaluation network; telemedicine; recognizing a recipe, issued in another member-state)[24]. On the one hand, considering the persons' rights of free travel in the European Union countries, the patients' mobility also is inevitable. But on the other hand, it is pointed out that cross-border treatment is permissible in cases of necessity or when delay of treatment cannot be allowed, but member-states must facilitate treatment for residents within their borders, ensuring universal and unlimited availability of medicine[25].

Upon evaluating the patient's possibility to voluntarily express his/her will in medicine, it can be concluded that to a large extent it is influenced by the actual circumstances. The influence of these circumstances cannot be completely eliminated. Nevertheless the legal means must be set out in the normative regulation which would reduce the influence of the actual circumstances on the patient's possibility to voluntarily express their will.

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[23] See, for example: Judgment of the European Union (previously – Community) Court of May 16, 2006 in the case: Yvonne Watts v. Bedford Primary Care Trust and Secretary of State for Health. Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0372:LV:HTML [viewed 11 February 2012]; Judgment of the Court of Justice of the European Union (previously – Community) of May 13, 2003 in the case: V. G. Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA; un E.E.M. van Riet v. Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen. Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999J0385:LV:HTML [viewed 11 February 2012]; Judgment of the Court of Justice of the European Union (previously – Community) of July 12, 2001 in the case: B. S. M. Smits, laulātās uzvārdā Geraets, v. Stichting Ziekenfonds VGZ; and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen. Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999J0157:LV:HTML [viewed 11 February 2012]; Judgment of the Court of Justice of the European Union (previously – Community) of July 12, 2001 in the case: Abdon Vanbraekel u.c. v. Alliance nationale des mutualités chrétiennes (ANMC). Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0368:LV:HTML [viewed 11 February 2012].

See also: Resolution of the European Parliament about the patients' mobility and the development of healthcare in the European Union. Commission Declaration. (No. :52008DC0415, 02.07.2008, Brussels). Available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0415:LV:HTML [viewed 11 February 2012].

[24] On the application of the patients' rights in cross-border healthcare: European Parliament and Council Directive 2011/24/ES of March 9, 2011. Official Journal, 2011, 4 April, L 88, pp. 45–65. (Art. 7, Art. 8(1), Art. 11, 12, 14, 15.).

[25] Resolution of the European Parliament about the patients' mobility and the development of healthcare in the European Union (2004/2148(INI)) (52005IP0236). Available: http://eur-lx.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005IP0236:LV:HTML [viewed 11 February 2012] (Para. 46).

Conclusion

Upon evaluating the influence of the economic factor on the patient's possibility to voluntarily express his/her will in medicine, it can be concluded that the normative regulation in Latvia currently does not to an adequate extent ensure the protection of the patient's free will from the aforementioned influence. Considering that the patient's possibility to voluntarily express his/her will is one of the criteria of validity of the expression of the patient's will, confirming its significance, the author sets forth the following theses, resulting from the study:

1. Economic conditions do not yet automatically ensure the implementation of legal provisions, they must be evaluated as preconditions. An appropriate financial environment creates beneficial grounds for the freedom of the patient's will. The patient should not necessarily exercise all his/her rights, but the aim of the normative regulation is to ensure the freedom of the patient's will, minimizing the influence of the economic factor on the patient's will.
2. In Latvia, the ensuring of a person's rights to health is limited by the economic resources of the state. The limited amount of the state's financial resources for the ensuring of a person's rights to health creates a clash in the legal system between significant interests of a certain individual and those of the society, where the public interests prevail, considering their priority character, without the provision for certain criteria in the normative regulation for distribution of the state funding for medicine.
3. When Latvia regained independence, medicine funding had the features of the state funding system, which still are set out in the normative regulation. However, considering the present-day tendencies in the medicine funding in Latvia, in reality, private system features can be found which are characterized by the most burdensome for the patient payment obligation in comparison with other systems. Considering the civil law character of the treatment relations, the increase of the participation in the funding of medicine must be supported. The system of mandatory health insurance should be introduced in Latvia, which would equalize the influence of the economic factor on the patient's freedom of will.
4. The wish of the European Union to limit popularity of cross-border treatment in the normative regulation is understandable, as such activity indirectly influences the balance of civil law circulation in the European Union member-states. Nevertheless, the possibility of all member-states to ensure universal and unlimited national availability of medicine is a subject of doubt, thus unavoidably facilitating cross-border treatment.

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IGNORING THE DOCTRINE IN LEGISLATION: THE CONCEPT OF INSTITUTION

Keywords: legal person's organs, legal person's internal organs, legal person's external organs, institution, public institution, private institution, authorities, autonomous institutions, autonomous institutions with limited legal capacity, competent autonomous institutions, institutions – legal persons.

The concept of institution in legislation. In legislative process it is important to ensure that the legislative text is unambiguous and comprehensible, so that the application of law would not leave ground for doubts or offer different interpretation opportunities. Legislative terminology should be clear, generally known and unambiguous. Terms with different meanings should not be used in legislation. Besides, the historical development of the legislative institute itself and the natural diversity of terms denoting it should be respected. In Latvia the term *institution* has created certain ambiguity, as it has been used under different meanings in the legislation. Latvian lawyers, inter alia senators of the Supreme Court (K. Torgāns[1], J. Briede[2]), give different interpretation of this term in the article 1407 of The Civil Law[3]. This paper will clarify how much the legislator is to blame for this and how much blame lies on imprecise interpretation of the term.

Legal person's organs. One of a legal person's compulsory and inalienable features is legal person's organs[4]. Legal person's organs are indispensable elements of legal person's organization. From the structural point any legal person's capacity to act is built in such a way that a legal person obtains an institution that is responsible for performing specific tasks; this institution is called an organ[5]. Only through its organs a legal person can define and amend its aim as well as shape, express and carry out the will of the legal person, to exercise its private rights of capacity to act, which is – to be both in capacity of making a deal and committing offence[6]. A legal person needs at least one

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2 Briede J., Danovskis E. Publisko tiesību subjektu civiltiesiskais statuss. *Jurista Vārds,* 2012, Nr. 7, 14.02.2012., 6.-11. lpp.

3 Civillikums. 28.01.1937. LMKNK, 1937. Nr. 5, 06.03.1937.

4 Dišlers K. Ievads administratīvo tiesību zinātnē. Rīga: TNA, 2002, 125.-127. lpp.

5 Peine F.-J. Allgemeines Verwaltungsrecht. Heidelberg: Müller Verlag, 1998, 4. Aufl., S. 11.; Paine F. J. Vācijas vispārīgās administratīvās tiesības. Vācijas administratīvā procesa likums. (J. Briede, red.) Rīga: TNA, 2002, 15. lpp. (in Latvian translation (the translator is not indicated) the idea is completely modified).

6 Balodis K. Ievads civiltiesībās. Rīga: Zvaigzne ABC, 2007, 93.-96. lpp.

external organ to be in capacity to act. Usually a legal person has several organs. To establish a legal person's organ it is necessary to have a respective legal act which defines the procedure of establishment, tasks, competency and functioning of the organ.

Legal person's organ usually consists of physical persons; but it can act only through them. Decision maker of a legal person which voices its will and acts on behalf of the legal person is composed either of one separate physical persons (monocratic organ) or is formed as a panel of physical persons (collegiate organ). Organ can be defined also as a part of legal person's body *(corpus),* through which the legal person shapes, expresses and exercises its will of the legal person.

Article 1410, paragraph 2 of the Civil Law stipulates that "legal persons make legal deals through their rightful representatives". It should be reasonably noted that the terms "legal person's organs" and "legal person's legal representatives" are not synonyms[7]. By calling legal person's organs the legal person's legal representatives, it gives an impression that a legal person, similar to underage, does not have a capacity to act (article 1411 of the Civil Law). Local [civil]law digest (LCLD) stipulated that legal persons were "represented" by "their legal organs and representatives"[8], where in Latvian translation of the law *representatives* became both *heads*[9] and *board*[10] (article 2918 of LCLD). However, article 636 of LCLD stipulated that "legal persons express their will through their legal representatives, trustees, secretaries or for that purpose specifically appointed authorised persons"[11]. As to our opinion, legal person's organs in the Civil Law *expresis verbis* should have been defined as *legal person's organs* or as *legal person's deputy,* applying the term used in today's circulation in article 5 of the Constitution of the Republic of Latvia as well as in other articles[12], as the formulation "legal persons make legal deals through their rightful organs [deputy] and representatives" expresses more precisely the essence of a legal person and its organs as well as the traditional representation. It prevents any possible objections against the term *organs* and expresses the meaning of this article more precisely. Represented and representatives remain both, legal person (association) and its organ remains as the single person[13]. It is essential to differ between legal person as an actually existing organisation with its own body that comprises legal person's participant, its property and its organs, and which, despite the changing and subtle nature of its forming elements, who forms one unit, from parts of legal persons. Organs are parts of this

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7 Balodis K. Ievads civiltiesībās. Rīga: Zvaigzne ABC, 2007, 93. lpp.

8 Свод местных узаконений губерний Остзейских. Часть третия. Законы гражданские. Санктпетербург: Типография второго отделения собственной Е. И. В. Канцелярии, 1884, стр. 465.

9 Vidzemes un Kurzemes privāttiesību likumu grāmata (G. Maters, red.). Liepājā: G. Cimmermaņa izdevniecība, 1885, 503. lpp.

10 Civīllikumi. Rīgā: Valters un Rapa, 1935, 386. lpp.

11 Свод местных узаконений губерний Остзейских. Часть третия. Законы гражданские. Санктпетербург: Типография второго отделения собственной Е. И. В. Канцелярии, 1884, стр. 103; Civīllikumi. Rīgā: Valters un Rapa, 1935, 101. lpp.

12 Latvijas Republikas Satversme. 15.02.1922. LVRK 1922, Nr. 12, 07.08.1922.; *Latvijas Vēstnesis,* Nr. 43, 01.07.1993.

13 Еллинек Г. Общее учение о государстве. Санкт-Петербург: ЮЦП, 2004, стр. 537; Dišlers K. Ievads administratīvo tiesību zinātnē. Rīga: TNA, 2002, 125. lpp.

single unit, parts of the legal person. Organs relate to the body of a legal person in the same way in which a part relates to the whole unit; legal person relates to its organs in the same way in which the whole unit relates to its parts[14]. It is not possible to meet a legal person; one can only meet the legal person's organs or its property.

Legal person's organs endowed with public law function exercise not only the public function of a legal person, but also are organs in its private rights capacity to act and vice versa.

Classification of legal person's organs. There are several ways of classifying legal persons organs. Organs may be classified according to the following features – direct and indirect, monocratic and collegiate, as to the amount of performed functions – preparatory, consultative, decision making, executive, etc. As to our opinion it is essential to have a formal division of legal person's organs in relation to its tasks of legal person functions. There should be a distinction between organs forming the will of a legal person and organs executing the will of a legal person[15]. The first are called internal organs of a legal person (Cabinet of Ministers, university assembly meeting, meeting of shareholders, assembly of sworn advocates, etc.), the second are called external organs of a legal person (Prime Minister, Head of University, President of Bank of Latvia, state and municipal institutions, etc.). Internal organs participate in forming the will of a legal person or exercise other specific internal functions. External organs are established for a legal person to exercise the will of a legal person formulated by internal organs, as well as enter into legal relationship with other persons. In private rights circulation and in relationship with other persons legal persons enter mainly with the help of external organs. Legal person's external organs are usually formed to ensure legal person's interaction with other persons, which is uncharacteristic to legal person's internal organs. Neither legal person's internal, nor external organs have the rights of a legal person, they relate to a legal person in the same way in which a part relates to the whole unit.

Legal person's institutions. Doctrine[16] and law[17] define legal person's institutions as external organs of a legal person that have a set of institutional features to establish a legal person's institution and ensure its functioning. Institution's features comprise **judicial element** (1) – legislative act made public by authorisation of law and in a lawful way, which regulates the functioning of an institution; **personal element** (2) – formation and operation of institution's organs as well as presence of paid individuals (personnel) in its organs, and **material element** (3) – institution holds property owned by legal person and it handles it in a certain way in order to fulfill institution's functions, as well as there are allocated financial funds from legal person's budget, that are required to ensure institution's continuous operation. It is controversial whether institutions should be only those external organs of a legal person under public law, or any legal person's all external organs or only certain type of them.

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[14] Muciņš L. Juridiskās personas jēdziens. Inovāciju juridiskais nodrošinājums: Latvijas Universitātes 70. konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2012, 169.-170. lpp.

[15] Gierke O. von. Deutsches Privatrecht. B. I. Lepzig: Verlag von Duncker und Humblot, 1895, S. 498.

[16] Dišlers K. Ievads administratīvo tiesību zinātnē. Rīga: TNA, 2002, 181.-184. lpp.

[17] Valsts pārvaldes iekārtas likums. 06.06.2002. *Latvijas Vēstnesis*, Nr. 94, 20.06.2002.

External organs of a legal person are legally organised and are defined by a term, for instance, *board* for commercial firms, *judiciary institutions, police institutions* for the state, *Latvian Council of Sworn Advocates* for Latvian Collegium of Sworn Advocates, *educational establishments* for the state and municipality, etc. Not always do these include the direct name of *institution.* In public law with a legislative act an external organ of a respective legal person obtains specific public competency (principle of public law – to do what the law instructs). In private law this is usually not done so (principle of private law – everything is allowed except from what is prohibited by law). There are no doubts that a legal person under public law that has an external organ with public competency, provided it has all the features of institution, is called an institution. However, there are cases when the name of institution comprises not only legal persons under public law but also an organ established by a legal person under private law, which has obtained public competency or is arranged for public aims. Thus article 22 of Law on Education stipulates that there are "state, municipal and private educational institutions"[18], although it would be more accurate to name them in law as state, municipal and privately established [public] educational institutions. To our opinion, a concept of "private kindergarten" is nonsense. It should also be noted that on separate occasions abroad a term "institution" was applied to institutions that were established only in the form of a competent legal person (banks, for instance). However, in Latvia private individuals are establishing public institutions (banks, kindergartens, schools, universities) in the form of private commercial capital companies. The reason for this is that the concept of institution's institute in Latvia has not been fully and finally developed and concretized both in theory and legislation. It has not been precisely defined and categorized in different laws (due to lack of terminology), and these different laws have not been internally and externally agreed.

Besides, a term of institution that has been used in above mentioned cases to denominate external organ of a legal person, in several laws has been used to denominate a concept that refers only to that particular law. So in article 1 of Administrative proceedings law a term "institution" applies not only to the subject of administrative law – institution itself, but also to "the structural unit or official..."[19]. In such cases terminology of the law is functional only within the respective law and shall not be used for other purposes.

Classification of institutions. Classification of institutions may have public rights or private rights meaning. From organizational point institutions are often classified as to their field of operation, dividing, for example, them into financial institutions, police institutions, educational institutions, cultural institutions, schools, hospitals, banks, etc. Classification of institutions as to their field of operation or subordination (ministries, subordinated institutions of ministries, indirectly subordinated institutions of ministries) does not reveal competency of these institutions under public rights, contents of private rights conduct and relationship with the legal person, part of which they are. Such classification, if any of its aspects are not fragmentary regulated

[18] Izglītības likums. 29.10.1998. *Latvijas Vēstnesis*, Nr. 343/344, 17.11.1998.

[19] Administratīvā procesa likums. 25.10.2001. *Latvijas Vēstnesis*, Nr. 164, 14.11.2001.

through a special normative act, does not allocate the institution any specific public rights competences, as well as does not deprive of any specific private rights competency. It only assists to organise legal acts and state administration uniformly. Our and foreign legislation does not have a practice of passing a state governing law that would be of higher hierarchy in respect to other laws and would organize the whole state administration as such. Dividing institutions into lawmaking authorities, executive (governing) authorities and judiciary authorities does not solve the existing problem. This can be solved only by doctrinal approach.

Doctrine and history of legal persons institute offers another classification method which, as to our opinion, has been ignored during the discussions on legal person's substance[20] which is based on the whole amount of public authority allocated to the institution, founder of the institution and the aim, institution's potentially dangerous action, disposable property and the procedure of its forming. Institutional competencies do not result from classification of institutions; they are directly and specifically stipulated in legal acts on types of institutions, their establishment and functioning. Doctrine divides institutions in two essentially different groups. All institutions are either institutions with dominant authority[21] or **authorities** (legislative authorities, executive (governing) authorities and judicial authorities) and institutions without the dominant authority – so called **autonomous institutions**[22]. Differences in such institutional division spring from delegated amount of public authority and the vector of activity, however, essentially institutions are related with internal constructive relationship that exists among establishers of these institutions – legal persons and institutions founded by them in the field of institutional self-dependency, as well as in the nature of legal relationship between these institutions and, mainly, private individuals. Such relationship affects the type of authority executed by institutions, fee for institutional operation, hazardous offense level of the institutions, as well as other problems under public rights and private rights as well as civil procedural problems.

Authorities. Authorities are those of legal persons authorities *(behörde)*, mainly state and municipal authorities, that under public law execute the authority allocated to them externally against any person outside the institutional walls (parliament, police authorities, customs authorities, prosecution authorities, etc.) or against persons

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[20] Sinaiskis V. Tiesiskais antropomorfisms sakarā ar mācībām par valdīšanu, juridisko personu un jaunu mācību par civiltiesībām. *Tieslietu Ministrijas Vēstnesis,* 1927, Nr. 12, 369.-379. lpp., 1928, Nr. 3, 49.-68. lpp.; Muciņš L. Publisko iestāžu klasifikācijas modelis. *Likums un Tiesības,* 2000, Nr. 4, 98.-102. lpp.; Tihomirnijs K. Par juridisko personu, par tās iespējamo kriminālatbildību. *Jurista Vārds,* 2000, Nr. 27, 11.07.2000.; Saulītis E. Publisko personu rīcībspējas un tiesībspējas civilprocesuālie aspekti. *Jurista Vārds,* 2009, Nr. 44, 03.11.2009., 19.-22. lpp.; Torgāns K. Mantiskā atbildība privātajās un publiskajās tiesībās. *Jurista Vārds,* 2011, Nr. 46, 15.11.2011., 4.-13. lpp.; Briede J., Danovskis E. Publisko tiesību subjektu civiltiesiskais statuss. *Jurista Vārds,* 2012, Nr. 7, 14.02.2012., 6.-11. lpp.; Torgāns K. Valsts pārvaldes iestāžu divi statusi ir realitāte. *Jurista Vārds,* 2012, Nr. 12, 20.03.2012., 6.-9. lpp.; Muciņš L. Juridiskās personas jēdziens. Inovāciju juridiskais nodrošinājums: Latvijas Universitātes 70. konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2012, 163.-171. lpp.

[21] Еллинек Г. Общее учение о государстве. Санкт-Петербург: ЮЦП, 2004, стр. 593.

[22] Dišlers K. Ievads administratīvo tiesību zinātnē. Rīga: TNA, 2002, 184. lpp.; Peine F.-J. Allgemeines Verwaltungsrecht. Heidelberg: Müller Verlag, 1998, 4. Aufl., S. 20-21.

within the limits of their competencies (municipal, self-governing and other derivative legal person authorities under public law), or hierarchically govern other institutions (Ministry of Culture, Liepāja City Educational Administration, etc.). Authorities act in a bossy *(obrigkeitliche)*[23] and dominant *(hoheitliche)*[24] manner against any person and institution within its competency; it acts with nature of coercive and potentially is more dangerous to the society and its private individuals in comparison to autonomous institutions. From the viewpoint of private rights it is important to establish responsibility on damages made by authorities. According to the modern human rights in case of unjustified violation of rights damages shall be redeemed accordingly (article 92 of the Constitution of the Republic of Latvia). For ages the state functioning practice has highlighted a necessity to tie closely authorities and legal persons, and autonomy of authorities is minimal. State authority (executive power) institutions are set up in a hierarchic structure and according to article 58 of the Constitution of the Republic of Latvia they are subordinated to the Cabinet of Ministers. Authorities do not possess a separate budget, their budget is a part of legal person's under public law (usually – state, municipality) budget. State tariffs, penalties and other payments, even the fee on services provided by authorities, are directly collected in the budget of legal person and not to the budget of the authority. Thus, the compensation for damages caused by authority should be collected from the public legal person, from the legal person's budget as the authority does not hold its own budget. In case with the state it would be most appropriate to collect remuneration from State Treasury.

Autonomous institutions. History of the institute of a legal person shows that with the raise of Christianity in Roman law besides one type of a legal person – associations of persons *(universitatis personarum)* emerged another type of legal person – foundations *(universitatis bonorum)*[25]. Historically foundations were established in the areas related to church and its social sphere – as legal persons under public law[26]. Later, when these areas were taken over by the state, foundations lost the status of a legal person and became state property and state institutions, acting only in social field[27], and, unlike already existing state authorities, these publically autonomous institutions were granted with bigger autonomy, however, they got almost no public authority that already belonged to the state authorities. Thus today we can distinguish between competent autonomous institutions (legal persons), as well as autonomous institutions with limited legal capacity.

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[23] Еллинек Г. Общее учение о государстве. Санкт-Петербург: ЮЦП, 2004, стр. 593-594.

[24] Ibid., c. 595.

[25] Барон Ю. Система римского гражданского права. Санкт-Петербург: ЮЦП, 2005, стр. 120, 128-129; Regelsberger, F. Pandekten. B. I., Leipzig: Verlag von Duncker und Humblot, 1893., S. 296.

[26] Celms K. Nodibinājumu juridiskais stāvoklis un viņu nozīme tagadnē. *Tieslietu Ministrijas Vēstnesis,* 1939, Nr. 3, 634.-657. lpp.; Gierke, O. von. Deutsches Privatrecht. B. I., Leipzig: Verlag von Duncker und Humblot, 1895, S. 636, 646.

[27] Еллинек Г. Общее учение о государстве. Санкт-Петербург: ЮЦП, 2004, стр. 595.

Autonomous institutions with limited legal capacity[28], as indicated in the name of autonomous institution *(anstalt)* and in Latvian history of law, as well as in the state practice belonging to Germanic law group, are characterized by a higher degree of autonomy and are significantly more self-dependent[29], especially when signing contracts under private law within the limits of their own budget revenue, bearing the responsibility under the civil law on damages within the boundaries of their own budget revenues, etc. This autonomy foresees a separate budget segregated from the budget of the legal person, own revenues in the budget of an autonomous institution, usually as a fee for using the autonomous institution (service fee), more independent spending of the budget. On the other hand, public competency of autonomous institutions has been significantly limited – they do not possess direct dominating power outside the walls of respective institution and in regards to unlimited number of private individuals. It is controversial to acknowledge such autonomous institutions as legal subjects[30] and their participation in civil circulation on behalf of the autonomous institution itself, but in own amount of its budget revenues, or acknowledging such institution as a subject in civil proceedings law along with the rights to act as a plaintiff and obligations to undertake liabilities stipulated in the civil law on behalf of itself within the own amount of its budget revenues, however not on behalf of the legal person.

Power of autonomous institution with limited legal capacity is limited only in respect to the use of these institutions (providing service) and mostly concern individuals inside the institution – users of institution, personnel, in separate cases, indirectly, a wider group of users of the institution. Part of these autonomous institutions in Latvia is defined as agencies by the law[31], part – as authorities[32], part (educational institutions[33]) has been left outside the classification. Quite often autonomous institutions "run" to the legal forms of commercial companies (hospitals, culture establishments, etc)[34].

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[28] Peine F.-J. Allgemeines Verwaltungsrecht, Heidelberg: Müller Verlag, 1998, 4. Aufl., S. 21; Paine F. J. Vācijas vispārīgās administratīvās tiesības. Vācijas administratīvā procesa likums. (J. Briede, red.) Rīga: TNA, 2002, 28. lpp.

[29] Muciņš L. Publisko iestāžu klasifikācijas modelis. *Likums un Tiesības,* 2000, Nr. 4, 101.-102. lpp.

[30] Vaivods K. Administratīvā procesa tiesā būtība. Administratīvais process tiesā (J. Briede, red.), Rīga: *Latvijas Vēstnesis*, 2008, 29. lpp., 78. piezīme.

[31] Publisko aģentūru likums. 22.03.2001. *Latvijas Vēstnesis*, Nr. 58, 11.04.2001.; Augstskolu likums. 02.11.1995. *Latvijas Vēstnesis,* Nr. 179, 17.11.1995., 21. pants; Zinātniskās darbības likums. 14.04.2005. *Latvijas Vēstnesis*, Nr. 70, 05.05.2005., 21.-1. pants.

[32] Ieslodzījumu vietu pārvaldes likums. 31.10.2002. *Latvijas Vēstnesis*, Nr. 168, 19.11.2002.

[33] Izglītības likums. 29.10.1998. *Latvijas Vēstnesis,* Nr. 343/344, 17.11.98., 1. pants. However, Izglītības likums [Law of Education] seperate "educational authorities" and "educational institutions"; Augstskolu likums. 02.11.1995. *Latvijas Vēstnesis,* Nr. 179, 17.11.1995., 7. pants. That establish the Academy of National Defence of Latvia and state founded college are state institutions.

[34] Typical example of "running" to the commercial companies is National Opera house of Latvia. See: Latvijas Nacionālās operas likums, 22.05.2002. variants (*Latvijas Vēstnesis,* Nr. 88, 12.06.2002.) un 23.12.2008. variants (*Latvijas Vēstnesis*, Nr. 200, 23.12.2008.), 1. pants.

Competent autonomous institutions – legal persons. Law defines when autonomous institutions are established in the form of a competent legal person. By rule of law, authorities will never obtain status of a competent legal person. Usually competent autonomous institution – legal person is established by a separate law to fulfill certain public goals[35] or to limit civil liability of the legal person-establisher, or to achieve other goals[36]. Usually competent autonomous institutions do not possess dominating power and private individuals enter into the service-providing relationship, similar as to the autonomous institutions with limited legal capacity. From the aspect of private law these autonomous institutions are competent legal persons[37]. In German civil law on the basis of the model of competent autonomous institutions – legal persons emerged and developed private commercial capital companies – legal persons, – companies with limited liability and stock companies, that are widely known today.

It is necessary to look deeper into the concept of *institution* of the article 1407 of the Civil law in order to establish what contents did the legislator put into this concept as well as to look if the declaration stated in the summary of the article by K.Torgāns, paragraph 5, is grounded – that according to the article 1407 of the Civil law an institution shall be any state institution[38]. Starting with more formal objections: the norm of this law (article 1407) deals only with those institutions that are competent legal persons ("are acknowledged as legal persons"), and, thus, as such are acknowledged by a public legal act, as results from the text of the article ("which have been granted a legal identity"). Denomination "state", which K. Torgāns has added to the word "institutions" ("any state institution") indicates that this institution (but why not municipal and other institutions derived from public law legal persons) is an organ and a component of a legal person, state – in this case, thus an institution which is a part of other body (legal person) cannot be a legal person in any way. Article 1407 of the Civil Law does not refer just to any type of institutions, this is indicated by the stated origin of legal persons and their historical development, as well as the two types of institutions – authorities and autonomous institutions, and article 58 of the Constitution of the Republic of Latvia along with the translation to German of the article 1407 of the Civil Law, where a term *"anstalt"*[39] has been unequivocally used. The same refers to comparison of German texts of Constitution

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[35] Muciņš L. Publisko iestāžu klasifikācijas modelis. *Likums un Tiesības,* 2000, Nr. 4, 102. lpp.

[36] Likums "Par Latvijas Banku". 19.05.1992. LRAPVZ, Nr. 22/23, 04.06.1992. 1. pants.; Grozījums likumā "Par Latvijas Banku" 01.06.2000. *Latvijas Vēstnesis*, Nr. 223/225, 14.06.2000., 1. pants; Finansu un kapitāla tirgus komisijas likums. 01.06.2000. *Latvijas Vēstnesis*, Nr. 230/232, 20.06.2000., 2. pants.

[37] Muciņš L. Publisko iestāžu klasifikācijas modelis. *Likums un Tiesības,* 2000, Nr. 4, 101.-102. lpp. The article is written on 2000 before adoption of the State Administration Structure Law and it provides for several ideas which are not doctrinally correct or it contains ideas which were not supported by the legislator. For example, it is indicated that competent autonomous institutions do not have their own belongigs. That time amendments to Law 'On Bank of Latvia' were not yet adopted.

