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When American Exceptionalism Isn't Exceptional: Consumer Arbitration in the United States

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The United States takes a unique position in allowing binding pre-dispute arbitration clauses in consumer contracts. This article uses the failure to regulate or prohibit the use of pre-dispute arbitration provisions in nursing home agreements as a means of understanding the current state of pre-dispute arbitration clauses in consumer contracts in the United States. State laws or judicial rules that regulate arbitration clauses in nursing home contracts are routinely blocked by federal courts. Efforts in the U.S. Congress to prohibit such clauses in nursing home contracts have been unsuccessful.

Keywords: consumer law, arbitration, unconscionability, federalism.

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Introduction

This article uses the failure to regulate or prohibit the use of pre-dispute arbitration provisions in nursing home agreements as a means of understanding the current state of pre-dispute arbitration clauses in consumer contracts in

the United States.¹ There is not a consistent American policy on whether such provisions should be enforceable. The debate over arbitration generally is drawn along partisan lines, and the debate over nursing home arbitration generally follows the same lines. Republicans generally favor pre-dispute arbitration agreements while Democrats generally oppose such agreements.² There has been inaction in Congress, where several Fairness in Nursing Home Arbitration bills have languished. There has been some executive action during the Obama administration. The executive branch attempts of this kind are already being overturned under the Trump administration.³ This was to be expected, as Donald Trump both shares Republican pro-business ideology and seemingly has practiced consumer fraud as a business model before becoming a president.⁴ There have been attempts to regulate arbitration agreements by state legislatures. Under American federalism, these laws are only enforceable when federal law does not apply. Because most nursing home lawsuits involve interstate commerce, these state laws have been regularly blocked by both state and federal courts. And, most importantly, the United States Supreme Court has been hostile to such attempts to regulate arbitration.

¹ See, e.g., Bailey, L. A. et al. Combating Abusive Arbitration Clauses in Nursing Home Contracts. *Trial Trends*, 2009, p. 18.; Bagby, K. & Souza, S. Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts. *Journal of Contemporary Health Law & Policy*, 2013, 29(2), p. 183; Krasuki, A. E. Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents. *DePaul Journal of Health Care Law*, 2004, 8(1), p. 263; Palm, K. Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate. *Elder Law Journal*, 2006, 14(2), p. 453; Pavlic, J. Reverse Pre-Emptying the Federal Arbitration Act: Alleviating the Arbitration Crisis in Nursing Homes. *Journal of Law & Health*, 2009, 22(2), p. 375; Pomerance, B. Arbitration Over Accountability? The State of Mandatory Arbitration Clauses in Nursing Home Admission Contracts. *Florida Coastal Law Review*, 2015, 16(2), p. 153; Schleppenbach, J. R. Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes between Nursing Homes and their Residents. *Elder Law Journal*, 2014, 22(1), p. 141; Tripp, L. A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts. *Campbell Law Review*, 2009, 31(2), p. 157; Tripp, L. Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of *AT&T Mobility v. Concepcion*. *American Journal of Trial Advocacy*, 2011, 35(1), p. 87.

² The Democratic Party Platform for 2016 states:

The Democratic Party believes consumers, workers, students, retirees, and investors who have been mistreated should never be denied their right to fight for fair treatment under the law. That is why we will support efforts to limit the use of forced arbitration clauses in employment and service contracts, which unfairly strip consumers, workers, students, retirees, and investors of their right to their day in court.

2016 Democratic Party Platform, 21 July 2016. Available at http://www.presidency.ucsb.edu/papers_pdf/117717.pdf [last viewed 05.08.2017].

The 2008 Republican Platform criticized attempts by trial lawyers and their “Democratic donees” to “weaken lower-cost dispute resolution alternatives such as mediation and arbitration in order to put more cases into court.”

2008 Republican Party Platform, 1 Sept. 2008. Available at <http://www.presidency.ucsb.edu/ws/index.php?pid=78545> [last viewed 05.08.2017].

³ Lazarus, D. Trump wants to deny nursing-home residents and their families the right to sue, *Los Angeles Times*, 13 June 2017. Available at <https://www.latimes.com/business/lazarus/la-fi-lazarus-nursing-home-arbitration-20170613-story.html> [last viewed 05.08.2017]; see also Cooper, P. Arbitration Update: CFPB Rule Uncertain, Mixed Fates for Others, Bloomberg BNA, 1 June 2017. Available at <https://www.bna.com/arbitration-update-cfpb-n73014451803/> [last viewed 05.08.2017].

⁴ Eder, S. and Medina J. Trump University Suit Settlement Approved by Judge, *New York Times*, 31 March 2017. Available at <https://www.nytimes.com/2017/03/31/us/trump-university-settlement.html> [last viewed 05.08.2017]; Barbaro, M. and Eder S. Former Trump University Workers Call the School a ‘Lie’ and a ‘Scheme’ in Testimony, *New York Times*, 31 May 2016. Available at <https://www.nytimes.com/2016/06/01/us/politics/donald-trump-university.html> [last viewed 05.08.2017].

Lawsuits often are brought against nursing homes by nursing home residents for personal injuries, or by their surviving children for wrongful death. Such lawsuits are essential as the enforcement mechanism for consumer protection as the United States relies upon *ex post* law enforcement (in contrast to the European *ex ante* regulatory approach).⁵ The defendant nursing homes invariably file motions to compel arbitration.

Arbitration clauses in nursing home contracts have become “the rule rather than the exception.”⁶ A New York Times investigation found that between 2010 and 2014, “more than 100 cases against nursing homes for wrongful death, medical malpractice, and elder abuse were pushed into arbitration.” Nursing homes use arbitration agreements to shield or immunize nursing homes by denying access to courts. They also use them to mitigate their damages: the average indemnity payment associated with an arbitrated outcome is about \$90 000, which, according to an American Health Care Association study, is “about 35% less than the average indemnity payment associated with a non-arbitrated outcome of about \$138 000.”^{7 8}

1. Pre-dispute Arbitration Provisions in Consumer Contracts in the EU

Unlike the United States, European policy toward pre-dispute arbitration clauses in consumer contracts is relatively clear.⁹ In 1993, the Council of the European Communities issued a Directive on unfair terms in consumer contracts. The Directive declared that boilerplate terms in contracts “shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.” An Annex contained a list of terms that “may be regarded as unfair.” Among the listed unfair terms are terms that have the 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 not covered by legal provisions.”¹⁰ The European Court of Justice noted that the Unfair Terms Directive was “based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.”¹¹

⁵ *Sternlight, J. R.* Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims. *Southwestern Law Review*, 2012, 42(1), p. 87.

⁶ *Koppel, N.* Nursing Homes, in Bid to Cut Costs, Prod Patients to Forego Lawsuits, *Wall Street Journal*, 11 April 2008, at A1.

⁷ American Health Care Association, Special Study on Arbitration in the Long Term Care Industry 4, 7, 16 June 2009.

⁸ *Silver-Greenburg, J. and Corkery M.* In Arbitration, a “Privatization of the Justice System,” *New York Times*, 1 Nov. 2015. Available at <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [last viewed 05.08.2017].

⁹ For useful comparative scholarship on consumer arbitration in the United States and Europe, see *Drahozal, C. R. and Friel, R.* Consumer Arbitration in the European Union and the United States. *North Carolina Journal of International Law and Commercial Regulation*, 2003, 28(2), p. 357; *Schmitz, A. J.* American Exceptionalism in Consumer Arbitration. *Loyola University Chicago International Law Review*, 2013, 10(1), p. 81; *Sternlight, J. R.* Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World. *University of Miami Law Review*, 2002, 56(4), p. 831.

¹⁰ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *Official Journal of the European Communities* L 195/29, 21.4.93, pp. 31, 33.

¹¹ Judgment of 26 Oct. 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, para. 25.

European countries took different approaches to pre-dispute arbitration clauses in consumer contracts. One approach declared such provisions null and void. The other approach allowed presumed such a clause was abusive unless the pre-dispute arbitration provision was “individually negotiated and subscribed.” The arbitration agreement would have to separate from the main contract.¹²

The 2013 Directive on Consumer ADR will make this field even simpler. It says that a pre-dispute agreement between a consumer and a trader to submit complaints to ADR should not be binding on the consumer “if it has the effect of depriving the consumer of his right to bring an action before the courts.”¹³ The portion of the Directive on Consumer ADR on pre-dispute arbitration clauses reflects a 1998 Recommendation of the Commission of the European Communities on out-of-court settlement of consumer disputes. One of the principles was that a “consumer’s recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.”¹⁴

2. Pre-dispute Arbitration Provisions in Consumer Contracts in the United States

A series of United States Supreme Court decisions dramatically expanded the Federal Arbitration Act’s scope. Section 2 of the FAA – described by the Supreme Court as “the primary substantive provision of the Act” – states that a written agreement to arbitrate “in any maritime transaction or a contract evidencing a transaction involving commerce. [...] shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁵ The FAA’s legislative history suggests that Congress intended the law to overcome judicial resistance by federal judges to arbitration in order to permit private dispute resolution of commercial – not consumer – disputes.¹⁶ Before the FAA, American courts followed the English rule that arbitration agreements were

¹² Citizens’ Rights and Constitutional Affairs, Directorate General for Internal Policies Policy Department C, European Parliament, Legal Instruments and Practice of Arbitration in the EU 53, 2014.

¹³ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, Official Journal of the European Communities L 165/63, 18.06.2013, p. 67. For an example of the transposition of this Directive, see Patērētāju ārpustiesas strīdu risinātāju likums. Available at <https://likumi.lv/doc.php?id=275063> [last viewed 05.08.2017]. The Latvian law declares, “Vienošanās par strīda nodošanu ārpustiesas strīdu risinātājam nav saistoša patērētājam, ja tā noslēgta pirms strīda rašanās un patērētājam ir liegta tiesības vērsties tiesā savu tiesību aizstāvībai.”

¹⁴ Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, *Official Journal of the European Communities* L 115/31, 17.4.1998, p. 34.

¹⁵ *Moses H. C. Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24, 1983; 9 U. S. C. § 2.

¹⁶ See generally *Leslie, C. R.* The Arbitration Bootstrap. *Texas Law Review*, 2015, 94(2), p. 265; *Moses, M. L.* Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress. *Florida State University Law Review*, 2006, 34(1), p. 99; *Szalai, I.* Outsourcing Justice: The Rise of Modern Arbitration Laws in America. Durham, N.C.: Carolina Academic Press, 2013; *Szalai, I. S.* Exploring the Federal Arbitration Act through the Lens of History. *Journal of Dispute Resolution*, 2016, (1), p. 115.

unenforceable because they “ousted” courts of their jurisdiction.¹⁷ Imre Szalai has concluded that the FAA “was enacted to cover privately-negotiated arbitration agreements between merchants in order to facilitate the resolution of contractual disputes, through minimal procedures applicable solely in federal court.”¹⁸

The Supreme Court’s interpretation of the FAA no longer puts arbitration clauses on an “equal footing” with other contracts; according to Richard Frankel, the court places them on a pedestal. Frankel argues that the court has created special interpretive rules for arbitration clauses that do not apply to other contracts; arbitration clauses are now “super contracts.” One example will suffice: courts interpret ambiguous arbitration contracts in favor of arbitration instead of using the traditional contract rule of interpreting ambiguities against the drafter.¹⁹

The Supreme Court in 1983 transformed the FAA from a procedural rule that applied only in federal court to a substantive rule that applied in both state and federal court. Justice William Brennan concluded that “section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”²⁰ The court subsequently decided that the FAA preempted state laws that regulated arbitration.²¹ Justice O’Connor warned that the court’s “broad formulation” of the FAA would result in displacing “many state statutes carefully calibrated to protect consumers” and “state procedural requirements aimed at ensuring knowing and voluntary consent.”²² That’s exactly what happened. Justice Ruth Ginsburg lamented in 2015 that the court’s decisions “have predictably resulted in the deprivation of consumers’ rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws.”²³

According to the logic of these Supreme Court arbitration opinions, few, if any, claims subject to an arbitration clause belong in court instead of arbitration. Federal statutory claims for age, sex, or racial discrimination have been shunted into the private world of arbitration.²⁴ Simple consumer transactions are subject to arbitration.²⁵ The Supreme Court has sanctioned the use of class-action waivers in arbitration clauses that permit corporations to avoid class-action lawsuits.²⁶ Even wrongful death claims have been held to be arbitrable.²⁷

¹⁷ Leslie, C. R. The Arbitration Bootstrap, 94 *Texas Law Review*, pp. 300–301.

¹⁸ Szalai, I. S. Exploring the Federal Arbitration Act through the Lens of History, 2016 *Journal of Dispute Resolution*, p. 118.

¹⁹ Frankel, R. The Arbitration Clause as Super Contract. *Washington University Law Review*, 2014, 91(3), p. 531.

²⁰ *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1 at 24–25.

²¹ *Southland Corp. v. Keating*, 465 U.S. 1, 1984; *Perry v. Thomas*, 482 U.S. 483, 1987.

²² *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283, 1995, (O’Connor, J., concurring).

²³ *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 477, 2015 (Ginsburg, J., dissenting).

²⁴ *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 1991. See also *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 1989 (Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 1987 (Racketeer Influenced and Corrupt Organizations Act).

²⁵ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 1995.

²⁶ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 2011.

²⁷ *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 2012. The lower courts have been more receptive to keeping wrongful death claims from arbitration. See, e.g., *Richmond Health Facilities v. Nichols*, 811 F.3d 192, 6th Cir. 2016; *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695, Miss. 2009; *Lawrence v. Beverly Manor*, 273 S.W.3d 525, Mo. 2009.

The transformative impact of the Supreme Court arbitration jurisprudence is sometimes overlooked. Jean R. Sternlight, the leading scholar on pre-dispute arbitration clauses, has written with great prescience about arbitration in America. She noted in 1996 that the Supreme Court instead of protecting consumers was “itself leading the revolutionary transition from litigation to mandatory binding private arbitration.”²⁸ With each pro-arbitration opinion issued by the Supreme Court in the 1970s and 1980s, businesses “jumped on the opportunity to compel arbitration in contexts where they previously thought arbitration agreements would not be enforced.”²⁹ Pre-dispute arbitration clauses have become ubiquitous in consumer transactions and employment contracts.³⁰

3. Nursing Home Litigation

If a party files a lawsuit against a nursing home and there is an underlying agreement that contains an arbitration clause, the nursing home can file a motion to compel arbitration. In cases governed by the Federal Arbitration Act, the party resisting enforcement of the arbitration clause has limited grounds. The FAA only allows challenges that “exist a law or in equity for the revocation of any such contract.”³¹ Common challenges to arbitration clauses in nursing home litigation are unconscionability and lack of capacity.³² Most courts have been unreceptive to challenges to arbitration clauses based upon unconscionability.³³

The common-law doctrine of unconscionability has two aspects: procedural unconscionability and substantive unconscionability. Procedural unconscionability refers to the circumstances surrounding the adoption of the arbitration clause. Substantive unconscionability refers to the fairness of the arbitration provision itself.³⁴ Substantive unconscionability exists when the arbitration clauses creates barriers to the consumers pursuing their claims in arbitration. The United States Supreme Court in 2000 addressed the issue of whether an arbitration agreement is unenforceable if it says nothing about the costs of arbitration, thus failing to provide protection the consumer from “potentially substantial costs.” The court held that the mere “risks” of large arbitration costs “is too speculative to justify the invalidation of an arbitration agreement.”³⁵ Courts have since routinely rejected challenges to arbitration based on speculative costs.³⁶ Occasionally, the party resisting arbitration is able to provide sufficient proof that “the cost of the proposed arbitration was so prohibitive as to render the arbitration agreement substantively unconscionable.”³⁷

²⁸ Sternlight, J. R. Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration. *Washington University Law Quarterly*, 1996, 74(3), p. 637. The supreme court's arbitration jurisprudence is part of a larger trend to make citizens' access to courts more difficult. See Chemerinsky, E. *Closing the Courthouse Door: How Your Constitutional Rights Became Unenforceable*. New Haven, CN: Yale University Press, 2017.

²⁹ Sternlight, J. R. Creeping Mandatory Arbitration: Is It Just?. *Stanford Law Review*, 2005, 57(5), p. 1631.