[38] Torgāns K. Mantiskā atbildība privātajās un publiskajās tiesībās. *Jurista Vārds,* 2011, Nr. 46, 15.11.2011., 13. lpp.

[39] Latvijas Republikas Civillikums. Lettlands Zivilgesetzbuch. Rīga: Latvijas Vēstnesis, 2006, 310. lpp. Look article 1407 the German language text.

and Civil law[40]. Besides articles 2348-2357 of LCLD[41] (that have been converted to articles 494-499 of the Civil Law and do not refer to the concept of institution, rather replacing it with the concept of legal person) deal with institutions – legal persons (for instance, article 2348 of LCLD on humanitarian, charitable and overly useful institutions[42]). As can be seen from the text of the article 2353 of LCLD ("If the executor of will does nothing or is not appointed and the heir is not attending to establishment of such institution, then the competent court institution appoints trustee with the rights and obligations to execute the will in this regard"[43]), pre-war lawyers did not have a problem as to the theory to distinguish between the concept of institution mentioned in the same article – one of them, the court institution, is an authority institution and an organ of a legal person and is not a legal subject, the other one – newly established institution, is autonomous institution and a competent legal person.

In regards to interpretation of the term *institutions* by J. Briede and E. Danovskis in article 1407 of the Civil Law (paragraph 2 in the summary)[44], who by this term perceive derived public [rights legal] person, then this replacement is also imprecise. Statement that institution mentioned in the article 1407 of the Civil Law, if established as a legal person under public law is a derived legal person under public law, is not incorrect. But the term institution in no way should be perceived as adequate and in-depth appropriate to the term "derived legal person under public law", as derived legal persons under public law currently in the article are also municipalities (all), associations of individuals (part), institutions (all) and establishments (part). K.Balodis has provided a correct and theory satisfying interpretation of an institution[45] (and not an *attempt* to interpret the concept of institution in the Civil Law), however, authors have not liked it, as their key thesis of interpreting legal person under public law states that public [rights legal] person's legal capacity, also in the field of private rights is fully regulated by the State Administration Structure Law[46]. By allocating legal person's status to an organization, any legal person becomes competent under private rights, however, under public law its competency is granted by a public legislative act relating to establishment of the respective legal person[47], and State Administration Structure Law does not have a hierarchy above other laws.

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[40] Compare the concept of "institution" in translation from Latvian language to German language *Latvijas Republikas Civillikums. Lettlands Zivilgesetzbuch*. Rīga: Latvijas Vēstnesis, 2006, 310. lpp., in article 1407 and in article's 58 Constitution of the Republic of Latvia in precise translation, in five languages: *Latvijas Republikas Satversme*. Rīga: TIC, 1997.

[41] Civillikumi. Rīgā: Valters un Rapa, 1935, 303.-304. lpp.

[42] Ibid., 303. lpp.

[43] Ibid., 304. lpp.

[44] Briede J., Danovskis E. Publisko tiesību subjektu civiltiesiskais statuss. *Jurista Vārds,* 2012, Nr. 7, 14.02.2012., 7.-8. lpp., 11. lpp.

[45] Balodis K. Ievads civiltiesībās. Rīga: Zvaigzne ABC, 2007, 103.-104. lpp.

[46] Briede J., Danovskis E. Publisko tiesību subjektu civiltiesiskais statuss. *Jurista Vārds,* 2012, Nr. 7, 14.02.2012., 7.-8. lpp., 11. lpp.

[47] Muciņš L. Juridiskās personas jēdziens. Inovāciju juridiskais nodrošinājums: Latvijas Universitātes 70. konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2012, 163.-171. lpp.

Conclusion

1. Legal person's organs are inalienable part of legal person's organisation. There is a distinction between legal person's internal organs that form the will of a legal person and external organs that execute this will.
2. Institutions are external organs of a legal persons formed in a respective way. Legal persons under both – public and private law have institutions.
3. All institutions can be divided into authorities and autonomous institutions.
4. Authorities and autonomous institutions as organs of a legal person act on behalf of legal person in public and private law. It is controversial to acknowledge autonomous institution as a legal subject in the amount of its budget revenues.
5. Autonomous institutions may be formed not only as organs of a legal person; they can also be established as competent and self-dependent autonomous institutions in the form of a legal person.
6. According to the article 1407 of the Civil Law the said institution is considered to be a competent legal person – autonomous institution, which enters into legal relationship with its users. According to the article 1407 of the Civil Law the said institution is not an institution established as an organ of a legal person. Although institution mentioned in the article 1407 of the Civil Law in public law is also a derived legal person under public law, the concept of this institution does not embrace any derived legal person under the public law.
7. Thus both concept interpretations of the article 1407 of the Civil Law offered in this discussion are ungrounded and should not be used.

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SUBJECTS OF EVIDENCE IN A CIVIL PROCEDURE AND THEIR PLACE IN THE PROCESS OF PROOF

Keywords: evidence, proof, civil procedure, subjects, parties to a case, court, parties.

The issue of subjects of evidence in legal writings about civil procedures has been considered and analysed rather scantily. Only some authors opine about who the persons to be included among the subjects of evidence are and what their rights and duties are. It must be noted that the views on the subjects of evidence in the perspective of scientists belonging to the Romano–Germanic legal system countries and of those belonging to the Anglo-American legal system countries differ rather significantly.

Mostly, in all sources, which consider the process of evidence, the subject of evidence refers to the parties of a civil dispute, which within the adversarial principle primarily are granted the rights to gather, select, and submit evidence to the court. One could agree with the expressed observation that the Western scientists favour an analysis of evidence as a process, of the types and peculiarities of evidence, however they do not get into more elaborate analyses of the theoretical base of the subject of evidence,[1] believing it to be a self-evident matter formed historically over time, namely, that the parties to the dispute (participants of civil relations) must elucidate among themselves the issues for which a dispute exists and then it must be proven. It is also clear that in case of non-existence of a dispute, legal proceedings cannot be implemented. Section 3 of the Law on Judicial Power prescribes the rights to be protected by a court.[2] The protection by the court can be realised only if a person's interests or rights have been infringed upon. Therefore, a person, who has addressed the court with a claim, has a mandatory duty to prove the existence of infringement or the material-legal grounds of the claim.[3] Otherwise, legal proceedings in a case will not be commenced. Thus, the plaintiff has a mandatory duty to prove, by substantiating and reasoning the claim with evidence. Without proving to the court that rights or interests have been infringed upon, the court has no grounds for initiating a civil case and starting proceedings. Therefore, it can be concluded that the plaintiff is to be regarded as an active subject of evidence. The defendant, however, is entitled to object or agree to the

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1 Strada-Rozenberga K. Pierādīšanas teorija kriminālprocesā. Biznesa augstskola Turība, Riga, 2002, p. 95.

2 15.12.1992. likums "Par tiesu varu" [Law on Judicial Power], *Ziņotājs*, 1, 14.01.1993. Available: www.likumi.lv [viewed 25 July 2011].

3 Balzer Ch. Beweisaufnahme und Beweiswürdigung im Zivilprozess:eine systematische Darstellung und Anleitung für die gerichtliche und anwaltliche Praxis. Berlin, 2001, s. 40.

conditions indicated in the case. The process of providing evidence in such case will be performed only if the plaintiff chooses to defend themselves and prove the opposite to the court. It allows drawing a conclusion that the defendant being a subject of the process of providing evidence has both rights and the duty to prove, however, by starting or not starting to perform the duty of proving, the defendant becomes an active subject of evidence. One can agree with the opinion expressed by the civil procedure expert A. Līcis claiming that "in case of recognition or failure to challenge, the court can recognise the unchallenged facts or conditions as well-grounded..., by releasing the adversary from the duty of proving the unchallenged facts."[4] Thus, even without exercising the rights to prove, the defendant has gotten engaged in the process of securing evidence and enables the court to draw the relevant conclusions regarding the actual conditions of the dispute. Hence, in either case, the defendant is to be regarded as an active subject of evidence, because with their conduct they express either concurrence with or denial of the allegations provided by the plaintiff substantiated by evidence and directly concerning the plaintiff, generating forward-looking consequences of adverse pecuniary or non-pecuniary nature.

Besides the parties to the dispute, which normally are the plaintiff and the defendant, the legal writings include an ambiguously reckonable conclusion, namely, that "the main subject of evidence in civil proceedings is the court".[5] Such statement would be true if the objective examination principle still dominated the civil procedure, however under the impact of adversarial principle the court's role has been reduced from an active process participant to the passive, i.e. it is not typical for the court to gather evidence, but the court being the main party of the civil procedure relations in the court proceedings has been imposed the duty to assess the submitted evidence and on the grounds thereof to adjudicate the case. The main task of the court in the process of securing evidence is to achieve material justice, by perceiving the evidence submitted by parties, examining them, comparing and assessing their power of proof. Thus, the Latvian civil procedure expert V. Bukovskis has rightly pointed it out in this statement, by concluding that "a court is not at all indifferent and passive concerning the issue of determining the truth."[6]

When performing the entrusted duties, even though the adversarial competition between the parties is stressed as the guiding principle, the court in Romano-Germanic legal system countries has been granted a sufficiently active role in the process of the entire adjudication procedure, including also concerning the process of securing evidence not only in Latvia but also in other European countries, the processes of which have had the effect on the Latvian civil procedure, such as Germany, France, Austria. The following examples indicate to the active role played by the court. Thus, already during the preparatory stage of the case, the court is given the rights to clarify the conditions of the case and the evidence.[7] During the case adjudication stage, upon

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4 Līcis A. Prasības tiesvedībā un pierādījumi. Rīga, Tiesu nama aģentūra, 2003, 70. lpp.

5 Rozenbergs J., Briģis I. Padomju civilprocesuālās tiesības. Rīga, Zvaigzne, 1978, 152. lpp.

6 Bukovskis V. Civīlprocesa mācības grāmata, Rīga, 1933, author's publication, 332. lpp.

7 LR Civilprocesa likums. 149. pants [LR Civil Procedure Law. Section 149]. Stājās spēkā 01.03.1999. *Latvijas Vēstnesis*, 1998. g. 3. novembris, Nr. 326/330.

completing to adjudicate on the merits of the matter, the court is given the rights to resume adjudicating on the merits of the matter, by imposing the obligation on the parties to submit additional evidence[8], as well as the court is entitled to adopt a decision on ordering a repeated expert-examination[9]. These are only a few examples of when the court's initiative in line with the procedure as stipulated in the proceedings allows performing investigatory activity. Such cases in processes are considered as a sign of impact of the inquisitorial[10] process on the adversarial process, and to a certain extent are to be considered as restrictions of the adversarial principle prescribed by law. To a greater or lesser extent, but the majority of processes of European countries include aspects of inquisitorial process investigation, however in the context with the adversarial principle, the parties to the dispute are attributed the active position in realising the securing of evidence, to convince the court about their stance regarding the actual conditions in a dispute. In the current phase of development of a civil procedure, slow but firm merging of certain institutes of a specific inquisitorial process and adversarial process is observed, i.e., in the one and the other process, the positive and negative traits of certain institutes, including the process of proving, are being analysed, and procedural nuances recognised as positive are introduced in normative regulation.

Regardless of the aforementioned examples of active conduct by the court, nevertheless, it must be borne in mind that the initial choice of what is to be proven and which evidence is to be submitted is left at the parties' discretion. The court finds out the truth by obtaining information solely from those sources of information, which are offered by the participants in the case, primarily the parties. In a number of conferences organised by the Ministry of Justice of Latvia regarding the topical problems of a civil procedure[11], as well as during sittings of the work group for amendments to the Civil Procedure Law created by the Ministry of Justice[12] an opinion has been voiced that still, in the process of gathering evidence, the court should have a more active role, similar to the administrative process. The effective normative regulation of the Latvian CPL prescribes the rights for the court to gather evidence at their own initiative only in two cases:

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[8] LR Civilprocesa likums. 188. pants. [LR Civil Procedure Law. Section 188]. Stājās spēkā 01.03.1999. *Latvijas Vēstnesis*, 1998. g. 3. novembris, Nr. 326/330.

[9] LR Civilprocesa likums. 125. pants [LR Civil Procedure Law. Section 125]. Stājās spēkā 01.03.1999. *Latvijas Vēstnesis*, 1998. g. There is a similar provision also in the German Zivilprozessordnung, 372.§, Ausfertigungsdatum: 12.09.1950. Available: http://www.gesetze-im-internet.de/zpo/ [viewed 20 November 2010].

[10] Inquisition (Lat. inquisitio – "investigation") – pre-trial investigation of the accusation, i.e., the adjudication is based not only on a charge put forth by a private entity and on provided evidence, but before the court hearing, a public institution specifically investigates the particular case, looks for evidence to prove the guilt or innocence of the accused. The collected evidence and the opinion are given to the court, which decides on the guilt of the accused. Available: http://vesture.eu/index.php/Inkviz%C4%ABcija [viewed 23 July 2011].

[11] Civilprocesa turpmākās attīstības tendences. Tieslietu ministrija. Rīga, 19.09.2007.

[12] Minutes of meetings of the working group for the amendments to the Civil Procedure Law, 2007–2009 unpublished materials.

1) if the interests of a minor child are infringed upon, for example, in Section 244(2), it is indicated that in a case deriving from guardianship or contact rights, the court on its own initiative or upon a request by interested persons demands evidence;
2) if an issue regarding recognition of a person as incapacitated to act and determining guardianship must be decided, for instance, in Section 267, a court decides on an issue regarding appointing forensic psychiatric and, if necessary, forensic psychological expertise.

In both cases, the court being a public institution, must protect the interests of a person, which the person by itself cannot take care of either because of the age or due to limited mental capacity. Hence, it cannot be claimed unequivocally that the gathering of evidence as a part of the process of proving in the Civil Process is based solely and exclusively on the adversarial conduct of parties. It would not be logical because, as can be seen from the aforementioned, also the court in some cases is granted the rights to actively obtain evidence, as well as pursuant to Section 93(4) of CPL, if the court recognises that with respect to any of the facts, on which a party's requests or objections are substantiated, evidence has not been submitted, it notifies the parties about it and, if necessary, sets a deadline for submitting evidence. Thereby the court indicates to conditions, the existence of non-existence of which has not been proven. Furthermore, the modern-day trends in civil procedure strive to achieve that the adversarial principle does not exclude the possibility also for the court to get involved in the process of proof and gather evidence, thereby more effectively determining the objective truth about the conditions of the dispute. An example is Estonia, which when updating the Civil Procedure Law included an option for courts to request evidence. As pointed out by the judge of the Tallinn Circuit Court Merimaa Mare, in the Estonian civil procedure, one cannot speak about a process, which would be fully based on the adversarial principle, because a court in disputes concerning public interests is entitled to request evidence and draw attention to the lack thereof. The Estonian case-law is taking course in this direction, as well. The judge's role in a civil procedure becomes increasingly more active.[13]

A similar example for court activity is seen also in the German ZPO (Zivilprozessordnung), Section 372, in which it is stipulated that a court realising recordkeeping in a case can adopt a decision on inviting one or several experts for considering the evidence.[14] As well as German ZPO Section 398, whereby a court is granted the rights to repeatedly summon a witness for questioning.[15] Taking into account the judge's more active role in the civil procedure and the impact of the

[13] Merimā Mare "Civilprocesa attīstība Igaunijas Republikā", *Jurista Vārds*, 2008. g. 3. jūnijs, Nr. 21(255).

[14] Vācijas Zivilprozessordnung, 372.§, Ausfertigungsdatum: 12.09.1950. Available: http://www.gesetze-im-internet.de/zpo/ [viewed 20 November 2010].

[15] Vācijas Zivilprozessordnung, 398.§, Ausfertigungsdatum: 12.09.1950. Available: http://www.gesetze-im-internet.de/zpo/ [viewed 20 November 2010].

European Council and European Union law,[16] it must be admitted that the civil process development of Latvia is also directed at that the understanding of the adversarial principle in the process of proof cannot be absolute, by excluding a judge as an important momentum in the process. Proving as a process has never been solely and exclusively a process of the parties in the dispute, in which the court is entrusted with a role of passive observer, in order that later when making the ruling, the necessary conclusions can be drawn. Hence, it is indicative of the fact that the court can also be included among the active subjects of evidence.

Another role of the court is pointed out in common law civil procedures, in which the court has an established a passive role, but the parties – directly opposite, as active as possible.[17] Contrary to the inquisitorial process, it is the adversarial process, in which only the parties gather evidence. The court has no authorisation to interfere with this process with remarks on insufficient evidence or by asking questions to a witness and experts. The court's task is leading the procedure.[18] Thus, formally making sure that the procedure is observed and deciding on certain procedural matters. For example, Article 611 of the US Federal Rules of Evidence prescribes the court control rights, stipulating that the court carries out reasonable control over the type and procedure of how witnesses are questioned and evidence is provided.[19]

Several aspects are mentioned as positive with respect to the subjects of evidence in common law civil procedure, in which, according to the opinion of several authors, the adversarial principle is very expressly manifested:

1. the parties themselves control the case preparation for the legal proceedings, by exchanging evidence during the pre-trial process (discovery);
2. the parties are given equal opportunity to gather the necessary evidence to the necessary extent and submit it to the court;
3. the parties themselves study the evidence;
4. the court controls compliance with the procedure, resolves disputes on procedural matters, withdraws inadequately posed questions, etc.
5. the court does not lead the process of gathering, submitting, and studying the evidence.[20]

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[16] See: Council Regulation (EC) No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. Available: http://eur-lex.europa.eu [viewed 24 July 2011].

[17] Решетникова И. В. Доказательственное право Англии и США. Екатеринбург, изд-во УрГЮА, 1997, с. 21.

[18] Munday R. Evidence.Third Edition. Oxford University Press, 2005, p. 17.

[19] Federal Rules of Evidence. Rule 6011. Available: http://federalevidence.com/rules-of-evidence [viewed 24 July 2011].

[20] Решетникова И. В. Доказательственное право Англии и США. Екатеринбург, изд-во УрГЮА, 1997, с. 23.

The benefit from such procedure of cases, as pointed out and recognised by a number of authors,[21] is that the majority of disputes are solved already during the case preparation stage, by exchanging evidence, thus not even reaching the court hearing, in which this evidence is to be examined and evaluated. Thus, the role of the court in the process of proof as such procedurally is insignificant. Regardless of that, an opinion exists that as normative regulation of the process of proof develops, it is observed that the role of a judge increases in the common law process of proof, thus, for instance, it is pointed out that the UK court judges are entitled to control submitting of evidence, by indicating that with respect to certain conditions evidence has not been submitted.[22] Hence, it can be concluded that the judge's role as a subject of the process of proof in common law process is increasing, by taking over certain rights of an active participant from processes of European countries.

Overall evaluating the role of subjects of evidence – the parties to a dispute and the court – it must be concluded that the parties in all processes, regardless of whether it is an inquisitorial or adversarial process, the adversarial principle imposes the obligation to prove the conditions of a dispute, by submitting relevant evidence. What concerns the court as a subject of evidence, it must be concluded that only in inquisitorial process the court is granted the rights to actively participate in the process of proof in cases and to extent as stipulated in regulatory provisions, in order to foster resolution of a dispute and to make a fair judgment in the dispute.

Thus, the conclusion that the court carries out examination and evaluation of evidence is correct only with regard to inquisitorial process courts.[23]

Another rather important issue regarding persons, which during the civil procedure perform the process of proof, is that the scope of subjects gathering, selecting, and submitting evidence to the court for consideration is not restricted solely with the parties to the civil dispute – the plaintiff and defendant. In legal writings, one can encounter the concept "persons participating in a case"[24], but in regulatory enactments, the concept "parties to a case" is used".[25] Third persons with/without independent rights to claim are entitled to participate in a civil procedure with the entitlements to give explanations, gather and submit evidence at the court. All of the indicated persons in a civil procedure have the status of a participant to the case, hence have the rights to perform the process of proof.

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[21] Park R. C., Leonard D. P., Goldberg S. H. Evidence Law. A students Guide to the Law of evidence as applied in American Trials. St. Paul, Minn., 1988, p. 4, cited from Аболонин, Г. О. Гражданское процессуальное право США. Москва. Волтерс Клувер, 2010, с. 209.

[22] Кудрявцева Е. В. Английское гражданское судопроизводство: Сборник статей, published in the primary source: Институт раскрытия доказательств в России и в Англии. Законы России: опыт, анализ, практика. № 1. 2007, с. 72.

[23] Rozenbergs J., Briģis I. Padomju civilprocesuālās tiesības. Rīga, Zvaigzne, 1978, 152. lpp.

[24] Ibid.

[25] 73. pants LR Civilprocesa likums [Section 73 LR Civil Procedure Law]. Stājās spēkā 01.03.1999. *Latvijas Vēstnesis*,1998. g. 3. novembris, Nr. 326/330.

Unlike the parties to the dispute, third persons without independent rights to claim have strict limitations in the process of proof, because they are subjected to the object of evidence determined in the case and to the restrictions of proof established by the court concerning the civil dispute of the parties. The procedural status of these persons is most precisely characterised by the German ZPO § 66 by stipulating that a person, who is legally interested in the winning of one party can join that party with the objective of supporting it.[26] Therefore, the task of these persons is to support the effort of a certain party to win the civil dispute, but not to independently perform the process of proof. Therefore, third persons without independent rights to claim can be regarded as persons, who are entitled to perform the process of proof, but only under the guidance of the relevant party, thereby not becoming a procedurally active subject of evidence. Third persons without independent rights to claim are subject to the general principle of proof, namely, the party alleging a certain fact has the duty to prove it. However, a third person with independent rights to claim, as that person's claim is directed both against the plaintiff and defendant in a case, performs the process of proof for the sake of their own interest, but subject to restrictions of the scope of the subject of evidence and of proof determined in the case. Within the framework of a certain claim independence, a third person with independent rights to claim can also be included among the active subjects of evidence, as it is in that person's interests to gather, select, and submit evidence at the court to substantiate their allegations in a case.

However such participants in a case as representatives of parties and third persons, the prosecutor in cases permissible in the subject claim procedure, and institutions, which in compliance with the law have the rights to represent the rights and interests of other persons as prescribed with the law in a court, are not to be regarded as subjects of evidence in a civil procedure, because their task is not to independently perform the process of proof, but to act in the interests of those persons, which are to be recognised as parties to a civil dispute, hence the said persons are not independently implementing their will, but instead the will of the subject that they represent in the process. Such relations have substantive grounds[27] and new, independent civil relations, which do not concern the civil matter at hand, regarding which a dispute exists, are established between the representative and the represented person.

Upon summarising the aforementioned, it can be concluded that all "persons participating in a case" can be divided into active subjects of evidence – the parties (plaintiff, defendant), a third person with independent rights to claim. However, the

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[26] Vācijas Zivilprozessordnung, 66.§, Ausfertigungsdatum: 12.09.1950. Available: http://www.gesetze-im-internet.de/zpo/ [viewed 20 November 2010].

[27] For example, Section 2289 of the Civil Law establishes: Pursuant to an authorisation contract one party (authorised person, assignee) undertakes to perform a certain assignment for the other party (person granting the authorisation, authorising person, assignor), and the person granting the authorisation undertakes to recognise the activity of the authorised person as binding on him or her. 28.01.1937. likums "Civillikums. Ceturtā daļa. SAISTĪBU TIESĪBAS" [28.01.1937 law "Civil Law. Part four. OBLIGATIONS LAW"] [stājas spēkā 01.03.1993.] ar grozījumiem: 22.12.1992. likums (*Ziņotājs*, 1, 14.01.1993.). Available: www.likumi.lv [viewed 26 July 2011].

passive subjects of evidence or persons supporting the parties – third persons without independent rights to claim. Furthermore, separately distinguished as a subject of evidence is the court, which is included in the passive active subject group, because regardless of the process, a court of any legal system has the duty to establish legal facts, to evaluate and analyse evidence with the aim to render a justified judgment on the conditions of the dispute.

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QUALITY OF THE CIVIL PROCEDURE LAW AND LEGISLATOR'S WORK

Keywords: expediting civil proceedings, economy of resources, quality of civil proceedings regulation, methods chosen by the legislator.

Introduction

The shortcomings of the Latvian civil proceedings regulation and the need for improvements have been well-known already for a long time. Not only the society, but also the responsible state institutions have identified the most essential shortcomings of civil proceedings, and larger or smaller amendments in the regulation of civil proceedings are introduced from time to time. Notwithstanding that the work on the improvement of the civil proceedings regulation continues, the expedition of civil proceedings does not proceed as fast as the society would like it. The terms of hearing civil cases still are very long, and shortcomings can be identified in the existing regulation, complicating the protection of interests of parties to a case and the court work in general.

Within this paper, the shortcomings of the Civil Procedure Law of the Republic of Latvia[1] (hereinafter – CPL) and of its application will be pointed out, a brief description will be given of the methods chosen by the Parliament for the improvement of regulation, as well as an insight will be given about the possibilities of improvement of the present situation. The objective of this review is the necessity to examine the problems of the CPL quality and to analyse suitability of methods, chosen by the legislator. Using historical, comparative, analytical and other scientific research methods, a brief evaluation of the CPL quality will be given, as well as a remark will be provided about the approach of the Saeima (the Parliament) to the improvement of the existing situation and an opinion about some possible directions which could be chosen, in order to make the regulation of the civil proceedings in Latvia more up-to-date and of higher quality. Because of the limited length of this paper, a detailed and comprehensive analysis cannot be given, but it is still possible to point out the key problems and give a comment about the essential issues in a review of this extent.

[1] Civilprocesa likums [Civil Procedure Law]. LR likums: *Latvijas Vēstnesis*, 03.11.1998, Nr. 326/330.

An Insight into the Problems of CPL Quality and Application

The quality of the Civil Procedure Law is an essential prerequisite for ensuring maximum effective protection of infringed or challenged civil rights or legally protected interests of the subjects of the law in court within a reasonable term and with adequate usage of resources. Deficiencies in the CPL regulation not only make the civil proceedings longer and more complicated, but also lead to unnecessary expenditure of public resources and also of those of the parties to the case. Courts have to bear additional workload. It is understandable that the legislator is not the only cause of all "troubles" of the civil proceedings. A certain part of the "responsibility" must be assumed also by courts and parties to cases. Considering the limits of this paper, as well as the aim to point out the problems of CPL regulation and its application aspects as well, the readers' attention will further be directed only at some quality shortcomings in the law and removable inadequacies in its application.

Not the right defendant. Section 73(1) of CPL contains a list of those persons who can be participants in a matter of claim proceedings. It is clear that the claim is made by the plaintiff, and he is the one who points out the persons whom the court must ask to participate in the trial of the case, but in practice there are occasions when the plaintiff, because of lack of knowledge, has nominated a person who cannot be a defendant in that particular case as the defendant (e.g., there are no legal relations – party of a contract etc.). In this case, as it is pointed out in the legal literature[2], the claim must be refused as groundless. Considering the aforementioned, as well as the right of appeal, provided for in the CPL, the "wrong defendant" must litigate in several instances. The author believes that a new, ninth part must be added to Section 223 of CPL ("Basis for Terminating Court Proceedings") expressed as follows: *"during the trial it is found out that the claim is not made against the person, who must answer according to the claim."*[3] The aforementioned must be considered also in the connection of a possible mandatory preparatory hearing, in which the court would have a possibility to prevent the participation of the wrong defendant in the trial of the case. A similar solution, after the addition to CPL, suggested by assoc. prof. A. Līcis, can also be found regarding the invitation of third persons at the court's initiative. *Possible improvements of the preparation of civil cases for trial and the regulation of submission of evidence*.[4] The provisions of Section 20 of CPL regulate the rules of the preparation of civil cases for trial and the steps to be taken in order to facilitate and expedite the hearing of a case on its merits in claim proceedings. Notwithstanding that the preparation of a case for trial is one of the mandatory stages of civil proceedings, its significance in practice is undeservedly underestimated. Under the circumstances, in which Section 74 of CPL stipulates the rights of the plaintiff

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[2] Līcis A. Prasības tiesvedībā un pierādījumi. Prof. K. Torgāna vispārīgā zinātniskā redakcijā, Rīga, TNA, 2003, 30. lpp.

[3] Ibid., p. 30. In the author's opinion, the sentence by assoc. prof. A. Līcis is suitable for the relevant wording text.