³⁰ Leslie, C. R. The Arbitration Bootstrap, *Texas Law Review*, 94, pp. 269–270.

³¹ 9 U.S.C. § 2.

³² Bailey, L. A. et al. Combating Abusive Arbitration Clauses in Nursing Home Contracts, *Trial Trends* p. 18.

³³ Schmitz, A. American Exceptionalism in Consumer Arbitration, *Loyola University Chicago International Law Review*, 10, pp. 93–94.

³⁴ *In re Halliburton Company*, 80 S.W.3d 566, 571, Tex. 2002.

³⁵ *Green Tree Financial Corp.- Alabama v. Randolph*, 531 U.S. 79, 2000.

³⁶ See, e.g., *In re Olshan Foundation Repair Company, LLC*, 328 S.W.3d 883, Tex. 2010; *In re FirstMerit Bank*, 52 S.W.3d 749, Tex. 2001.

³⁷ *Olshan Foundation Repair Company v. Ayala*, 180 S.W.3d 212, Tex. App. – San Antonio 2005.

Lack of capacity is another common defense to the enforceability of arbitration clauses often found in nursing home cases. At the time of the signing of the admission documents containing an arbitration agreement, the future nursing home resident is of advanced age and likely diminished capacity.³⁸ The Centers for Disease Control and Prevention recently estimated that over a half of nursing home residents suffer from Alzheimer's disease or other dementias.³⁹ The ability to understand the significance of the contract generally or the arbitration clause specifically is almost invariably in question. But a threshold issue exists: does the court or does the arbitrator decide the lack of capacity issue? This question has not been addressed by the United States Supreme Court, and there is a split in the federal courts of appeals.⁴⁰

In 1967, the United States Supreme Court addressed the issue whether the court or arbitrator should resolve a claim of fraud in the inducement of the contract. The Supreme Court held that the arbitrator, not the trial judge, should resolve a claim that the contract was induced by fraud. Section 4 of the FAA limits a court's review to those matters concerning "the making of the arbitration agreement."⁴¹ A claim that the arbitration clause itself was induced by fraud would be decided by the court.⁴² The arbitration clause is considered "separable" from the rest of the contract.

When faced with a challenge to the enforceability of an arbitration clause, courts would determine whether the party was challenging the validity of the contract as a whole, which would be decided by the arbitrator, or was challenging the validity of the arbitration clause itself, which would be decided by the court.⁴³ In 2006, the United States Supreme Court held that a challenge to a motion to compel arbitration that was based upon the illegality of the contract would be for the arbitrator to decide.⁴⁴ The Supreme Court reaffirmed the rule that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." However, in a footnote, the court reserved the question of whether the trial court or the arbitrator would decide a challenge based upon whether any agreement was ever concluded in the first place. The court gave three examples of contract formation issues: whether the obligor ever signed the contract; whether the signer lacked authority to bind the principal; and "whether the signer lacked the mental capacity to assent." As the Texas Supreme Court has noted, "Several courts have read *Buckeye* to add a third discrete category to the *Prima Paint* analysis." The third category includes "a challenge to whether any agreement was ever

³⁸ *Bagby, K. & Souza, S.* Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts. *Journal of Contemporary Health Law & Policy*, 2013, 29(2), p. 183.

³⁹ Long-Term Care Providers and Services Users in the United States: Data from the National Study of Long-Term Care Providers, 2013–2014, In: 40, *Vital and Health Statistics*, Series 3, No. 38, Feb. 2016, National Center for Health Statistics, Centers for Disease Control and Prevention, U. S. Dep't of Health and Human Services.

⁴⁰ *Smith, A.* You Can't Judge Me: Mental Capacity Challenges to Arbitration Provisions. *Baylor Law Review*, 2004, 56(3), p. 1051.

⁴¹ 9 U.S.C. §4.

⁴² *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 1967.

⁴³ *Egle, A. V.* Back to *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*: To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement. *Washington Law Review*, 2003, 78(1), 199.; see also *In re Morgan Stanley & Co., Inc.* 293 S.W.3d 182, 187, Tex. 2009.

⁴⁴ *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 2006.

concluded.⁴⁵ The majority of courts have decided that this is a threshold issue for the court.⁴⁶

A good example of a nursing home case involving lack of capacity is *Rowan v. Brookdale Senior Living Communities, Inc.* There, the plaintiff Rowan was injured when he wandered away from an assisted living facility. He sued the facility for gross negligence and fraud. The facility moved to compel arbitration, and Rowan's lawyers argued that he lacked capacity when he signed the residency agreement the day he moved into the facility. The court noted that under Michigan law, contracts were presumed to be legal, valid, and enforceable and this presumption included "the assumption that the individuals signing a contract were mentally competent at the time of signing. "moreover, the party resisting enforcement of the contract bears the burden of proving he or she lacked the legal capacity to contract. The court ruled that Rowan was unable to show that he lacked capacity to enter into the contract."⁴⁷

Other cases involve instances where the arbitration agreement eliminates the remedies available to consumers or awards attorney fees to the prevailing parties (very few American laws allow such fee-shifting "loser pays" provisions).⁴⁸ These provisions would be considered substantively unconscionable. According to Article 2 of the Uniform Commercial Code, when any clause has been found to be unconscionable, the court "may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."⁴⁹ In the arbitration setting, the trend appears to be for courts to strike the offending provision and compel arbitration rather than hold that the arbitration agreement is wholly unenforceable.⁵⁰

In *Covenant Health Rehab of Picayune, L.P. v. Brown*, the Supreme Court of Mississippi reversed the trial court's determination that an arbitration provision was substantively unconscionable. The plaintiffs had filed a wrongful death lawsuit against a convalescent center. The defendants filed a motion to compel arbitration; the plaintiffs then filed a motion seeking a declaration that the admissions agreement was unconscionable and void. The trial court struck clauses that limited liability and punitive damages, waived liability for criminal acts of individuals, required that resident to forfeit all claims except for willful acts, and stipulated that the resident pay for all costs of enforcing the agreement if the resident challenged either the grievance resolution process or an award resulting from that process. The supreme court affirmed the trial court's determination that these provisions were unconscionable; however, it reversed the trial court's finding that the arbitration provision was unenforceable because of these provisions. The supreme court instead chose to enforce "the remainder of the contract without the unconscionable clause."

⁴⁵ *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 187, Tex. 2009.

⁴⁶ *See, e.g., In re Morgan Stanley & Co.*, 293 S.W.3d 182, 187, Tex. 2009; *Spahr v. Secco*, 330 F.3d 1266, 10th Cir. 2003; *Rowan v. Brookdale Living Communities, Inc.* No. 1:13-cv-1261, W. D. Mich., 1 June 2015; *Amirmotazedi v. Viacom, Inc.*, 768 F. Supp. 2d 256, D. D. C. 2011; but see *Primerica Life Insurance Co. v. Brown*, 304 F.3d 469, 472, 5th Cir. 2002.

⁴⁷ *Rowan v. Brookdale Senior Living Communities, Inc.*, No. 1:13-cv-1261, W. D. Mich., 1 June 2015.

⁴⁸ *Bailey, et al. Combating Abusive Arbitration Clauses in Nursing Home Contracts*, *Trial Trend*, pp. 27–28.

⁴⁹ Uniform Commercial Code §2-302.

⁵⁰ *See, e.g., In re Poly-America, L.P.*, 262 S.W.3d 337, Tex. 2008; *Venture Cotton Cooperative v. Freeman*, 435 S.W. 3d 222, Tex. 2014.

Under Mississippi law, if a court struck part of an agreement as void, the rest of the contract remained enforceable.⁵¹

4. Federal Preemption

With the proliferation of arbitration clauses in the 1980s, state legislatures have taken steps to regulate the use of arbitration clauses.⁵² The states have used two different approaches. Some states generally regulated arbitration clauses, typically by mandating notice requirements. Nebraska, for example, required certain language to appear in contracts with an arbitration clause:

*“The following statement shall appear in capitalized, underlined type adjoining the signature block of any standardized agreement in which binding arbitration is the sole remedy for dispute resolution: THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.”*⁵³

Vermont required an “acknowledgment of arbitration” that each party must sign, acknowledging that the party will not be able to bring a lawsuit over any disputes covered by the arbitration provision.⁵⁴ Rhode Island required the arbitration provision be placed “immediately before the testimonium clause or the signature of the parties.”⁵⁵ Montana similarly mandated “notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.”⁵⁶ Texas created a “consumer exception” that exempted from arbitration agreements involving “the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than \$50 000,” unless “the agreement is signed by each party and each party’s attorney.”⁵⁷ Tennessee required that the arbitration clause be “additionally signed or initialed by the parties” in contracts relating to farm property or residential property.⁵⁸

The second approach was to proscribe arbitration in specific situations such as nursing home agreements. This approach was taken by state legislatures in California, Illinois, Oklahoma, and West Virginia. For example, a provision in the California Long-Term Care, Health, Safety, and Security Act provides, “An agreement by a resident or patient of a skilled nursing facility or intermediate care facility to waive his or her rights to sue pursuant to this subdivision shall be void as contrary to public policy.”⁵⁹

These state attempts at regulating arbitration clauses in nursing home contracts must pass muster under the “Supremacy clause” of the United States Constitution. The Constitution declares that the Constitution and “the Laws of the United States”

⁵¹ *Covenant Health & Rehabilitation of Picayune, LP v. Brown*, 949 So. 2d 732, pp. 740–741, Miss. 2007.

⁵² *Schleppenbach, J. R.* Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes between Nursing Homes and their Residents. *Elder Law Journal*, 2014, 22(1), p. 141.

⁵³ Nebraska Revised Statutes § 25-2602.02.

⁵⁴ Vermont Statutes § 5652.

⁵⁵ Rhode Island Statutes § 10-3-2.

⁵⁶ Montana Code Annotated § 27-5-114(4), 1995. This provision was repealed in 1997.

⁵⁷ Texas Civil Practice & Remedies Code § 171.002 (a), (c).

⁵⁸ Tennessee Code Ann. § 29-5-302.

⁵⁹ California Health & Safety Code § 1430.

are “the Supreme Law of the Land.”⁶⁰ Consequently, state laws may be preempted by federal ones. In *Southland Corp. v. Keating*, the United States Supreme Court held that section 2 of the FAA applied to state courts.⁶¹ The California Supreme Court had interpreted the California Franchise Investment law to require courts, not arbitrators, to consider claims brought under that statute and refused to enforce the parties’ pre-dispute arbitration agreement. The United States Supreme Court reversed the California Supreme Court, holding that the California law “so interpreted” directly conflicted with the FAA and violated the Supremacy Clause. This 1984 decision has had a far-reaching impact, causing a “seismic shift from the FAA as a simple procedural statute for enforcing arbitration agreements in federal court to a major intrusion upon the police powers of the states.”⁶² As Sarah Rudolph Cole has explained, the Supreme Court has “developed a preemption doctrine that effectively precludes states from regulating arbitration because the Court nullifies state laws or judicial decisions that are inconsistent with either the policy underlying or the language” of the FAA.⁶³ A number of state statutes are now subject to preemption if the FAA applies.⁶⁴ The FAA typically will apply when interstate commerce is involved, and nursing home litigation usually involves interstate commerce.⁶⁵ State legislature’s attempts to regulate arbitration clauses generally or nursing home arbitration clauses specifically have run afoul of the Supremacy Clause. Courts routinely strike down such laws under the preemption doctrine.⁶⁶

The United States Supreme Court has held that such state statutes were preempted by the FAA. Montana law declared that arbitration clauses were unenforceable unless notice that the contract was subject to arbitration was “typed in underlined capital letters on the first page of the contract.”⁶⁷ The Montana Supreme Court refused to enforce an arbitration clause in a franchise agreement

⁶⁰ U.S. Constitution art. VI, Cl. 2.

⁶¹ *Southland Corp. v. Keating*, 465 U.S. 1, 1984.

⁶² *Moses, M. L. Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress. Florida State University Law Review*, 2006, 34(1), p. 99.

⁶³ *Cole, S. R. The Federalization of Consumer Arbitration: Possible Solutions. University of Chicago Legal Forum*, 2013, p. 271.

⁶⁴ *Ware, S. J., Arbitration and Unconscionability after Doctor’s Associates, Inc. v. Casarotto. Wake Forest Law Review*, 1996, 31(4), p. 1011 n. 72. Ware lists statutes from 22 states imperiled by the United States Supreme Court decisions on the FAA and preemption.

⁶⁵ As the Kentucky Supreme Court has noted in a nursing home case: The Federal Act applies to arbitration provisions in contracts “evidencing a transaction involving [interstate] commerce,” 9 U.S.C. § 2, and almost certainly applies here. Congress’s commerce power is interpreted broadly, and “may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice [...] subject to federal control.” *Citizens Bank v. Alafabco, Inc.*, 539 U.S. pp. 52, 56–57, 2003. The Supreme Court has held that health care is one such activity. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 1991 (hospital’s purchase of out-of-State medicines and acceptance of out-of-State insurance establish interstate commerce). Several courts, moreover, have applied the FAA to arbitration provisions in nursing home admission contracts. See, e.g., *Cook v. GGNSC Ripley, LLC*, 786 F.Supp.2d 1166, N.D. Miss. 2011; *Carter v. SSC Odin Operating Company, LLC*, 353 Ill. Dec. 422, 955 N.E.2d 1233, 2011; *Barker v. Evangelical Lutheran Good Samaritan Society*, 720 F.Supp.2d 1263, D.N.M. 2010; *Estate of Eckstein v. Life Care Centers of America, Inc.*, 623 F.Supp.2d 1235, E.D. Wash. 2009; *Triad Health Management of Ga., III, LLC v. Johnson*, 298 Ga. App. 204, 679 S.E.2d 785, 2009. *Ping v. Beverly Enterprises, Inc.*, 376 S.W. 3d 581, pp. 589–590, Ky. 2012; see also *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69, Tex. 2005 (Medicare funds crossing state lines constitute interstate commerce).

⁶⁶ *Moses, Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress, Florida State University Law Review*, 34, pp. 132–138.

⁶⁷ Montana Code Annotated § 27-5-114(4), 1995.

because the agreement lacked the required notice⁶⁸ The United State Supreme Court reversed. The Supreme Court held that arbitration agreements may not be invalidated “under state laws applicable only to arbitration provision.” The court noted that section 2 of the FAA only permits “generally applicable contract defenses, such as fraud, duress, or unconscionability” to be applied to invalidate arbitration agreements.⁶⁹

Lower federal courts and state appellate courts also have held that the FAA preempts state statutes. The Texas legislature has passed two statutes that regulate arbitration agreements; the Texas Supreme Court has held that both statutes are preempted by the FAA. The Texas Arbitration Act does not allow arbitration clauses to be enforceable in personal injury claims unless “the agreement is signed by each party and each party’s attorney.”⁷⁰ The Texas Supreme Court held that FAA (when applicable) preempts the Texas law because it “interferes with the enforceability of the arbitration agreement by adding an additional requirement – the signature of a party’s counsel – to arbitration agreements in personal injury cases.”⁷¹

In a wrongful death lawsuit against a nursing home, the Texas Supreme Court held that the FAA preempted the Texas Medical Liability Act’s provisions on arbitration. The TMLA requires an agreement to arbitrate a healthcare liability claim contain a written notice in bold-type, ten-point font that stated the agreement contains a waiver of important legal rights, including the right to a jury, and the patient should not sign the agreement without first consulting an attorney.⁷² The Texas Supreme Court held that the FAA preempted this provision because the underlying patient-provider transaction involved interstate commerce.⁷³

The Nebraska Supreme Court also held that the FAA preempted a Nebraska statute that required a notice about arbitration above the signature line in any agreement. The court concluded that it had “to yield to the precedent set by the Court’s holding in *Doctor’s Associates, Inc.* We hold that the FAA preempts § 25-2602.02 for the contract.”⁷⁴ The Illinois Supreme Court reached the same conclusion about the Illinois Nursing Home Care Act: “the antiwaiver provisions of the Nursing Home Care Act relied upon by the plaintiff are legally indistinguishable from the provisions struck down by the [United States] Supreme Court.”⁷⁵

The United States Supreme Court also has struck down state common-law rules because of the FAA’s preemptive effect. While the FAA provides for the revocation of arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract,” the Supreme Court has nonetheless held that judge-made rules “that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”⁷⁶ In *AT&T Mobility LLC v. Concepcion*, the Supreme Court addressed a California Supreme Court rule establishing an arbitration-specific framework for analyzing unconscionability. The “*Discover*

⁶⁸ *Burnham, S. J.* The War Against Arbitration in Montana. *Montana Law Review*, 2005, 66(1), p. 139.