[4] This aspect is not examined in the connection with regulation in Section 303 of CPL regarding the order n which cases of small amount claims are heard.

to withdraw their claims partly or fully, to reduce the amount of their claims or, for example, to change in writing the basis or object of the claim or increase the amount of the claim, before the hearing of case on its merits is started (CPL Section 163), the stabilizing function in the civil proceedings of Section 20 of CPL does not give the desired result. An identical conclusion can be drawn about the regulation of the submission of evidence in Section 93(3) of CPL. It is an internal incoherence of CPL, which should be eliminated in order not only to expedite claim proceedings, but also to facilitate the actions of parties to a case and the court in civil proceedings. As it was mentioned before, Section 149 and Section 149[1] of CPL stipulate the rights of the judge to schedule a preparatory sitting in which particular actions are to be carried out in order to prepare the case for trial: (1) invitation or admission of third persons; (2) provision of evidence; 3) summon of witnesses; (4) ordering an expert-examination etc. Bearing in mind that scheduling of such preparatory sitting is optional, it is being little used and the aforementioned questions are solved when the case should be heard on its merits. Often the hearing of a case must be postponed, thus delaying the proceedings. In the author's opinion, a positive turn towards the expedition of claim proceedings would be the introduction of a mandatory preparatory sitting. After the initiation of a civil case according to Section 131 of CPL, the court carries out actions, set out in Section 148 of CPL (sending the claim statement with true copies of documents added to it to the defendant). According to the term for submitting explanations, set out in Section 148 of CPL, the defendant gives explanations, which must be sent to the plaintiff. Up to this moment in the case preparation stage, the existing CPL wording is satisfactory. The following activities should be regulated differently. After receiving the defendant's explanations and sending them to the plaintiff, the court should schedule a place and time of a preparatory sitting, and notify the parties to the case about it. The term from sending of explanations to the plaintiff till the preparatory sitting should be set, considering the circumstances of the case. According to the provisions of Section 149[1] of CPL, a preparatory sitting should be held, in which the questions, set out in Section 149 are to be decided, the object and limits of dispute are to be specified, activities of reconciliation of the parties are to be carried out, as well as procedural terms are to be set for carrying out of certain procedural activities. Of course, there are no guarantees that the parties will be diligent enough to always attend the preparatory sittings, but still the application of procedural sanctions, set out in the CPL and a possibility of making a judgment by default (under certain circumstances) certainly will encourage people to respect the court and attend preparatory sittings. Thus, it should be stipulated in Section 149(1) of CPL that after receiving explanations or the expiration of term, set for their submission, the judge schedules time and place of a preparatory sitting, and notifies the parties to the case about it, According to the provisions of Section 149[1] of CPL, a preparatory sitting should be held. Amendments should be made to Section 74(3) of CPL, stipulating that the plaintiff has the rights to change in writing the basis or object of the claim or to increase the amount of the claim no later than in the term, provided in the law, till the preparatory sitting. The question about the term, until which the plaintiff can change in writing the basis or object of the claim or to increase the amount of the claim till the preparatory sitting, is rather complicated,

but, in the author's opinion, it certainly should not be later than seven days before the preparatory sitting, as the defendant must be informed about the changes before the sitting, must prepare for it. Section 20 of CPL should include the order of taking place of the mandatory preparatory sitting, because the preparatory sitting is a peculiar institution which differs from the usual hearing of cases on merits, but the regulation to be introduced must correspond to the principle of equality of parties and other principles of civil procedure.

With the law of October 31, 2002, Section 93(3) was specified, and in the legal literature it was commented as follows: "The parties and their representatives often tried to take the other party by surprise, by submitting important evidence only during the court sitting. This deprived the other party and also the court of the opportunity to examine the evidence. It could lead to an unjustified judgment. In many foreign countries, much greater significance is given to enquiring into case circumstances than in Latvia."[5] After making these amendments, in Section 93(3) of CPL, a regulation is in force stipulating that evidence must be submitted no later than seven days before the court sitting, if the judge has not set another term for submitting evidence. The first sentence of the third part of the section, compared with the previous wording, indeed is a step in the right direction, but still, these seven days are not always a sufficient time period for the court to send the submitted evidence to the other party, which should prepare till the court sitting. Despite the aforementioned, the second sentence of Section 93(3) of CPL stipulates that during the trial of the case, evidence can be submitted at the motivated request of a party or some other participant of the case, if it does not delay the trial or the court has admitted that the evidence was not submitted in due time for legitimate reasons, or the evidence is of facts which came to knowledge only during the trial of the case. It is rightly admitted in legal literature that the aforementioned possibilities not to observe the seven days term are an exception[6], but in practice, this exception often turns into a general pattern, delaying the proceedings. Justifications, stipulated for submission of evidence after the term, set in the law (the court admits delaying as justified, the evidence has become facts during trial) provides an easy space for parties to manipulate, because often it is fairly easy to find non-existent plausible reasons (e.g., the documents "have been found" only a day before the court sitting, evidence could not be submitted because of an "illness" of a participant of the case etc.). A cautious inference is expressed in the legal literature stating that: "Supposedly, the Latvian society is not yet ready for setting the prohibition to submit new evidence or change argumentation after a certain term (after the preparatory stage) already in the first instance court."[7] We can agree that the introduction of such conditions will be met with certain resistance, but in order to observe the society's interests

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[5] Līcis A. Prasības tiesvedībā un pierādījumi. Prof. K. Torgāna vispārīgā zinātniskā redakcijā, Rīga, TNA, 2003, 68. lpp.

[6] Civilprocesa likuma komentāri. Trešais papildinātais izdevums. Sagatavojis autoru kolektīvs prof. K. Torgāna vispārīgā zinātniskā redakcijā. Rīga, TNA, 2006, 175. lpp.

[7] Torgāns K. Civiltiesību, komerctiesību un civilprocesa aktualitātes. Raksti 1999-2008, Rīga, TNA, 2009, 513. lpp.

(resources of the court and of the participants of case, rights to the hearing of case in a reasonable time period etc.) – amendments must be introduced in CPL as soon as possible about the ban on submission of evidence after a certain moment in claim proceedings. In the author's opinion, along with the introduction of the mandatory preparatory sitting, amendments should be made also in Section 93 of CPL. The third part of the aforementioned section should be expressed as follows: *"Evidence shall be submitted not later than seven days before the preparatory sitting, unless the judge has set another time period within which evidence is to be submitted. Submission of evidence after the term set in the preparatory sitting is not allowed. During the preparatory sitting, the court sets a reasonable term for submission of evidence. A decision by the court to refuse acceptance of evidence may not be appealed, but objections regarding such may be expressed in an appellate complaint."*

With such amendments the participants of a case would be encouraged to consider thoroughly the argumentation of raising a claim, existence of evidence, consider giving up pointless litigation, and become more disciplined. Legal literature points out that preclusive terms and procedural sanctions are one of solutions to the "tardiness of proceedings"[8].

Precise and correct interpretation is an essential precondition to the facilitation of understanding of court proceedings and right application of civil-procedural legal provisions. *The necessity for revision of the making up of Senate judgments*. Section 475 of CPL ("Contents of a Judgment by a Cassation Court") contains a regulation regarding the content of the Senate judgments, stipulating the necessary elements. Analogically with the provisions of Section 193 of CPL, the Senate judgment content consists of: (1) introductory part; (2) descriptive part; (3) statement of reasons; 4) operative part. Senate adjudications differ from the first and second instance court judgments with one significant feature – therein only the questions of the application of provisions are considered, but the case is not considered on its merits. As we can see from examples of the existing court practice, Senate judgments rather extensively reflect the substance of a case and progress of proceedings in first two instances, which essentially is not the central mission of Senate judgments[9]. In the author's opinion, the Senate should not make abstracts of the first and second instance court judgments, extensively describe the circumstances of the case, and in the statement of reasons copy the content of sections of laws. The Senate should give highly qualified and concise view about the correctness of application of provisions in the lower instances court adjudications. Thus in Section 475(3) of CPL ("In the descriptive part, the court shall set out:") it is stipulated that in the descriptive part the court sets out: (1) a brief description of the circumstances of the matter; (2) the substance of the appellate instance court judgment; (3) the reasons for the cassation complaint;

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[8] Bukovskis V. Civīlprocesa mācības grāmata, Rīga, Autora izdevums, 1933, 252. lpp.

[9] See, for example: the judgment of the Senate of the Supreme Court of the Republic of Latvia Civil Cases Department of November 1, 2006 in the case No. SKC – 612, Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2006, Rīga, TNA, 2007, 272.-278. lpp. This example shows that the conclusions made by the Senate in the statement of reasons take up less than a half of total six pages of the judgment.

(4) the reasons for the counter-complaint, or the substance of the explanations. From the point of view of Section 475(3) of CPL, the abovementioned example of the Senate practice does not comply with the law, as it reflects even the conclusion of the first instance judgment and description of the raised claim. In the author's opinion, Section 475 of CPL must be interpreted according to the role of the Senate in claim proceedings, formation of case-law and according to CPL in its entirety. For example, pre-war Senate Civil Cassation Department judgments were worded briefly and concisely, meaning that the Senate focused mainly on verifying of the correctness of application of provisions in the lower instances court adjudications.[10] There is a possibility to carry out a revision of a CPL regulation which would be similar to the provisions of Section 921 of Civil Procedure Law (in its 1939 wording), which stipulated that in those cases in which the Department does not consider it necessary to express in detail the considerations on which the judgment is based, the decisions are not made up in their final form, but an order in such cases is sent, based on the resolution made in such cases (in the content of the resolution, without any general formal elements, indicated only the laws and practice which were considered). If such an approach were to be chosen, then Section 474 of CPL ("Rights of a Cassation Court") should be expanded.[11]

Legislator's Work in the Improvement of the CPL Regulation

The shortcomings of the Latvian civil procedure regulation and the corresponding necessity to improve it were identified already long ago. The political will to act was not lacking either. Significant civil procedure improvements can be achieved only when political will exists and it is successfully implemented. In the declaration of the present government it is set out: "We will reform and optimize the general jurisdiction and administrative court system, equalizing the courts' workload in the regions of Latvia, at the same time reducing the number of appeal instances for certain categories of cases."[12] It can be seen from the government declaration that at

[10] See, for example: the publications of full texts of the Senate Civil Cassation Department judgments of the first 6 months of the year 1935. *Valdības Vēstnesis,* Nr. 180, 1935. gada 12. augusts. Full texts of the Senate Civil Cassation Department judgments were published in the supplement to newspaper Valdības Vēstnesis. As it is pointed out in Section 938 of the Civil Procedure Law (1939 wording), judgments, which are of principal significance in the unifying of the court practice, must be published in the supplement to newspaper Valdības Vēstnesis at least once a year for general reference.

[11] It should be supplemented with a new fifth part in the following (possible) wording: ("5) to annul all judgment or any part thereof and to forward the case for a new hearing in the appellate or first instance court, without making up a full judgment text, if the judgment of the first or appellate instance court or any part thereof clearly does not conform to legal provisions. On such occasion, the provisions of Section 275(1), (2), and (5) of this law are observed in the judgment, but the statement of reasons of the judgment includes only the listing of violations of legal provisions which are made."

[12] Full text of the declaration of the prospective government. Available: http://www.apollo.lv/portal/news/articles/253765 [viewed 16 December 2011].

present there is political will to improve the existing situation in civil proceedings, but this political will still must be realized, and in such a way, so as to achieve the desired result. This is not the first time when political will is present to improve civil procedure regulation. For example, at the Parliament sitting on January 25, 1923, the Prime Minister J. Pauļuks read the government declaration, in which it was clearly indicated that: "The congestion of not-adjudicated cases in courts must be eliminated and the litigation must be speeded up [..]."[13] Besides that, J. Pauļuks drew attention of members of the parliament to the fact that: "The government immediately will begin the development of a draft law about the jury courts"[14]. On June 27 of the same year, the newspaper "Valdības Vēstnesis" published the declaration of government, headed by Z. A. Meirovics, in which it was pointed out that: "The government will work also on elimination of some shortcomings in the procedural laws and will continue the development of a draft law of jury courts."[15] These examples show the existence of political will from the historical perspective, but the jury courts were never introduced and the question about significant improvements of civil procedure regulation in those times is rather debatable. From the author's point of view, political will must be directed towards the achievement of long-term results in civil proceedings. CPL will be in existence longer that one term of the Parliament, therefore all initiatives in the amendment or complementing of laws must be considered in a long-term perspective.

A setting of general political aim to improve the existing situation in civil proceedings is not yet a great achievement. Guidelines and principles are necessary, by which to guide ourselves in the fulfilment of such a significant task. From the author's point of view, for the expedition and improvement of civil proceedings, several essential principles must be set out and followed. Firstly, it is necessary to utilize the possibilities provided by the legislation process as much as possible. Secondly, mechanisms which demand as little as possible state budget funds and other resources must be chosen. Of course, a different approach was also expressed. For example, the formation of specialized courts was suggested.[16] However, knowing the possibilities of the basic budget of the Republic of Latvia and the size of the state, it is rather utopian to speak about the formation of specialized courts, and therefore – a significant legislative work must be carried out, observing the limitations of available resources.

Thus: (1) it is necessary to identify the problem; (2) political will must be present to solve this problem; (3) this political will must be long-term oriented; (4) such instruments and mechanisms must be chosen, which are best suitable for the achievement of the aim and most appropriate for the financial resources of the state. It is clear that the problem already is identified, certain political will to solve this problem exists, but the presence of long-term oriented political will is debatable. The evidence of the aforementioned are the CPL amendments, passed in recent past and

[13] *Valdības Vēstnesis,* 1923. gada 27. janvāris, Nr. 21, 1. lpp.

[14] Ibid., p. 1.

[15] *Valdības Vēstnesis,* 1923. gada 27. jūnijs, Nr. 134, 1. lpp.

[16] Zālīte M. Jāveido komerctiesas godīgas komercprakses un ekonomikas attīstībai. *Jurista Vārds,* 2010. gada 13. aprīlis, Nr. 15 (610), 13.-15. lpp.

at present under discussion. Under the circumstances, in which, whatever they must be like, but the first three preconditions can be found, it is essential to evaluate the existence of the fourth precondition, as the content of the CPL will depend on it after the realization of the present or other political will.

For comparison – in the United Kingdom, in 1996, Lord Woolf publicized his rather extensive final report about access to justice (Access to Justice: final report to the Lord Chancellor on the civil justice system in England and Wales), which contained about 300 recommendations of changes in the civil proceedings system. A significant number of these recommendations were included in the law (Civil Procedure Act, 1997).[17] In the report, consisting of six parts plus the recommendations part, Lord Woolf pointed out several essential principles, which should be taken into consideration, making amendments in the civil procedural regulation. It was pointed out that: (1) the core of proposals must be determined in the provisions and number of provisions, stipulating it must be reduced; (2) such procedures must be ensured which apply to a possibly wider scope of cases to be considered, and the number of instances with a separate procedural regulation for separate categories of cases must be reduced; (3) the amount of regulation and the number of proposals in them must be reduced; (4) redundancy of words must be eliminated and a simpler and clearer law development style must be implemented; (5) the proposed reforms must be realized,[18] The shortcomings of CPL, identified in the legal science, have been ignored for a long time, no attention is paid to the necessity of evaluating suitability of methods chosen by the legislator for solving problems. Borrowing the expression, used by prof. Norman Davies, the legislator works in pointillism technique, namely, amendments to the existing CPL are made fragmentarily and without regarding the shortcomings of the CPL, identified by the legal science, for too long. For example, lack of coordination between the institution of postponing a hearing of a case and the order of raising a counterclaim, refusal or rejection of the judge[19] in the case of a wrong defendant.[20] The monolith nature and uniformity of CPL suffer from ill-considered amendments[21] or failure to introduce them at all. Such approach should be changed.

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[17] Fafinski S., Finch E. English Legal System. 2nd Edition. Harlow: Pearson Education Limited, 2009, p. 106.

[18] Wolf H. Acces to Justice – Final report. Available: http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/sec5.htm#c20 [viewed 20 January 2012].

[19] Osis M. Lietas izskatīšanas atlikšana civilprocesā. *Jurista Vārds,* 2010. g. 17. augusts, Nr. 33, 12.-15. lpp.

[20] Līcis A. Prasības tiesvedībā un pierādījumi. Prof. K. Torgāna vispārīgā zinātniskā redakcijā, Rīga, TNA, 2003, 68. lpp.

[21] LR Satversmes tiesas 2010. gada 30. marta spriedums lietā Nr. 2009-85-01 [Judgment of 30 March 2010 of the Constitutional Court of LR in the case No. 2009-85-01]. *Latvijas Vēstnesis*, 01.04.2010., Nr. 53.

Conclusion

1. The quality of the Civil Procedure Law and its application is an essential prerequisite to ensuring utmost effective protection of the infringed or challenged civil rights or legally protected interests of the subjects of the law. The problems of quality of the civil procedure regulation have been identified already long ago, and for a long time there has been the will to eliminate them.
2. The most essential aspect in the elimination of shortcomings of the civil procedure regulation quality is the method, chosen by the legislator for the solution of an identified problem. If the legislator chooses a wrong method or a controversial approach, the task of the enforcer of legal provisions (court) is complicated and additional obstacles are created on the way to exercising the rights to justice within a reasonable term. It must be pointed out that the instruments, chosen by the legislator for the elimination of shortcomings of the civil procedure or modernization of its regulation are closely correlated with the availability of resources.
3. Judging from the present tendencies in the elimination of shortcomings of the civil procedure regulation or efforts to modernize the civil procedure, using the simile by prof. Norman Davies, the legislator works in "pointillism technique". Amendments to the existing CPL are technically included into the law, and often that approach contradicts the existing CPL provisions, making them harder to apply, and the CPL in general becomes less monolithic and of poorer quality. At the same time, the legislator continuously ignores the necessity to eliminate the CPL shortcomings, identified in legal science and practice. Of course, such a conclusion cannot be applied to all amendments, made by the legislator, but the overall approach could be criticized.
4. The problems of the civil procedure regulation should be solved with an overall, comprehensive approach, based on unified principles, stopping the disorderly actions, motivated by implementation of short-term political interests. The elimination of civil procedure shortcomings must be based on several essential aspects: (1) political will must be present to solve this problem, and it must be long-term oriented; (2) the legislative process must be used to the maximum; (4) such instruments and mechanisms must be chosen, which are best suitable for the achievement of the aim and most appropriate for the financial resources of the state. The use of "pointillism technique", if it is continued, which could be criticized from the author's point of view, first of all should facilitate the elimination of shortcomings also identified, taking into consideration that CPL is a system, not a chaotic sequence of provisions.

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ENTROPY OF PHYSICAL UNITY OF PROPERTY *(AD CAELUM)* IN THE LATVIAN LAW

Annotation

The Civil law declares unrestricted rights of an owner to the airspace above the immovable property and the land strata[1] below it. This statement is in conflict with the scope of ownership rights defined by special laws. To eliminate this conflict, it is necessary to introduce amendments in the Civil law by providing certain restrictions to the rights of an owner to use the airspace and land strata according to the purpose for the usage of the property as well as introduce other amendments that would approximate the legal regulation of property in Latvia to those existing in other countries.

Keywords: ad caelum, superficies, land strata, subterranean depths, airspace, divided property, cultural heritage.

Introduction

Quality of legal acts is largely defined by the fact whether they precisely describe the situation in which the subject of law is located. As regards the quality of legal acts regulating ownership rights, it would certainly demand a detailed description of the scope of ownership rights in the legal norms. The role of the Civil law (CL) as a source of such description is undisputable.

The CL gives inadequate description of the scope of ownership rights that fail to comply with the real situation. The numerous corrections found in other legal acts to this very general description lead to the situation when a person attempting to establish the scope of his/her ownership rights, may arrive to an absolutely inadequate idea of the scope of his/her rights. Provided that this non-compliance is expressed through the person's idea that his/her rights are narrower than in reality, it would be certainly valued as a remarkable defect in the quality of the legal act. However, even more seriously should be valued defects that are causing perception that the rights inhered by a persona are wider than in fact. This is the exact situation with construction of the physical unity of property provided by the CL which does not comply with the real situation.

[1] The Civil Law of the Republic of Latvia uses the term land strata, while the law "On Subterranean depths" uses the term subterranean depths, therefore the author of this publication will use both terms depending on the reference to the source.

Physical unity of property (*ad caelum*)

Physical unity of property is understood as restrictions provided by law for horizontal division of the immovable property or for fragmentation of property (the so-called entropy of the physical unity of property)[2]ensuring the physical unity of property both in the land strata below and in the airspace above the property or the so-called *ad caelum*.[3] In difference from the most modern laws, the CL formally does not allow any digressions from the physical unity of property (CL 1042.p.).

A fundamentally important meaning was allocated to the physical unity of property during the drafting procedure of the CL. It was highlighted that the CL was following the general tendencies of codification: "with the last relicts of feudal law, the European codes are gradually losing the double property and building up a united system of ownership rights" by giving up "the civil law feudalism".[4] Still such declaration which was made in the thirtieth of the 20.th c. when drafting of the CL was accomplished did not follow the latest tendencies known for abandonment of the *ad caelum* principle. The dividing line refers to a quite short period of time between the final act of codification that did not allow almost any digressions from the physical unity of property, i.e. the German Civil Law (BGB)[5] which came into force in 1900, and the Swiss Civil Code (SZ)[6] which came into force in1907.

In difference from the BGB which in general does not admit horizontal division of any type of property, the SZ provides more detailed regulation: on the one hand, there is an indication, according to the *ad caelum* principle, that ownership in land reaches above and underneath into the air and the earth (Article 667 of the SZ). On the other hand, the law does not exclude possibility that buildings and other constructions located on or underneath the land so that they are permanently joined to the land, can have a different owner, however only in case these rights are entered

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[2] Parisi F. The fall and rise of functional property, in Property Rights Dynamics: A law and economics perspective, edited by Porrini Donatella and Ramello Giovanni Battista, Routledge: London and New York, 2007, p. 28.

[3] Ad caelum (concluded in the Middle Ages from a fragment of the Roman law in the Justinian Code. Available: http://www.duhaime.org/LegalDictionary/C/CuiusEstSolumEjusEstUsqueAdCaelum.aspx [viewed 23 May 2012]) – D. 43. 24. 22. 4., a reference to the Roman law made in the prototype of the CL Article 1042 – Article 877 of the Codification of the Baltic Local Laws (BLL). Quoted after: Свод Гражданских Узаконений Губерний Прибалтийских. Издание 1864 года, со включением статей по Продолжению1890 года. С.-Петербург: Издание кодификационного отдела при государственном совете, б. г. by use of – Civīllikums. Kodifikācijas nodaļas 1937. gada izdevums. Trešais iespiedums. Rīgā, 1938. g. [in Latvian].

[4] Ozoliņš O. Civiltiesību reforma Latvijā. Darbam un tiesībām. Latvijas krimināltiesību biedrības izdevums, 1939, 158. lpp. [in Latvian].

[5] German Civil Code (BGB). Available: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html [viewed 25 May 2012].

[6] The Swiss Civil Code. English version. By Ivy Williams, M. A., D. C. L., Oxon; L.L.D.., Lond. Barrister-at-Law published by Oxford University Press, 1925 reprinted by Remak Verlag Zurich, 1976 completely reset, revised and up-dated edition with Notes, Vocabularies, Index and a Synopsis of all changes of the law since 1912 by Siegried Wyler, De. Phil. Professor of English, Barbara Wyler, Dr.iur. Barrister-at-Law. Volume II. ReMaK Verlag Zurich.

in the Land register as servitude (Article 675 of the SZ). Besides, the SZ also envisages a special form of joint ownership when joint owners possess special rights to use precisely marked parts of the building, respectively – the usage of a building may be divided horizontally, in levels (Article 712a of the SZ).

Notwithstanding several remarkable differences, the Swiss regulation, in its essence, is close to the system of divided property which existed in Latvia until the CL came into force. There existed relatively independent rights of two different persons within the framework of one and the same immovable property.

One may also draw certain parallels between the CL and the Swiss Code with regard to regulation of legal consequences in cases when a person has erected building on another person's land in good faith by utilizing another person's materials (Article 970 of the CL). Still in difference from the CL which only provides "one-way" legal regulation when the landowner shall retain ownership rights to the building in any case *although when the landowner claims the land from them, not comply with this claim until they receive compensation for their building*, the SZ provides possibility that the one who has acted in good faith can demand ownership in land in case the value of the building clearly exceeds the value of the land (Article 673 of the SZ).

In this way the CL in its original format, i.e. as on January 1, 1938 when it first came into force, demanded very categorical observation of the *ad caelum* principle which on the general background of legislation of that period of time could be called as very conservative. The rights to the airspace and land strata (Article 1042 of the CL) do not admit any restrictions. This is different even from the BGB stating that the owner may not prohibit influences that are exercised at such a height or depth that he has no interest in excluding them (§ 905 of BGB). In the light of the above mentioned restrictions to *ad caelum* at the beginning of the 20.th. c., the CL regulation is difficult to be characterised other than anachronism.

Physical unity of property after reinstatement of the CL

Non-compliance with the average modern standards is even more obvious after reinstatement of the CL, especially against the regulation of our closest neighbours. Thus Article 127 of the Estonian Law on Property[7], similarly to the BGB, states that the land owner has no rights to restrict activities taking place at a height or depth at which, according to the usage purpose of the immovable property, the interests of the land owner do not reach. While Article 4.40 of the Civil Code of the Republic of Lithuania[8] states that the owner has ownership rights to the airspace as well as to minerals as far as it does not contradict the law and is required according to the usage purpose of the land.

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[7] Estonian Law on Property. Available: http://www.ebrd.com/downloads/legal/core/estlom.pdf [viewed 24 May 2012].

[8] Civil Code of the Republic of Lithuania. Available: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=404614&p_query=&p_tr2=2 [viewed 24 May 2012].

Demand for physical unity of property is also closely related with the provision that any buildings and other constructions that are permanently linked with the land shall be regarded as its part *(superficies solo cedit)*. This relation is expressed through the fact that *ad caelum,* which provides the owner's sovereign power over the airspace and land strata, could not exist if existence of any separate ownership rights to any objects permanently related to this land would be simultaneously allowed.

The provision incorporated under Article 1042 of the CL that provides unrestricted power of the owner over the land strata and the airspace remained in force without any disclaimers. Still the special laws envisage a number of situations when ownership rights to buildings appear to another person despite the land owner (divided property). Besides, the legal regulation of the land strata and airspace which was in force at the moment of reinstatement of the CL maintained remarkable restrictions to the physical unity of property. This legal dualism when, on the one hand, it declares unrestricted domination of the owner over the airspace and the land strata, while on the other hand, it ignores existing legal relation, however did not cause threats for legal violations because actual restrictions for management of the airspace and land strata had already consolidated in the legal awareness. Still the authority of the CL as a central source of civil law was remarkably shaken with the very moment of its reinstatement by admitting situations when the CL declarations were in clear conflict with legal reality.

Restrictions to physical unity of property – description in the special laws

Restrictions to the physical unity of property have very uneven character in the special laws and they are rather intended as provisional measures. The uneven character is manifested through the fact that for some of them a very large space is allocated in the legal acts, sometimes even too large which is characteristic for a "hyper-regulated society"[9], while others – are either regulated incompletely or ignored altogether.

The negative impact of "hyper-regulation" on the quality of legal acts is expressed not only through its very detailed character which inevitably comes into conflict with the general regulation, but also through the reason that the very high degree of details gives wrong idea that such regulation is comprehensive, while in fact it leaves out many unregulated spheres.

Under Article 14 of the law "On the reinstatement date and procedure of the introduction part, inheritance and property law chapters of the renewed Civil Law of the Republic of Latvia dated 1937" these cases are characterised as "exceptions" from Article 968 of the CL *"until they* [i.e. ownership rights to buildings and land – J. R.] *are joined in one property".* In this way the very formulation already indicates to the temporal character of the intended norm.

[9] Susskind R. The Future of Law. Facing the Challenges of Information Technology. New York: Oxford University Press, 1996, p. 12.

Restrictions to physical unity of property in the legal regulation of buildings and constructions

There are numerous situations when in the result of the regulation existing in the special laws, the rights of a person to individual objects located in the immovable property which is owned by another person (surface and underground utilities, pipe-line routes, parking lots and other similar buildings) are not constituted since they are not recorded in the Land register (Article 19 of the law "On recording of immovable property"), still the possibility to use the immovable property is remarkably restricted for its owner ("actual rights to another's property").