⁶⁹ *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 1996.

⁷⁰ Texas Civil Practice & Remedies Code §171.002 (c).

⁷¹ *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, Tex. 2005.

⁷² Texas Civil Practice & Remedies Code § 74.451.

⁷³ *The Fredericksburg Care Company, L.P. v. Perez*, 461 S.W.3d 513, Tex. 2015.

⁷⁴ *Aramark Uniform & Career Apparel, Inc. v. Hunan, Inc.*, 757 N.W.2d 205, 212, Nebraska, 2008; see also *Affiliated Foods Midwest Coop., Inc. v. Integrated Distribution Solutions*, 460 F. Supp. 2d 1068, D. Nebraska, 2006.

⁷⁵ *Carter v. SSC Odin Operating Co., LLC*, 927 N.E. 2d 1207, 1218, Ill. 2010.

⁷⁶ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 2011.

Bank Rule” rendered class-action waivers in arbitration clauses unenforceable, where a “consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”⁷⁷ Justice Scalia, for the majority, held that the *Discover Bank* rule was displaced by the FAA, because California courts were applying the rule “in a fashion that disfavors arbitration.” While the FAA’s saving clause “preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s obstacles.”⁷⁸

The United States Supreme Court also has rejected the West Virginia Supreme Court of Appeals’ common-law rule that, as a matter of public policy, all pre-dispute arbitration agreements that apply to personal injury or wrongful death claims against nursing homes were unenforceable. Interestingly, the West Virginia high court held that the state statute that prohibited arbitration in nursing home agreements was indeed preempted. However, the court asserted that its common-law rule was not affected by preemption because of the FAA’s savings clause.⁷⁹ In a *per curiam* opinion, the United States Supreme Court vacated the West Virginia opinion. Relying upon *Concepcion*, the Supreme Court rejected West Virginia court’s “categorical rule prohibiting arbitration of a particular type of claim.”⁸⁰

This term, the United States Supreme Court again addressed the issue whether a common-law rule is preempted by the FAA in an appeal involving nursing homes. The Kentucky Supreme Court held in 2012 that an agent appointed by a power of attorney cannot bind his or her principal to an arbitration agreement unless the power of attorney expressly authorized such authority. General provisions regarding management of property and financial affairs and decisions about health care do not encompass an agreement to arbitrate.⁸¹ In 2015, the Kentucky high court reiterated its holding in three consolidated appeals involving wrongful death claims against nursing homes. The court held that a power of attorney required a “clear and convincing manifestation” of the principal’s intent to delegate the authority to waive the right to trial by jury.⁸²

The Supreme Court reversed, because the Kentucky clear-statement rule violated the FAA by singling out arbitration agreements for “disfavored treatment.” Citing *Concepcion*, Justice Kagan noted that “a court may invalidate an arbitration agreement based on ‘generally applicable contract defenses’ like fraud or unconscionability, but not on legal rules that ‘apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’” The FAA preempts “any state rule discriminating on its face against arbitration.” The Kentucky rule failed “to put arbitration agreements on an equal plane with other contracts.” Instead the Kentucky Supreme Court directed the clear-statement rule to safeguard the “divine God-given right” of trial by jury. The rule was “too

⁷⁷ *Discover Bank v. Superior Court*, 113 P.3d 1100, Cal. 2005.

⁷⁸ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 2011.

⁷⁹ *Brown v. Genesis Healthcare Corp.*, 724 S.E. 2d 250, 282, W. Va. 2011, *vacated sub nom. Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 2012.

⁸⁰ *Marmet Health Center Inc. v. Brown*, 132 S. Ct. 1201, 1203, 2012.

⁸¹ *Ping v. Beverly Enter., Inc.*, 376 S.W. 3d 581, Ky. 2012.

⁸² *Extencicare Homes, Inc. v. Whisman*, 478 S.W. 3d 306, Ky. 2015; *judgment rev'd in part, vacated in part sub nom. Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 2017.

tailor-made to arbitration agreements” to survive the proscription “against singling out those contracts for disfavored treatment.”⁸³

The court also rebuffed the respondents’ attempt to create a distinction between contract formation and contract enforcement. The respondents argued, in vain, that states had free rein to decide whether are validly created in the first place. The court concluded, “A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.”⁸⁴

All was not lost for one of the respondents. For one of the respondents, the matter was over: their power of attorney was sufficiently broad to cover executing an arbitration agreement. However, the Kentucky Supreme Court had said that the other respondents’ power of attorney was insufficiently broad to execute an arbitration agreement. That left open the possibility that the arbitration clause was not enforceable regardless of the Supreme Court’s opinion. The Court reasoned that if the Kentucky’s court was “wholly independent of the court’s clear-statement rule, then nothing we have said disturbs it.”⁸⁵

5. Nursing Home Arbitration Clauses and the U. S. Congress

After the passage of the FAA in 1925, the United States Congress paid relatively little attention to arbitration until 2002. A special-interest group, the National Automobile Dealers Association, was responsible for the passage of a law that year that shielded care dealerships from arbitration agreements with automobile manufacturers. This “special-interest exemption” reflected the “considerable political clout of the motor vehicle lobby.”⁸⁶

Other federal laws belie a strong federal policy in favor of arbitration. The Talent-Nelson Military Lending Act, enacted in 2006, prohibited arbitration clauses in “consumer credit” agreements extended to service members and their dependents.⁸⁷ In a final rule issued on July 22, 2015, the Defense Department broadened the range of applicable credit products that were prohibited from requiring arbitration or imposing “other onerous legal notice provisions in the case of a dispute.”⁸⁸ The Defense Department in 2010 also prohibited military contractors from requiring its employees or independent contractors to arbitrate civil rights violations or “any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.”⁸⁹ The Dodd-Frank Wall Street Reform and

⁸³ *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S.Ct. 1421, 1425, 1427, 2017.

⁸⁴ *Ibid.* at 1428.

⁸⁵ *Ibid.* at 1429.

⁸⁶ *Chiappa, C. J., Stoelting, D.* Tip of the Iceberg? New Law Exempts Car Dealers from Federal Arbitration Act. *Franchise Law Journal*, 2003, 22(4), p. 219.

⁸⁷ 10 U.S.C. § 987 9(f)(4). The law provides, “Notwithstanding section 2 of title 9[FAA], or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.”

⁸⁸ Defense Department, Limitations on Terms of Consumer Credit Extended to Service Members and Dependents: Final Rule, Federal Register 43559, 43599, 43611, 22 July 2015.

⁸⁹ 48 C.F.R. 252.222-7006.

Consumer Protection Act of 2010 amended the Truth in Lending Act by prohibiting mandatory arbitration clauses from residential mortgage loans.⁹⁰

More comprehensive reform of arbitration law has not been forthcoming. Although Democrats tend to oppose mandatory pre-dispute arbitration clauses in consumer or employment contracts, the failure of Democratic-controlled Congresses to pass arbitration legislation may indicate that Jean R. Sternlight accurately described how the American approach to arbitration “represents the unusual ability of United States corporate interests to control public policy in our country.”⁹¹

In the 110th Congress, identical “arbitration fairness” bills were introduced by Democratic legislators in the House and Senate.⁹² The stated purpose of the bills was to amend the Federal Arbitration Act because of the U.S. Supreme Court decisions that “changed the meaning of the act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes.” The bills contained “findings” that explained the underlying rationale of the proposed legislation. Each bill stated:

- (1) *The Federal Arbitration Act [...] was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.*
- (2) *A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.*
- (3) *Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.*
- (4) *Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.*
- (5) *Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review*

⁹⁰ 15 U.S.C. § 1639c(e).

⁹¹ Sternlight, J. R. Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World. *University of Miami Law Review*, 2002, 56(4), p. 831.

⁹² Arbitration Fairness Act of 2007, H.R. 3010, 110th Congress, 2007; Arbitration Fairness Act of 2007, S. 1782, 110th Congress, 2007; see generally, Alderman, Richard. Why We Really Need the Arbitration Fairness Act: It's About Separation of Powers. *Journal of Consumer & Commercial Law*, 2009, 12(3), p. 151.

of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.

- (6) *Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.*
- (7) *Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.*⁹³

The bills were unsuccessful, despite Democrats having control of both the Senate and House.

After the 2008 election, when Barack Obama was elected president and Democrats gained seats in both houses, many observers predicted changes to the FAA that would reverse the Supreme Court's pro-business expansion of the FAA.⁹⁴ That change failed to come in the 110th Congress. "Arbitration Fairness" bills filed in the 111th Congress did not do any better. That was the last, best hope of amending the FAA as Democrats lost their majority in the House of Representative in the "Tea Party" wave of 2010. Democrats continued to file "Arbitration Fairness" bills in the 112th, 113th, 114th, and 115th Congresses.⁹⁵ In 2017, Democratic Senator Patrick J. Leahy introduced his bill "to restore statutory rights to the people of the United States from forced arbitration."⁹⁶ But none of these bills have yet to reach a vote in either the House or Senate. The furthest any bill has reached was Democratic Senator Al Franken holding a hearing on his version of the "Arbitration Fairness" bill in the 112th Congress.⁹⁷

⁹³ Arbitration Fairness Act of 2007, H.R. 3010, 110th Congress, 2007; Arbitration Fairness Act of 2007, S. 1782, 110th Congress, 2007.

⁹⁴ See, e.g., Knapp, C. L. Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device, *San Diego Law Review*, 46, pp. 618–619; Tripp, L. A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts, *Campbell Law Review*, 31, pp. 166–167.

⁹⁵ Arbitration Fairness Act of 2017, H.R. 1374, 115th Congress, 2017; Arbitration Fairness Act of 2017, S. 537, 115th Congress, 2017; Arbitration Fairness Act of 2015, H.R. 2087, 114th Congress, 2015; Arbitration Fairness Act of 2015, S. 1133, 114th Congress, 2015; Arbitration Fairness Act of 2013, H.R. 1844, 113th Congress, 2013; Arbitration Fairness Act of 2013, S. 878, 113th Congress, 2013; Arbitration Fairness Act of 2011, H.R. 1873, 112th Congress, 2011; Arbitration Fairness Act of 2011, S. 987, 112th Congress, 2011.

⁹⁶ Bill to restore statutory rights to the people of the United States from forced arbitration, S. 550, 115th Congress, 2017.

⁹⁷ The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses? Hearing Before the Committee on the Judiciary, United States Senate, 113th Congress, 17 Dec. 2013, Serial No. J–113–44.

The 110th Congress also saw the introduction of bills that specifically addressed nursing home arbitration clauses.⁹⁸ Representative Linda Sanchez, a Democrat from California, introduced the “Fairness in Nursing Home Arbitration Act” in the House of Representatives. The bill had 23 cosponsors, all but one were Democrats. The Senate version of the bill had some bipartisan support – the bill was introduced by Mel Martinez, a Republican from Florida, and Herb Kohl, a Democrat from Wisconsin. Martinez represented a state with a large number of retirees (Florida is commonly known as “God’s waiting room”). The only Republican cosponsor in the House was also from Florida.

Senators Martinez and Kohl gave statements on the floor of the Senate when they introduced the bill. Martinez noted an unsettling trend among nursing homes of “an unwarranted intrusion into a vulnerable population’s right to access the civil justice system.” Martinez wanted to prohibit any arbitration agreement that was made before the dispute arose. Senator Kohl pointed out how the proposed law was a “narrowly targeted measure that protects nursing home residents, one of our Nation’s most vulnerable populations.” Kohl stressed how the nursing home admissions process was a “stressful and emotional event” where “prospective residents and their families were given little choice other than to accept the terms of the admission agreement with no ability to negotiate.”⁹⁹ Both House and Senate bills declared “pre-dispute arbitration agreements” in nursing home contracts to be invalid and unenforceable.

Hearings were held in both the House and Senate. The subsequent Senate and House reports sounded nearly identical themes. The Senate Report announced the purpose of the bill as protecting “vulnerable nursing home residents and their families from unwittingly agreeing to pre-dispute mandatory arbitration, thus signing away their right to go to court.” The report also detailed the circumstances surrounding nursing home admissions.

“The nursing home admission process is emotional and traumatic for prospective residents and their families. The decision to enter a facility is made either immediately after a medical emergency, when an elderly person is no longer able to care for himself or herself, or when a family reluctantly acknowledges that they are no longer able to provide the level of care that their loved one needs. During the admissions process, residents or their caretakers face a blizzard of forms that must be signed in order to gain admission. Prospective residents that suffer from cognitive or physical impairments may have limited ability to read or understand arbitration agreements, much less the significant consequences that those agreements may have in the future. Family members admitting a loved one are focused solely on finding the best possible care, and not on the legal technicalities of arbitration.”¹⁰⁰

The report also contained “Minority Views” from Republican Senators Jon Kyl (Arizona), Jeff Sessions (Mississippi), and Tom Coburn (Oklahoma). These senators expressed standard Republican fare. They attacked the bill as coming “straight from the trial bar’s legislative agenda.” The proposed bill, if passed, would subject nursing homes “to a litigation environment of trial-lawyer-driven class actions and

⁹⁸ Fairness in Nursing Home Arbitration Act of 2008, S. 2838, 110th Congress, 2008; Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Congress, 2008.

⁹⁹ Congressional Record Senate, 9 April 2008, S2819–S2820.

¹⁰⁰ Senate Report 110–518, at 2–3, 110th Congress.

extreme jury awards.”¹⁰¹ (Republicans for all their fealty to the Constitution are very suspicious of jury trials, a right guaranteed in the Constitution.) The House Report expressed the same partisan points of view: the majority, composed of Democrats, extolled the virtues of the proposed legislation while the minority, composed of Republicans, warned of its dangers.¹⁰² These minority views in the respective committees prevailed in Congress. Neither bill was even voted on in either chamber.

The bills were introduced again in the 111th Congress. They fared no better the second time around despite the gains made by the Democratic Party in the 2008 elections. Representative Sanchez’s bill gained an additional eight cosponsors. But neither bill made it out of committee. In the following session of Congress, in which Tea Party Republicans gained control of the House by picking up 63 seats, Representative Sanchez was joined by only three cosponsors after having 31 cosponsors two years before. No Senate bill was introduced.¹⁰³

6. Nursing Home Arbitration Clauses and Administrative Regulation

The different approaches to arbitration by Democrats and Republicans are reflected in executive orders and administrative regulations promulgated during the Obama Administration and actions already taken by the Trump administration to undo those efforts. For example, President Obama issued an executive order in 2014 that, among other things, declared agreements to arbitrate civil rights or certain tort claims involving companies with procurement contracts exceeding \$1 000 000 USD could “only be made with the voluntary consent of employees or independent contractors after such disputes arise.”¹⁰⁴ The Department of Defense, General Services Administration, and NASA then issued new rules amending federal procurement regulations to implement the executive order in August 2016.¹⁰⁵ The 115th Congress, now aggressively using the Congressional Review Act, acted to overturn the new regulations.¹⁰⁶ The regulations that were disapproved by Congressional resolution addressed more than arbitration clauses. Interestingly, only Democrats mentioned how the resolution affected the regulations concerning arbitration. For example, Representative Suzanne Bonamici decried how the resolution “would also remove critical protections for workers that allow them to access our judicial system. [...]Workers deserve the opportunity to have their day in court to seek justice for their sexual assault and discrimination claims.” Representative Hank Johnson argued, “[T]he Fair Pay and Safe Workplaces executive order required Federal contractors to give employees their day in court. By doing away with this order, the new administration is subjecting workers to forced arbitration, which is a private and fundamentally unfair process[...] Equal access

¹⁰¹ Senate Report 110–518, at 19–24, 110th Congress.

¹⁰² House Report 110–894, at 2–6, 19–27, 110th Congress.