Not only "exceptions" and subordination to the united regime despite the owner, but also "actual rights to another's property" are digressions from the principle of the physical unity of property under the CL, which legitimize double standards.

The detailed legal regulation of buildings and constructions (inventory) [10] has not eliminated defects within mutual relations between owners of buildings and land. Splitting of the physical unity of property and existence of formally unregulated individual rights to buildings (constructions) has become even more topical due to implementation of the building tax and the intended tax for ancillary buildings.[11]

The heating system alone which is a very common element in any living premises is regulated by a large number of legal acts, including the law "On Residential Properties", Energy law, the law "On recording of immovable property". Notwithstanding the above, there are still considerable difficulties to establish ownership rights to these objects as both the owners of apartments, the community of apartment owners and the various energy providers are claiming such.

The changing range of objects recordable in the Land register has lead to the situation when similar kind of objects (pipe-lines, small buildings etc.) may either be recorded or not recorded in the Land register depending on the time when recording has taken place. In this way these objects either acquire or fail to acquire the status of an independent object of ownership rights.

Restrictions to physical unity of property and the rights to use subterranean depths (land strata)

The law "On subterranean depths" provides a number of restrictions to the immovable property, yet the circumstances and mechanisms for their application are not precisely described and contradict to the general principles of law about the horizontal unity of property. In this way, the state and municipalities may restrict, suspend or terminate

[10] Rīgas valsts tehniskās inventarizācijas birojs. 07.10.1991–28.12.1994. Available: http://www.firmas.lv/profile/rigas-valsts-tehniskas-inventarizacijas-birojs/000303264 [viewed 5 April 2012] [in Latvian].

[11] Pašvaldības rosina pirms palīgēku nodokļa ieviešanas veikt ēku inventarizāciju. Otrdiena, 2011. g. 27. decembris. Leta. Available: http://www.apollo.lv/portal/ipasums/articles/259943?ref=theme [viewed 5 April 2012] [in Latvian].

activities by any legal or natural persons in the use of subterranean depths. The Cabinet is entitled to burden the land owned by legal persons and natural persons and depths thereof with restrictions on ownership rights necessary for the State in the cases specified by the laws. Such regulation, in turn, comes into conflict with the principle consolidated in the Constitution and the CL (Article 1033) which provides that ownership rights may be seized only through alienation of the property in the procedure specified by law. However, the Constitutional Court has already declared that the mechanism which is assigning such rights to the Cabinet shall be regarded as unconstitutional.[12] Among the users of subterranean depths is specified a person who has entered into a contract with the land owner or his or her authorised person, in which the type of use of subterranean depths is indicated. This contract is a mandatory precondition for the receipt of the licence for the use of subterranean depths or the authorisation for the extraction of widespread mineral resources. Still opposite to this provision, the law provides that the contract referred to in Section 8, Paragraph one, Clause 3 of this law for the receipt of the licence for the use of subterranean depths for the performance of geological exploration works within the interests of the society and the State in sections of subterranean depths of national significance shall not be necessary. Practical application of this norm may be connected with deprival of ownership rights considering the fact that adoption of any decision about the use of the object of ownership rights shall be the owner's prerogative.

Restriction to ownership rights of subterranean depth may be specified in the sections of subterranean depths of national significance, if it is necessary in the interests of public and the State to use useful properties of subterranean depths or obtain ground water. The Cabinet shall decide separately regarding each restriction of ownership rights and each case of the use of subterranean depths or properties thereof. For the time being only the usage provisions for the use of the subterranean depths in the section of the national significance "Dobeles struktura" have been approved (the Cabinet regulation No 534, year 2008) where it is planned to build underground gas storage. At the same time, however, the gas storage in Inchukalns has been working for a long time without approval of such provisions.

The concept of the physical unity of property also contradicts with the thesis that the value of subterranean depths shall not be included in the cadastral value of the property, and the property tax shall not be paid for the subterranean depths. Besides, such announcement is totally incompatible with the idea declared in the same legal act (Article 6 of the law "On subterranean depths") that subterranean depths are a non-renewable asset. In fact, the thesis included in the same legal norm that the subterranean depths "*are to be used for the benefit of land owners, the State and public"* is not working as well.

[12] The judgment by the Constitutional Court made on December 16, 2005 in the case no 2005-12-0103 "On compliance of the Cabinet regulations no 17 "Amendments to the law "On the forced alienation of the immovable property for the interests of the State and the public" dated January 11, 2005 and of the law "On amendments to the law "On the forced alienation of the immovable property for the interests of the State and the public" dated June 9, 2005 with Articles 1 and 105 of the Constitution of the Republic of Latvia". Available: www.satv.tiesa.gov.lv/upload/2005-12-0103.rtf [viewed 25 May 2012] [in Latvian].

Archaeological heritage

Rights of the owner to the subterranean depths may be influenced by the archaeological heritage.[13] The current regulation only refers to the monuments listed in the List of Monuments Protected by the State (Article 1083 of the CL). With regard to the property found buried in the ground, immured or in any other way hidden, the CL states that ownership of concealed property discovered on one's own land accrues to the finder (Articles 951 and 952 of the CL), except cases when concealed property is accidentally found on the land of another person. In such circumstances the finder shall acquire half thereof but the other half accrues to the owner of the land (Article 953 of the CL). In this way, the situation with archaeological heritage, in difference from the general legal regulation of building and constructions as well as the use of the land strata, fully corresponds with the *ad caelum* provision declared under Article 1042 of the CL. However, this regulation is in conflict with the principles incorporated under the European Convention on the Protection of the Archaeological Heritage where it is exactly this sphere where restrictions to ownership rights should be imposed.

Perspective for revocation of restrictions to physical unity of property

In practise, the system for restrictions and especially "exceptions" to the physical unity of property has turned out surprisingly vital, despite the initially intended "temporal" character; they have survived despite the several attempts to dispute the restricting norms to the physical unity of property before the Constitutional Court. [14]

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[13] The European Convention on the Protection of the Archaeological Heritage of January 16, 1992. Adopted and approved in Latvia by the law of 05.06.2003. "Par Eiropas Konvenciju arheoloģiskā mantojuma aizsardzībai": LR likums. *Latvijas Vēstnesis,* 92 (2857), 19.06.2003.

[14] The judgement made by the Constitutional Court on April 15, 2009 in the case no 2008-36-01 "On compliance of the words "residential apartment house" under Section 2 of Article 12 of the law "On the land reform on the cities of the Republic of Latvia"" and of Article 7 of the transitional provisions and of the first sentence under Section 2 of Article 54 of the law "On privatisation of the state and municipal residential buildings" and of Article 40 of the transitional provisions with Articles 1 and 105 of the Constitution of the Republic of Latvia", available: http://www.satv.tiesa.gov.lv/upload/spriedums_2008-36-01.htm [viewed 24 May 2012] [in Latvian]; the judgment made by the Constitutional Court on February 13, 2009 in the case no 2008-34-01 "On compliance of the word "norm" used under Section 3 of Article 12 of the law "On the land reform in the cities of the Republic of Latvia" and under Sections 1 and 2 of Article 54 of the law "On privatization of the state and municipal residential buildings" with the first sentence under Article 91 and Article 105 of the Constitution of the Republic of Latvia", available: http://www.satv.tiesa.gov.lv/upload/spriedums_2008-34-01.htm [viewed 24 May 2012] [in Latvian]; the judgment made by the Constitutional court on January 27, 2011 in the case no 2010-22-01 "On compliance of Article 7 of the transitional provisions of the law "On the land reform in the cities of the Republic of Latvia", as far as it concerns the land under residential houses, and of Article 40 of the transitional provisions of the law "On privatisation of the state and municipal residential houses" with Articles

Since any burden upon a property should be regarded as an expression of deprivation of ownership rights, the procedure provided by the special laws is in conflict with the Constitution and the practice by the Constitutional Court stating that deprivation of ownership rights, including imposing of restrictions, shall only be admitted on the grounds of law.

It is not possible to solve the problem of the divided property by the pattern of the law which dates back to the pre-war Latvia.[15] First, the present "formula of temporary solutions" differs from the system which existed by 1937 and was borrowed from the pandect law. It consisted of a surface property that was referred to by V. Bukovskis,[16] as well as F. Konradi and A. Valters[17] as *dominium directum*; *Ober-Eigentum*, and of the ownership usage (*dominium utile*; *Unter-Eigentum*) which were both recorded in one and the same division of the Land register. The present "formula of temporary solutions", in turn, provides co-existence of two entirely independent objects of immovable property with each of them being recorded in an independent division of the Land register although physically they are located in the same place. Secondly, considerable changes have been brought by environment where any, even partial, measures of restriction are perceived as violation of human rights. This makes termination of the divided property problematic because due to the above mentioned peculiarities, any of the two components of the divided property is qualified as a fully independent property in Latvia, and termination of the divided property is inevitably associated with termination of independently existing ownership rights. Thirdly, if the law remarkably changes the forms of the divided property which exist in actual relations, but are not legalised formally, it could bring considerable damage to the third persons.

Bearing in mind the previous experience which convincingly shows that complete implementation of *ad caelum* has turned out impossible, it would be necessary to abandon the categorical demand about termination of the divided property. Proposals based on the conception of the law "On cancellation of divided ownership rights" of 1938 do not correspond to the modern approaches any longer and to Article 105 of the Constitution of the Republic of Latvia and its application practice. Actually existing restrictions to the immovable property should be reflected in the CL.

To prevent the current situation with the divided property, one should more likely introduce provisions in the CL similar to the SZ mechanism with a chance to establish servitude on a foreign land in a form of a separate building; to provide possibility in the CL to divide immovable property horizontally in levels as well as to provide possibility that a person who has carried out construction on another person's

1 and 105 of the Constitution of the Republic of Latvia". Available: http://www.satv.tiesa.gov.lv/upload/spriedums_2010_22_01.htm [viewed 24 May 2012] [in Latvian].

[15] Ministru Kabineta 1938. g. 8 dec. Likums par dalītu īpašuma tiesību atcelšanu. Likumu un Ministru kabineta noteikumu krājums. 1938, 46. burtnīca [in Latvian].

[16] Буковский В. Свод гражданских узаконений губерний Прибалтийских с продолжением 1912-1914 г.г. и с разъяснениями в 2 томах, Т. I, Рига: Тип. Г. Гемпель и Ко, 1914, с. 406.

[17] Konradi F., Valters A. Lietu tiesības. Baltijas vietējo likumu kopojuma trešās daļas skaidrojumi. Rīga: 1935, 211. lpp. [in Latvian].

land may acquire the land in his ownership in case the value of the building clearly exceeds the value of the land.

Conclusion

1. It is necessary to include disclaimer in Article 1042 of the CL that rights of a land owner do not pertain to the airspace and land strata at a height and depth were such actions would be in conflict with the usage purpose of the immovable property.
2. It is necessary to include indications in the CL that are similar to Articles 673, 675 and 712.a of the SZ: about the rights of a person to acquire land in ownership in case the value of the building clearly exceeds the value of the land; to provide possibility to record a separate building on a foreign land in a form of servitude; as well as provide possibility to divide immovable property in levels.
3. It is necessary to formulate precise legal regulation for significant constructions built in the land strata which do not belong to the land owner, but whose special legal status are not adequately reflected in the Land registers now.
4. Inventory of the value of the resources of subterranean depths should be carried out.
5. Legal status of cultural and archaeological objects found in subterranean depths should be established.

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QUALITY OF LEGAL REGULATION OF MINIMUM PROCEDURAL STANDARDS IN EUROPEAN PROCEDURES OF ENFORCEMENT OF DECISIONS: A CRITICAL ANALYSIS

Keywords: European enforcement order, European order for payment, European small claims procedure, minimum procedural standards, service of documents, international civil procedure.

Introduction

It is no secret that the international civil procedure of the European Union (hereinafter – the EU) is developing so rapidly that the court practice, legal science, and the legislators of the member states can hardly keep up with these processes. This rapid development started at the time when the Treaty of Amsterdam[1] was adopted on 1 May 1999, and is still rapidly continuing today, i.e. after the Treaty of Lisbon[2] came into force on 1 December 2009.

In the author's opinion, the main planning document of the EU institutions to mention in the field of civil procedure up to now is the common programme for measures adopted on 30 November 2000 by the Commission and the Council "Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters" (hereinafter – the Common Programme for Measures),[3] in which it is referred to reduction of causes valid for rejecting recognition, including, cancelling the public order (*ordre public*) control of enforcement of the ruling in a member state. However, it is expected to replace this type of control in some situations by introducing common "minimum procedural standards"[4], which in the EU secondary regulatory legal enactments would be established autonomously,

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[1] The text of the Treaty of Amsterdam in English is available at: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Related Acts. Official Journal C 340, 10.11.1997. (The Treaty of Amsterdam was adopted on 2 October 1997 and it came into force on 1 May 1999).

[2] The Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community. Official Journal C 306, Vol. 50, 17.12.2007, pp. 1-231. Signed in Lisbon on 13 December 2007 (effective on 1 December 2009).

[3] Projet de programme des mesures sur la mise en œuvre du principe de reconnaissance mutuelle des décisions en matière civile et commerciale (2001/C12/01). Journal officiel C 12, 15.01.2001, p. 1-9 (not available in Latvian).

[4] Ibid., p. 5, 6.

i.e. jointly for all member states. These minimum procedural standards are included in the following regulations:

1) Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 *creating a European Enforcement Order for uncontested claims*[5] (hereinafter – Regulation 805/2004);
2) Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 *creating a European order for payment procedure*[6] (hereinafter – Regulation 1896/2006);
3) Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 *establishing a European Small Claims Procedure*[7] (hereinafter – Regulation 861/2007).

Hence, the concept "European enforcement procedures" includes the European enforcement order (hereinafter – EEO), European order for payment (EOP), and the European small claims procedure.

Additionally, it must be noted that the author in the paper is consistently using the concept "defendant", even though the Regulation 805/2004 includes a concept "debtor". Likewise, this paper considers the minimum procedural standards only with respect to court decisions, not to settlements and public documents.

Problem of Autonomy of Legal Regulation

The minimum procedural standards included in **Regulations 805/2004** and **1896/2006** are peculiar with the fact that on one hand they are to be regarded as an autonomously defined[8] totality of requirements of document service, however, on the other hand, they do not form uniform and directly applicable procedural norms for service of documents of the EU level. Therefore, legal scientists believe that these standards only autonomously show certain frameworks of service of documents, which supposedly sufficiently should protect the defendant's interests.[9] Simultaneously, it must be said that the provisions of both aforementioned regulations do not require that the provisions of civil procedure law of the member states are directly harmonised

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5 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. Official Journal L 143, 30.04.2004, pp. 38-62.

6 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure. Official Journal L 399, 30.12.2006, pp. 1-32.

7 Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. Official Journal, L 199, 31.07.2007, pp. 1-22.

8 Rauscher T. Der Europäische Vollstreckungstitel für unbestrittene Forderungen. München: Sellier, 2004, S. 42.

9 Rauscher T. (Hrsg.). Gruber U.P., Heiderhoff B., Von Hein J., Mäsch G., Pabst S., Varga I. Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR Kommentar. München: Sellier, 2010, S. 126 (Pabst S., Art. 13).

with the requirements of regulations.[10] Nevertheless, *de facto* these national legal provisions may not be inconsistent with the said standards.[11] Legal scholars even regard them as an odd and peculiar directive included in a regulation.[12]

For instance, Regulation 805/2004 is peculiar with the fact that it does not explicitly and clearly require that in the process of reviewing the main proceedings minimum procedural standards are observed. It merely establishes that at the time, when the judge decides on the approval of a judgment on EEO (in cases when the defendant has been passive), the judge must make sure that these standards have been abided by in a process that has already taken place (*post processum*). Therefore, any plaintiff, plaintiff's representative, and judge must be careful and even far-sighted, by predicting whether a need might arise after passing the judgment to approve it as EEO.

The problem can be observed also in Regulation 1896/2006, namely, the minimum procedural standards included therein, all of a sudden are not that autonomous anymore as they were in Regulation 805/2004[13]:

Table No. 1

Regulation 805/2004	Reulation 1896/2006
Article 13 "The document instituting the proceedings or an equivalent document may have been served on the debtor **by one of the following methods**: [*methods with proof of receipt*]".	**Article 13** "The European order for payment may be served on the defendant **in accordance with the national law of the State in which the service is to be effected, by one of the following methods**: [*methods with proof of receipt*]".
Article 14 "Service of the document instituting the proceedings or an equivalent document and any summons to a court hearing on the debtor may also have been effected **by one of the following methods**: [*methods for receipt without proof*]".	**Article 14** "The European order for payment may also be served on the defendant **in accordance with the national law of the State in which service is to be effected, by one of the following methods**: [*methods for receipt without proof*]. See also **Article 12(5)**: "The court shall ensure that the order is served on the defendant **in accordance with national law by a method that shall meet the minimum standards** laid down in Articles 13, 14 and 15".

[10] Regarding the Regulation 805/2004, see also: Giebel Ch.M. Fünf Jahre Europäischer Vollstreckungstitel in der deutschen Gerichtspraxis – Zwischenbilanz und fortbestehender Klärungsbedarf. Praxis des Internationalen Privat- und Verfahrensrechts (IPRax), Heft 6, 2011, S. 532.

[11] See Article 12(5) of Regulation 1896/2006: "The court shall ensure that EOP is served on the defendant in accordance with national law by a method that shall meet the minimum standards laid down in Articles 13, 14 and 15".

[12] Péroz H. Le règlement CE n° 805/2004 du 21 avril 2004 portant création d'un titre exécutoire européen pour les créances incontestées. Journal du droit international. Paris: Clunet, 2005, Nr. 3, p. 650.

[13] Lopez de Tejada M., D'Avout L. Les non-dits de la procédure européenne d'injonction de payer. Revue critique de droit international privé. Paris: Dalloz, n° 4, 2007, p. 727.

From the comparative *Table No. 1* it is seen that in the case of EOP, the service of court documents must be made not simply by using one of the minimum procedural standard methods, but already in compliance with the national law of the country, in which service is to be carried out (simultaneously applying one of the minimum procedural standard methods). If the defendant resides in the country where the court issuing EOP is located, then this regulation is comprehensible. However, if the defendant's place of residence is in another member state, then let us imagine the following situation:

Situation

A commercial company registered in Latvia files an application at a court of Latvia for a European Order for Payment against a legal entity registered in Finland. The court of Latvia issues EOP against the defendant in Finland. Further on, the court of Latvia (under Article 12(5) of the Regulation) must send this EOP to the defendant in Finland **in accordance with the national law of Finland, while observing the minimum procedural standards** stipulated in Articles 13, 14, and 15 of the Regulation. How, in the opinion of the EU legislator, should the court in Latvia act?

How will the court in Latvia be able to control that the procedure of serving documents performed in Finland meets the minimum procedural standards? In this case, do not the Finnish competent authorities performing service of court documents of Latvia have any obligation to meet the minimum procedural standards, which supposedly are autonomous in all signatory states to the Regulation? The author at this time finds it difficult to explain how such a mechanism of serving documents which is completely unreasoned could actually operate in practice. Most likely, the member state serving the documents, instead of applying national law, could apply Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 *on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000*[14] (hereinafter – Regulation on Service of Documents) along with the minimum procedural standards. Nevertheless, also in such a situation, there is no clear uniform view and proper studies performed in the EU regarding the relations of these minimum procedural standards with the Regulation on Service of Documents (which rather frequently refers to the national law of the member states).

Unlike both of the aforementioned regulations, in Article 13 of **Regulation 861/2007**, the EU legislator has attempted to include also directly applicable provisions concerning the service of documents. Hence, with regard to the Regulation 861/2007 one can speak of a supposedly autonomous procedure of service of documents within

[14] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. Official Journal L 324, 10.12.2007, pp. 79-120.

EU in small claim procedures.[15] However, an important question is about the relations of these methods of service with the methods of cross-border service stipulated in the Regulation on Service of Documents. It can be concluded from Clause 2 of Section $56^2(1)$ of the Civil Procedure Law of Latvia[16] (hereinafter – CPL) that in the case of applying the Regulation 861/2007, court documents to a person residing in another member state are served in compliance with the procedures established in Article 13 of this Regulation and not in line with the mechanism stipulated in the Regulation on Service of Documents (to which a reference is included in Clause 1 of Section $56^2(1)$). In the author's opinion, the legislator of Latvia should reconsider this issue carefully.

Problem of hierarchy

The minimum procedural standards stipulated in **Regulations 805/2004** and **1896/2006** do not feature any mutual **hierarchy**. There neither is hierarchy between Article 13 and 14 (i.e. between service with proof of receipt and service without proof of receipt), nor between the methods of service mentioned in each of these groups of service [e.g., between the methods of service mentioned in item b) and item c) of Article 14(1)]. In practice, it means that the judge can freely choose to issue a court document, and apply a method of high probability (Article 14) before applying a method of full certainty (Article 13). Most certainly, it affects the defendant's rights to be properly informed about the initiation of legal proceedings and to prepare for defence.

In **Regulation 861/2007** it can be observed that the EU legislator has attempted to introduce a hierarchy of methods of service, namely, the court should first try to service documents in line with Article 13(1) of the Regulation ("Documents shall be served *by postal service* attested by an acknowledgement of receipt including the date of receipt"), and only then, if this method is infeasible, the other methods stipulated in Article 13 *or* 14 of Regulation 805/2004 are applicable (see, *inter alia*, also Article 5(2) and (6) of Regulation 861/2007). Hence, paragraph one and two of Article 13 of the Regulation with respect to each other are **subsidiary** legal provisions. What is surprising, though, is the near-sightedness of the EU legislator manifested in several aspects:

Firstly, as hierarchically the first and, apparently, safest method of service, instead of serving the addressee in person [see safe methods mentioned in items a) and b) of Article 13(1) of Regulation 805/2004], **service by mail** [see item c) of Article 13 of Regulation 805/2004] is mentioned. However, if the wording of item c) of Article 13(1) of Regulation 805/2004 is compared with Article 13(1) of Regulation 861/2007, one can notice rather considerable differences, which can affect

[15] Rauscher T. (Hrsg.) u.a. Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR Kommentar. München: Sellier, 2010, S. 478, 479 (Varga I., Art. 13).

[16] Civilprocesa likums [Civil Procedure Law]: LR likums. *Latvijas Vēstnesis*, 1998. g. 3. novembris, Nr. 326/330.

the rights of the addressee[17] of a document (and especially, of a defendant) to fair justice, namely:

Table No. 2

Regulation 805/2004 **Item c) of Article 13(1)**	**Regulation 861/2007** **Article 13(1)**
"postal service attested by an acknowledgement of receipt including the date of receipt, **which is signed and returned by the debtor**".	"Documents shall be served by postal service attested by an acknowledgement of receipt including the date of receipt".

From the comparison, it can be clearly seen that the hierarchically higher method of service mentioned in Article 13(1) of Regulation 861/2007 does not require that the addressee's signature is included on the acknowledgement of receipt; it is sufficient to include only the date. However, is it not important, **to whom** the court documents are served? The method stipulated in Article 13(1) of the Regulation can lead to such cases, when the court documents are served to a completely different person. Furthermore, unlike Article 14 of Regulation 805/2004, in which it stipulates that methods of lower probability level can be used only if the debtor's address is certainly known,[18] there is nothing similar found in Article 13(1) of Regulation 861/2007. Hence, it results in a situation that this method, which hierarchically is of higher level, is applicable *also* if the defendant's address is not certainly known.

Secondly, methods indicated in Article 13(2) of Regulation 861/2007 (which are the same as methods stipulated in Articles 13 and 14 of Regulation 805/2004) may be applied *only if* the service under paragraph one of this article is infeasible. As was just demonstrated, the methods indicated in items a) through d) of Article 13(1) of Regulation 805/2004 are of much higher level of probability (as it is required that in all cases the defendant's signature is placed on acknowledgement of service, as well as that the person's address is known) than the option of service stipulated in Article 13(1) of Regulation 861/2007 (which requires only the date of service, but not the addressee's signature and certain address).

Thirdly, Article 13(2) of Regulation 861/2007 refers back to Article 13 *or* 14 of Regulation 805/2004 the choice of which is left once again at the judge's discretion, because there is still no mutual hierarchy between the methods mentioned in both articles (just like within the Regulation 805/2004 and Regulation 1896/2006).

Hence, **Article 13(1) of Regulation 861/2007 should be expressed at least as follows**:

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[17] With regard to Regulation 861/2007, the author uses the term "addressee" instead of "a defendant". This is due to the fact that in Article 5(2) and (6) of the Regulation it derives that under Article 13, the court documents are to be served both to the defendant and the plaintiff (concerning a counterclaim).

[18] See Article 14(2) of Regulation 805/2004 "For the purposes of this Regulation, service under paragraph 1 is not admissible if the debtor's address is not known with certainty".

Table No. 3

Current wording of Regulation 861/2007 Article 13(1)	Wording suggested for Regulation 861/2007, Article 13(1)
Article 13(1) "1. Documents shall be served by postal service attested by an acknowledgement of receipt including the date of receipt".	**Article 13(1)** "1. Documents shall be served to the **addressee** by postal service, attested by an acknowledgement of receipt, **including** the date of receipt **and signed and returned by the addressee**".

Problem of timeliness

Further on, the author considers the next issue, which is not clearly stipulated in procedural standards (i.e. in none of the three regulations), namely, it is **timeliness** of service of court documents. As the author already pointed out before, the minimum procedural standards is an experimental innovation, which does not replace the regular control of the fact of informing the defendant in the member state where the judgment is enforced. Pursuant to the Council Regulation (EC) No 44/2001 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*,[19] Article 34(2): "A judgment shall not be recognised where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document **in sufficient time** and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so".

As can be seen, the timeliness of serving the court documents is also very important in informing the defendant. There is no reference regarding the requirement for timely service of the court documents in Article 13 and 14 of Regulation 805/2004, Article 13 and 14 of Regulation 1896/2006, or in Article 13 of Regulation 861/2007. However, it does not mean that courts do not have to comply with this very important element in the case of three regulations. This is where internal systemic interpretation of regulation provisions can be of assistance, namely:

1) considering Article 13 and 14 of **Regulation 805/2004** in a system with item a), subitem ii) of Article 19(1), pursuant to which "Further to Articles 13 to 18, a judgment can only be certified as a EEO if the defendant is entitled, under the law of the Member State of origin, to apply for a review of the judgment where: [..] ii) **service was not effected in sufficient time** to enable him to arrange for his defence, without any fault on his part";

[19] Regulation (EC) No. 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Official Journal L 12, 10.01.2001, pp. 42-64.

2) considering Article 13 and 14 of **Regulation 1896/2006** together with item a), subitem ii) of Article 20, which is identical to the already specified legal provision in Regulation 805/2004;
3) considering Article 13 of **Regulation 861/2007** in a joint system with item a) of Article 18(1), which stipulates the following: "The defendant shall be entitled to apply for a review of the judgment given in the European Small Claims Procedure before the court or tribunal with jurisdiction of the Member State where the judgment was given where: i) the claim form or the summons to an oral hearing were served by a method without proof of receipt by him personally, as provided for in Article 14 of Regulation (EC) No 805/2004, **and** ii) **service** [**of a notice**] **was not effected in sufficient time** to enable him to arrange for his defence without any fault on his part".

It appears odd that in this Regulation only service [of a notice] must be effected in due time, but it does not refer to other types of court documents. Fortunately, such wording appears only in the Latvian language version of the Regulation text. Texts in other language do not contain this short-coming, namely, in English, it is *"service"* (service, delivery), in French – "*la signification ou la notification*", while in German – *"die Zustellung*". As can be seen, no reference to "a court notice". Therefore, the author recommends that the responsible authority of Latvia correct this imprecision in the Latvian text of the Regulation.

Conclusion

1. Minimal procedural standards found in Regulations 805/2004 and 1896/2006 are on one hand to be regarded as a totality of autonomously defined service requirements, but on the other hand, they *de facto* do not create uniform and directly applicable procedural provisions for the service of documents of the EU level.
2. In Regulation 861/2007, the EU legislator has intended to include also directly applicable provisions of service of documents, therefore the minimum procedural standards in this Regulation already have turned into **methods of delivering** documents, which supposedly would enable talking about autonomous document service procedure in small claims procedures. Nevertheless, the wording of these standards is very clumsy and imprecise.
3. There is no mutual **hierarchy** between the minimum procedural standards stipulated in Regulations 805/2004 and 1896/2006. However, in Regulation 861/2007 one can already observe that the EU legislator has attempted to introduce certain hierarchy of methods of service. However, the quality of these provisions is still not successful.
4. In Regulations 805/2004 and 1896/2006, and in Regulation 861/2007, no reference can be found to the **requirement of timeliness** for serving court documents. However, it does not mean that courts do not have to observe this very important element in the case of the aforementioned three regulations.