¹⁰³ Fairness in Nursing Home Arbitration Act of 2009, S. 512, 111th Congress, 2009; Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Congress, 2009; Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Congress, 2012.

¹⁰⁴ Executive Order – Fair Pay and Safe Workplaces. 31 July 2014. Available at <https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces> [last viewed 14.08.2017].

¹⁰⁵ Department of Defense, General Services Administration, National Aeronautics and Space Administration, Federal Acquisition Regulation, 81 Federal Register 58562, 25 Aug. 2016.

¹⁰⁶ Congressional Review Act, 5 United States Code § 801 et seq.; House Joint Resolution 37, 115th Congress, 131 Statutes at Large 75, 2017.

to justice for all should not be an aspiration but a guarantee for all Americans.”¹⁰⁷ The Republicans in Congress prevailed, and President Trump also issued an executive order that revoked President Obama’s executive order on fair pay and safe workplaces.¹⁰⁸

The Obama administration also issued regulations prompted by explicit delegation by Congress. The Department of Education issued a final rule in November 2016 that prohibited schools to participate in the direct loan program from using pre-dispute arbitration agreements for claims by borrowers against the schools.¹⁰⁹ The effective date of that rule, along with others protecting borrowers, has been postponed by the new administration.¹¹⁰ The only Obama administration regulation on arbitration that has not been upended or delayed by the Trump administration is the Department of Labor rule issued in April 2016 that prohibited financial advisors from using class-action waivers in arbitration clauses.¹¹¹

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 directed the newly-formed Consumer Financial Protection Bureau to study “the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services” and gave the Bureau the authority to “prohibit or impose conditions or limitation” on the use of such arbitration clauses.¹¹² The CFPB issued a preliminary report on arbitration three years later. It found that arbitration clauses are commonly used by large banks in credit card and checking account agreements. It also found that roughly 9 out of 10 clauses allow banks to prevent consumers from participating in class actions.¹¹³ The CFPB issued a final report in 2015.¹¹⁴ In 2016, the CFPB issued a proposed rule that would prohibit arbitration clauses in covered agreements from containing class-action waivers. The proposed rule would require language that stated, “We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it.”¹¹⁵

¹⁰⁷ 163 Congressional Record H907, H911, H913, daily edition 2 Feb. 2017.

¹⁰⁸ Executive Order – Revocation of Federal Contracting Executive Orders, 27 March 2017. Available at <https://www.whitehouse.gov/the-press-office/2017/03/27/presidential-executive-order-revocation-federal-contracting-executive> [last viewed 05.08.2017].

¹⁰⁹ Department of Education, William D. Ford Federal Direct Loan Program: Final Rule, 81 Federal Register 75926–75927, 76021–76031, 76088, 1 Nov. 2016.

¹¹⁰ Department of Education, Student Assistance General Provisions: Final Rule; Notification of Partial Delay of Effective Dates, 82 Federal Register 27621, 16 June 2017.

¹¹¹ Department of Labor, Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, 81 Federal Register 21089, 21116–21119, 21135–21136, 8 April 2016.

¹¹² Pub. L. 111–203, 124 Statutes at Large 1376, 2010, §1028.

¹¹³ Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 12–15 (12 Dec. 2013). Available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [last viewed 05.08.2017].

¹¹⁴ Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), March 2015. Available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [last viewed 05.08.2017].

¹¹⁵ Consumer Financial Protection Bureau, Proposed Rule on Arbitration Agreements, 81 Federal Register 32829, May 24, 2016. Available at http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf [last viewed 05.08.2017].

The failure of the various Fairness in Nursing Home Arbitration bills to advance in Congress led some advocates to urge an “executive branch solution.”¹¹⁶ The Obama Administration attempted such a solution in 2016. The Centers for Medicare & Medicaid Services in the Department of Health and Human Services promulgated a final rule on 4 October 2016 that included a prohibition on the use of pre-dispute arbitration agreements for any long-term care facility participating in Medicare and Medicaid programs.¹¹⁷ The rule would have a far-reaching effect: 94% of American Nursing Homes are certified to participate in both Medicare and Medicaid programs.¹¹⁸ Initially, CMS in its proposed rule merely required facilities to meet certain criteria when asking residents to resolve disputes by binding arbitration, including requiring the facility to inform the resident that the resident would be waiving his or her right to judicial relief for any potential cause of action. But CMS also solicited comments on whether binding pre-dispute arbitration agreements should be prohibited altogether.¹¹⁹ When CMS promulgated its final rule, it banned the use of pre-dispute arbitration agreements for long-term care facilities. CMS concluded that “it is unconscionable for LTC facilities to demand, as a condition of admission” that residents sign such agreements. CMS explained:

*“[W]e are convinced that requiring residents to sign pre-dispute arbitration agreements is fundamentally unfair because, among other things, it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen.”*¹²⁰

The final rule stated that long-term facilities that participate in Medicare or Medicaid “must not enter into a pre-dispute agreement for binding arbitration with any resident or resident’s representative not require that a resident sign an arbitration agreement as a condition of admission to the LTC facility.”¹²¹

The final rule, which was to go into effect on 28 November 2016, was enjoined by a federal district court on 7 November 2016. The court appeared sympathetic to purpose of the rule, noting that the case “places this court in the undesirable position of preliminarily enjoining a rule which it believes to be based upon sound public policy.”¹²² The court, in fact, began its decision disagreeing with the plaintiff’s argument that “nursing home arbitration is a fast and efficient process.” The court described “the one intractable problem affecting nursing home arbitration, and no others form of arbitration, namely mental competency.” In the court’s experience, many nursing homes obtain signatures from resident “in spite of grave doubt about their mental competency.”¹²³

Despite the court’s misgivings, it granted the preliminary injunction because CMS “will ultimately be held to have presented insufficient justification for banning nursing home arbitration,” even assuming CMS had the authority to take its action. The court also had “considerable skepticism” of the action taken by CMS. While

¹¹⁶ *Tripp, L. A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts, Campbell Law Review*, 2009, 31(2), p. 157.

¹¹⁷ Centers for Medicare & Medicaid Servs., Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Federal Register 68688, 68790–68793, 4 Oct. 2016.

¹¹⁸ *Tripp, L. A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts, Campbell Law Review*, 2009, 31(2), p. 161.

¹¹⁹ 81 Federal Register at 68790.

¹²⁰ *Ibid.* at 68792.

¹²¹ 42 C.F.R. § 483.70 (n) (i).

¹²² *American Health Care Association v. Burwell*, No. 3-16-cv-00233, N.D. Miss., 7 Nov. 2016.

¹²³ *Ibid.*

Congress had expressly granted certain federal agencies the authority to regulate or prohibit the use of arbitration agreements, it had not done so here. The court noted that CMS's statement that it had received a letter from 34 Senators urging the agency act to prohibit pre-dispute arbitration agreements raised concerns that "they were attempting to accomplish by agency *fiat* what they could not accomplish through the legislative process."¹²⁴ In December, CMS instructed State Survey Agency Directors to not enforce the prohibition of pre-dispute arbitration clauses while the court-ordered injunction was in place.¹²⁵

The outcome of this litigation became moot when CMS issued a proposed rule in June 2017 that would remove both the requirement precluding facilities from entering into pre-dispute arbitration agreements and the prohibition against facilities requiring residents to sign arbitration agreements as a condition of admission. CMS made its priorities clear: "[A] ban on pre-dispute arbitration agreements would likely impose unnecessary or excessive costs *on providers*."¹²⁶ CMS did not leave the transaction between the facility and the resident entirely unregulated. The proposed regulation would require that the agreement be explained to the resident or representative in a manner that the resident understands the agreement. The proposed regulation also would require the arbitration provision be in "plain writing." Facilities also would be required to post a notice that describes its policies on using agreements with binding arbitration "in an area that is visible to residents and visitors."¹²⁷ Consumer groups have banded together to form an umbrella organization called the Fair Arbitration Now Coalition that will try to stop the Trump Administration's plan to roll back the Obama Administration rule. Thirty-one Senators also called upon the Trump Administration to not abandon the CMS rule.¹²⁸

Conclusions

In the United States, nursing home residents are a particularly vulnerable population. They are not helped by the pervasive use of pre-dispute binding arbitration clauses in nursing home agreements. Efforts to either effectively regulate or completely prohibit such clauses in nursing home agreements are doomed to failure until Congress legislatively overturns the Supreme Court's erroneous arbitration jurisprudence and restores the Federal Arbitration Act to its originally intended scope, which would not encompass such agreements. That is not happening anytime soon.

¹²⁴ *American Health Care Association v. Burwell*, No. 3-16-cv-00233, N.D. Miss., 7 Nov. 2016.

¹²⁵ Centers for Medicare & Medicaid Servs., Center for Clinical Standards and Quality /Survey & Certification Group, Memorandum to State Survey Agency Directors, S & C: 17-12-NH. 9 Dec. 2016. Available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-12.pdf> [last viewed 05.08.2017].

¹²⁶ Centers for Medicare & Medicaid Services, Proposed Rule, Medicare and Medicaid Programs:

¹²⁷ Long Term Care Facilities: Arbitration Agreements, 82 Federal Register 26649, 26650, 8 June 2017 (emphasis added).

¹²⁷ *Ibid.* at 26651.

¹²⁸ *Morran*, C. 31 Senators Ask Trump Administration to Not Strip Nursing Home Residents, Families of Their Legal Rights. *Consumerist*, 7 Aug. 7, 2017. Available at <https://consumerist.com/2017/08/07/31-senators-ask-trump-administration-to-not-strip-nursing-home-residents-families-of-their-legal-rights/> [last viewed 16.08.2017]; *Wheeler*, L. Fight over right to sue nursing homes heats up. *The Hill*, 6 Aug. 2017. Available at <http://thehill.com/regulation/healthcare/345411-fight-over-right-to-sue-nursing-homes-heats-up> [last viewed 16.08.2017].

This use of pre-dispute arbitration clauses in consumer contracts is an example of American exceptionalism. American exceptionalism is a firmly held belief that America is an example for the world to follow. Ronald Reagan encapsulated this concept as America as a “shining city on a hill.”¹²⁹ Reagan was referencing the Pilgrim settler John Winthrop. Winthrop believed that the Massachusetts Colony would be a city upon a hill. But Winthrop did not have Reagan’s sunny optimism. Winthrop, instead, was full of dread over the prospect that “the eyes of all people” would be upon the Pilgrims. The city on the hill could be a warning, not a promise.¹³⁰ In the use of pre-dispute consumer arbitration clauses, American practice is unique. It is a path the rest of the world should shun.

A Note on United States Sources

Obtaining free access to American legal materials can be a laborious, and sometimes fruitless, task. American case law cited in this article is available through Google Scholar, <<https://scholar.google.com/>>. Federal legislative materials are available at <<https://www.congress.gov/>>. All law journal articles that are posted at SSRN, <<https://www.ssrn.com/en/>>, are marked by an asterisk.

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Regional Challenges in Implementation of European Convention on Human Rights: Lithuanian Perspective¹

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The European region encompasses countries with a different historical past, consequently, entailing a variety of political, legal, and cultural traditions. Despite the general commitment to the same principles, human rights and fundamental freedoms under the European Convention on Human Rights, the actual situation is marked by disputes and different approaches towards the assumed obligations occurring on both the political and constitutional level. The article addresses two main types of challenges concerning the implementation of the Convention on the level covering both the *inter partes* and *erga omnes* effects of the judgments adopted in Strasbourg. The first is the rise of political populism that is usually directed against the European standards of human rights. The second is the insufficient observance of the principle of subsidiarity by the European Court of Human Rights in some cases sensitive to the core elements of national identity of certain states, in particular those from the Central Europe. The lack of understanding of particularities of those states who share the legacy of double totalitarianism can reduce the legitimacy of the ECtHR judgments within those societies and, by the same token, strengthen the anti-European populist ideas. The article deals with the issue how constitutional courts can respond to those challenges and contribute to the implementation of the ECtHR judgments. It provides the example of the Lithuanian Constitutional Court in deciding the landmark cases relevant to the Convention law. From that example one can see that openness and determination to follow the European standards, even though the Constitution provides for its superiority over the Convention law, are the best means to harmonise two legal orders from the national perspective. The article also argues that the application of the European consensus criterion by the ECtHR should be based on a clear methodology and the subsidiary nature of the Convention mechanism should be retained. The proper respect to national, in particular constitutional, jurisdiction without compromising the Convention values is also required in increasing the legitimacy and implementation of the ECtHR judgments.

Keywords: European Convention on Human Rights, principle of subsidiarity, constitutional court, constitutional doctrine, European consensus.

¹ This article was written on the basis of the report delivered on 8 December 2016 at the International Conference “Regional Challenges in Implementation of the European Convention on Human Rights”, which was held at the Constitutional Court of the Republic of Lithuania and organised by the European Humanities University together with the Council of Europe and the Constitutional Court of the Republic of Lithuania.

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Introduction

The European region, covered by the European Convention on Human Rights (hereinafter, – the Convention), encompasses countries with a different historical past. This entails a variety of political, legal, and cultural traditions, existing under the umbrella of principles enshrined in the preamble to the Statute of the Council of Europe² – individual freedom, political liberty, and the rule of law – i.e. the principles that form the basis of all genuine democracy.³ However, it is evident that, despite the general commitment to the same principles and to the maintenance and further realisation of human rights and fundamental freedoms,⁴ the situation “on the ground” is marked by disputes and different approaches towards the particular assumed obligations. For example, it is observed that some founding states of the Council of Europe show certain resistance towards what they perceive as the aspirations of the European Court of Human Rights (thereinafter – the ECtHR) to become a pan-European constitutional court. Such resistance occurs both on the political level, including the ideas concerning the withdrawal from

² Council of Europe. (1949). *Statute of the Council of Europe: London, 5th May, 1949*. London: H.M.S.O. Available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052> [last viewed 02.01.2017].

³ The corresponding intent of the preamble of the Statute of the Council of Europe reads, as follows: “Reaffirming their devotion to the spiritual and moral values, which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy”.

⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Preamble. Available at <http://www.refworld.org/docid/3ae6b3b04.html> [last viewed 28.12.2016].

the Convention (e.g., in the United Kingdom),⁵ and on the constitutional level (e.g., in Italy).⁶

The challenges concerning the implementation of the Convention may be analysed from different perspectives. The following two types of challenges are to be considered in this article. The first type is related to what may be described as the rise of political populism, which is faced now by many of European states, in particular by the Central Europe. It is in this context that constitutional courts gain a particular relevance in responding, at least indirectly, to certain populist ideas by ensuring the openness of national legal systems towards the Convention, as interpreted in the case law of the ECtHR (or the Convention law). The second type of challenges is linked to the insufficient observance of the subsidiarity principle by the ECtHR in some sensitive cases related to the core elements of national identity of certain states. Those types of challenges are interrelated: one can note that sometimes the lack of understanding at the European level of sensitive particularities of certain states may provoke in those societies the ideas directed against the common human rights standards.

The article is focused on the challenges occurring in the Central Europe, in particular on the experience of the Lithuanian Constitutional Court in dealing with the implementation of the Convention law. For the purposes of this article, the notion of implementation covers both the *inter partes* and *erga omnes* effects of the judgments adopted in Strasbourg. As stated by the ECtHR, the Convention is a “constitutional instrument of European public order”.⁷ This implies the *erga omnes* effect – even if indirect – of the ECtHR jurisprudence.

⁵ The Conservative Party. Protecting Human Rights in the UK, 3 October 2014. Available at https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf [last viewed 07.01.2017]. The Conservative Party policy document sets out the proposal to repeal the Human Rights Act 1998 (HRA) and replace it with a British Bill of Rights. The policy document raises the prospect that the UK might withdraw from the European Convention on Human Rights. See also: Lock, T., Dzehtsiarou, K. The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights, 15 May 2015. Available at <http://ohrh.law.ox.ac.uk/the-legal-implications-of-a-repeal-of-the-human-rights-act-1998-and-withdrawal-from-the-european-convention-on-human-rights> [last viewed 29.12.2016]. See also: Asthana, A., Mason, R. UK must leave European convention on human rights, says Theresa May in *The Guardian*, 2016. Available at <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum> [last viewed 29.12.2016]. From the perspective of national law, due to the doctrine of parliamentary sovereignty, the Parliament is entitled to ignore any decision issued by national courts, including the Supreme Court. Available at <https://publiclawforeveryone.com/2013/12/05/the-three-dimensions-of-the-relationship-between-uk-law-and-the-echr> [last viewed 29.12.2016].