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LIQUIDATION OF FOUNDATIONS IN POLISH LAW

Keywords: fundation, liquidation, assets of the Fundation, conditions for liquidation, winding-up proceedings.

Introduction

The Polish statutory regulations concerning the liquidation of Foundations are contained in Article 15 of the Act of 6 April 1984 concerning Foundations, hereinafter referred to as the "Act on Foundations".[1] The provisions of this Article constitute the sole framework applicable to the entire complicated process of eliminating the legal existence of a Foundation as part of its liquidation. Analysis of the norms contained in the Article demonstrates that they can be reduced to the following: setting forth the reasons which underlie the need for liquidation of the Foundation; identifying the legal entities who may be entitled to request liquidation in the event of inactivity of the Foundation's legally constituted organs; and elaboration of a means to deal with the Foundation's post-liquidation assets in the event its Charter (called 'Statute' in Polish) fails to designate a particular recipient or recipients to whom the assets should be transferred.

The Polish Act does not establish the/procedure for carrying out liquidation proceedings. Instead it provides that they are to be carried out in accordance with the provisions contained in the Foundation's Charter. However, it should be pointed out that there is no legal obligation on a Foundation to make provisions for its possible liquidation in its Charter, and very often the founding members of a Foundation fail to include such provisions in the Charter, ironically owing to the difficulties involved in the formulation of a procedure which would protect the interests of all creditors.[2] The same concerns apply to a forced liquidation. As a result, in practice the liquidation of a Foundation is intertwined with a number of serious difficulties of a procedural nature.[3]

The generality and imprecision of the applicable legal provisions regarding the liquidation of Foundations has been the subject of universal criticism in the legal literature, which regularly posits that the existing regulations are insufficient and

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1 Dz. U. z 1996 r., Nr 46, poz. 203 (1996 *Journal of Laws*, Nr. 146, position 203).

2 Niemirka B. Status fundacji (Part I). Monitor Prawniczy 1995, No. 3, p. 89, and Cioch H. Status polski fundacji w świetle judykatury. Rejent, 2000, No. 5, p. 13 and following.

3 Bugajna-Sporczyk D.Trudna likwidacja fundacji. Prawo spółek, 1998, No. 7-8, p. 94 and following.

inappropriate.[4] As is the case in the liquidation of other legal entities, the institutional solutions applied in the liquidation of a Foundation should be precisely set forth and regulated as part of an overall process established by law, and not according to Foundation Charters.[5] The principle *de lege lata* indicates the clear need to apply legal solutions contained in other legal acts governing the liquidation of other legal entities to the liquidation of Foundations. Although it has been variously postulated that Foundations should be liquidated according to the laws governing the liquidation of cooperatives, Associations, or according to the Code of Commercial Partnerships and Companies,[6] it is generally acknowledge that the application of the law governing cooperatives is most closely related to the liquidation of Foundations.[7] It is worth underscoring that the proceedings for liquidating a legal cooperative are regulated rather thoroughly and appropriately and as a result they are often used. This chapter of this work will discuss and analyze the possibility and appropriateness of applying the provisions of the law concerning cooperatives to the liquidation of Foundations by comparing and taking into account the respective legal provisions applicable to their liquidation.

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[4] See: Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34, p. 49, also O potrzebie dokonania zmian w polskim prawie fundacyjnym. Gdańskie Studia Prawnicze 1999, No. 5, p. 65; Fundacje w ujęciu prawa polskiego. Lublin, 2000, p. 146; Prawo fundacyjne. Warszawa 2005, pp. 144-148, Bugajna-Sporczyk D. Trudna likwidacja fundacji. Prawo spółek, 1998, No. 7-8, p. 94.

[5] See: Cioch H. O potrzebie dokonania zmian w polskim prawie fundacyjnym. Gdańskie Studia Prawnicze 1999, No. 5, p. 49, also Fundacje w ujęciu prawa polskiego. Lublin 2000, p. 146; Prawo fundacyjne. Warszawa 2005, pp. 144-148, Suski P. Stowarzyszenia i fundacje. Warszawa 2005, pp. 412-420, and Bugajna-Storczyk D. Co dalej z ustawą o fundacjach? Gazeta Sądowa, 1997, No. 9-10, p. 4 and following.

[6] Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34, p. 49 also Cioch H. Status polski fundacji w świetle judykatury. Rejent 2000, No. 5, p. 13, Fundacje w ujęciu prawa polskiego. Lublin 2000, p. 146, Prawo fundacyjne. Warszawa 2005, pp. 144-148; Strzępka, J. etc. Prawo o fundacjach. Komentarz. Warszawa, 1992, pp. 67-69, Kidyba A.Ustawa o fundacjach, Prawo o stowarzyszeniach. Warszawa 1997, pp. 53-57; decision of the Supreme Court of 8 February 2000, I CKN 416/98, OSNC 2000, Nr. 9, pos. 157. For a contrary view, see: Suski P. Stowarzyszenia i fundacje. Warszawa 2005, pp. 412-420 who considers that the certainty of law and uniformity of case law requires new regulations concerning liquidation proceedings, and not the application of analogous laws.

[7] For voices in favor of the application of cooperative law, see, among others, Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34, p. 49, also Cioch H. Status polski fundacji w świetle judykatury. Rejent, 2000, No. 5, p. 13, Fundacje w ujęciu prawa polskiego. Lublin 2000, p. 146, Prawo fundacyjne. Warszawa 2005, pp. 144-148, Strzępka, J.etc. Prawo o fundacjach. Komentarz. Warszawa 1992, pp. 67-69 and Kidyba A. Ustawa o fundacjach, Prawo o stowarzyszeniach. Warszawa, 1997, pp. 53-57. See also Stecki L. Fundacja Część druga i trzecia. Toruń 1996, pp. 138-140, who considers that the laws governing the liquidation of companies and cooperatives may be applied to the liquidation of Foundations.

The legal basis

The term 'liquidation of a Foundation' used in Article 15 paragraph 1 of the Act on Foundations should be understood broadly. It is accepted doctrine that this phrase encompasses all legal institutions involved in the process whereby a Foundation loses its status as a legal entity. [8] An analysis of Article 15 allows for the conclusion that a Foundation may be liquidated via a 'Charter liquidation', (Article 15, paragraphs 1 and 2), a 'forced liquidation'(Article 15, paragraphs 2 and 3), and a liquidation by bankruptcy.[9] The possibility of bankruptcy derives from paragraph 3 of Article 15, which provides that "in cases other than those envisioned in paragraph 1 the liquidation of a Foundation can take place only in accordance with the provisions of an applicable law." Owing to space considerations, the broad-ranging and complicated issues surrounding the bankruptcy of a Foundation are omitted from the present work.

The law of Foundations envisions two legal bases upon which a Foundation may enter a liquidation phase: 1) realization of attainment of its aims; and 2) exhaustion of the financial resources and assets of a Foundation.

The first above-mentioned legal basis is connected with Article 1 of the Act, which provides that a Foundation must be created for realization of a fundamental interest of the Republic of Poland in socially and economically beneficial areas such as: protection of health, economic and scientific development, education and training, art and culture, social services and assistance, environmental protection, and the preservation of landmarks. The aim of a Foundation is a basic constitutive element of every Foundation and cannot be subsequently changed, although it may be modified upon the fulfillment of a number of statutory provisions.[10] The applicable law permits a Foundation to have more than one aim. If however a Foundation lists more than one aim, it cannot be liquidated on the basis of having fulfilled its aim until all the listed

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[8] Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34, p. 49. In the opinion of A. Kidyby, the concept of liquidation of a Foundation needs to be understood in relation to three situations; 1) the reaswons for the instigation o liquidation proceedings, 2) liquidation proceedings themselves, 3)loss of legal status via elimination from the National Register, Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa, 2007, pp. 266-270.

[9] Compare Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34, p. 49, Suski P. Stowarzyszenia i fundacje. Warszawa 2005, pp. 412-420; Strzępka J. etc. Prawo o fundacjach. Komentarz. Warszawa 1992, pp. 67-69, Stecki L. Fundacja Część druga i trzecia. Toruń 1996, pp. 138-140. A differing view of the possibilities offered by Charter liquidations is presented by Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa 2007, pp. 266-270 as well as Pawłowski M. Jak założyć fundację. Przegląd Gospodarczy, 1996, No. 3, p. 68. These authors consider that a restrictive approach should be taken to the liquidation of a Foundation, and that reasons other than those listed in the regulations should not be applied in support of liquidation of a Foundation.

[10] For a more detailed analysis, see Cioch H., Przekształcenie fundacji. StudiaPrawnicze, 1988, No. 4, p. 23, also Glosa do postanowienia Sądu Najwyższego z dnia 12 lutego 2002 r. I CKN 1388/99, Rejent, 2004, No. 1, p. 103. as well as the Supreme Court resolution of 7 July 1993, III CZP 88/93, Orzecznictwo Sadów Polskich 1994, No. 2, pos. 28.

aims are fulfilled, including its major aim as well as other less important ones. [11] The aim of a Foundation may be the realization of a single venture, such as for example the building of a school, hospital, or cultural center. In such cases the completion of the venture brings about the automatic liquidation of the Foundation. On the other hand the aim of a Foundation's existence may be stated in general terms, without time limitations, for example using formulations such as "support of science, culture, education" or "to combat unemployment." In such cases the complete achievement of a Foundation's aim is very difficult, if not impossible. There is no doubt but that such broadly defined tasks can only be considered 'fulfilled' if something has been created of a definite and permanent nature (for example unemployment in a given district has been reduced to zero).[12] Given the rarity of such concrete achievements, Foundations which are created for an indefinite period to achieve an ongoing aim must almost always rely on the second reason for liquidation specified in Article 15, paragraph 1 of the Act on Foundations.

In addition to fulfillment of a Foundation's aims, Article 15 provides that a Foundation may be liquidated if it has exhausted its financial resources and assets. The formulation used in the relevant provision has been rightly criticized by legal scholars.[13] The possession of assets is a *sine qua non* condition for the establishment and existence of a Foundation, This is connected to the fact that a Foundation is a legal entity of an establishment nature.[14] The assets of a Foundation include substrates such as limited rights in rem, receivables, and the ownership of real and personal property, including money (accounts).[15] There is no agreement among legal scholars as to a doctrinal position regarding when a Foundation has exhausted its financial resources and assets. According to one school of thought, "in order for a Foundation to cease to exist, it must exhaust absolutely everything and may not even have an account receivable owed by a third person." [16] A contrary view is based on the assumption that a Foundation may undergo liquidation not only in the case of absolute exhaustion of its financial resources, but also in cases where a Foundations

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[11] Stecki L. Fundacja Część druga i trzecia. Toruń 1996, pp. 138-140; Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa 2007, pp. 266-270.

[12] Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa, 2007, pp. 266-270.

[13] A critical position regarding this formulation was taken by Stecki L. Fundacja Część druga i trzecia. Toruń 1996, pp. 138-140, who argues that while a Foundation may lack financial assets, it may own property which allows it to function in an appropriate manner. Thus the exhaustion of financial resources need not necessarily lead to the liquidation of a Foundation. In support of this position, see Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa 2007, pp. 266-270 who argue that these objections could be met by a change in phrasing to "exhaustion of a Foundation's property," which would necessarily lead to its liquidation.

[14] Zobacz m. in. Cioch H. Fundacje w ujęciu prawa polskiego. Lublin 2000, p. 22-25, as well as Prawo fundacyjne. Warszawa 2005, pp. 19-48, Wach M. Fundacja – wyodrębniona masa majątkowa czy organizacja społeczna, Przegląd Prawa Handlowego 2007, No. 7, pp. 27-32.

[15] Bugajna-Sporczyk D.Trudna likwidacja fundacji. Prawo spółek, 1998, No. 7-8, p. 94 and following. For more on the topic of transfer of a Foundation's property, as well as Cioch H. Glosa do postanowienia Sądu Najwyższego z dnia 12 lutego 2002 r. I CKN 1388/99, Rejent, 2004, No. 1, p. 103.

[16] Bugajna-Sporczyk D.Trudna likwidacja fundacji. Prawo spółek, 1998, No. 7-8, p. 94 and following.

assets are reduced below a point that would allow it to realize its (permanent) aim.[17] This latter position must be considered as correct, since the Act speaks only of 'exhaustion' of resources, and not *complete* exhaustion thereof. In addition one of the aims of a liquidation proceeding is satisfaction of creditors' rights in a Foundation's assets.[18] Obviously there is no possibility to realize this aim if one of the conditions of instigating a liquidation proceeding is that the Foundation cannot possess any assets does not possess assets whatsoever.

In addition to the legal bases for liquidating a Foundation contained in the Act, a Foundation may also be liquidated if circumstances arise which are stipulated in the Foundation's Charter as reasons for liquidation. According to one of the leading authorities on Polish Foundation law, H. Cioch, this assumption arises from an *a contrario* reversal of the formulation contained in paragraph 2 of Article 15 – "unless the Charter does not envision the liquidation of the Foundation."[19] Accordingly, it may be assumed that a Charter *can* envision the liquidation of a Foundation. This view is not undermined by the provision in Article 5, paragraph 1, sentence 2 which provides a list of acceptable reasons for liquidation, since the list is clearly giving examples and is not an exhaustive list.[20] Thus the Charter of a particular Foundation may envision a variety of reasons which would bring about its liquidation. Among the most typical one may list: creation of a Foundation for a limited period of time, and passage of time beyond that for which the Foundation was created; the existence of pre-established conditions which would, according to the Foundation's Charter, bring about its dissolution.[21] Such pre-established conditions must however be connected in some fashion with the operation or effects of a Foundation's activities. Founding members of a Foundation thus have a great deal of freedom when creating the Charter to determine and establish those conditions which would bring about the liquidation of the Foundation being created. In this respect the legal doctrine regarding the liquidation of Foundations is similar to that regarding the liquidation of companies under commercial law. [22]

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[17] Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34, p. 49, Suski P. Stowarzyszenia i fundacje. Warszawa 2005, pp. 412-420; Strzępka, J. etc. Prawo o fundacjach. Komentarz. Warszawa 1992, pp. 67-69.

[18] So declared the Supreme Court on 19 June 1996, III CZP 66/96, OSNC 1996, nr 10, pos. 133. See also Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa 2007, pp. 266-270; Suski P. Stowarzyszenia i fundacje. Warszawa 2005, pp. 412-420.

[19] Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34, Prawo fundacyjne. Warszawa 2005, pp. 144-148, and the Supreme Court ruling of 8 February 2000, I CKN 416/98, OSNC 2000, No. 9, pos. 157.

[20] Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34, Suski P. Stowarzyszenia i fundacje. Warszawa 2005, pp. 412-420; Niemirka B. Status fundacji (Part I). Monitor Prawniczy 1995, No. 3, p. 89.

[21] Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34, Strzępka, J. etc. Prawo o fundacjach. Komentarz. Warszawa 1992, pp. 67-69.

[22] The provisions of the Code of Commercial Partnerships and Companies provides that the basis for liquidation of any commercial company is the confirmation that an event envisioned in the Charter or partnership agreement has occurred. See, among others, Article 58 point 1, Article. 98 § 1, Article 148 § 1point 1, and Article. 270 § 1 of the Code of Commercial Partnerships and Companies.

The legal doctrine regarding the liquidation of Foundations does not acknowledge the following circumstances as constituting a basis for liquidation of a Foundation: realization by a Foundation of aims outside those envisioned in its Charter; acting in an illegal fashion or contrary to the principles of social harmony; or violations of general principles of law. [23] In such circumstances the obligation of the supervisory organs of a Foundation is to undertake appropriate actions as envisioned in Articles 13 and 14 of the Act on Foundations.

A forced liquidation of a Foundation may occur only when *all* of the following prerequisites are fulfilled: a) the existence of one of the events indicated in Article 15 paragraph 1 or contained in the provisions of other acts; b) the Foundation's Charter does not envision the liquidation of the Foundation, or c) the Foundation's Charter envisions the liquidation of the Foundation, but not in the given circumstances.[24] A decision authorizing the forced liquidation of a Foundation can only be undertaken by a Court on the basis of a petition filed by an appropriate minister (the Head of a designated central office – Article 18) or an appropriate provincial official (known in Polish as "starosta" – Article 15, paragraph 2). The Act concerning Foundations does not specify which Court is vested with competence to issue a decision authorizing forced liquidation. It is commonly understood however that the appropriate Court is the Court exercising jurisdiction over Foundations, i.e. the District Court, Civil Division, in the Voivodship (province) where the Foundation has its headquarters. [25] The appropriate minister or starosta may prepare a petition either ex officio on their own initiative or on the basis of information received from an interested party, frequently a creditor. There is also no obstacle preventing the Management Council or Supervisory Board of a Foundation from undertaking activities aimed at instituting liquidation proceedings in instances where the Foundation's Charter does not provide such officials with the power to pass a resolution calling for liquidation of the Foundation.[26] The forced liquidation of a Foundation is also an effective means of last resort to combat inactivity on the part of a Foundation's organs.[27]

In addition to the reasons set forth in the Act for liquidation of a Foundation, similarly as with cooperatives it is assumed that a Foundation as a legal entity can also

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[23] Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34 as well as Prawo fundacyjne. Warszawa 2005, pp. 144-148, Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa 2007, pp. 266-270.

[24] Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34.

[25] Suski P. Stowarzyszenia i fundacje. Warszawa 2005, pp. 412-420; Bugajna-Sporczyk D.Trudna likwidacja fundacji. Prawo spółek, 1998, No. 7-8, p. 94 and following. Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa 2007, pp. 266-270.

[26] Such a possibility was expressly recognized by the Supreme Court, Civil Chamber, in its decision of 8 February 2000, I CKN 416/98, Orzecznictwo Sadu Najwyższegi – Izba Cywilna, 2000, No. 9, pozycja 157.

[27] Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34. The author gives as an ex ample of the need for a forced liquidation the withdrawal of a decision allowing a Foundation to carry out economic activities.

be liquidated on the basis of Article 42 of the Commercial Code as well as Article 29 paragraph 1 of the Law establishing a National Court Register.[28]

In this author's opinion, the legal basis for a Foundation to enter into liquidation proceedings does not require the application of provisions similar to those contained in Article 113, paragraph 1 and Article 114, paragraph 2 of the Act on Cooperatives. A Foundation is regulated by its own separate law, which is closely related to the essential features of a Foundation as an entity created for the achievement of socially desired aims as defined by the founding members. In addition Foundation law envisions the liquidation of a Foundation on the basis of Charter provisions, which is connected with the freedom granted to founding members in creating the substance of the Foundation Charter.[29] The founding members, acting within the limits of applicable law, can define the conditions or events which may render the Foundation's continued legal existence useless or unnecessary. In this light, *de lege ferenda* it is necessary only to revise those provisions of Article 15 paragraph 1 which create doubts about the ability to specify in a Foundation's Charter other reasons for liquidating a foundation than those provided for in the Act on Foundations.[30]

Applicable procedure

The Act on Foundations does not establish the course of liquidation proceedings. Article 15 paragraph 2 declares that the provisions of the Foundation Charter should be applied. This solution is defective for several reasons. In the first place, the inclusion of provisions regarding liquidation proceedings in the Charter of a Foundation is not obligatory. As a result, founding members frequently don't include such provisions in the Charter, or if they do they restrict themselves to copying into the Charter the contents of Article 15 paragraph 1, which is not aimed at regulating the procedures for liquidation of a Foundation.[31] Another reason for the failure to include provisions regulating the procedures for liquidation in a Foundation's Charter is that the founding members are unable to construe the procedures in such a way

[28] See Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa 2007, pp. 266-270 as well as the resolution of the Supreme Court of 18 April 2000, III CZP9/00, Orzeczcznictwo Sądu Najwyższego-Izba Cywina, 2000, Nr. 9, pos. 153, where it confirmed that the lack of competent organs as well as the inevitable exhaustion of assets may lead to the liquidation of a Foundation, in the first instance indirectly via the application of Article 42 § 1 and 2 k.c., and in the second instance by use of the procedure established by Article 15 paragraphs 1 or 2 of the Act on Foundations.

[29] In the case of cooperatives, there is no possibility for the reasons for liquidation contained in the cooperative's charter to differ from those prescribed by statute.

[30] It has been proposed that this Article be revised to reflect the provisions of Article 113 § 1 act on cooperative law by use of the formulation: "a Foundation goes into liquidation upon the existence of circumstances requiring liquidation described in the Charter, attainment of its purpose, or exhaustion of the property of the Foundation."

[31] The problem of the lack of specific Charter provisions regarding liquidation was noted in the Supreme Court, Civil Chamber ruling of 8 February 2000, I CKN 416/98, OSNC 2000, No. 9, pozycja 157, as well as by Bugajna-Sporczyk D. Trudna likwidacja fundacji. Prawo spółek, 1998, No. 7-8, p. 94 and following.

as to protect the interests of all interested parties. Finally, the legislators failed to perceive the need to include regulations regarding the procedures to be employed in a forced liquidation.

As a result of the foregoing, both in instances of Charter liquidation as well as forced liquidation in practice it is frequently unclear which organ is supposed to appoint liquidators, who is supposed to announce the commencement of liquidation proceedings in the Court register, what liquidation procedures are to be undertaken by the liquidators, nor what the ordinary course of proceedings might look like.

The existing legal state of affairs calls out for the application of the legal regulations governing liquidation proceedings contained in the law concerning cooperatives. A model for liquidation of a Foundation based on application of the analogical provisions contained in Articles 113-126 of Cooperative Code would, in the opinion of this author, be the best solution. The remaining part of this work examines how the liquidation proceedings would look applying such provisions. The course of the proceedings is described as though they in fact exist.

From the moment that circumstances come into existence fulfilling either Charter or legal prerequisites requiring liquidation a subject Foundation, it would automatically go into a liquidation state (Article 113, paragraph 1 act on cooperative law). The basic rule is that the Management Council of the Foundation files a petition with the National Court Register for the institution of liquidation proceedings, and notifies the appropriate minister or starosta of this action. At the same time the Management Council appoints liquidators. In addition to the Management Council, a liquidator him/herself has the right to petition the National Court Register to file an official notice announcing the commencement of liquidation proceedings (including data identifying the liquidator and establishing his/her right of representation) in the event such a request has not been executed by the Management Council.

In instances of forced liquidation the petition requesting the commencement of liquidation proceedings is filed in the court by the appropriate minister or starosta. The court exercising supervision over the Foundation can issue a liquidation order.[32] If at the same time the court appoints a liquidator, it would send an official copy of its liquidation order to the National Registry Court, which on its own initiative would publicly record the data concerning the liquidator (Article 45, paragraph 4 in association with Article 49, paragraph 1 act on National Court Register). [33]

Liquidation proceedings, both in cases of Charter liquidation as well as forced liquidation, are strictly supervised by the appropriate minister or starosta. [34] This is connected with the fact that, as described in Articles 12 – 14 of the Act on Foundations, the supervisory duties contained in the Act on Foundations are not suspended by the fact that liquidation proceedings are underway. A liquidator is

[32] Such an order would be of a declaratory nature.

[33] Suski P. Stowarzyszenia i fundacje. Warszawa 2005, pp. 412-420; Bugajna-Sporczyk D.Trudna likwidacja fundacji. Prawo spółek, 1998, No. 7-8, p. 94 and following. Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa, 2007, pp. 266-270.

[34] Cioch H. Prawo fundacyjne. Warszawa 2005, pp. 145-14.

required to inform the appropriate minister/starosta of the commencement as well as the completion of liquidation proceedings, and must furnish the minister/starosta with any relevant information requested concerning the course of proceedings. However, the requirement that a liquidator file an annual report with the appropriate minister/starosta describing the activities undertaken by the liquidator seems excessive.[35] The justification is that the activities of the Foundation during liquidation proceedings are to be aimed solely at liquidation of its property, and not at continuation or development of the Foundation's previous activities.

From the moment that the commencement of liquidation proceedings is recorded and published in the National Court Register, a Foundation should act under its name (or firm name if it conducts business activities) with the constant addition and attachment of the phrase "in liquidation". However a Foundation undergoing liquidation proceedings does not lose its legal identity. [36] It continues to possess legal capacity and the capacity to undertake legal acts, and may sue and be sued. On the other hand from that moment on its activities should be aimed exclusively at wrapping up its current affairs (if it conducts business activities), liquidating its assets and securing or coming to terms with its creditors. As a result, its legal capacity must be considered as undergoing a considerable restriction.

The liquidation of a Foundation is carried out by the liquidators, who may be either a company or a physical person. If a liquidator is a physical person, he or she must possess full capacity to engage in legal acts.[37] Members of the final Management Council of the Foundation may also serve as liquidators.[38] For that matter, there is no obstacle to designating a future liquidator in a Foundation Charter. The basic function of a liquidator consists of managing the organizational relations which arise with the liquidator's appointment. A liquidator must sign a contract to execute liquidation activities with the Management Council and/or Supervisory Board, in the event the latter exists in the Foundation. (Article 118 paragraph 3, PrSpółdz).[39] In the event it is not possible to conclude a valid contract between a liquidator

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[35] See Article 19 paragraph 9 of the legislative project for a new act on Foundations of 12 April 2007 (sejm copy number 1890), http://orka.sejm.gov.pl/Druki5ka.nsf. For more on the changes envisioned in the legislative draft project, see. Kidyba S. Wybrane zagadnienia z nadzoru nad fundacjami – uwagi de lege lata i de lege ferenda. Przegląd Prawa Handlowego, 2007, No. 9, p. 32 and following.

[36] In accordance with the Supreme Court, Civil Chamber ruling of 8 February 2000, I CKN 416/98, OSNC 2000, Nr. 9, pos. 157, a "decision by an appropriate organ of a Foundation regarding liquidation does not result in a loss of legal status, but constitutes a pre-requisite to the instigation of liquidation proceedings. An court order requiring the instigation of liquidation proceedings has the same effect." See also Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa 2007, pp. 266-270.

[37] For a similar view regardings liquidators of a Foundation, see Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa 2007, pp. 266-270.

[38] Kidyba A.Ustawa o fundacjach, Prawo o stowarzyszeniach. Warszawa 1997, pp. 51-54.

[39] Legal doctrine generalny acknowledges the possibility of establishing, by Charter, organs of a Foundation other than the management council. For more, see Cioch H. Organy i organizacja fundacji w aspekcie prawnoporównaczym. Nowe Prawo, 1986, No. 5-6, p. 66 and following.

and an appropriate organ of the Foundation, the possibility should be left open for the conclusion of such a contract by the appropriate minister or starosta exercising supervision over the Foundation. The contract should be signed between the liquidator and the appropriate minister/starosta, with the latter acting in the name of the Foundation.

The scope of rights and duties of a liquidator are coincident with the competences of the Management Council. In the event more than one liquidator is appointed, the provisions of the Foundation Charter regarding representation in the Management Council are applied, unless the Foundation Charter provides otherwise (Article 119, paragraph 1 act on cooperative law). The legal entity confirmed as liquidator must submit an official statement in the name of the Foundation in accordance with the legal regulations regarding such statements (Article 121, paragraph 2 act on cooperative law). Taking into account that the activities of a liquidator must be aimed at wrapping up the affairs of the Foundation, liquidators are not authorized to enter into new contracts on behalf of the Foundation, unless such contracts are necessary to the Foundation's liquidation (for example contracts with a law firm or debt collection agency concerning liquidation of a Foundation's obligations to a creditor). Further restrictions may be placed on a liquidator's activities by the organ which appointed the liquidator (or by court agreement or the organ in charge of acquisition of personal property). Any such restrictions must be recorded in the National Court Register (Article 119, paragraphs 1 and 2 act on cooperative law).[40]

Among the fundamental obligations of a liquidator is conversion of a Foundation's material assets into pecuniary assets, collection of receivables, and fulfillment of the Foundation's remaining obligations.[41] Liquidators are entitled to remuneration for their services. It should be noted that in the event a liquidator is appointed by a court, the court so appointing shall establish the appropriate remuneration.[42] A liquidator may be dismissed at any time by the organ which appointed him/her, and accordingly a liquidator appointed by a court may only be relieved of his or her duties by the court which made the appointment. The appropriate minister/starosta in charge of overall supervision of the Foundation may also dismiss a liquidator in the event said dismissal is justified for important reasons. A decision relieving a liquidator his or her duties must at the same time designate a new liquidator. (Article 119, paragraphs 4 and 5 act on cooperative law).

A liquidator is obligated, immediately following his or her appointment, to undertake the duties specified in Article 122, points 2-5 act on cooperative law. Among the primary obligations of a liquidator one may list informing the bank handling a Foundation's accounts of the commencement of liquidation proceedings, as well as other legal subjects which have a legal or economic relationship with the Foundation, in particular creditors. Optimally, an official notice of the commencement of liquidation proceedings should be placed in appropriate newspapers, both local and

[40] Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa, 2007, pp. 266-270.

[41] Strzępka J. etc. Prawo o fundacjach. Komentarz. Warszawa, 1992, pp. 67-69.

[42] Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa, 2007, pp. 266-270.

national. In the case of Foundations registered in the official Register of Business Companies, notice of the commencement of liquidation proceedings is announced in the Court and Economic Monitor (Article 13, paragraph 1, act on National Court Register). The liquidator's notice of commencement of liquidation proceedings must include a request to creditors that they submit their claims to the liquidator within three months from the date of the announcement.

Upon the completion of the above activities, a liquidator must prepare a report on the financial affairs of the Foundation, listing both the debts owing and receivables due the Foundation.[43]

The next step following the issuance of this report is the preparation of a liquidation plan for settling all accounts. During this time the liquidator must begin actual liquidation of the Foundations assets, collection of receivables, and payment of creditors. The order of satisfaction of creditors' claims is set forth in Article 125, paragraph 1, points 1-4, act on cooperative law. In the event monies owed by a Foundation are not yet due or the Foundation's alleged obligations are the subject of controversy, the liquidator must place an appropriate amount in escrow deposit with the appropriate court (Article 125, paragraph 2, act on cooperative law).

Any amount remaining after a full and complete settlement of creditors' claims and deposit of the above-mentioned escrow must be designated for a particular purpose as defined in the Foundation's Charter. It is accepted without question that the founding members of a Foundation have complete freedom in designating the uses which may be made of remaining Foundation assets following liquidation. This competence assigned to the founding members may not be ceded to any other organ.[44] If the Foundation Charter does not designate a recipient for the remaining assets, the competent court will make the designation, taking into account the aims for which the Foundation was approved. Said court is obligated to designate that the assets be used on behalf of another Foundation or other type of legal entity (professional association, cooperative) realizing aims similar to those which were carried out by the liquidated Foundation.[45] A court may not divide any remaining Foundation assets among the members of an organ of the Foundation, as that would be contrary to the *ratio legis* of Article 15 paragraph 4 of the Act on Foundations. This provision does not however exclude the transfer of any remaining funds to the Polish State Treasury.

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[43] Preparation of the financial report is to be based on the criteria contained in the Act of 29 September 1994 regarding accounting principles. (2002 Journal of Laws, Nr 76, pos. 694, together with subsequent changes). As regards Foundations not carrying out economic activities, the provisions of the decree of the Minister of Finance of 15 November 2001 will be applied. (2001 Journal of Laws. Nr 137, pos. 1539. together with subsequent changes).

[44] Cioch H. Prawo fundacyjne. Warszawa, 2005, pp. 148-152.

[45] Ibid.

Conclusion

Upon completion of all his or her duties, a liquidator must prepare a final financial report detailing the Foundation's (liquidated) status on the day of its liquidation. This report must be approved by the appropriate supervisory organ, which in the case of forced liquidation is the court (Article 126, paragraphs 1 and 2, act on cooperative law).

Upon the completion of the entire liquidation process, the liquidator must file a petition with the appropriate court register to have the Foundation removed from the National Court Register.[46] When the Foundation is so unlisted, it loses its status as a legal entity.

The final activity of a liquidator is to surrender the official documents of the liquidated Foundation active in one Voidvodship to the official archive office of the Voidvodship, or in the event the Foundation operated nationwide, to the Government Archives in Warsaw.[47]

It needs to be kept in mind that a Foundation may be re-activated during liquidation proceedings on the basis of a resolution duly passed by the Management Council (Article 116, paragraph 1 act on cooperative law). Such a situation may arise when, in the course of collecting receivables and settling accounts, it turns out that the Foundation has sufficient assets to continue its normal activities.[48] Re-activation is permitted by Article 15, paragraph 4 of the Act on Foundations, which envisions that assets remaining following the liquidation of a Foundation should be designated to purposes which the Foundation served. Taking this into account, it may not be necessary to reduce all the assets of a Foundation into pecuniary assets. This is particularly true when the pre-requisite to liquidation is either that the aim of the Foundation has already been attained or the exhaustion of assets.[49] Doubts may arise whether the activities of a Foundation may be re-instituted in the case of a forced liquidation.

In the opinion of the author, the above-presented model of liquidation proceedings based on the application of the law on cooperatives is, given the current state of affairs, the most appropriate legal solution. It guarantees the rights of creditors to the maximum extent while at the same time taking into account the aims and purposes for which the Foundation was founded. However, the application to the liquidation of Foundations of models of liquidation proceedings aimed at other legal entities is still far from an ideal solution. It may produce variations in court practice and doubts about the choosing the appropriate method of liquidation for various legal entities.

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[46] See: Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa, 2007, pp. 266-270; Suski P. Stowarzyszenia i fundacje. Warszawa, 2005, pp. 412-420. For a contrary view, see H. Cioch, who considers that a petition to have a Foundation removed from the National Register should be filed by the supervisory organ. See Prawo fundacyjne. Warszawa 2005, pp. 148 as well as Cioch H. Utrata osobowości prawnej przez fundacje. Annales Universitatis Mariae Curie-Skłodowska, Sectio G. Ius 1987, No. 34.

[47] Strzępka J. etc. Prawo o fundacjach. Komentarz.Warszawa 1992, pp. 67-69.

[48] Kidyba A. etc. Ustawa o fundacjach. Komentarz. Warszawa 2007, pp. 266-270.

[49] Ibid.

Nonetheless nothing stands in the way of introducing an amendment to the Act on Foundations referring directly to application of the law on cooperatives as regards liquidation proceedings, at least in terms of determining the rights and duties of the liquidator.[50]

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[50] Article 19 paragraph 6 of the proposed legislative project on Foundations of 12 April 2007 postulated that Article 37 of the Act of 7 April 1989 on Associations be applied in determining the rights and duties of liquidators of Foundations. This solution, which was examined in work on the liquidation of Associations, would have been unworkeable. In the opinion of this author the best current solution would be to add the formulation: "The rights and duties of liquidators of a Foundation are determined with reference to Articles 122-126 of the Act of 16 September 1982 – Law on Cooperatives."

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MECHANISMS OF PROTECTION OF THIRD PERSONS IN CASE OF TRANSFER OF AN UNDERTAKING AND POTENTIAL IMPROVEMENT POSSIBILITIES THEREOF IN LATVIAN COMMERCIAL LAW

Keywords: Undertaking, transfer of an undertaking, protection of third person rights.

Introduction

Development of commercial law over the last centuries has brought about significant changes, which among other things are discernible in the condition that increasingly more often the debtor's assets regardless of their affiliation provide the creditors with an opportunity to receive performance of the preceding owner's debts. As shown by the development of contract law from nexum[1] institute in Roman law up to a prohibition of imprisonment in case of non-payment, the provisions of that time in such situations continued envisaging the debtor's personal liability in case of failure of paying the debt. This principle has two-fold consequences: firstly – the main object of liability is the debtor's persona; secondly – the assets available to creditors are those, which are owned by the debtor at the time of performing the obligations. At this stage of development, the debtor's assets were not affected by the fact that the debtor assumed debt obligations. Only more advanced legal systems ensured means of legal protection against the alienation of assets carried out with the purpose of in fraudem creditorum, for instance, actio Pauliana.[2] Thus, regardless of the fact that for centuries the only way of how commitments could follow the property were with the help of universal succession mortis causa institute established in Roman law in case of inheritance, an undertaking with time was recognised as a legal entity, as a result of which the German law for the first time embodied the idea of non-personal commitment, which in 1897, by adopting the German Commercial Act, was mainly

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[1] Nexum was one of the forms of mancipatio (an oral sales-purchase contract) during the former Roman Republic (later, a contract was forbidden), a symbolic transfer of rights including an oath, a scale, and copper counterweights, in which the debtor pledged his persona as the object of pledge, ensuring non-fulfilment of obligations towards the creditor (it is unknown wheter before or after the non-fulfilment of obligations has set in). See, e.g.: Muirhead J. Historical Introduction to the Private Law of Rome. The Lawbook Exchange, Ltd., 2009, p. 62.

[2] Bayitch S. A. Transfer of Business. A Study in Comparative Law. The American Journal of Comparative Law, Vol. 6, No. 2/3 (Spring–Summer), American Society of Comparative Law. 1957, p. 284.

materialised to consolidate the confidence in a firm, and later this idea in various transformations was introduced also in legal enactments of other countries.[3]

Having regard to the fact that certain aspects related to the transfer of an undertaking in the Latvian commercial law have already been considered before,[4] this article will consider certain problematic issues related to the protection of the rights of third persons in case of a transfer of an undertaking, by proposing the possible amendments to the Commercial Law, whereby it would be feasible to ensure a better quality normative regulation for the protection of rights of third persons in case of a transfer of an undertaking. Bearing in mind that the protection of employees' rights exceeds the sphere of commercial law, on which this paper focuses, moreover, the protection of employees in case of a transfer of an undertaking within the context of Latvia has been studied relatively recently,[5] the third persons, the problem issues of the protection of rights whereof in case of a transfer of an undertaking are considered in this article, do not include employees.

Joint liability of the transferor and the acquirer of the undertaking about liabilities included in the undertaking, the deadline of performance of which has originated before the transfer of the undertaking

In compliance with the general procedure stipulated in Section 20 of the Commercial Law, as an undertaking or an independent part thereof is transferred, the law imposes the acquirer of the undertaking full liability for the obligations included in the undertaking. However, according to a special procedure in case if the respective obligations have arisen before the transfer of the undertaking or an independent part thereof to another person and the deadline of fulfilment of which or the conditions of fulfilment has become effective within five years after the transfer of the undertaking, the transferor and the acquirer are jointly liable. It means that, for instance, an obligation contained in the undertaking, which has originated before the transfer of the undertaking and the term of fulfilment of which has set in before the transfer of the undertaking, the acquirer of the undertaking will be solely liable, whereas the transferor of the undertaking thereby disposes of an obligation, for which the term of fulfilment has already set in but which due to certain reasons has not been fulfilled. Thus, without informing the creditor of an obligation contained in a company and

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[3] Bayitch S. A. Transfer of Business. A Study in Comparative Law. The American Journal of Comparative Law, Vol. 6, No. 2/3 (Spring–Summer), American Society of Comparative Law. 1957, p. 285.

[4] See, for instance: Balodis K. Komersanta uzņēmums kā civiltiesību objekts. *Likums un Tiesības,* 2005, No. 3 (67), pp. 66-71; Strupišs A. Komerclikuma komentāri: A daļa: Komercdarbības vispārīgie noteikumi (1.-73. pants), Riga: A.Strupiša juridiskais birojs, 2003, p. 113, §§256-270.

[5] Kalniņa I. Promocijas darbs. Darbinieku aizsardzība uzņēmuma pārejas gadījumā. Riga, 2011, p. 19. Available: https://lira.lanet.lv/F/P1H5KJJB7SLRQUXKL9NCA87K69L8NYS3JXPE6FX7VDBULPUQTK-17228?func=full-set-set&set_number=002747&set_entry=000002&format=999 [viewed 28 May 2012].

without receiving the creditor's consent, the debtor's change for another is possible, which, for instance, if the new debtor is in a less favourable situation financially than the previous debtor, considerably deteriorates the creditor's possibility to receive proper performance.

Even though the aforementioned regulation established in the Commercial Law in essence is a decision of legal policy, nevertheless such regulation does not fully achieve the legislator's intent, namely, the protection of the third person,[6] because objective justification cannot be provided for why in one case, when the obligation has originated before the transfer of an undertaking, but the term of fulfilment whereof has set in within five years after the transfer of the undertaking, joint liability is prescribed for the transferor and acquirer of the undertaking, but in the other case, if the term of fulfilment of an obligation has set in before the transfer of an undertaking, and, for instance, the transferor of the undertaking deliberately does not fulfil the obligation, the creditor ends up in a less favourable situation, as the debtor changes without the creditor's consent, enabling a request to fulfil the obligation only from the acquirer of the undertaking. Likewise, it must be noted that a situation, in which the debtor of obligations is changed without the creditor's consent, does not comply with the pre-war legal regulation,[7] the general provisions on novation and cession stipulated in the Civil Law, prescribing that the creditor's consent must be obtained, and does not provide proper protection of the creditors' rights, because the creditor, upon concluding the relevant contract with the transferor of an undertaking, who, for example, owns several undertakings, can count with the transferor's solvency in general, however, as the liability for the performance of obligations is transferred to the acquirer of the undertaking only, the creditor's possibilities to receive performance of the obligation can be considerably deteriorated. Furthermore, whether the obligation contained in an undertaking with the term of fulfilment setting in before the transfer of the undertaking is transferred or not to the acquirer of the undertaking, is dependant only on honesty of the transferor of the undertaking, as a result the creditor for the obligation contained in the undertaking is not protected from dishonest conduct of the transferor of the undertaking.

For example, German law prescribes proper protection of creditors, by stipulating that the transferor of an undertaking remains subordinately responsible also for the fulfilment of those obligations, the term of performance whereof has set in before the transfer of the undertaking[8], moreover, the creditor, if they are not satisfied with the new contractual partner, in certain cases can withdraw from the contract, for instance, on the grounds of a clause of changed conditions or significant encumbrance, included

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[6] Strupišs A. Komerclikuma komentāri: A daļa: Komercdarbības vispārīgie noteikumi (1.-73. pants), Riga: A. Strupiša juridiskais birojs, 2003, p. 113, §256.

[7] See, for example: 1916. gada Likumu par tirdzniecības un un rūpniecības uzņēmuma pāreju pēc līgumiem. Likumi un Senāta prakse tirdzniecības lietās. Izdevniecība "Jurists", Riga: 1934, pp. 163-172; 1938. gada Likumu par tirdzniecības uzņēmumu pāreju. Likumu un Ministru kabineta noteikumu krājums. Tieslietu ministrijas kodifikācijas departaments, Riga: 1939, pp. 394-395.

[8] Handelsgesetzbuch. Available: http://www.gesetze-im-internet.de/hgb/ [viewed 2 June 2012], §25.

in the German Civil Law.[9] However in Latvia, commercial legal regulation and means of legal protection are not prescribed to protect the creditor from situations, when the debtor changes without the creditor's consent. Therefore, in order to improve the existing regulation, the second sentence of Section 20(1) of the Commercial Law should be amended, stipulating that: "However, in respect to those obligations which arose prior to the transfer of the undertaking or its independent part to the ownership or use of another person and the terms or conditions for the fulfilment of which has come into effect before the transfer of the undertaking or within five years after the transfer of the undertaking, the transferor of the undertaking and the acquirer of the undertaking will be jointly liable."

Protection of creditor's rights, by prescribing inclusive obligations

Bearing in mind the versatility of life situations, it is often rather difficult to determine, which obligations are contained in an undertaking and therefore are transferred to the acquirer of the undertaking. Furthermore, it is even more difficult for creditors of obligations contained in an undertaking, who do not participate in the process of transferring an undertaking and who do not have access to the undertaking's accounting information, to determine, whether the relevant obligation is contained in the undertaking and therefore is transferred to the acquirer of the undertaking.

In order to determine, whether the relevant obligation is contained in an undertaking, the court could employ a range of criteria established in legal doctrine and case-law, with the help of which it is possible to find out, whether the obligations contained in an undertaking are transferred to the acquirer of an undertaking. However, considering that the creditors in capacity of a third person do not have access to comprehensive information about the company, the regulation, which was included in Section 3 of the Law of Russia on Transfer of Trade and Industry Undertaking by Contracts of 3 July 1916, can be regarded as rather successful regulation. This provision prescribed that in doubt each debt of the alienator is regarded as a debt of the undertaking to be alienated, insofar as the interested person does not prove the contrary.[10] This has been the determinant regulation in finding out the obligations contained in a company in several Senate cases.[11] Analogous regulation concerning the presumption that all debts of the former owner are contained in the undertaking was included also in the 1938 Law on Transfer of Trade Undertakings.[12]

Thus, taking into account that it can be problematic for creditors, who are not a party in the transaction of transfer of the undertaking, to determine whether the

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[9] Bürgerliches Gesetzbuch. Available: http://www.gesetze-im-internet.de/bgb/BJNR001950896.html [viewed 26 May 2012], §313, §314.

[10] 1916. gada Likums par tirdzniecības un rūpniecības uzņēmuma pāreju pēc līgumiem. Likumi un Senāta prakse tirdzniecības lietās. Publishing house "Jurists", Riga: 1934, pp. 164-165, Section 3.

[11] Senāta 1933. gada 27. septembra spriedums lietā Nr. 297. Likumi un Senāta prakse tirdzniecības lietās. Izdevniecība "Jurists", Riga: 1934, pp. 166-167.

[12] 1938. gada Likums par tirdzniecības uzņēmumu pāreju. Likumu un Ministru kabineta noteikumu krājums. Tieslietu ministrijas kodifikācijas departaments, Riga: 1939, pp. 394-395, Section 3(3).

relevant obligation is contained in the undertaking and therefore has been transferred to the acquirer of the undertaking, it is necessary to set a presumption, by adding the following regulation to Section 20(2) of the Commercial Law: "In case of reasonable doubt, it is to be considered that all obligations of the transferor of undertaking are contained in the undertaking or in independent parts thereof".

Fulfilment of debtor's obligations of the transferor of an undertaking after the transfer of the undertaking

Similar as is the case with cession of claims governed by the Civil Law, also in the case of a transfer of an undertaking, a situation can form, when the debtor, being unaware of the transfer of an enterprise and therefore also about the change of the creditor of the obligation, fulfils the obligation with respect to the former, i.e. incorrect creditor – the transferor of the undertaking.

Even though in compliance with the dominant opinion in the German legal doctrine, within the framework of a transfer of an undertaking, the parties' will to perform cession of claims is presumed,[13] nevertheless, such approach cannot be justified in Latvian law, because in compliance with Section 1800 of the CL, only the right to a claim is transferred to the cessionary rather than the contractual relationship from which the right derives. Therefore, what concerns the debtor's obligation fulfilment towards the acquirer of the undertaking, the legal regulation of a cession cannot be directly applicable. Regardless of the fact that the Commercial Law does not give an answer of how to solve a situation, when the debtor settles the obligation with the wrong creditor, but the interpretation of Section 20 of the Commercial Law does not envisage fair solution, because the said article emphasises the protection of the undertaking's creditor rights, disregarding the protection of debtors' rights. Therefore, there are grounds to talk about a gap in the law, for the filling of which methods of improving the law, including analogy, are to be used.

Thus, if the debtor has fulfilled an obligation in favour of the transferor of the undertaking, being mistaken about the creditor of obligation, which can be fully justified, because in case of a transfer of an undertaking, there is no pre-requisite established to notify the creditors or debtors about the transfer of an undertaking, the debtor should not suffer adverse consequences and should not assume liability for not having been informed, by addressing the transferor of the undertaking reclaiming the payment made groundlessly and re-fulfilling the obligation with regard to the now clarified – the true creditor – the acquirer of the undertaking. In such case, even though it is found that the transfer of rights in this case is not a cession, it would be substantiated to apply by analogy Section 1804 of CL, stipulating that the former creditor, regardless of the cession, is still regarded as a creditor until such time when the cessionary receives satisfaction from the debtor, or has brought an

[13] Furthermore, it is not possible to cede such claims, the further ceding whereof is forbidden. Schmidt K. Münchener Kommentar zum – Handelsgesetzbuch: HGB. Verlag C.H. Beck/ Verlag Franz Vahlen Munchen, 2010, pp. 571-574, §71-81.

action against the debtor, or at least has informed the debtor of the cession in an appropriate manner, fostering also the informing of debtors about the transfer of the undertaking, thereby ensuring proper protection of debtors' rights in case of a transfer of an undertaking.

Informing creditors of obligations contained in an undertaking about the transfer of an undertaking and the prescription of liability of the transferor of the undertaking for obligations contained in the undertaking

In the Latvian law, unlike, for instance, German law, in which the transfer of an undertaking is related to continuity of a firm,[14] a transfer of an undertaking can be unnoticed from the outside, therefore creditors might not be informed about the fact of a transfer of the undertaking and the transfer of obligations occurring therein to the acquirer of the undertaking. In such case, even though the law formally entitles to request from the acquirer of an undertaking that obligations are fulfilled, not being aware of the transfer of the undertaking, the creditors cannot fully exercise their rights, hence protection of the rights of third persons is not achieved. Therefore, a solution must be found, whereby it is possible to ensure that the creditors are informed about the transfer of the undertaking.

It is doubtful that introduction of a declarative provision in the Commercial Law envisaging the duty for the transferor or the acquirer of the undertaking to inform creditors would reach the aforementioned objective, if adverse consequences are not prescribed in case of non-fulfilment, however, the complicated mechanisms for the protection of creditors' rights prescribed in other countries,[15] in compliance wherewith, for instance, the creditor's consent is necessary for the transfer of an undertaking, do not foster civil transactions.

One of the options to encourage the transferor of an undertaking to inform creditors about the transfer of the undertaking would be establishing that the creditor's claims for fulfilment of obligations toward the jointly liable transferor of undertaking are subject to a five year prescription from the moment, when the transferor of the undertaking has informed the creditors in writing about the transfer of the undertaking. Thereby, the transferor of the undertaking, in order to dispose of undesirable obligations after the transfer of the undertaking, would be interested to inform the creditors as soon as possible about the transfer, which would ensure that the creditors are properly informed, thereby achieving more effective protection of the

[14] Schmidt K. Münchener Kommentar zum Handelsgesetzbuch: HGB. Verlag C.H. Beck/ Verlag Franz Vahlen Munchen, 2010, pp. 553-554.

[15] See, for instance: The Civil Code of Lithuania. Available: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=245495 [viewed 24 May 2012], articles 6.402-6.410, 6.536-6.554; Commercial Code of France. Available: http://195.83.177.9/code/liste.phtml?lang=uk&c=61&r=2146 [viewed 25 May 2012], articles L141-1 – L144-13; The Civil Code of Russian Federation. Available: http://www.russian-civil-code.com/PartII/SectionIV/Subsection1/Chapter34.html [viewed 25 May 2012], articles 559-566, 656-664.

creditor's rights. Moreover, one cannot agree with the opinion voiced in legal doctrine, namely, that the creditors' "protection is restricted to a five year term after the transfer of the undertaking" and "the actually commented section deals with prescription", to which all general Civil Law provisions regarding prescription must be applied[16]. Such a conclusion is groundless, because if Section 20(2) of the Commercial Law is grammatically interpreted, it can be concluded that a provision distinguishes between the obligations, for which only the acquirer of the undertaking is liable, from those, for which the acquirer of the undertaking and the transferor of the undertaking are jointly liable. Therefore, the Commercial Law as of now does not prescribe special prescription for creditors' claims toward the transferor of the undertaking, thereby failing to ensure stability of civil transactions.

Having regard to the aforementioned, it is necessary to supplement Section 20 of the Commercial Law with Part 5, by determining that: "(5) Joint liability of the transferor of the undertaking stipulated in the second sentence of Part 1 of the present section is subject to a five year prescription from the moment, when the transferor of an undertaking has informed the relevant creditor about the transfer of the undertaking or of an independent part thereof to the acquirer of the undertaking." This regulation would enable to simultaneously solve the problem with informing the creditors and with the prescription of initiating claims toward the transferor of the undertaking not included in the law.

Observing the rights and interests of the enterprise's shareholders in case of a transfer of the undertaking

The Commercial Law has strived to protect also the interests of the enterprise's shareholders, by imposing the obligation onto the enterprise in some cases, which in essence are not related to the performance of routine commercial activity, that before the performance of the relevant activity, the enterprise must obtain a decision of the meeting of enterprise's shareholders. Such procedure, when the law sets a mandatory pre-requisite of receiving a decision of the shareholders' meeting, is established, for instance, with respect to introducing changes in the fixed capital, as well as regarding reorganisation of the enterprise.

Effectively also, for instance, splitting up an enterprise within the framework of a reorganisation can achieve the same economic result as a transfer of an undertaking by means of a general procedure established in the Commercial Law. Therefore, a question might arise, why in one case – i.e. after reorganisation of an enterprise – a decision of the shareholders' meeting is necessary, but in the case of a transfer of an undertaking, such decision of shareholders is not required. Bearing in mind that the shareholders, when adopting a decision, thus express their consent to performance of a certain activity, then if the consent of shareholders is not received in the case of a transfer of an undertaking, the shareholders might be confused why the officials have

[16] Strupišs A. Komerclikuma komentāri: A daļa: Komercdarbības vispārīgie noteikumi (1.-73. pants), Rīga: A. Strupiša juridiskais birojs, 2003, pp. 114-115, §263.

sold undertakings owned by an enterprise, for instance, leaving merely a merchant registered in the commercial register with money on the account, even though the enterprise's shareholders, say, were interested in the enterprise and in undertakings owned by it as profit-earning units, to enable earning profit also in future, etc. However, without ensuring further operations of the undertaking, the rights of the shareholders might also be infringed upon, for instance, with regard to receiving dividends, etc.

Therefore, the Commercial Law should envisage regulation protecting the rights of shareholders of the undertaking's seller in case of a transfer, by establishing that a decision of the shareholder meeting must be received in order to perform the transfer of the undertaking, and in case of failure to comply with this obligation, the shareholder, whose interests have been infringed upon, can invite the court to recognise the transfer of an undertaking as null and void.

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ESTONIAN EMPLOYMENT CONTRACTS ACT: FAILURE TO APPLY THE PRINCIPLE OF FLEXICURITY

Keywords: principle of flexicurity in the European Union; new Estonian Employment Contracts Act and flexicurity; confusing rules in Estonian Employment Contracts Act.

Introduction

Discussions about the flexicurity are at the moment modest. One can say the idea of flexicurity has already reached its end. Although the European Union has published a series of documents on flexicurity and modernisation of labour law in the European Union and in Member States, the question about the limits of flexibilisation labour relations and intensity of social security remains open. There are a number of Member States, where the level of flexibilisation of labour relations is quite high, but at the same time necessary level of social security is modest or missing. Estonia is one of these states. In Estonia there is maximum level of flexibilisation in labour relations, but the necessary level of social security is missing.

Here the question could be raised are there or should be there any connections between labour law and social security law in order to guarantee the flexicurity. At first sight it is difficult to find any connection between labour law and social security law. These are different fields of law – one is the part of the private law, social security law is a part of public law. Social security law does not guarantee flexible employment conditions, but it could partly help to finance "flexible labour conditions" or to cover at least partly costs of the termination of the employment relation (e.g. payment of compensation in case of redundancies).

Although the ECA was adopted in order to apply flexicurity in Estonia, it could be described as a failure in applying the flexicurity. Although it is true that the regulation of employment relationship has become more flexible, in the ECA many questions remain without any solutions and it is difficult for employers and employees to understand how they should behave in labour relations and apply flexible labour relations.

In this paper some problematical aspects of the ECA will be discussed.

Concept of flexicurity and its components

As it is well-known in the European labour law the concept of flexicurity consists of four parts: flexibilisation of labour relations, intensive social security protection for

those, who have lost their job, lifelong learning and active labour market measures for unemployed. In order to guarantee the realisation of idea of flexicurity it is desirable that all the four components should exist. There has been a lot of literature and research on the topic of flexicurity,[1] but at same time one should say, that there is no concrete idea or plan of actions how this system should function and should be implemented in the Member States. It has been stated, that an example state is Denmark. In Denmark the idea of flexicurity is one of the best developed.[2] If there are any other states, it is unclear.[3]

Although the principle of flexicurity has been clarified and described in many ways, uncertainty still exists. No body is able to give solution, how to introduce and to develop the concept of flexicurity. There will also be no body in the future, who could understand how to implement the principle of flexicurity in labour law.