⁶ According to the rulings of the Italian Constitutional Court adopted in 2007, the Convention ranks between the Constitution and ordinary statutes. The Italian Constitutional Court acknowledged that the Convention is a fundamental charter, as it protects and fosters fundamental human rights and freedoms. However, as a treaty law, it binds the State without having a direct effect in the domestic order: thus, national judges cannot apply the Convention in trials before them, by displaying the internal norms in potential conflict with it (Italy adheres to the dualistic concept of the relationship between international and national law). In this way the Italian Constitutional Court reacted towards the evolving practice of ordinary courts to display statutory law in conflict with the Convention. See *Biondi Dal Monte, F., Fontanelli, F.* Decisions No. 348 and No. 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System. pp. 912–913. Available at <https://core.ac.uk/download/pdf/8767376.pdf> [last viewed 27.12.2016].

⁷ *Loizidou v. Turkey* (preliminary objections), 23 March 1995, para. 75. Available at <http://hudoc.echr.coe.int/eng?i=001-57920> [last viewed 08.01.2017].

1. Response to Challenges Posed by Political Populism

One can briefly describe political populism as the conduct of policy based on popular emotions rather than rational arguments, which includes giving irresponsible, unrealistic and controversial promises for the attainment of short-term political benefit. One can see at least three common features that characterise political populism as such.

Firstly, populist political movements give strong preference to the rule of the people over the rule of law. They often advocate the use of referendums (direct democracy), because, in this way, allegedly the voice of the people is directly heard. They also implicitly claim that constituent power has absolute primacy vis-à-vis the constitution (as well as the Convention law) and the rules and powers derived from it.⁸ They insist on the alleged higher degree of legitimacy of the legislator and, by the same token, intend to question the legitimacy of other branches of the state power, in particular, the judiciary.

Secondly, according to political populists, the people (or the nation of the state) have to be perceived as a uniform monolithic or homogenous structure, which leads to the idea that democracy is simply a rule of the majority without taking into account any needs of minorities (that leads to the inevitable conflict with the constitutional principles of equal rights and protection of minorities⁹). Naturally, such a perception implies the rejection of pluralism and results in hostility towards minorities. Thus, political populism, especially the right-wing populist movements, promotes discriminative ideas. They include the proposals to discriminate the LGBT people and minorities in general, to dictate the moral perceptions of private life by adopting a specific legislation on the definition of family, absolute prohibition of abortion, strict restriction or prohibition of artificial insemination, etc.

Thirdly, in Europe, including Lithuania, political populism generally entails a negative attitude towards the international obligations of a state, in particular in the area of human rights protection (first of all, those under the Convention law). These obligations are claimed to be unfounded restrictions of the sovereign powers of the people, or even considered to be threatening to the national identity of the people.¹⁰

One can observe that the hostility of political populists towards the European Union and international obligations in general is highly beneficial to the aims of the Russian policy to destroy the European unity. These ideas also resonate with the concept of the Russian World and the propagated idea of the protection of Russian “traditional” values against the “rotten West”. Thus, it is no coincidence that the rhetoric of the majority of populist political movements shows clear sympathies towards Russia and its domestic and foreign policies, including its aggression against neighbouring countries (e.g., the annexation of Crimea). It is also

⁸ See: *Corrias, L.* Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity. In: *European Constitutional Law Review*, Vol. 12, No. 1, May 2016, pp. 6–26.

⁹ *Lane, J.-E.* Konstitucija ir politikos teorija. Kaunas: Naujasis lankas, 2003, p. 238.

¹⁰ For example, according to the Lithuanian politician Rolandas Paksas, “The people have had enough of listening to unserious directives of bureaucrats in Brussels and, I am sorry to say this, their nonsense – they want to determine their own fates by themselves”. He also speaks about the alleged value crisis in Europe and asserts that the Christian and national values are being thrown out of Europe. See: Buvęs Lietuvos prezidentas, Europos parlamento narys R. Paksas: Europa jau nebėra ta, norima sumaišyti tautas, lytis, tikėjimus, religijas, 2 October 2016. Available at http://www.respublika.lt/lt/naujienos/lietuva/lietuvos_politika/buves_lietuvos_prezidentas_europos_parlamento_narys_rpaksas_europa_jau_nebera_ta_norima_sumaisyti_tautas_lytis_tikejimus_religijas/print.1 [last viewed 25.01.2017].

no surprise that sometimes those political movements are even openly backed by Russia.

1.1. Constitutional Approaches Towards Convention Law in Central and Eastern Europe

Within the limits of their competence, constitutional courts may perform a significant role in responding to at least some of the challenges posed by populist initiatives aimed at curtailing human rights and, by the same token, in increasing the efficiency of the implementation of the Convention law. One of the most important concepts in this respect is the openness of national constitutions to international law. In this context, one can see that the Central and Eastern European states that have chosen the path of Western geopolitical orientation tend to be cooperative with the European Court of Human Rights, in particular on the constitutional level. The openness of these states towards international law and, in particular, towards human rights law, can be explained on account of their experience under the Soviet totalitarian regime, where international human rights standards were rejected. Thus, a friendly approach on the constitutional level towards international commitments in the field of human rights is closely interrelated with the aspirations to protect democracy and the rule of law as the core elements of the constitutional identity of those states.

For example, the Constitutional Court of Moldova stated that the elements essential in defining the constitutional identity of the Republic of Moldova encompass the democratisation, rule of law, norms of international law, European geopolitical orientation, the ensuring of social, economic, and cultural rights and political freedoms for all the citizens of the Republic of Moldova.¹¹ The Constitutional Court of Moldova has specifically acknowledged the binding nature of the judgments of the European Court of Human Rights;¹² in cases of divergence between a judgment of the Constitutional Court and that of the European Court of Human Rights, the judgment of the Strasbourg Court is considered as a circumstance constituting a basis for the review of the constitutional judgment.¹³

Another example of a particularly friendly approach towards Convention law is witnessed in Slovenia. The Constitution of Slovenia (Article 15) consolidates the principle that the highest level of protection of human rights must always be observed; this principle ensures a constitutional ranking to a treaty that provides

¹¹ The 5 December 2013 Judgment of the Constitutional Court of Moldova No. 36 of on the Interpretation of Article 13, Par. (1) of the Constitution in Correlation with the Preamble of the Constitution and the Declaration of Independence of the Republic of Moldova, No. 8b/2013; 41b/2013). Available at <http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=476&l=en> [last viewed 03.01.2017].

¹² The 16 April 2010 Judgment of the Constitutional Court of Moldova No. 10 on the Revision of the Judgment of the Constitutional Court No. 16 of 28.05.1998 on Interpretation of Article 20 of the Constitution of the Republic of Moldova as amended by Judgment no. 39 of 09.07.2001. Available at <http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=55&l=en> [last viewed 03.01.2017].

¹³ Following the judgment of the ECtHR in the case of *Tănase v. Moldova* (in which the ECtHR found that the law prohibiting the members of the Parliament with multiple citizenship from holding the position of a Deputy in the Parliament was disproportionate and, thus, violated Article 3 of Protocol No. 1 to the Convention), the Constitutional Court of Moldova considered it necessary to revise its own case-law, namely its judgment No. 9 of 26 May 2009, and declared unconstitutional the legal provisions that prohibited persons in public positions from holding multiple citizenship (The of 11 December 2014 Judgment of the Constitutional Court of Moldova No. 31 on the review of Judgment of the Constitutional Court of Moldova No. 9 of 26 May 2009. Available at <http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=568&l=ru> [last viewed 03.01.2017]).

a higher level of protection of a certain human right compared to the Constitution.¹⁴ Consequently, the Constitutional Court of Slovenia has held that the judgments of the European Court of Human Rights are binding even if they were not adopted in a case against Slovenia.¹⁵

On the opposite side, there is the position of the Russian Federation and its Constitutional Court. In its judgment of 14 July 2015,¹⁶ the Constitutional Court of the Russian Federation assumed the power to declare the judgments rendered by the ECtHR against Russia as “unenforceable”. This position was codified in the statutory provisions, and the first judgment concerning the impossibility to execute the judgment of the European Court of Human Rights (in the case of *Anchugov and Gladkov v. Russia*¹⁷ concerning the disenfranchisement of prisoners) was adopted on 19 April 2016.¹⁸ The Russian Constitutional Court found that a contradiction with the Russian Constitution existed not in respect of the Convention as such, but only in respect of the interpretation given by the ECtHR in the light of the Convention with regard to the issue of disenfranchisement of prisoners. According to the Russian Constitutional Court, the interpretation by the ECtHR “was an evolutive [...] rather than a well-established one”. In this manner, the Russian Constitutional Court continued the line of the judgment of 14 July 2015, whereby it questioned the authority of the ECtHR to interpret the Convention.

Such a hostile approach adopted by the most authoritative court of the state towards the European mechanism for the protection of human rights is unique in the European context. Moreover, as acknowledged by the Venice Commission, a declaration of unenforceability of the ECtHR judgment constitutes a violation of the obligation of state, party to the Convention, to abide by the final judgment

¹⁴ *The Constitutional Court of the Republic of Slovenia*, Selected Decisions 1991–2015, p. 23. Available: <http://www.us-rs.si/media/zbirka.an.25.-.let.pdf> [last viewed 11.01.2017].

¹⁵ *Ibid.*, p. 37.

¹⁶ The 14 July 2015 Judgment of the Constitutional Court of the Russian Federation No. 21-II/2015 on the case concerning the review of constitutionality of the provisions of Article 1 of the Federal Law “On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto”, Items 1 and 2 of Article 32 of the Federal Law “On International Treaties of the Russian Federation”, Sections 1 and 4 of Article 11, Item 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation, Sections 1 and 4 of Article 13, Item 4 of Section 3 of Article 311 of the Arbitration Procedure Code of the Russian Federation, Sections 1 and 4 of Article 15, Item 4 of Section 1 of Article 350 of the Administrative Judicial Proceedings Code of the Russian Federation and Item 2 of Section 4 of Article 413 of the Criminal Procedure Code of the Russian Federation in connection with the request of a group of deputies of the State Duma. Available at <https://rg.ru/2015/07/27/ks-dok.html> [last viewed 06.01.2017].

¹⁷ *Anchugov and Gladkov v. Russia*, Nos. 11157/04 and 15162/05, 4 July 2013. Available: <http://hudoc.echr.coe.int/eng?i=001-122260> [last viewed 12.01.2017].

¹⁸ The Constitutional Court of the Russian Federation ruled that it was impossible to execute the judgment of the ECtHR in the case of *Anchugov and Gladkov* in the sense of amending the legislation of the Russian Federation to exclude from disenfranchisement some categories of convicted persons serving a sentence in places of deprivation of liberty. See: the 19 April 2016 Judgment of the Constitutional Court of the Russian Federation No. 12-II/2016 on the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 4th July, 2013 in the case of *Anchugov and Gladkov v. Russia* in connection with the request of the Ministry of Justice of the Russian Federation. Available at http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf [last viewed 12.01.2017].

of this Court in any case to which it is a party.¹⁹ This obligation includes the requirement for the state to abide by the interpretation and the application of the Convention made by the ECtHR in cases brought against it. However, taking into public statements by the President of the Russian Constitutional Court Mr Valery Zorkin,²⁰ it seems that this institution prioritizes the official narrative, directed against the “rotten Western values”.²¹ For example, in his speech delivered on 1 November 2016,²² Mr Zorkin expressed concerns over trends in European legal developments, which allegedly contrast with traditional orthodox values. In particular, Mr Zorkin referred to legal norms concerning non-discrimination of sexual minorities and equality of men and women. Such a position, assumed by the head of the highest judicial institution, is a strong indication of challenges for the implementation of the Convention, posed by the so-called traditionalist approaches coupled with populist trends.

1.2. Convention Law from Perspective of Lithuanian Constitutional Law

Lithuania can be considered as a country with a particularly friendly approach towards the Convention law. From the perspective of the Lithuanian constitutional law, treaties ratified by the *Seimas*, including the Convention, formally acquire the force of a law.²³ Consequently, as regards the relationship between treaties and national laws, the Constitutional Court of the Republic of Lithuania has consolidated a monistic approach. In view of the constitutional tradition of respect for international law as reflected in Article 135(1) of the Constitution (that obliges the State to follow the universally recognised principles and norms of international law), the Constitutional Court held that, according to the Constitution, in cases where a national legal act (with the exception of the Constitution itself) establishes

¹⁹ Final Opinion on the Amendment to the Federal Constitutional Law on the Constitutional Court adopted by the Venice Commission. Opinion No. 832/2015 of 13 June 2016, CDL-AD(2016)016-e. Available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)016-e) [last viewed 05.01.2016].

²⁰ *Coalson, R.* Top Russian Judge Wants Legal System to Embrace Gender “Differences“, 2 November 2016. Available at <http://www.rferl.org/a/russia-top-judge-calls-for-postsecular-legal-framework/28091305.html> [last viewed 06.01.2017].

²¹ In addition, one can note that it is namely the Russian Constitutional Court that, for the first time in history, was used for the commission of international crime – the annexation of Crimea.

²² Glava KS predupredil o predskazannoj apostolom Pavlom ugroze bezzakonija, 1 November 2016. Available at <http://www.rbc.ru/society/01/11/2016/581870649a7947865c3d8355?from=main> [last viewed 25.01.2017].

²³ This conclusion is made on the basis of Article 138(3) of the Constitution of the Republic of Lithuania, which reads as follows: “International treaties ratified by the *Seimas* of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania”. *Constitution of the Republic of Lithuania* [Lithuania], 6 November 1992. Official Gazette *Valstybės Žinios*, 1992, No. 33-1014. Among others, see the 24 January 1995 Conclusion of the Constitutional Court of the Republic of Lithuania on the compliance of Articles 4, 5, 9, 14 as well as Article 2 of Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 1995, No. 9-199. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta990/content> [last viewed 06.01.2017]. See also: the 17 October 1995 Ruling of the Constitutional Court of the Republic of Lithuania on the compliance of Paragraph 4 of Article 7 and Article 12 of the Republic of Lithuania’s Law “On International Treaties of the Republic of Lithuania” with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 1995, No. 86-1949. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta983/content> [last viewed 06.01.2017]; the 14 March 2006 Ruling of the Constitutional Court of the Republic of Lithuania on the Limitation on the Rights of Ownership in Areas of Particular Value and in Forest Land. Official Gazette *Valstybės žinios*, 2006, No. 30-1050. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta1357/content> [last viewed 06.01.2017].

a legal regulation that competes with the one established in an international treaty, the international treaty must be applied.²⁴ Thus, a collision between the provisions of a law (or any other national legal act) and the Convention is considered to be an issue of the application of law. National courts have to resolve such collisions by directly applying the Convention and taking into account the priority of the application of the Convention.²⁵

In the absolute majority of cases, this constitutional framework enables the effective execution of ECtHR judgments in terms of individual measures. It also serves as a partial substitute for the general measures, when relevant political will to adopt necessary legal norms is lacking (usually due to the populist reasoning). For example, in the case of *L. v. Lithuania*²⁶, the ECtHR found a violation of the Convention on the account of the absence of a law regulating full gender reassignment surgery. This legislative gap led to the applicant being unable to undergo full gender reassignment surgery and change his gender identification in all official documents. Following the judgment in this case, the domestic courts developed a consistent practice allowing for changes in official documents without excessive formalism and within a reasonable time. Moreover, non-pecuniary compensation is granted for the inconveniences encountered due to the lack of the relevant legislation in this respect. In addition, it is possible for persons who undergo gender reassignment surgery abroad to claim reimbursement of medical expenses under certain conditions.²⁷ Taking into account the lack of the political will to adopt a necessary regulation (partly because of the strong influence of the Catholic Church), Lithuanian courts have ensured the implementation of the Convention at least on *ad hoc* basis.²⁸

Nevertheless, the monist model may be applied inasmuch as it is related to domestic legal acts other than the Constitution of the Republic of Lithuania. Since Article 7(1) of the Constitution of the Republic of Lithuania proclaims the principle of the superiority of the Constitution,²⁹ in cases where a provision of the Convention competes with a legal regulation established in the Constitution, the provisions of the Convention take no precedence in terms of application.³⁰ However, as it is clear from the jurisprudence of the Lithuanian Constitutional

²⁴ Among others, see the 14 March 2006 Ruling of the Constitutional Court of the Republic of Lithuania on the Limitation on the Rights of Ownership in Areas of Particular Value and in Forest Land. Official Gazette *Valstybės žinios*, 2006, No. 30-1050. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta1357/content> [last viewed 06.01.2017].