As it has been described in literature: "*Core of the flexicurity idea is that security is a precondition for flexibility, and flexibility a precondition for security".* Also it has been stated, that much depends on if and how Member States take up the flexicurity ideas (if at all), the content of the policies and regulations they implement and the effects these measures have.[4]

It has been stated that the concept of flexicurity consists of four main parts:

1) flexible and reliable contractual arrangements;
2) efficient active labour market policies to strengthen transition security;
3) systematic and responsive lifelong learning;
4) modern social security provisions that also contribute to good mobility in the labour market.

As these four components should be the usual components of the flexicurity, sometimes also the fifth component is included – the development of supportive and productive social dialogue.[5]

As one can see all these measures are meant mainly to promote flexibility in labour market in meaning that, if a person changes the place of work, he or she could find a new job as soon as possible. It could also be described that the "*free movement of*

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[1] e.g. Hendrickx, F.(ed). Flexicurity and the Lisbon Agenda: a Cross-disciplinary Reflection. Intersentia 2008. Also important: Rojot,J. Security of Employment and Employability: in Blanpain,R. Collective Labour Law and Industrial Relations in Industrialized Market Economies, IX ed, Kluwer, 2007, pp 439-461; Also Green Paper Modernising Labour Law to Meet the Challenges of the 21st Century. Available: http://ec.europa.eu/employment_social/labour_law/answers/documents/4_93_en.pdf [viewed 29 June 2012].

[2] Ilsøe A. The Danish flexicurity model – a lesson for the US: in Hendrickx, F.(ed). Flexicurity and the Lisbon Agenda: a cross-disciplinary Reflection. Intersentia 2008, pp 65-99.

[3] In some cases it has been stated, that also the Netherlands could be an example of flexicurity e.g. Wilthagen T., Bekker S. Flexicurity: is Europe right on track? Hendrickx, F(ed). Flexicurity and the Lisbon Agenda: a cross-disciplinary Reflection. Intersentia 2008, pp 33-47.

[4] Ibid.

[5] Ibid.

persons inside of the state" will be encouraged. The fifth component is not only a part of the flexicurity, but it is a necessary part of employment relations as such.

Situation in Estonia

Estonia wanted to introduce the idea of flexicurity via reform of the individual employment law. Already in 2007 preparations have started in order to reform the Estonian individual employment law. The idea was simple – to make the individual employment contract similar to other civil law contracts, to reduce the level of formalities (e.g. employment contract in written for or in verbal form) and to reduce financial burden of employer in case of redundancy, to give more possibilities for employer to amend the employment conditions unilaterally. Although the preparations for drafting of the new Employment Contracts Act started in 2007 only in 2008 the reasoning for modification of the individual employment law was idea of flexicurity based on the green paper of the European Commission on modernisation of European labour law.

Government of the Estonia tried to be also one of the first Member States to introduce the concept of flexicurity. With the new draft of the ECA[6] it was also proposed some modification in system of protection of unemployed, also the system of health insurance was reformed (sickness insurance for registered unemployed). In this situation it seemed that Estonia will seriously apply the methods and principles of flexicurity.

Before the date the new ECA would come into force, the social security protection was postponed. In framework of the new ECA2008 unemployment insurance system was changed in following aspects: 1) the coverage of insured persons was widened (e.g. when an employee will leave the job in his or her free will, the unemployment insurance benefit will be granted) 2) also the amount of benefit would be increased. The system of unemployment insurance remained unchanged. Also the necessary costs of the active labour market policy and lifelong learning were diminished. Although in 2008 it was clear, that there will be lack of resources in order to enable the better unemployment insurance protection, the Government had an opinion – its is better to postpone the social security protection instead of stopping the flexibilisation of the employment relations.[7]

Flexible employment conditions – what should this mean?

One most important aspect by the concept of the flexicurity is the part of flexible employment conditions. At the same time, it is unclear what does it mean –

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[6] Employment Contracts Act – Riigi Teataja (State Gazette) 2009,5,35. English version available: http://www.legaltext.ee [viewed 29 June 2012].

[7] At the same time trade unions had an opinion according to which it is not possible to implement ECA2008 without any changes in unemployment insurance. In April 2012 Parliament – Riigikogu – adopted a law which abolished all the planned amendments in unemployment insurance scheme. This means, that the idea of flexicurity has been forgotten in Estonia forever. It was only used in order to find a justification for intensive flexiblisation of labour relations in Estonia.

employment conditions are flexible? One should ask – flexible to whom? If the Member States are free to choose, how they are going to implement the concept of the flexicurity, it should be clear what kind of flexibility in employment conditions should be applied? If we talk about the flexibilisation of employment conditions from the perspective of an employee, it should mean the flexibility of fulfilling employment tasks e.g. home work, telework, part-time work in order to combine better employment tasks and family life.[8] This is a very important aspect in order to guarantee a flexible position of an employee.

At the same time, it is also evident, that nobody will talk under the subject flexibility of labour relations – flexicurity on side of employee. Mainly it is mentioned, that an employer should have better opportunities for flexible employment conditions in order to avoid dismissal of an employee and to guarantee the continuity of an employment or to make it easier to dismiss an employee. As a consequence the idea of flexicurity is meant to protect an employer, to guarantee for an employer better opportunity to change the employment conditions unilaterally and to dismiss an employee without any obstacles or better to say without any good reason. At the same time the security is a tool foreseen for the employee to be protected against the flexibilisation of employment conditions.

Situation in Estonia

As it was stated in literature, it is for Member States to decide, how they will develop the idea of flexible employment conditions. Estonia has developed probably the most radical way of flexibilisation of employment conditions. In Estonia the previous Employment Contracts Act (hereinafter ECA 1992) protected intensively the employees' rights (employment contract had to be concluded in written form, fixed list of reasons for conclusion of fixed term contract, exact rules in case of redundancies especially how to choose the dismissed employees etc). It was complained that ECA 1992 is too old and does not take into account the needs of small and medium enterprises.

ECA 2008 changes the situation. Mainly there are no direct instructions in a law how to build up an employment relation. Instead of that it will be decided mainly by the employer, if something is reasonable and if something will take into account both sides' interests. Hereby one example – by ordering the additional work an employer is mostly free to do this, if this is reasonable and takes into account both sides interests. How the both sides' interests will be taken into account is unclear. In everyday practice, the employer will order additional work and employee has to follow the employer's order.

According to ECA2008 ***§ 47 section 4 arranging of the working time*** is an obligation of an employer. Employer can change the system and rules on working time unilaterally, if there is need to do that. There is no obligation to inform an employee about the changes in working time before the changes will take effect. The mandatory information and consultation system will be applied only if the number

[8] See e.g for Germany: Preis.U, Innovative Arbeitsformen: Flexibilisierung von Arbeitszeit, Arbeitsentgelt, Arbeitsorganisation. Dr.Otto Schmidt, Köln, 2005.

of employees is more than 30 employees. If the number of employees is under that level, no information and consultation has been foreseen.

One could argue that the working time is obligatory part of employment contract and it should be agreed in an employment contract. In ECA 2008 it is not the case. According to art 5 ECA 2008 an employer can make a unilateral written statement, where the employment conditions are laid down. According to art 5 ECA 2008, if there is no written employment contract an employer has in written form to inform an employee about the employment conditions. It should be done before an employee starts to work. If it has not been done before the begin of employment, it could also be done at the later stage, but only in case an employee demands such documents. This means that there is a possibility, where the employee does not know what kind of system of working time will be used (part-time or full time, are there any shifts and if there are any then how many hours the shifts will last).

Although one can see that there is flexibility in organising the working time, this kind of flexibility brings more uncertainty in labour relations. If an employee does not know, how many hours he or she should work and for how many hours he or she will be paid, it is confusing for an employee, when he or she wants to combine working and private life.

Another problem concerns ***conclusion of an employment contract***. On question about the conclusion of an employment contract the ECA 2008 is somewhat confusing. In order to apply the principle of flexicurity, it is necessary to guarantee, that conclusion of an employment contract should be as simple as possible. According to § 4 of the ECA, it has been foreseen, that an employment contract should be in written form. This means, that both sides will sign a document in which both parties' rights and obligations will be stated. At the same time § 4 section 2 of ECA states, that the written form of the employment contract is not mandatory i.e. if there is no written form, still the employment contract does exist, if an employee has started with his or her work. So far the rules on conclusion of employment contract are clear. The situation will be complicated by applying § 5 of the ECA. In the § 5 of the ECA, there is a rule, according to which an employer should not conclude a written employment contract, but it is enough, if an employer gives unilateral declaration about the applicable employment conditions. There are no time limits, within which an employer has to present this kind of declaration. Only one condition is clear – if an employee demands such declaration, employer has to present it within 15 days. This means, that it is quite possible, that employee will be employed without knowing what the conditions of the employment contract are.

The ECA makes the situation even more complicated. According to § 5 of the ECA an employer can change the employment contracts conditions unilaterally and according to the ECA employer has to inform an employee about the changes within one month starting from the day the changes have been made.

In that case one could ask – what is the importance of the written employment contract (§ 4 of the ECA), if it is possible to avoid a written contract and to work under the unilateral declaration done by the employer? These two opportunities are confusing and do not contribute to the flexibilisation of employment relations. The

legislative power has to take decision how the employment contract will be concluded. It would be desirable, if Estonia stays by written employment contract and leaves aside the opportunity for a unilateral declaration presented by employer.

Another example of applying the principle of flexicurity is the rules on ***conclusion of fixed term employment contracts***.[9] Fixed term employment contracts have been seen as a tool in order to create more flexible labour relations, to guarantee more jobs, to give for people opportunity to start to work again, if they have been unemployed long time. Usually in order to conclude a fixed term employment contracts, there should be a good reason to do that.[10]

According to the ECA § 9 an employer has a right to conclude a fixed term contract, if it is justified by good reasons arising from the temporary fixed-term nature of the work. In such regulation, there is nothing strange and it is up to the employer to decide, if there are possibilities to conclude the fixed term employment contracts. Still one can say that the fixed term employment contracts are not very common in Estonia. The ECA 2008 makes the fixed term employment contracts not attractive for employers. Reason for that is the extraordinary termination of fixed term contract. In order to terminate the employment contract an employer has to have good reason for that. If there is a need to dismiss a fixed-term- employee due to the lack of work, an employer has to pay employee compensation to an extent that corresponds to the wages that the employee would have been entitled to until the expiry of the contract term. In addition to that, an employer has to pay one month salary as additional compensation in case of redundancy. As one can see, the ECA makes fixed term contract unexpectedly expensive for an employer and therefore it is quite good to understand, why the employers in Estonia do not want to conclude fixed term employment contracts. Again it is clear, that the idea of flexicurity in ECA has failed. Although fixed term contract could be a tool for shortening the unemployment, in Estonia this is not the case. It is advisable for employers to avoid fixed term employment contract as much as possible.

Limitations to flexibility of labour relations?

This situation described above raises the question, if there are some limits for flexibilisation? There is no concrete answer to that question. It is argued that labour law is field of law that should protect an employee against the mistreatment by the employer. If one will analyse the concept of flexicurity, then it is obvious, that limits of flexibility will be established by the Member States. This means that through the EU Member States the level of flexibility will be different and employment conditions will still vary. At the same time it will be clear, that less protection in employment relationship is asked. The consequence – labour law does not offer any protection

[9] See also: Muda M. Turvaline paindlikkus uues töölepingu seaduses (Flexicurity in the New Contract of Employment Act). Juridica 2012, IV pp 295-304 (in Estonian).

[10] See, e.g.: Dütz W., Thüsing G. Arbeitsrecht. 16. Auflage, Beck, 2011, pp. 165-170.

to employees. Employment relationship is like any other relationship of private law based on mutual consent without any additional special protection rules.

Of course we have to make here the correction – according to the understanding of the European Union the flexible employment conditions should mean the flexibility in broader sense. This involves different innovative forms of employment like tele-work, part-time work etc. It is the responsibility of the Member States to introduce the concept of flexicurity and to choose the methods how the flexibility of labour relations will be introduced and to what extent it will be applied.

According to OECD index the protective measures in Estonian labour law were quite high. The research that was done by the Estonian Employers Association has shown that the flexibility of labour relation is not very high. It is not common to use part-time work; also tele-work is not very widespread. It was also mentioned that the administrative obligations are too high (e.g. it was necessary to agree the internal rules of work with labour inspectorate, to get consent before dismissing the employees' representative or pregnant worker, to formulate the termination of employment contract in written form). All those aspects were viewed as disturbing in order to guarantee the normal, flexible employment relation. Since 2008 Estonia has new Employment Contracts Act where all these aspects are not applied any more. One can say – at least on level of law there is the flexibilisation of employment relations, but in practice both employers and employees are careful and they are not very quick in order to use the new ways and method that the new ECA 2008 could guarantee.

Sometimes it could be viewed that employees have got new rights (too many flexibility) which can be questionable. As an example here could be art § 38 of the ECA2008. According to this rule an employee who has personal reason can leave his or her place of work temporarily and the employer has an obligation to pay average wage for reasonable period of time. Important in that case is the fact, that an employer is not allowed to ask where an employee goes, but an employer has only right to decide, if he or she will pay the average salary and for what period of time.

Flexibility of employment conditions has also negative side. One can say that the level of protection of pregnant workers has diminished. According to the ECA 1992 it was forbidden for an employer to dismiss a pregnant employee. Even if the employer did not know about the pregnancy, still the termination of an employment contract was null and void. ECA2008 does not forbid the redundancy of a pregnant worker. It is the task of a pregnant employee herself to take care about the protection against the dismissal. According to the art § 93 of the ECA2008 a pregnant employee is protected only in case she will present a doctoral certification within 14 day she has got the dismissal notification. If this is not the case, the redundancy is legal. There are some doubts, if such regulation is in conformity with European and international standards on protection of maternity, but so far the Estonian government is not in hurry to change the legislation.

Conclusion

As the situation in Estonia shows the idea of flexicurity is misunderstood and it could be also the case that the flexicurity could be misused in order to introduce flexible employment conditions. Although Estonia tried to be one of the first Member States to apply the principle of flexicurity, the principle of flexicurity has never been applied in Estonia. Today one can say, Estonia is most probably the first Member State of the European Union, that has left the principle of flexicurity for ever.

Estonia has taken only the one component of flexicurity – flexible labour relations. It is obvious, that the concept of flexicurity could be used for any reform of labour relations. At the same time nobody uses the notion flexicurity for amendments in social security law.

As the case of Estonia shows even application of flexible labour relations could be confusing, because both parties to the employment contracts could lose the faith in legislation.

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A NEW LAW – A NEW CHANCE FOR ARBITRATION IN GEORGIA

Keywords: Arbitration; Georgia.

On June 19, 2009 Georgian Parliament adopted the Law of Georgia on Arbitration which came into effect on January 1, 2010. The new Law consists of 48 articles, divided into ten chapters, which in general structure and content follow the UNCITRAL Model Law on International Commercial Arbitration (2006) (hereinafter the "Model Law"). Explanatory Note to the draft of the law states that its preparation was triggered by the necessity of harmonization of Georgian arbitral legislation with that of Europe and popularization of arbitration in the country[2]. The present article seeks to assess the significance of adoption of the new law and what complementary measures, if any, will need to be taken for Georgia to establish itself as a friendly seat for domestic as well as international arbitrations. With this aim, the article will first discuss the background preceding adoption of the new Law and general overview of the act; second part of the article shall identify some of the factors working against arbitration in Georgia; in the end, the prospects for the future shall be analysed.

PART I. BACKGROUND AND GENERAL OVERVIEW

Law of Georgia on Private Arbitration, 1997

Prior to enactment of the new Law, arbitration was governed by the Law of Georgia on Private Arbitration, 1997. The Law had many shortcomings, some of which still affect the way arbitration is conducted in Georgia.

Article 7 of the 1997 Law required all permanent arbitration courts be registered as commercial entities pursuant to the Law of Georgia on Entrepreneurship. This has led to the situation still existing today, where arbitration is a "business" in which arbitration courts compete with each other for "clients", i.e., large institutions that will name the arbitration court in their arbitration agreements. Another drawback of the 1997 Law was that it empowered the chairman of an arbitration panel to issue

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[2] Explanatory Note to the draft of the Law of Georgia on Arbitration, para 1.

an enforcement order within 5 days after a party's request. Thus, arbitral awards were subject of enforcement without any judicial review. In practice this resulted in cases of abuse of the power by arbitrators and fraudulent arbitrations.[3] At the same time, the Law did not regulate recognition and enforcement of foreign arbitral awards. Despite the fact that Georgia had ratified UN Convention on Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (hereinafter the "New York Convention") in 1994, when enforcing foreign arbitral awards the Supreme Court of Georgia, whose jurisdiction was not established by law, often applied the Law of Georgia on Private International Law[4]. Furthermore, the Law did not provide any clear provisions on setting aside of domestic arbitral awards. Art. 43 of the Law granted courts authority to "change" awards, without spelling out detailed bases or scope of such authority.

The obscure and incomplete law had appeared to be a poor attempt to introduce modern system of arbitration in Georgia. To the contrary, for the 12 years of its effect wrongful practises have been established, discrediting the institute of arbitration in Georgia.

Law of Georgia on Arbitration, 2009

With this background adoption of the new Law which is based on the Model Law is a significant step forward and a second-in-a-lifetime opportunity for Georgia to promote arbitration for resolution of domestic as well as international disputes. Although the Mode Law was designed with international arbitration in mind, the UNCITRAL Working Group has itself noted that to avoid dichotomy in national laws the states may consider extending their enactment of the Model Law to domestic arbitrations[5]. It is plausible that the drafters of the Georgian Law acknowledged its suitability for domestic arbitral proceedings and the importance of having modern legislation for both dimensions.

The Law applies to property disputes of private character "which the parties are able to settle between themselves."[6] It clearly designates the courts with jurisdiction for the recognition and enforcement of awards, which, in cases of international awards, is the Supreme Court of Georgia, and, with respect to domestic awards, the Courts of Appeals. Grounds for setting aside or refusal to recognize and enforce arbitral awards closely resemble those of the Model Law and New York Convention. The rules on composition and jurisdiction of the tribunal, conduct of arbitral proceedings and

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[3] Blechman M. D. Assessment of ADR in Georgia, October 2011, Part III. A. Available: http://www.ewmi-jilep.org.

[4] The Law of Georgia on Private International Law only applies to recognition of "foreign court judgments", which means that the Supreme Court has either interpreted "court judgments" broadly to include arbitral awards, or applied article 68.1 of the Law as a matter of analogy of law.

[5] Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, March 25, 1985, UN Doc.A/CN.9/264, para. 22; Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, para. 10. Available: www.uncitral.org.

[6] Law of Georgia on Arbitration, 2009, art. 1.2.

rendering of award at large correspond to the provisions of the Model Law, including the form requirement and new detailed regime on interim measures introduced by UNCITRAL in 2006. Overall the Law follows the spirit of the Model Law by entailing many discretionary provisions and giving respect to party autonomy.

There are some differences between the Model Law and the Georgian arbitration law, however. The most significant ways in which the Georgian Law departs from the provisions of the Model Law are noted below.

Form of Arbitration Agreement

The Law gives effect to exchange of statements of claim and defence as satisfying "writing" requirement[7], as well as to arbitration agreements concluded by means of electronic communication[8]. However, these provisions do not apply when a party to an arbitration agreement is an administrative agency or an individual. In such cases the Law requires arbitration agreement to actually be in writing[9]. Furthermore, if both parties to arbitration agreement are natural persons, the agreement must be countersigned by parties' attorneys or be certified by notary[10]. With respect to individuals, the restrictions aim at protecting consumers[11]. While the rationale may exist in relation to consumers[12], it is questionable whether administrative agencies require similar protection. In the modern world, where state agencies, including those of Georgia, strive to become flexible, relieve bureaucratic barriers and make a transition towards electronic services the invalidity of arbitration agreements concluded by these means seems to be an outdated approach.

Effect of an Arbitration Agreement

The New York Convention and the Model Law require courts to refer parties to arbitration in matters which are subject of an arbitration agreement. Art. 9.1. of the Georgian Law requires such referral only after commencement of the arbitration hearing. Thus, rather than giving effect to arbitration agreement itself, the Law designates commencement of arbitration hearing as a pre-requisite for dismissing a

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7 Law of Georgia on Arbitration, 2009, art. 8.6.

8 Ibid., art. 8.5.

9 Art. 8.8 of the Law specifies that paragraphs 4-6 of the Law (equating exchange of statements of claim and defense, and electronic communications to "writing") shall not apply if one of the parties to the arbitration agreement is a natural person or an administrative agency.

10 Law of Georgia on Arbitration, 2009, art. 8.9.

11 Explanatory Note to the draft of the Law of Georgia on Arbitration, para 9.

12 In many respects individuals acting for personal, family or household purposes should not be held to the same standards of diligence as entities or persons engaged in commercial activities. This is a valid consideration with respect to electronic communications. For example, Art. 2 (1) (a) of the UN Convention on the Use of Electronic Communications in International Contracts expressly excludes from its sphere of application contracts concluded for personal, family or household purposes; Furthermore, both, UNCITRAL Model Law on Electronic Commerce (1996) and UNCITRAL Model Law on Electronic Signatures (2001) contain provisions subjecting these laws to rules of law intended for the protection of consumers. It is submitted, though, that these measures are not sufficient to protect consumers in Georgia. The issue of consumer protection will be discussed in more detail in parts II and III of the present article.

court action on a matter which is subject of an arbitration agreement. This is a serious departure which puts Georgia in violation of the requirement of article II of the New York Convention. It is noteworthy that Civil Procedure Code of Georgia expressly provides that the very existence of an arbitration agreement covering the dispute is a ground for either dismissal or termination of court proceedings[13]. The collision of these two acts must necessarily be resolved by modification of the conflicting provision of the Law on Arbitration so as to give effect to the mere existence of an agreement to arbitrate.

Power of Courts

Another departure from the Model Law is Art. 44 of the 2009 Law, which empowers a court to suspend recognition and enforcement of award upon request of a party who provides appropriate security. The Model Law allows such suspension only in more limited circumstances, such as when the award has been set aside or suspended by a court in the country where it was rendered. While Georgian Law has a similar provision in art. 45, the power of the court under Art. 44 to suspend recognition and enforcement may be considered as expansion of the scope of courts' interference in the process of recognition and enforcement of awards.

Despite these few deviations the new Law is a contemporary legislation which brings Georgian Law at the forefront of modern arbitration laws. As Professor Klaus Peter Berger noted referring to the importance of adoption of the UNCITRAL Model Law by Germany[14], by implementing the Model Law with very few modifications, this time Georgia is sending an important signal around the arbitration world: those practitioners who know the Model Law also know the new Georgian arbitration law. This is indeed a significant achievement and a foundation for Georgia to promote arbitration on domestic and international level.

PART II. FACTORS WORKING AGAINST ARBITRATION IN GEORGIA

There still remain several detractors of arbitration in Georgia which will need to be addressed in order for the truly arbitration friendly environment to be established in the country. The most significant ones are analysed below.

There are well over 100 "permanent" arbitral institutions registered in Georgia all of them being commercial entities (mostly limited liability companies). As noted above, the practise is a legacy of the 1997 Law. In reality it has resulted in treating arbitration as a business, where multitude of such businesses compete to attract new or maintain old "clients" – parties who refer their disputes to this particular institution. This competition, however, has not been based on the criteria of fairness, independence or efficiency. Rather, it has resulted in arbitration becoming a tool for "result-shipping" by many dominant players of the market. The assessment conducted in September-

[13] Civil Procedure Code of Georgia arts. 186 (1) (d) and 272 (f).

[14] Berger K. P. Germany Adopts the Uncitral Model Law. Int. A.L.R. 1998, 1(3), 121-126.

October 2011, of which I was a part, obviated that in many such arbitral institutions over 90% of arbitrations took place between financial/credit or insurance companies on the one hand, and consumers or small businesses on the other hand[15]. In this context arbitration clause is often a result of a contract of adhesion providing for arbitration before institutions inherently biased towards such companies, i.e. their "clients". In an environment where arbitration is being seen as a venue for result-shopping while denying public access to courts it may never count on trust and credibility of the society in the system.

Another factor which hinders development of arbitration in Georgia is absence of self-regulation of the profession. There are no professional standards, no code of ethics and no mechanism of self-policing of arbitrators. As a result, level of professionalism, qualification and integrity of arbitrators is often questionable.

Combination of the above two factors has led to yet another negative practise. Georgian courts, instead of establishing an environment where arbitration is to be fostered, tend towards becoming a protection mechanism against controversial awards, by finding ways to refuse their recognition and enforcement. While in some instances these protective measures are justified and in line with the spirit of the Law, in other cases they become overly intrusive. For example, under the practice of Tbilisi Court of Appeals if penalties for late payment awarded to claimant are too excessive it considers such award as contrary to "public policy" and refuses recognition and enforcement of the award. Even more so, the Court often itself reduces the amount of the penalty to the level which it considers reasonable[16]. In doing so, the Court relies on art. 420 of the Civil Code of Georgia which grants discretion to reduce excessively high penalties. However, when parties subject their dispute to arbitration, the only authority which would be entitled to exercise the discretion under art. 420 would be the arbitrators. If the alleged misapplication of art. 420 by arbitrators is to be considered as violation of "public policy" what would prevent the courts from finding any award, where in courts' view the law would have been incorrectly applied, as contrary to "public policy"? Thus, the criticism refers most importantly to the fact that these decisions do not provide adequate reasoning and guidance as to when the award will be found to violate public policy. Yet another practise of the Court of Appeals invalidates arbitration agreements unless the choice of the arbitral institution is unequivocal and certain. Thus, where arbitration agreement calls for arbitration under the rules of an institution to be later named by claimant, the court considers such agreements as invalid[17]. Likewise, an arbitration clause is invalid if referral to a

[15] Blechman M. D. Assessment of ADR in Georgia. October 2011, part II. Available: http://www.ewmi-jilep.org.

[16] Tbilisi Court of Appeals decision of May 31, 2011, Case No. 2b/1604-11, BasisBank v. Kapanadze, where the court found the penalty rate of 0.1% per day too excessive and reduced it to 2% per month.

[17] Tbilisi Court of Appeals decision of April, 2011, Case No. 2b/-----10. In this case arbitration agreement subjected disptues to a permanent arbitral institution, to be chosen by claimant. The clause further stated that the disptue was to be decided by one arbitrator to be appointed by teh named arbitral institution. The court noted that arbitration agreement is void if the referral to an

specific arbitral institution is an option to be exercised by one of the parties[18]. The rationale is said to be the principle that arbitration agreement must contain true will of the parties to refer specific dispute to a specific arbitral institution[19]. Let alone other issues with this reasoning, such practice may put at risk livelihood of *ad hoc* arbitrations where no specific arbitral institution may be named.

The problem with these practices of the Court of Appeals is twofold: first of all, neither invalidation of the optional or open[20] clauses nor refusal of recognition of awards will eliminate the root of the problem. The dominant players may easily name their preferred institutions in the clauses, thus eliminating the ground for invalidation of the arbitration agreements; however, this will not cure the real problem of "forced arbitrations" since naming of an arbitral institution in the clause will have no effect on the ability of a weaker party to negotiate the term. Secondly and most importantly, by limiting the effect of arbitration agreement and leaving the door wide open for revision of the merits of the award on "public policy" ground Georgia loses its chance to become an arbitration friendly country. For this reason, it is critically important that we start tackling the root causes rather than letting the courts to do "justice" which will appear to be temporary, controversial and will prejudice the spirit and principles on which the new Law is based.

PART III. PROSPECTS FOR THE FUTURE

Identification of these problems, which by no means are exhaustive,[21] is a good starting point for defining the strategy towards revival of arbitration in Georgia. The strategy should include the following:

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arbitral institution is not unequivocal or if it is impossible to determine from the conetn which specific arbitral institution did the parteis intend to subject their dispute to.

[18] Tbilisi Court of Appeals decision of April, 2011, Case No. 2b/-----10. In this case an agreement which called for dispute resolution either by referral to the court at teh location of the bank or an arbitral instution Ltd "_____", with the choice to be exercised by claimant, was found to be invalid.

[19] Tbilisi Court of Appeals decision of July 19, 2011, Case No. 2b/1733-11.

[20] Meaning clauses where no specific arbitral institution is named, rather the choice is left open to one of the parties.