²⁵ The 9 May 2016 Decision of the Constitutional Court of the Republic of Lithuania on refusing to consider a petition. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta1639/content> [last viewed 06.01.2017].

²⁶ *L. v. Lithuania*, No. 27527/03, 11 September 2007. Available at <http://hudoc.echr.coe.int/eng?i=001-82243> [last viewed 08.01.2017].

²⁷ *Council of Europe*. Information on pending cases: current state of execution. Available at http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=LIT&SectionCode=ENHANCED+SUPERVISION [last viewed 08.01.2017].

²⁸ *Ibid.*

²⁹ Article 7(1) of the Constitution reads as follows: “Any law or other act that contradicts the Constitution shall be invalid”. Constitution of the Republic of Lithuania [Lithuania], 6 November 1992. Official Gazette *Valstybės žinios*, 1992, No. 33-1014.

³⁰ The 5 September 2012 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of Paragraph 5 (Wording of 22 March 2012) of Article 2 of the Republic of Lithuania Law on Elections to the *Seimas* with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 2012, No. 105-5330. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta1055/content> [last viewed 18.01.2017].

Court, the Convention is perceived as the treaty with exceptional legal significance for Lithuanian constitutional law. That is due to the intrinsically interrelated constitutional principles that imply the compatibility between the Constitution and the Convention and consequently lead to the openness of the Constitution to the Convention law. These constitutional principles comprise the principle of respect for international law, the principle of an open civil society, and the principle of the geopolitical orientation of the State. The principle of *pacta sunt servanda* (that is expressed in the above-mentioned Article 135(1) of the Constitution) is strengthened by two other principles. The principle of an open civil society (expressed in the preamble of the Constitution) precludes self-isolation and implies the openness of Lithuania to international community and its legal standards, while the principle of geopolitical orientation of the State (expressed in the constitutional acts on non-alignment with the post-Soviet unions and on the membership in the European Union) is grounded on the value-based commonness of Lithuania with Western democratic states and therefore directs towards integration of the European human rights standards into national legal system.

The openness of the Constitution to the Convention law in its turn gives rise to a few major constitutional implications. Firstly, the Convention law is perceived as the minimum necessary constitutional standard for national law. Secondly, under the Constitution the Constitutional Court has the duty of consistent interpretation – the duty to pay due regard to the Convention law, when interpreting the provisions of the Constitution.

1.2.1. Landmark Constitutional Cases on Openness to Convention Law

These implications can be illustrated by several landmark cases considered by the Constitutional Court of the Republic of Lithuania. They demonstrate how the constitutional jurisprudence can respond to the challenges posed by populist initiatives.

Firstly, two cases in which the doctrine of constitutionality of constitutional amendments are the most important in this regard. These are rulings of 24 January 2014 and 11 July 2014.³¹ There the Constitutional Court identified the substantive (material) restrictions on the amendments to the Constitution.

One can see two types of those restrictions. The first is absolute prohibition to adopt, even by the referendum, any such amendments to the Constitution that would deny the eternal constitutional values, including the innate nature of human rights. While formulating this doctrine in its ruling of 11 July 2014, the Constitutional Court referred to the Guidelines for Constitutional Referendums at National Level (adopted by the Venice Commission), according to which constitutional amendments must not be contrary to international law or the statutory principles of the Council of Europe (democracy, the protection of human rights and the rule of law). The second type is relative (or conditional) material restrictions. They include the prohibition on denying, by means of constitutional

³¹ The 24 January 2014 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of the Republic of Lithuania's Law amending Article 125 of the Constitution and Article 170 (Wording of 15 March 2012) of the Statute of the *Seimas* of the Republic of Lithuania with the Constitution of the Republic of Lithuania. TAR, 2014, No. 478. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta850/content> [last viewed 14.01.2017]; the 11 July 2014 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of the Provisions of the Republic of Lithuania's Law on Referendums with the Constitution of the Republic of Lithuania. TAR, 2014, No. 10117. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta859/content> [last viewed 14.01.2017].

amendments, the international obligations of the Republic of Lithuania and, at the same time, the constitutional principle of *pacta sunt servanda*, as long as these international obligations are not renounced according to international legal rules.

Thus, the doctrine of constitutionality of constitutional amendments totally excludes such constitutional amendments that could reintroduce the death penalty or legalise torture, as well as precludes any other amendments to the Constitution that would be in conflict with the Convention. In this way, the doctrine of constitutionality of constitutional amendments plays a key preventive role against various possible populist initiatives that would be contrary to the Convention law. Evidently, among other assumptions, this doctrine is based on the principle that the constitutional standards for human rights protection cannot be lower than those provided by the Convention law.

Secondly, the case on the constitutionality of the death penalty (the ruling of 9 December 1998)³² can be mentioned where the latter principle was formulated for the first time. In this case, the Constitutional Court was requested to adopt the decision on the abolition of the death penalty, i.e. to decide the issue that was avoided by the politicians due to wide support for the death penalty in society. In response to this question, the Constitutional Court confirmed that the Constitution cannot provide for lower level of protection, but can establish higher standards than those existing under international human rights law. In determining the constitutional standard, the Constitutional Court has also to take into account the trends of progressive development of human rights law.

That is why the Constitutional Court highlighted that the Convention and its Article 2 guided the members of the Council of Europe towards the rejection of the death penalty, despite of the fact that in the then ECtHR case law of the (namely, in the case of *Soering v. the United Kingdom*³³), the Convention was interpreted as not consolidating the general prohibition of the death penalty. Also it was taken into account that, at that time, Lithuania was one of only five states of the Council of Europe that had not yet signed Protocol No. 6 of the Convention concerning the abolition of the death penalty. Thus, the formation of the European standard regarding the inadmissibility of the death penalty, had a strong reinforcing, if not decisive, role leading to the conclusion on the unconstitutionality of the penalty that, in the words of the Council of Europe, serves “no purpose in a civilised society governed by the rule of law and respect for human rights”.³⁴

³² The 9 December 1998 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of the Death Penalty Provided for by the Sanction of Article 105 of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 1998, No. 109-3004. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta1135/content> [last viewed 11.01.2017].

³³ *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989. Available: <http://hudoc.echr.coe.int/eng?i=001-57619> [last viewed 16.01.2016]. The Court clarified that, even though *de facto* the death penalty no longer existed in any of the Contracting States to the Convention, the evolutive interpretation of the Convention could not be used as a basis for the conclusion that, under Article 3, the Convention prohibits the death penalty, as: first of all, such a conclusion would deny the possibility of executing the death penalty, which is explicitly consolidated in Paragraph 1 of Article 2 of the Convention by the Contracting Parties; and secondly, the adoption of Protocol No. 6 shows that member states chose the normal method of the amendment of the Convention preventing from reference to subsequent national practice in the application of the treaty as endorsing the rejection of the death penalty.

³⁴ *Council of Europe. Abolition of the Death Penalty*, 2014. Available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others_issues/Death_Penalty/default_en.asp [last viewed 14.01.2017].

Thirdly, the case concerning the constitutionality of the State Family Policy Concept (the ruling of 28 September 2011)³⁵ can be referred as the striking example of the duty of consistent interpretation carried out by the Constitutional Court. According to this Concept, which embodied the view of “the majority”, a family was defined as a relationship founded exclusively on the basis of marriage. Consequently, families based exclusively on marriage were to be entitled to more favourable conditions for gaining access to housing, social assistance, or other support.

In its ruling, the Constitutional Court held that the constitutional concept of the family must be interpreted in view of the international obligations of under the Convention. Therefore the ECtHR case-law (*Marckx v. Belgium*³⁶, *Kroon and Others v. the Netherlands*³⁷, *Keegan v. Ireland*³⁸, and *El Boujaïdi v. France*³⁹) had a decisive impact on the interpretation of the constitutional concept of family and inspired the Constitutional Court to give priority to the content of family relationship rather than its form.⁴⁰ By declaring the State Family Policy Concept unconstitutional, the Constitutional Court precluded discriminatory regulation in respect of families emerged on other basis than marriage.

1.2.2. Duty to Remove Incompatibilities

The supremacy of the Constitution and, notably, the system of constitutional values entrenched draw the limits of its openness to the Convention law. The Constitutional Court explicitly addressed this question after the incompatibility between the provisions of the Constitution and the Convention became apparent following the ECtHR judgment in the case of *Paksas v. Lithuania*⁴¹ (namely, in terms of the right to free elections, consolidated in Article 3 of the First Protocol to the Convention). This incompatibility has emerged as a result of the difference in the jurisprudence of the Constitutional Court and the ECtHR in balancing colliding legal values and perceiving the permissible limitations on the passive electoral right. Formulating the doctrine on the consequences of impeachment in its ruling of 25 May 2004,⁴² the Constitutional Court placed more weight on such constitutional values as the security of the state and the related loyalty of members

³⁵ The 28 September 2011 Ruling of the Constitutional Court of the Republic of Lithuania on the State Family Policy Concept. Official Gazette *Valstybės žinios*, 2011, No. 118-5564. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta1112/content> [last viewed 18.01.2017].

³⁶ *Marckx v. Belgium*, No. 6833/74, 13 June 1979. Available at <http://hudoc.echr.coe.int/eng?i=001-57534> [last viewed 16.01.2017].

³⁷ *Kroon and Others v. the Netherlands*, No. 18535/91, 27 October 1994. Available at <http://hudoc.echr.coe.int/eng?i=001-57904> [last viewed 16.01.2017].

³⁸ *Keegan v. Ireland*, No. 28867/03, 18 July 2006. Available at <http://hudoc.echr.coe.int/eng?i=001-76453> [last viewed 16.01.2017].

³⁹ *El Boujaïdi v. France*, No. 123/1996/742/941, 26 September 1997. Available at <http://hudoc.echr.coe.int/eng?i=001-58099> [last viewed 16.01.2017].

⁴⁰ The 28 September 2011 Ruling of the Constitutional Court of the Republic of Lithuania on the State Family Policy Concept, para. 15.1 of Chapter II of the reasoning part of the Ruling. Official Gazette *Valstybės žinios*, 2011, No. 118-5564. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta1112/content> [last viewed 18.01.2017].

⁴¹ *Paksas v. Lithuania*, No. 34932/04, 6 January 2011. Available at <http://hudoc.echr.coe.int/eng?i=001-102617> [last viewed 17.01.2017].

⁴² The 25 May 2004 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of Article 1(1) (Wording of 4 May 2004) and Paragraph 2 (Wording of 4 May 2004) of Article 2 of the Republic of Lithuania's Law on Presidential Elections with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 2004, No. 85-3094. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta1269/content> [last viewed 18.01.2017].

of the Parliament and other highest officials to the state and its constitutional order, whereas, in the case *Paksas v. Lithuania* the ECtHR gave priority to the free expression of the opinion of the people in the choice of the legislature, even though this would entail the possibility of electing candidates with doubtful loyalty to the state and its constitutional order.

Facing this incompatibility, the Constitutional Court held that the ECtHR judgment may not serve in itself as a constitutional ground for the reinterpretation (correction) of the official constitutional doctrine.⁴³ Reinterpretation is not permitted if, in the absence of the appropriate amendments to the Constitution, it would substantially change the overall constitutional regulation (in this case, the integrity of the constitutional institutes of impeachment, oath and electoral rights), would distort the system of constitutional values, or would compromise the guarantees of the protection of the supremacy of the Constitution in the legal system.⁴⁴

However, the refusal to reinterpret the Constitution in that case does not mean the possibility not to implement the ECtHR judgment. On the contrary, the Constitutional Court underlined that the constitutional principle of respect for international law determines the duty of the Republic of Lithuania to remove the incompatibility between the provisions of the Convention and the Constitution by adopting the appropriate amendments to the Constitution. Although in general the state enjoys the broader discretion to choose a means of removing incompatibilities between a treaty and the Constitution, this discretion in the area of human rights is limited. In view of the perception of human rights as fundamental constitutional values and the constitutional principles of an open civil society and the geopolitical orientation of the state, renouncing international obligations in the area of human rights would not be a constitutionally justified option.

Thus, on the one hand, the constitutional duty to remove incompatibilities between the Constitution and the Convention law by making appropriate amendments to the former preserves the superiority of the Constitution. On the other hand, this duty demonstrates the especially friendly constitutional attitude towards the Convention law, as the incompatibility between the Constitution and the Convention law is perceived as a constitutional anomaly that has to be removed by the appropriate constitutional amendments.

2. Observance of Subsidiarity Principle

The challenges to the implementation of the Convention law of the first type (those related with political populism) can be regarded as the challenges of internal character, as they mostly occur due to internal factors within the states, parties to the Convention. While the challenges of the second type (those related with the observance of the principle of subsidiarity) can be considered as external challenges from the perspective of national law, as they occur due to the certain ECtHR judgments where the reasonable doubt can be raised as to whether the Strasbourg

⁴³ The 5 September 2012 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of Paragraph 5 (Wording of 22 March 2012) of Article 2 of the Republic of Lithuania Law on Elections to the *Seimas* with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 2012, No. 105-5330. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta1055/content> [last viewed 18.01.2017].

⁴⁴ *Ibid.*

Court, in determining the violation of the Convention, has duly taken into account the particularities of the situation in a concrete state. Indeed, one can mention a number of cases when national institutions seemed to be in a better position to assess the situation and it can be argued that, by rejecting their assessment, the ECtHR has disregarded the subsidiarity principle that underlies the Convention mechanism. In these situations, the ECtHR judgment is unlikely to be perceived as possessing a sufficient degree of legitimacy in the state concerned; therefore, their implementation can meet a strong resistance from the political institutions or society in general.

One can mention a few Lithuanian cases, most importantly with regard to the principle of subsidiarity. For example, the abovementioned case of *Paksas v. Lithuania* can be referred where, by rejecting the position of the Lithuanian Constitutional Court concerning the importance and the role of a constitutional oath,⁴⁵ the ECtHR has actually undermined the significance of the constitutional institute of an oath. In addition, the ECtHR examined only the right to stand in elections to the *Seimas*; whereas under the Lithuanian Constitution, this right is directly linked with the capacity of standing as a candidate in presidential elections, while the institute of a constitutional oath is also related to the capacity to occupy some other highest offices, including in the judiciary. Thus, actually the Strasbourg Court judgment has broader implication than only on a passive electoral right in the parliamentary elections. Therefore, the question may be raised as to whether the ECtHR has not interfered too deeply within the jurisdiction of the Lithuanian Constitutional Court. In view of these circumstances, although the Constitutional Court ruled on the necessity to adopt the appropriate amendments to the Constitution, so far all the attempts to implement this ruling have failed.

Similar questions arise out of the case of *Vasiliauskas v. Lithuania*.⁴⁶ In this case the ECtHR in principle questioned the assessment by the domestic courts that the Lithuanian freedom fighters were a significant part of a national group for the purposes of a definition of genocide. In this way, the ECtHR has actually diminished the prominent role of those who, among other things, fought and lost their lives for the values declared in the Convention (the testimony to this is the Declaration of the Council of the Lithuanian Freedom Fight Movement of 16 February 1949,⁴⁷ whereby the adherence of the Lithuanian State to the Universal Declaration of Human Rights was declared).

Another example illustrating the sensitivity of subsidiarity could be the assessment of totalitarian symbols. It is relevant to Lithuania, as it has introduced the ban on public demonstration of both Nazi and Communist regime symbols.