[21] Two other barriers have not been included in the body text of the article due to the limited space available as well as due to the fact that contrary to other aspects which necessitate more institutional changes, these two aspects could easily be cured by the corresopnding legislative amendments:

1. Under Art. 39 1, (a)2 of the Civil Procedure Code of Georgia, the court fee for an application for recognition and enforcement of an arbitral award is 3% of the value of award, but not less than 300 GEL. Given that the fee for litigating the case ab initio is 3% of the value of the claim arbitration appears to be a more expensive option of dispute resolution since the parties will have to pay the costs of arbitration in addition to the court fees for recognition and enforcement.
2. In July 2009, the Parliament of Georgia introduced changes to the Criminal Code of Georgia equating arbitrators to public officials for the purposes of the criminal laws concerning abuse of public office. Thus, arbitrators became subject to prosecution for, among other things, "abuse of

Regulation of consumer arbitrations

Protection of consumers against "forced arbitrations" has been addressed by various means in different countries. In most of them, pre-dispute arbitration clauses are held void, voidable or otherwise regulated with consumers free to opt for arbitration after the dispute has arisen[22]. Certainly, such regulation will likely be opposed by the existing arbitral institutions whose "businesses" may be affected by losing of majority of their "clients". However, such conceptual change is the only way arbitration can be promoted in Georgia. Once financial institutions shall be deprived the opportunity to force their clients in their preferred arbitral institutions, arbitral institutions will have to become attractive for all parties, including the consumers. Furthermore, decrease of consumer arbitration will create a demand for making arbitration attractive for businesses to business disputes (which has been its historic context – to resolve commercial disputes). All of this will lead to the competition between arbitral institutions be based on the principles of impartiality and independence, professionalism and efficiency in service. It will also likely contribute to the decrease of the number of multitude of arbitral institutions and emergence of a limited number of credible and reputable institutions.

Creation of a professional regulatory body

A professional association of arbitrators which would set certain professional standards, work out enforceable code of ethics, and provide a venue for professional interaction as well as opportunities for advancement of qualification of arbitrators will play an essential role for arbitration to become a reliable and trusted method of dispute resolution.

Ensuring support of the judiciary

Above all, our courts will need to prove that they are able to successfully make a transition from the old regime, to the arena of contemporary commercial arbitration and develop a consistent pro-arbitration jurisprudence. In this respect, it is suggested that Supreme Court of Georgia takes the lead and issues a recommendation[23] calling

public authority" (CC Art. 332), "exceeding their authority" (CC Art. 333) and "indifference to the public office" (CC Art. 342). The application of these provisions has been said to be controversial. While some arbitrators may indeed abuse their authority, there will likely be found another ground to police them under criminal code. Availability of prosecution on the grounds noted above prejudices the arbitrators' need to function independently without concern for personal reprisal. This will adversely affect the independence of arbitrators and the willingness of many to serve at all.

[22] The EU's Directive on Unfair Terms in Consumer Contracts defines unfair terms as those "caus[ing] a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" (art. 3.1). Annexed to the directive is a non-exhaustive list of terms that may be regarded as unfair, including "terms which have the object or effect of ... excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration...." (art. 3.3 annex (q)). Majority of EU member states have implemented the Directive with varying effects of rendering the pre-dispute arbitration agreements unenforceable, voidable or non-binding.

[23] Supreme Court of Georgia issues such recommendations for the purposes of improvement and harmonization of jurisprudence.

for limited interpretation of "public policy" and for pro-enforcement bias to be exercised by courts.

The above measures may seem too demanding or even illusory. While not an easy task, all the above may become a matter of consistent implementation. With the adoption of the new Law the Georgian government has already demonstrated that it acknowledges the importance of promotion of arbitration as a method of commercial dispute resolution in the country. The impact that emergence of Georgia as a regional seat may have is obvious to appreciate. And Georgia has much to recommend itself in this respect: proven record of successful reforms, location ensuring its significance as a strategic transition point of commerce, good infrastructure and flight connections, wide pool of internationally educated highly qualified lawyers, and for arbitral tourists – a remarkable history, delicious cuisine, and a geography unparalleled in its beauty. It is hoped that Georgia will take advantage of these natural gifts as well as of the momentum that the adoption of the new Law provides and take necessary measures for advancement and promotion of arbitration for resolution of domestic and international disputes.

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ACCEPTANCE OF AN INHERITANCE – FORM AND TERMS

Keywords: acceptance of inheritance, inheritance, actions, terms.

Introduction

Inheritance law is an important segment of the civil law regulating procedures for the transfer of assets, rights and obligations of the deceased to his/her successors. Acceptance of the inheritance, probably, is the most important stage of the inheritance process. At this stage the potential successors having expressed their intent to accept the inheritance according to the procedures and within the term set forth by the law get the opportunity to receive inheritance. "In order to receive inheritance heirs on intestacy, as well as testamentary and contractual heirs, must be alive at the time of the devolution of an inheritance […] and simultaneous invitation to inherit […] but heirs designated conditionally must be alive at the time of performance of the respective condition"[1], However, "[i]nvitation to inherit establishes only an opportunity to become a heir. Acquisition of inheritance is subject to expression of intent by the invited to accept the inheritance he/she is entitled to"[2]. Accordingly, acceptance of the inheritance in compliance with the procedures and deadlines established by the law has a decisive role in the acquisition of the inheritance. Thus, it can be concluded that if a person expresses intent to accept the inheritance it does not mean that he/she will certainly become a heir and as such will substitute the deceased in his rights and commitments. The Civil Law provides for the procedures and sequence which shall be used to determine which one of all the persons invited to inherit will actually receive the estate or part thereof and will become a heir. It should be noted, however, that the Civil Law is somewhat inconsequent with the use of concepts of "person invited to inherit" (*mantot aicinātais*) and "heir" *(mantinieks)*.

Form for the Acceptance of Inheritance

Article 689 of the Civil Law (hereinafter "CL") entitles the person invited to inherit either to accept or decline the inheritance. The only exception is the contractual heir who has not contracted to himself or herself a right to decline the inheritance.

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[1] Civil Law [Civillikums]: LR law 28.01.1937. *Ziņotājs,* No. 1, January 14, 1993. Available: http://www.likumi.lv/doc.php?id=90222 [viewed 29 June 2012], Article 687.

[2] Ibid., Article 688.

According to the first clause of Article 690 of CL, the intent to accept the inheritance may be expressed in person or via substitute. Currently[3] CL provides that substitution is necessary if the person invited to inherit lacks legal capacity – it is stated that "the intent of minors shall be expressed on their behalf by parents or guardians, on behalf of the mentally ill – by the trustees, and on behalf of legal entities – their legal representatives. Persons, for whom a trusteeship has been established because of their dissolute or spendthrift lifestyle, need the consent of the trustee to accept an inheritance"[4]. It should be noted, however, that currently Saeima reviews amendments to the Civil Law regarding amendments to the concept of legal capacity (the bill is subject to be reviewed in the 3rd reading[5]). Inter alia, it is planned to amend also regulation of substitution in Article 690 of CL to the effect that "such substitution is necessary when the person invited to inherit himself or herself has legal capacity limitations, or is a minor. The intent of minors shall be expressed on their behalf by parents or guardians, on behalf of the mentally ill – by the trustees, and on behalf of legal entities – their legal representatives"[6]. Thus, according to the planned amendments, depending on the extent of legal capacity limitations, the intent to accept an inheritance may be expressed by the person invited to inherit jointly with the trustee, or by the trustee acting alone on behalf of such person, whereas, according to the currently still effective wording of Article 690 of CL, the intent to accept inheritance on behalf of the legally incapacitated shall be expressed by the trustee only.

As of the 1st January 2003 the following are the forms for the acceptance of inheritance in Latvia:

- expression of intent to accept the inheritance in the form of notarial deed prepared and certified by notary public;
- taking actual possession of the estate with intent to possess and use it as ones' own estate.

The first clause of Paragraph 1 of Article 254 of the Notary Act determines that "[i] nheritance application comprising intent to accept or decline the inheritance shall be executed by notary public in the form of a notarial deed"[7]. At the same time Article 691 of CL actually does not provide for the necessity of such special form; instead, it is determined that "the intent to accept inheritance may be expressed either explicitly, orally or in writing, or also implicitly but with such actions that in the relevant circumstances can only be interpreted in such a way that a certain

[3] At the time of this article.

[4] Civil Law [Civillikums]: LR law 28.01.1937. *Ziņotājs,* No. 1, January 14, 1993. Available: http://www.likumi.lv/doc.php?id=90222 [viewed 29 June 2012], Article 690.

[5] Please see: registry for draft laws to the 3rd reading. Available: http://titania.saeima.lv/LIVS11/saeimalivs11.nsf/webPhase7?OpenView&Count=30 [viewed 25 June 2012].

[6] Please see: draft law "Amendments to Civil Law" [Grozījumi Civillikumā] (No. 53/Lp11)", including draft law No. 65/Lp11. Available: http://titania.saeima.lv/LIVS11/saeimalivs11.nsf/0/9C8E549181F9F755C2257A1D004CAF93?OpenDocument [viewed 25 June 2012].

[7] Notary Act [Notariāta likums]: LR law 01.06.1993. *Ziņotājs,* No. 26/27, July 5, 1993. Available: http://www.likumi.lv/doc.php?id=59982 [viewed 27 June 2012].

person acknowledges himself or herself as a heir"[8]. Thus, a potential heir may express his intent orally or in writing, however, as long as the special form of notarial deed requested for such expression of intent will not be complied with, it shall have no legal effect. It leads us to question what is the reasoning of such provision of the Notary Act, effectively introducing special form requirement for the acceptance (or declining) of inheritance.

Acceptance or declining of the inheritance are unilateral transactions of the heir[9] and, same as with any other transaction, the main requirement for the acceptance of inheritance is free will to enter the transaction – without mistake, fraud or duress. The notary public executing a notarial deed "[…] shall determine the intent of the participants to the notarial deed and the terms and conditions of the transaction, shall clearly and unmistakably transcribe the statements of the persons, shall explain to the participants potential legal consequences of the transaction to make sure that unawareness of the law and lack of experience will not be used to their detriment"[10]. "Notarial deed is […] approval of the expression of intent having legal meaning […]"[11], thus, it shall secure compliance with the provisions of the Civil Law regulating expression of intent, as it is recognized that "notarial deed is indispensable evidence. It ensures legal certainty and time economy"[12].

Accordingly, it can be concluded that the form of notarial deed ensures proper confirmation of the expression of intent by the person invited to inherit. Moreover, the notary public executing notarial deed shall have explained to the person consequences of acceptance (or declining) of the inheritance, thereby informing the person on his/her rights and obligations incurred as of the acceptance of inheritance (for example, liability for the debts of the deceased where such form part of the estate). Thus, compliance with respective form requirement is in the best interests of the person invited to inherit. However, we must also consider a situation which may occur if the person invited to inherit, being unaware of the requirements of the Notary Act, expresses his/her intent in free form, e.g., sending a letter to the notary public with a statement of his/her intent to accept the inheritance. Let's assume that the letter has been sent by post on the last date of term set for the acceptance of the inheritance. According to Article 256 of the Notary Act "[i]f the inheritance application has not been certified as required by the law notary public shall immediately notify the applicant on the necessity to submit a new, properly certified,

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[8] Civil Law [Civillikums]: LR law 28.01.1937. *Ziņotājs,* No. 1, January 14, 1993. Available: http://www.likumi.lv/doc.php?id=90222 [viewed 29 June 2012].

[9] Gencs Z. Civillikuma komentāri. Otrā daļa. Mantojuma tiesības (655.–840. pants). Riga: TNA, 2012. p. 103.

[10] Notary Act [Notariāta likums]: LR law 01.06.1993. *Ziņotājs,* No. 26/27, July 5, 1993. Available: http://www.likumi.lv/doc.php?id=59982 [viewed 27 June 2012], Article 871.

[11] Damane L. Notariālais akts kā mantisko un nemantisko tiesību garants. Promocijas darbs. Riga: [b.i.], 2012. Available: https://luis.lanet.lv/pls/pub/luj.fprnt?l=1&fn=F-2050448075/Linda Damane 2012.pdf. [viewed 27 June 2012].

[12] Pilsētniece I. Notariāts kā vienas pieturas aģentūra: [former Chairperson of Latvian Sworn Notaries Counsel in an interview to Sannija Matule]. *Jurista Vārds,* Nr. 43 (548), 11 November 2008, p. 3.

inheritance application"[13]. According to Section 23 of the Regulations of the Cabinet of Ministers No. 618 "On the Procedures for Inheritance Registry and Inheritance Cases", "[i]f the inheritance application submitted to the notary public has not been certified in accordance with requirements set in Article 254 of the Notary Act, there is no basis for the initiation of the inheritance case. If such application has been received by mail, notary public shall in written explain to the applicant necessity to submit a new, properly certified, inheritance application"[14]. Nevertheless, in case of a later potential dispute, such circumstance may not serve as the basis for conclusion that the person invited to inherit has not expressed his/her intent within the term prescribed by the law. The intent was expressed on time but it just did not comply with the requirements set by the Notary Act. In such circumstances it is essential to establish that the person invited to inherit expressed intent in the form set by Article 691 of CL, which qualifies the expression of intent as timely.

Neither law, nor court practice or legal doctrine provide a single clear uniform explanation and guidance for the interpretation of concept used in Article 691 – action that in the relevant circumstances can only be interpreted in such a way that a certain person acknowledges himself or herself as a heir. The legislator has not listed any examples of such actions in the relevant legal provision. It means that the interpretation of this concept may differ from case to case. Potentially, in different cases one and same action will be evaluated differently or even contrary, but in any case it is essential to conclude that the person invited to inherit would not have taken the particular action if he/she would not be willing to accept the inheritance[15]. Legal doctrine indicates that "an action to be considered as an implicit expression of intent must be such to lead to safe conclusion on the existence of respective intent. Only such action can be considered acceptance of the inheritance which by logical certainty leads to conclusion that in the particular case person invited to inherit would not have acted so in absence of intent to accept the inheritance"[16]. In the court practice following actions have been recognized as serving such purpose:

- collection of documents proving kinship for filing to the court[17],
- payment of the land taxes, performance of economic works[18],

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[13] Notary Act [Notariāta likums]: LR law 01.06.1993. *Ziņotājs,* No. 26/27, July 5, 1993. Available: http://www.likumi.lv/doc.php?id=59982 [viewed 27 June 2012].

[14] Regulations of the Cabinet of Ministers of the Republic of Latvia No. 618 "On the Procedures for Inheritance Registry and Inheritance Cases" [Par mantojuma reģistra un mantojuma lietu vešanu]: Regulations of the Cabinet of Ministers 04.08.2008. *Latvijas Vēstnesis*, No. 130 (3914), August 22, 2008. Available: http://www.likumi.lv/doc.php?id=180087&from=off [viewed 27 June 2012].

[15] Briedis V. Mantojuma pieņemšana un atraidīšana. Riga: [b.i.], 1940, p. 6., p. 22.

[16] Briedis V. Mantojuma pieņemšana un atraidīšana. Riga: [b.i.], 1940, p. 22; Krauze R., Gencs Z. Latvijas Republikas Civillikuma komentāri. Mantojuma tiesības (382-840 p.). Riga. Mans Īpašums, 1997. p. 245.

[17] Judgment of Civil Law Department of Zemgales Regional Court of the Republic of Latvia, case No. AC 2–111. Latvijas Republikas Apelācijas instances civillietu nolēmumu apkopojums 1998 – 1999. Riga: TNA, 2003, p. 207.

[18] Judgement of Riga City Kurzemes District Court of the Republic of Latvia, case No. LR 2 – 91. Latvijas Republikas Apelācijas instances civillietu nolēmumu apkopojums 2001–2002. Riga: TNA, 2003, p. 28.

- masonry works at the wall of barn forming part of the household and construction works in the house[19].

The actions which were recognized as proving intent of the person invited to inherit to accept the inheritance were not identical but the court in all those cases ruled that such actions certify the person's intent to accept the inheritance, although taken separately it might seem that such actions have nothing in common.

Terms for the Acceptance of Inheritance

According to Article 693 of CL, "[i]f the deceased has specified a deadline for accepting the inheritance, the appointed heir shall observe it. If such a deadline has not been specified but the heirs have been invited, then those invited to inherit must express their intent to accept the inheritance by the deadline specified in the invitation. If there has not been an invitation, then the heir shall within a period of one year express his or her intent to accept the inheritance, calculating the term from the day of devolution of an inheritance, if the estate is in the actual possession of the heir (Article 692, Paragraph 2), but otherwise, from the time when information was received on the devolution of an inheritance"[20]. The Civil Law provides for the terms for acceptance of the inheritance but it does not provide for the terms for requesting allocation of the legacy[21] or the preferential share[22]. In practice it is assumed that allocation of legacy, as well as preferential share, must be requested within the term set for the acceptance of inheritance, however, it does not correspond to the legal nature of these institutes. Preferential share is not an inheritance as, according to Article 382 of CL, the inheritance shall comprise also liabilities of the deceased, whereas the preferential share shall be determined "based on the composition and value of the assets they had at the time of death of the testator"[23] and shall be calculated from "the net assets of the testator, subtracting all his debts"[24]. The legacy also does

[19] Judgment of the Civil Law Department of the Senate of Supreme Court of the Republic of Latvia, case of 9 May 2007, No. SKC – 382. Available: http://at.gov.lv/lv/info/archive/department1/2007/ [viewed 29 June 2012].

[20] Civil Law [Civillikums]: LR law 28.01.1937. *Ziņotājs,* No. 1, January 14, 1993. Available: http://www.likumi.lv/doc.php?id=90222 [viewed 29 June 2012].

[21] Article 500 of CL – "If someone has been bequeathed not the whole estate, nor a share in relation to the whole of the estate, but only a separate inheritance object, then the bequest is called a legacy, but the person to whom it has been bequeathed, a legatee". Civil Law [Civillikums]: LR law 28.01.1937. *Ziņotājs,* No. 1, January 14, 1993. Available: http://www.likumi.lv/doc.php?id=90222 [viewed 29 June 2012].

[22] Paragraph 1 of Article 422 of CL – "A testator may freely determine the disposition of his or her whole estate in case of his or her death, with the restriction that his or her forced heirs shall be bequeathed their preferential shares". Civil Law [Civillikums]: LR law 28.01.1937. *Ziņotājs,* No. 1, January 14, 1993. Available: http://www.likumi.lv/doc.php?id=90222 [viewed 29 June 2012].

[23] Civil Law [Civillikums]: LR law 28.01.1937. *Ziņotājs,* No. 1, January 14, 1993. Available: http://www.likumi.lv/doc.php?id=90222 [viewed 29 June 2012], Paragraph 1 of Article 424.

[24] Civil Law [Civillikums]: LR law 28.01.1937. *Ziņotājs,* No. 1, January 14, 1993. Available: http://www.likumi.lv/doc.php?id=90222 [viewed 29 June 2012], Paragraph 3 of Article 424.

not correspond to the definition of the inheritance on the part of liabilities of the deceased. The legacy is a separate asset of the estate which means that the legatee is not a heir and he should not settle the liabilities of the deceased[25]. Therefore, there must be separate terms set for the acceptance of the legacy, as well as for the request to allocate preferential share. At the same time it would be appropriate to resolve here also the question on substantiation of applicability of term for bringing inheritance claim to the claim for the allocation of preferential share, whereas the Civil Law does not set separate terms for bringing claim to the court for the allocation of preferential share. Considering the substantive protection system for the forced heirs[26], stipulated by the Civil law, the procedure for request of the preferential share should not be correlated and tied to the terms set for bringing the inheritance claim. The necessity to set forth separate terms for the acceptance of legacy, as well as for the request to allocate preferential share, has been also recognized within the scope of initiative for the modernization of the Civil Law[27], however, as it can be seen from the current wording of the proposed amendments to the Inheritance Law section of CL, respective additions to the law have not been covered so far[28].

Inter alia, as regards the terms, it must be also indicated that it would be suitable to determine in the Civil Law sequence for the settlement of encumbering commitments and claims to the effect that claims of forced heirs shall be satisfied after the claims of creditors but before the claims of legatees for the distribution of respective legacies (except for legacies distribution or performance of which has been charged to the particular heir personally). Currently, there are few indications on the potential sequence for settlement of encumbering commitments and claims in some provisions of the Civil Law (e.g., Article 424 of CL regulating distribution of the preferential share), however, the Civil Law does not resolve dispute situations between legatees and creditors. Article 583 of CL provides that "[l]egatees do not have to participate in payment of the debts of the deceased. However, if the legacies exceed the value of the estate, and, furthermore, there is no direct heir, then a proportional deduction shall be taken from the legatees to pay the aforementioned debts"[29], however, it does not "comprise indication as was included in Article 2666 of V.C.L. as the creditors of the deceased in any case have priority over legatees. Provisions of Article 2313 were also not included providing for the distribution of the legates from the net asset balance

[25] Please see the first clause of Article 583 of CL.

[26] Damane L., Zīle K. Mantojuma tiesību problēmjautājumu aktualizācija. *Jurista Vārds,* Nr. 2 (555), 13 January 2009. Available: http://www.juristavards.lv/?menu=doc&id=186180 [viewed 29 June 2012].

[27] Policy Concept for the Modernization of the Inheritance Law Section of the Civil Law (informative part). Available: http://polsis.mk.gov.lv/view.do?id=3232 [viewed 29 June 2012].

[28] Informative report on the progress of legal regulation development relating to the performance of Policy Concept for the Modernization of the Inheritance Law Section of the Civil Law. Available: http://www.mk.gov.lv/lv/mk/tap/?pid=40246866 [viewed 29 June 2012]; Draft law "Amendments to Civil Law". Available: http://www.mk.gov.lv/lv/mk/tap/?pid=40246873 [viewed 29 June 2012].

[29] Civil Law [Civillikums]: LR law 28.01.1937. *Ziņotājs,* No. 1, January 14, 1993. Available: http://www.likumi.lv/doc.php?id=90222 [viewed 29 June 2012].

(remaining after the debts have been settled and the claims of the forced heirs have been satisfied)"[30].

According to Articles 709 and 711 of CL, the person invited to inherit may restrict his liability for the debts of the deceased with the amount of inherited assets if he/she accepts the inheritance with inventory right within 2 months after the devolution of an inheritance, or after becoming aware of the devolution of an inheritance. However, the term set for the acceptance of the inheritance with inventory right – 2 months – is too short for the person invited to inherit to decide on the acceptance of inheritance, considering, in particular, the material consequences of the use of inventory right. Therefore, a longer term should be determined. Moreover, it should be considered whether the term for the use of the inventory right shall be coordinated with the term set for bringing creditor claims, so that the person invited to inherit could acquaint with the list of creditor claims and with the inventory list, and then decide on the acceptance of the inheritance with inventory right. It must be considered here that the inventory list does not include or disclose the commitments of the deceased since those become known only after the expiry of the term set in the announcement on devolution of an inheritance and invitation of heirs and creditors, whereas the inventory list normally is prepared before that, except the case provided in Paragraph 2 of Article 709 of CL. Thus, from the perspective of rights of the person invited to inherit, the term for the use of the inventory right should be set longer than the term set in the announcement on the devolution of an inheritance extending invitation to heirs and creditors.

According to Article 16 of CL, "[i]nheritance rights regarding an inheritance located in Latvia shall be adjudged in accordance with Latvian law". At the same time, according to Article 691, "[t]he intent to accept an inheritance may be expressed either explicitly, orally or in writing, or also implicitly but with such actions that in the relevant circumstances can only be interpreted in such a way that a certain person acknowledges himself or herself as heir". Does it mean that, in case the inheritance is located in several jurisdictions, including Latvia, the actions indicating intent to accept the inheritance, must be taken in Latvia? Shall, for example, actions directed towards acceptance of the inheritance located in USA be interpreted as an acceptance of the assets located in Latvia forming part of the same estate?

For example, person A deceases in USA and his heirs living in USA within one year after the death accept the inheritance with such actions that in the relevant circumstances can only be interpreted in such a way that they have acknowledged themselves as heirs. After one year and two months these heirs become aware that the deceased had some assets in Latvia. When they come to Latvia to settle the inheritance case it appears that the heirs are late with the one year term set forth by Article 693 of CL whereas they have not expressed their intent to inherit in Latvia within this one year term. Can we say that by the performance of actions accepting inheritance in the USA the heirs have simultaneously expressed intent to accept inheritance located in Latvia? There is a basis to conclude that the heirs, having accepted the inheritance in

[30] Gencs Z. Mantošana. Zinātniski praktisks komentārs. Rīga, Tiesu namu aģentūra, 2002, p. 219.

USA, have simultaneously expressed their intent to accept the inheritance located in Latvia, as they have performed actions provided for in the Civil Law within the term set forth by the Civil Law[31]. The situation would be different if the Civil Law would set forth or request certain very specific actions for the acceptance of the inheritance, for example, an instruction that to express intent to inherit a real estate one must 3 times go round such a real estate barefooted in the morning dew. If there would be such a detailed instruction it would not be possible to accept the inheritance without the performance of such specific actions. However, since the law does not prescribe any specific actions, as mentioned before, it is essential to establish that the purpose of the particular actions demonstrates that the persons invited to inherit actually wanted to accept the inheritance. At the same time, without any doubt, it does not release the persons invited to inherit from the obligation to settle inheritance case in front of the Latvian notary public according to the procedures set by the Civil Law and the Notary Act.

Conclusion

1. As of the effective date of amendments to the Civil Law introducing the new model for the legal capacity, depending on the extent of legal capacity limitations for the person invited to inherit, the intent to accept the inheritance shall be expressed by the person invited to inherit himself or herself acting jointly with a trustee, or by the trustee alone acting on behalf of the person invited to inherit.
2. The first clause of Paragraph 1 of Article 254 of the Notary Act determines that "[i]nheritance application comprising intent to accept or decline the inheritance shall be executed by notary public in the form of notarial deed". At the same time Article 691 of CL actually does not provide for the necessity of such special form; instead, it is determined that "the intent to accept inheritance may be expressed either explicitly, orally or in writing, or also implicitly but with such actions that in the relevant circumstances can only be interpreted in such a way that a certain person acknowledges himself or herself as a heir". Thus, the form of notarial deed ensures proper confirmation of the expression of intent by the person invited to inherit. Nevertheless, when there is a dispute as to whether or not the person invited to inherit has expressed his/her intent on time, there is no basis, by reference to the Notary Act, to argue that the inheritance application prepared in the form of notarial deed shall be the only instrument for the acceptance of the inheritance.
3. The Civil Law allows for the acceptance of the inheritance "with such action that in the relevant circumstances can only be interpreted in such a way that a certain person acknowledges himself or herself as a heir", however the law does not list such actions. Therefore, it shall be up to the court in each particular case to determine whether the respective action demonstrating implicit expression of

[31] Please see judgment of the Civil Law Department of the Senate of Supreme Court of the Republic of Latvia as of 14 December 2011, No. SKC – 317 [not published].

intent is such that indicates a clear intent to accept inheritance by the person invited to inherit. The listing of any such actions in the law would not be suitable since one and the same action in different circumstances can and should be interpreted differently.

4. The term set for the acceptance of an inheritance by the use of inventory right is too short for the person invited to inherit to decide on the acceptance of an inheritance, therefore, it should be extended. Moreover, it should be considered whether the term for the use of the inventory right should be coordinated with the term set for bringing creditor claims, so that the person invited to inherit could acquaint with the list of creditor claims and with the inventory list, and then decide on acceptance of the inheritance with inventory right or declining of the inheritance.
5. From the perspective of legal clarity and certainty it would be appropriate to set forth separate terms for the acceptance of legacy, as well as for the request to allocate preferential share, whereas neither of them constitutes inheritance. Therefore, automatic application of terms set for the acceptance of inheritance to the acceptance of legacy and the request to allocate preferential share is not correct.
6. The Civil Law should regulate sequence for the settlement of commitments and claims encumbering the inheritance to the effect that claims of forced heirs shall be settled after full settlement of the creditors' claims but before the distribution of legacies (except for legacies distribution or performance of which has been charged to the particular heir personally), or, it should at least be determined that the claims of creditors of the deceased in any case have priority over those of legatees. Otherwise, the institute of legacy may continue to serve as an ungrounded instrument to avoid settlement of debts encumbering the inheritance.

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