⁴⁵ That this oath cannot be perceived as a pure formality; therefore, the duly established breach of the oath will result in a constant reasonable doubt regarding the trustworthiness of the person concerned and his loyalty to the state and its constitutional order, and, for this reason, the oath cannot be taken again by the same person. See: the 25 May 2004 Ruling of the Constitutional Court of the Republic of Lithuania on the Compliance of Article 1(1) (Wording of 4 May 2004) and Paragraph 2 (Wording of 4 May 2004) of Article 2 of the Republic of Lithuania's Law on Presidential Elections with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 2004, No. 85-3094. Available at <http://www.lrkt.lt/en/court-acts/search/170/ta1269/content> [last viewed 18.01.2017].

⁴⁶ *Vasiliauskas v. Lithuania*, No 35343/05, 20 October 2015. Available at <http://hudoc.echr.coe.int/eng?i=001-158290> [last viewed 15.01.2017].

⁴⁷ Declaration of the Council of the Lithuanian Freedom Fight Movement. Available at <http://www.lrkt.lt/en/legal-information/lithuanias-independence-acts/declaration-of-the-council-of-the-lithuanian-freedom-fight-movement/364> [last viewed 15.01.2017].

In this regard one can refer to the case of *Vajnai v. Hungary*,⁴⁸ where the persecution for the public demonstration of a five-pointed red star was recognised as contrary to the Convention due to the alleged multi-meaningful character of that symbol. By denying the conclusion of the Constitutional Court of Hungary, the ECtHR maintained that this symbol, as well, can be perceived as a symbol of “international workers’ movement struggling for a fairer society”. However, it is evident that, irrespective of their multiple theoretical attributes, the symbols like a five-pointed red star have a clear dominant meaning in the states that had experienced the Communist totalitarian regime. For example, in popular understanding in Lithuania it has never been associated with any peaceful democratic workers’ movement; unambiguously, it is perceived only as the symbol of the Soviet occupation totalitarian regime and its repressive structures, including the Soviet armed forces. Nevertheless, the ECtHR seems to ignore the double legacy of totalitarianism in the Central Europe: it ruled that, although “the display of a symbol which was ubiquitous during the reign of [Soviet] regimes may create uneasiness among the victims of systematic terror and their relatives, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment”.⁴⁹ Following this line of logic, one can put a rhetorical question whether the same reasoning could be applicable to the assessment of a swastika.

On the other hand, the reasoning in *Vajnai v. Hungary* case may be compared with arguments employed in the case of *S.A.S. v. France*,⁵⁰ which concerned the prohibition on wearing a full-face veil. The state was granted a wide margin of appreciation, by holding that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society. The ECtHR found a general ban, guaranteed by means of criminal sanctions, to be necessary in a democratic society in order to protect a rather vague notion of “living together” as an element of the “protection of the rights and freedoms of others”. The principle of unhindered interaction between individuals (or, in other words, the possibility to see the face of a person you are talking to) was accorded priority over the rights of certain Muslim women. This conclusion was made in spite of the fact that many international and national institutions, working in the field of fundamental rights protection, had found the blanket ban to be disproportionate.⁵¹

Although the cases of *Vajnai* and *S.A.S.* concerned different rights, generally implying different breadth of the margin of appreciation (accordingly, freedom of expression and freedom to manifest religion), it seems that criticism concerning the selective liberalism, which underlies certain judgments of the Strasbourg Court, is not so unreasonable. To sum it up, one can argue that, as long as the domestic courts are not found to have failed to comply with the standards of fair court proceedings under the Convention law (primarily, Article 6 of the Convention), the ECtHR should not “substitute” its assessment of the facts for that given by the domestic courts of the factual, historical, political, or other circumstances specific to a particular state. For the purposes of the effective implementation

⁴⁸ *Vajnai v. Hungary*, No. 33629/06, 8 July 2008. Available at <http://hudoc.echr.coe.int/eng?i=001-87404> [last viewed 14.01.2017].

⁴⁹ *Ibid.*

⁵⁰ *S.A.S. v. France* [GC], No. 43835/11, 1 July 2014. Available at <http://hudoc.echr.coe.int/eng?i=001-145466> [last viewed 14.01.2017].

⁵¹ *Ibid.*

of the Convention law, the balanced and consistent application of the principle of subsidiarity and the margin of appreciation doctrine stemming from this principle are very important in sensitive cases related to the historical experience and other specific features of a particular society and its constitutional values.

3. Establishment of European Consensus

This leads to another topic, which raises similar discussions, namely, the relevance of the European consensus in the interpretation of the Convention guarantees. The significance of the concept of the European consensus is twofold.

Firstly, the convergence of national standards in the field of human rights protection constitutes an important basis for applying the “living instrument” approach and expanding the scope of the rights guaranteed by the Convention. In the recent judgment of *Magyar Helsinki v. Hungary*,⁵² a broad consensus (existing among thirty states) of recognising the right of access to information held by public authorities, together with consensus on the international level, led the Strasbourg Court to interpret the scope of Article 10 (guaranteeing freedom of expression) as encompassing the right of access to information. Though reliance on European consensus, as one of the main sources of inspiration for applying the evolutive interpretation of the Convention gains certain criticisms, the approach based on both European and international consensus is an important guarantee of the vitality of Convention standards, including the effectiveness of their implementation.

Secondly, the existence (or non-existence) of a common European standard in a particular field is employed by the ECtHR in deciding whether national institutions remained within their margin of appreciation when striking a balance between the competing interests. A common practice of the majority of European states, revealing the generally higher standard of protection than in a state concerned, is a strong argument in favour of “codification” of this standard on the supranational level. However, the methodology of establishing the existence or non-existence of the European consensus in a particular field is not always transparent.

At the same time, the precision with which the object of comparative analysis is defined may have a decisive impact upon the conclusion as to the existence of the European consensus. To clarify, it would be useful to refer to the case of *Animal Defenders International v. the United Kingdom*,⁵³ concerning a ban on broadly defined political advertising. The scope of this ban included social interest advertising, even to the extent of preventing the airing of an advertisement calling attention to the genocide in Rwanda and Burundi. In this case, the ECtHR (the majority of 9 judges in the Grand Chamber) found that there was no European consensus between the Contracting States on how to regulate paid political advertising in broadcasting. However, dissenting judges emphasised that comparative law material, which dealt primarily with political party advertising, could not serve as an appropriate basis to justify restrictions imposed on public interest groups that wished to draw attention to an issue of public interest (such as

⁵² *Magyar Helsinki Bizottság v. Hungary* [GC], No. 18030/11, 8 November 2016. Available at <http://hudoc.echr.coe.int/eng?i=001-167828> [last viewed 16.01.2017].

⁵³ *Animal Defenders International v. the United Kingdom* [GC], No. 48876/08, 22 April 2013. Available at <http://hudoc.echr.coe.int/eng?i=001-119244> [last viewed 18.01.2017].

commercial exploitation of animals in circuses).⁵⁴ Dissenting judges also observed that the respondent State was one of a few in Europe that still applied such a comprehensive ban on “political” advertising.⁵⁵ Thus, the finding of the majority rested on a rather broadly understood object of comparison.

Similar conclusion can be drawn from the abovementioned case *Paksas v. Lithuania*, which concerned the right of the impeached President to stand in parliamentary elections. The ECtHR held that impeachment proceedings in most of European republics had no direct effects on the electoral and other political rights of a head of state who was removed from office. This conclusion was made despite the non-existent practice of actual presidential impeachments in Europe (only Lithuania has successfully impeached the head of a state and faced the challenge to establish the consequences thereof).

In this context, an interesting note by the ECtHR, made in the case of *Grosaru v. Romania*,⁵⁶ concerning electoral matters may be mentioned. After observing that Belgium, Italy, and Luxembourg stood out in the European context as the states where the only post-election remedy available was validation by the parliament, the Strasbourg Court was quick to note that those three countries had enjoyed a long tradition of democracy, which would tend to dissipate any doubts as to the legitimacy of such a practice.⁵⁷ Again, one can raise a rhetorical question as to the application of double standards to the so-called old and new democracies.

To sum it up, taking into account that the criterion European consensus is a strong presumption in favour of the solution adopted by the majority of the Contracting Parties,⁵⁸ the application of this criterion should be based on a clear methodology.

Conclusions

Constitutional courts can certainly play a decisive role within their states in ensuring the implementation of the Convention law. This role is particularly important in responding to the first type of the challenges to implementation of the Convention law, i.e. the challenges posed by the populist initiatives aiming to undermine the European human rights standards. However, this role can be successfully carried out, provided that the Constitutional Court is consolidating the openness of the Constitution to the Convention law, even if the text of the Constitution does not seem friendly to the Convention by establishing unconditional superiority of the Constitution, and is firmly determined to follow the European standards.

This conclusion is confirmed by good practice of the Lithuanian Constitutional Court. It can be compared with the practice in Germany, whose legal system is also based on the supremacy of the Constitution. However, at the same time the Convention enjoys special constitutional significance. The German Federal

⁵⁴ *Animal Defenders International v. the United Kingdom* [GC], No. 48876/08, 22 April 2013 (dissenting opinion of Judges Ziemele, Sajo, Kalaydjyeva, Vučinić and De Gaetano; dissenting opinion of Judge Tulkens, joined by Judges Spielmann and Laffranque). Available at <http://hudoc.echr.coe.int/eng?i=001-119244> [last viewed 18.01.2017].

⁵⁵ *Ibid.*

⁵⁶ *Grosaru v. Romania*, No. 78039/01, 2 March 2010. Available at <http://hudoc.echr.coe.int/eng?i=001-97617> [last viewed 18.01.2017].

⁵⁷ *Ibid.*, para. 28.

⁵⁸ *Brems, E.*, Human Rights: Universality and Diversity. The Hague: Kluwer Law International, 2001, p. 420.

Constitutional Court is guided by the principle of friendliness of the Constitution towards international law and interprets the content of fundamental constitutional rights consistently with the interpretation provided by the ECtHR.⁵⁹

Similarly, in Lithuania the interpretation by the Constitutional Court of the relevant constitutional principles, in particular, the principles of *pacta sunt servanda*, an open civil society and geopolitical orientation of the state, lead to the openness of the Constitution to the Convention law. That has a few major constitutional implications. Firstly, the Convention law is a source for the interpretation of the Constitution as supreme law within the State. Secondly, Convention law is perceived as the minimum necessary constitutional standard for Lithuanian national law. Thirdly, under the Constitution, the Constitutional Court has the duty of consistent interpretation, i.e., the duty to interpret the relevant constitutional provisions in line with the Convention law. Derogations from this duty are possible only in two cases: where the Constitution provides for a higher standard of protection than the Convention, or where the interpretation in line with the Convention would substantially affect the system of constitutional values. Fourthly, the latter case of the incompatibility between the Constitution and the Convention law is perceived as a constitutional anomaly that has to be removed by the appropriate constitutional amendments.

On the other hand, solely the efforts of national courts to ensure the implementation of the Convention law are insufficient. The second type of challenges in this field can be considered as external from the perspective of national law, as they occur due to the lack of subsidiarity in certain ECtHR judgments. The principle that, due to their direct and continuous contact with the vital forces in the society, national courts are better placed to evaluate the local needs and conditions should be equally applicable to all states, parties to the Convention (including the Central Europe). While the application of the European consensus criterion that is relevant to the observance of subsidiarity should be based on a clear methodology.

The denial of different experience and specific features of particular states and societies would imply not a dialogue between national courts and the ECtHR, but a monologue of the latter. This may adversely affect the legitimacy of its judgments (in terms of reception by the relevant societies) and complicate their execution on the spot. Therefore, apart from the openness of national constitutions to the Convention law, the need of the real judicial dialogue and the respect to national, in particular, constitutional jurisdiction without compromising the Convention values is no less important for the efficient implementation of the Convention law.

⁵⁹ *Die Völkerrechtsfreundlichkeit des Grundgesetzes*. The German Federal Constitutional Court held that the provisions of the ECHR serve, on the level of constitutional law, as interpretation aids to determine the contents and the scope of fundamental rights and of rule-of-law principles of the German constitution. See the 14 October 2004 Order of the Federal Constitutional Court of the Federal Republic of Germany, 2 BvR 1481/04, BVerfGE 111, 307 (315 f.). Available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html [last viewed 17.01.2017]; the 26 February 2008 Decision of the Federal Constitutional Court, 1 BvR 1602, 1606, 1626/07, para. 52. Available at http://www.bverfg.de/e/rs20080226_1bvr160207.html [last viewed 17.01.2017].

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Approach to the Amendment Process of the Procedural Penal Codes in Latin America

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The current article aims to provide the reader with a close view of the genesis of the movement and later the development of the Amendment Process of the Procedural Penal Codes that took place in Latin America at the end of the XX century and at the beginning of the XXI century, trying to focus in the common aspects that such a change had for the region and the challenges that the different Latin American countries had to face at the moment in which they had to implement a new Procedural Penal Code; as will be shown, those challenges were approached by all these states from diverse perspectives and not in a uniform way. At the conclusion of this article, a prognosis will be given regarding the road to be followed to solve some critical loopholes that still persevere.

Keywords: Latin America, Procedural Penal Code, Implementation of the Procedural Code, Latin American Courts, due process.

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Introduction

Since the times of both the Spanish and the Portuguese Colonies in Latin America (XVI century), the influences that Spain and Portugal on the most

different aspects of the Latin American peoples' life could not be contested, and it also reached into the legal field and particularly affected the Penal Law and the Procedural Law of the first colonies and then the newly established countries that developed thereof.

Immediately after these countries obtained their independence as of the XIX century and along all their Republican Period, the new countries that were formed in Latin America retained their Procedural Penal Code based on the concepts of the Inquisition, namely: secret procedures without open court and a vertical judicial governmental organization. Nevertheless, that situation gradually started to change as of 1940, when in some sectors of the Latin American countries a different concept from the Penal Procedure started to be developed, a process which was originally of an academic character rather than a political one and that, together with some democratic processes that developed in the region during the 1980s, started to build the necessary basis that would eventually complete changing the Procedural Penal Codes of the whole region.

The current article will provide an insight into the abovementioned process and, at the same time, enlighten the reader about the path which enabled the Latin American countries to abandon the inquisition system normally used in procedural penal matters and to eventually replace it by a new antagonistic, open and adversarial procedure.

It is correct to state that to understand this process as a whole, it is necessary to go much more deeper than possible within the limits of the current article, but the author will attempt to introduce the development of the process that brought about the tremendous change in the Procedural Penal Codes of the Latin American countries and the complexities thereof, including the difficulties that are still far from being solved today.

1. Previous Outlook to the Amendment Process of the Procedural Penal Codes

Prior to the Independence Declaration of the Latin American countries (starting at the dawn of the XIX century), the model that ruled in the colony was that of the Inquisition, and its main characteristics were a vertical hierarchy structure, limits in relation to rights, a clear inequality between the defense and the prosecution (which was fulfilled by the judge who embodied all the functions of the process, that is to say, he had the function of investigating and of judging¹). Consequently, the interaction with the Procedural Law deeply influenced the way in which judges adopted their decisions, they were based on the presumption of guilt.²

When the Latin American countries declared their independence, Procedural Law was modified in certain ways, basically due to the influence of the British colonies in North America and, subsequently, the influence of the French Criminal Examining Code in 1808, however, such influences only meant some compliance changes, thus, Procedural Law largely retained its basic features

This scene persisted for more than a century, and only after all the Latin American countries first subscribed to, then ratified the International Human

¹ *Ambos, K., Montealegre, L. (comp.). Constitución y sistema acusatorio. Un estudio comparado, Universidad de Colombia, Bogotá, 2005, p. 101.*

² *Ferrajoli, L. Citado por Bovino, Alberto, Ingeniería de la verdad. In: Problemas del derecho procesal contemporáneo. Editorial del Puerto, Buenos Aires, 1998.*

Rights Treaties, and finally these treaties took effect regarding those specific indications about certain rules of procedure that were contained in those treaties³ slowly but steadily, some scholars started to shape a movement so as to make those changes effective in their own countries. The so-called Cordova School in Argentina stood out among others due to the fact that they created a Procedural Penal Code for the Cordova Province.

Notwithstanding the above, this creative impulse lead by the scholars faced a tough resistance of the political world mainly because there was a military government ruling those countries during the 1970s.

Once democracy started to return to Latin America around the 1980s, an institute called “The 1988 Procedural Penal Model Code for Ibero-America” was developed and the text of this document eventually served as the basis of many of the Procedural Codes that were finally approved in Latin American countries, e.g. Chile, Argentina, Venezuela, Ecuador, Bolivia, Peru, Costa Rica, Guatemala, Panama, El Salvador and Dominican Republic.

2. Common Characteristics of the Procedural Penal Amendment in Latin America

Even though the cultural, economic and political reality of every single country in Latin America meant that the reforms of the criminal proceedings had certain differences in each country, it did not mean that there were no common features that united them. These features include the following:

- a) The Procedural Penal Amendment in Latin America was a regional movement, that is to say, there was a supranational effort implying that not only the development but also the implementation of the amendment in Latin America had a rather parallel and a more or less homogenous characteristic in every country of the region. This reality was favoured by the academic support that the amendment had, which meant a common ground for the pursued objectives.
- b) The incorporation of the Procedural Penal Amendment in the political agendas of the Latin American countries along with the democratizing process that the region underwent as of the 1980s, showed that the legal system of the Latin American countries and particularly the Procedural Penal Law met the requirements that a real Rule of Law needed and that the society of those days had started to demand. However, the process was not as smooth as desired, and, although Chile and Colombia soon made a crucial progress, making themselves a model for the rest of the countries to follow, there were some of the countries that faced numerous difficulties on their way to reaching a general consent that would help them to obtain a new scheme and thus implement the required changes.
- c) The Procedural Penal Amendment was a part of an integral process of changes that Latin America had; as previously stated, the Procedural Penal Amendment was not an isolated fact in the region, furthermore, it was fulfilled in a context of many transformations that the region underwent. All of this created the necessary preconditions to conceive the Procedural

³ Declaración Universal de Derechos Humanos, 1948; Pacto Internacional de Derechos Civiles y Políticos, 1966; Declaración Americana de los Derechos y deberes del Hombre, 1948 y la Convención Americana sobre Derechos Humanos, 1969.

Amendment, create it from the very basis regarding its design and later implementation, and producing a serious attempt to change the setup, and to implement this process differently, not as traditionally done in the region (only through legislative changes),⁴ therefore, some aspects, as training and participation of administrative experts who could back up the work of the institutions that were participating in the process, were taken into consideration. And finally, along with the design and the implementation, there had to be a due intra-systemic coherence between the Procedural Penal Amendment and the rest of the nominative bodies of the system.

3. Common Stages of the Procedural Penal Amendment in Latin America

The structure of the new Procedural Penal Model in Latin America is a process of a unique type (regarding the indictable criminal activity prosecuted by the Public Penal Action), that starts with the activity of investigation led by the prosecutor, continues with the accusation, the preliminary hearing and the oral trial. This unique process does not exclude the presence of consensual processes and abbreviated processes, namely, the conditional suspension of the process among others, that can be fulfilled during the whole preparatory stage and even before the presentation of the charges.

Now, it is possible to distinguish three stages in this common process that are clearly differentiated:

- a) An initial investigative stage led by the prosecutor;
- d) A probationary stage, exclusively practiced by the parties;
- e) An intermediate stage serving as a filter or as a control station of the evidence.

Hence, the investigation has a clear goal of accumulating the conviction elements of charge and of deposition that help the prosecutor to decide whether to dismiss a case or not, whether to make an accusation or not, and whether to ask for an adjournment or whether the prosecutor would suggest an alternative way out, and, furthermore, this stage will assist the person under investigation in preparing his defense.

Apart from the above, it is necessary to add that the elements of conviction gathered in this stage would additionally be used as legal grounds both by the prosecutor and also by the defense to ask the judge the implementation or variation of the precautionary measures that may be requested or had been requested. In this stage, the judge controls the legality of the actions of both parties and takes into consideration the personal provisional remedy or the modification of the personal provisional remedy.

These stages re succeeded by the oral hearing, that is, *par excellence*, the moment to act upon the principles of orality, publicity, immediacy with full validity of the challenge. Taking into account the special characteristics of every Latin American

⁴ Vargas Viancos, J. E. La nueva generación de reformas procesales penales en Latinoamérica. Ponencia presentada al congreso Internacional de Derecho Penal – VII Jornadas sobre Justicia Penal, organizado por la Universidad Autónoma de México, ciudad de Mexico, junio de 2006.

country, the structure of the oral hearing may vary among them, but there are several procedures that all of them share:⁵

- a) The opening of the hearing;
- f) The preliminary statements or opening statements;
- g) The conformance or probatory evidence;
- h) The probatory action;
- i) The final pleas;
- j) The deliberation;
- k) The sentence.

Finally, between the investigation implemented by the prosecutor and the public, open and challenging hearing, there is an intermediate stage that serves as a filter because, through this, excessive, overabundant evidence or evidence that had been legally obtained is prevented from reaching the oral hearing stage. To enable this function, this intermediate stage has a series of mechanisms that are used in order to:

- a) Control the prosecution;
- l) Control the evidence that will be presented in the trial;
- m) Delimit the subject matter of the hearing.

4. Implementation of the Procedural Penal Amendment in Latin America

4.1. Two Different Models for Implementation of the Procedural Penal Amendment Introduced in Latin America

- a) *Total or Full Implementation*: The purpose of this system implies that the Procedural Penal Amendment was applied or became effective at once and all over a specific country, including in this implementation all the contents covered by the amendment. Some examples, where this approach of implementation was carried out in Latin America, were: Bolivia, Costa Rica, Paraguay, El Salvador and Venezuela. This system implied that all the parties concerned had to know and adapt the new model prior to its coming into force. The modification of the legal system was of such a magnitude that it meant a radical change for the parties involved. Due to this, it was not an easy task for the countries that applied this approach of implementation, nor was it as successful as intended.⁶
- n) *Progressive Implementation*: On the other hand, the progressive implementation of the Procedural Penal Amendment implied that the validity of the new system was gradually introduced in the area of an specific country, and that, in general, it began in less complex scenarios: territory extension (districts, regions, etc.), or according to the extent or type of felony. Subsequently, the new experiences and competences that were acquired, were eventually passed on to the rest of the territory of the country. Such approach

⁵ Oré Guardia, A., Ramos Dávila, L. Aspectos comunes de la Reforma Procesal Penal en América Latina, 2000.

⁶ Regarding the case of Ecuador, see Zamalea León, D. Audiencias en la etapa de investigación; en reformas procesales penales en América Latina, Discusiones Locales, Ceja-JSCA, Santiago, 2005, p. 573 y ss, para este autor: "Basically, there was no understanding of what it really meant to set up a new procedural model in place, in praxis it was treated as a legislative change that basically required actors to know a normative corpus".

enabled foreseeing the failures in the system and at the same time improved the working methodologies for the parties concerned. The considerations that made this model more convenient, include economic reasons (enabling the division of the implementation cost); technical and cultural reasons (enabling learning of the operators).⁷ The Latin American countries that introduced the progressive system, were Chile, Mexico, Nicaragua, Peru and Argentina.

4.2. Costs of Procedural Penal Amendment

The economic costs of the Procedural Penal Amendment in Latin America were always a stumbling block for the attempts to modify the procedural amendment because of the fact that the strict compliance of the principle of the procedural legality compelled the states to investigate and penalize all of the felonies committed in their respective territories; however, this principle could be no more than a declaration without a chance to become a reality, among other reasons, because of the shortage of the economic resources.⁸

In the case of Chile, studies concluded that the new criminal justice system was by 24% more economic than the old system, hence, the cost of investigating a felony in the old system was USD 721 but in the new system the cost would not exceed USD 548.

6. Final Considerations

The Procedural Penal Amendment in Latin America strengthened the principles of orality and challenging, and brought them to life, thereby generating challenging spaces in hearings and eventually making possible criminal justice with greater degrees of transparency, obtaining the criminal justice and bringing the understanding of the same closer to the community, thereby obtaining higher levels of celerity than in the previous system, besides, consequently diminishing the time that the suspect was under a personal provisional remedy, for example, in custody. The transparency of the litigation process made the actionable person into a witness and, at the same time, a participant of the decision making in his own case. For example, a 81% of the people surveyed regarding the transparency of the Criminal Court (Juzgados de Garantía) in Chile considered it good or excellent.⁹

However, not everything was so positive when implementing the Procedural Penal Amendment in the Latin American countries. The community demands of public security are rising, partly because of the way in which the communities have been informed about the Procedural Penal Amendment, that is to say, as a means to fight against the sensation of insecurity, experienced by a part of society. Nevertheless, the figures do not show that the Procedural Penal Amendment has

⁷ *Espinoza Goyena, J.* El nuevo Código Procesal Penal. Apuntes preliminares respecto a su implementación. Código Penal, Dike editora, Lima, 2004, p. 23.

⁸ *Vargas Viancos, J. E.* Criterios económicos en la reforma procesal penal. Revista Apuntes de Derecho Facultad de Derecho, Universidad Diego Portales. Available at http://www.udp.cl/DERECHO/publicaciones/criterios_econ.pdf [last viewed 20.06.2017].

⁹ Encuesta de Intercorp solicitada por el Instituto de Estudios Judiciales, *Vera Quilodrán, A.* En Avances en la Implementación de la Reforma Procesal Penal en Países Latinoamericanos. Santiago de Chile, Ministerio de Justicia, 2004, p. 193.

had any effects to significantly lower the levels of insecurity that the authorities have declared at the moment the Amendment was introduced.¹⁰

It is difficult to deny the huge impact that the demands of specific sectors of the society have brought about a criminal proceeding that is not made to reduce crime, but that always results in declaring a person guilty of charge, when criminals are on the rise, or even when other prevention areas fail to deal with crime. This is clear, for instance, when the community senses that crime does not decrease, when the mass media coverage is excessive regarding certain criminal behaviours and therefore produces insecurity in the community; when the police states that they fulfil their duties but the prosecutor or the judges set the criminal free. All of this generates mistrust in the new model without a direct relationship to its actual advantages or disadvantages.

For example, a study in Chile could not find a direct relation between the introduction of a new criminal proceeding model and the insecurity in the people, in other words, it showed that the Procedural Penal Amendment was not a key factor or even a variable in explaining the fluctuations in the perception of fear or insecurity in the population. On the same grounds, the fact that an increasing number of police reports has been understood, by this same study, as a proof of more extensive trust in the system on behalf of the community (decrease in the figures characterising criminality).¹¹

Moreover, the Procedural Penal Amendment provided the Attorney's General Office with a greater role when assigning the direction of the investigation establishing that the police, in the context of a criminal investigation, must follow the same direction. This forethought created a sensation of invasion in the police, and even the sensation of being submitted to a hierarchy.¹² Obviously, this conflict is only apparent. As stated by Horvitz, in the background there is a distribution of competences as a part of the Rule of Law.¹³

Even though the police is a collaborator in the criminal investigation, its function is essential during the preparatory investigation of a crime.¹⁴ The determination of the type of information required to establish a case lies upon the prosecutor, but obtaining that information and the responsibility for the quality of the information is that of the police.

Today, there are some conflicts of competence that might have a negative influence in the development of an amendment. Thus, in some cases, there is an open rejection of the new model and its argument deals with the decrease in the faculties of the police, insufficient understanding of the dynamics of the police duties or even the tolerance toward crime or promotion of impunity. In some other cases, the rejection of the amendment is hidden under apparently harmless lack of coordination (for example, lack of information of timely *notitia criminis* or the

¹⁰ Matus Acuña, J. P. Por qué no bajan las tasas de criminalidad en Chile? *Revista de Derecho Penal y Criminología*, Universidad nacional de Educación a Distancia. 2º Época, Madrid, Julio 2006, No. 18, p. 562.

¹¹ Baytelman, A., Duce, M. Evaluación de la reforma procesal penal. p. 35; Vargas J. E., Binder, A. (Dir.) *Sistemas Judiciales, Una perspectiva integral sobre la administración de justicia*, CEJA, Buenos Aires, 2002, p. 18.

¹² Maier, J. Ambos, K., Woischnik, J. *Las reformas procesales penales en América Latina*. Editorial Ad-hoc, Argentina, 2001, p. 844.

¹³ Horvitz Lennon, M. I., López Masle, J. *Derecho Procesal Penal Chileno*. Tomo I, Editorial Jurídica Chile, 2005, p. 123

¹⁴ Horvitz Lennon, M. I., López Masle, J. *Derecho Procesal Penal Chileno*. Tomo I, Editorial Jurídica de Chile, 2005, p. 173

arrest being carried out within the correct deadline), which may be perceived as a failure, when applying the Code or the lack of understanding of the new order, but when practiced in a systematic manner actually shows the resistance to the model, as well as the institutional struggle for sharing the power.

In any case, it is clear that the Procedural Penal Amendment in Latin America is here to stay and has become a criminal justice with a more extensive certainty and respect for the rights and principles of the Rule of Law, and over the years, it has gradually been solving the problems arising from its implementation and set into motion in the region.

Conclusions

1. Since the colonial times, the Procedural Penal Code in Latin America was based on the Inquisition's model characterized by its secrecy and lack of respect for guaranteeing of a due process.
2. This system began to transform in the middle of the XX century, when a regional movement started, first of all, with academic support, and then grew to become the basis that allowed the changing of the Procedural Penal Codes in the whole region that, along with the development of democratic governments in all the Latin American countries starting in the 1980s, inspired many, so that the change from the Inquisition model to the contradictory model could happen.
3. However, such changes had common difficulties in all the Latin American countries; one of them, and maybe the most important one, were the associated costs to implement the new Procedural Penal Code. This was clearly seen when the new parties concerned were introduced into the system, trained, and a whole new infrastructure was developed for them. The difficulties were not limited only to these aspects, they also surfaced regarding the way in which the Latin American countries set in motion the Amendment of the Procedural Penal Code; hence, there were two systems, the first one, implemented by Bolivia and Mexico among other countries, foresaw introduction of this amendment on a national basis, all at once and for the whole state, and other countries, e.g., Argentina and Chile, made the change gradually, trying to improve this model while developing it in different regions of their countries.
4. Once the new procedural Penal Code was implemented in the region, it was clear that it was less expensive than the previous one and, furthermore, it better represented the regional democracies, respecting the due process and the celerity of the Penal Code.
5. Notwithstanding the above, not everything has been effortless and efficient this process, as a wider prominence of some parties concerned, mainly the Attorney's Office, has produced some conflicts with others, that feel displaced. These conflicts are on the decrease, but they still continue. Consequently, a single inter-institutional coordination would be the fundamental basis for the system to work properly and guarantee a rational and just process in each of its phases.

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Ownership Acquired in Good Faith

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Acquisition of property in good faith is recognized by Latvian law through numerous exceptions from the principle of causation. The law does not provide a clear-cut regulation. Case law has experienced several stages where the same law is applied differently in similar situations, and this has made the outcome of court rulings unpredictable. Attempts to solve the problem by amending existing law so far have been unsuccessful.

Keywords: adverse possession, corroboration, immovable, liability, owner, principle of causality.

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1. Acquisition In Good Faith as a Remedy for a Non-owner in Latvian Civil Law

The Civil Law¹ (CL) does not provide that a person, who has not objectively acquired ownership, should enjoy special protection due to the fact that he/she has acquired their right in good faith. This is apparent from Section 1053 of the CL, which addresses the issue of liability by a defendant in an ownership claim: "liability of a defendant to a plaintiff is diverse, having regard to whether the defendant is a possessor in good faith or in bad faith of the property".

¹ 28.01.1937. Civillikums [Civil Law, hereinafter – CL]. Available at <http://likumi.lv/doc.php?id=225418> [last viewed 08.08.2017].

It follows that the CL in general denies the very probability that the defendant could retain the ownership of a property, which has been acquired contrary to the so-called “principle of causality”.²

The acquirer in good faith may only count on decreasing of his/her liability “so that he or she are not liable only for his or her prior acts or failures to act”³. As soon as the acquirer in good faith finds out that in fact he/she did not acquire the property (for instance, a person to whom a non-owner has transferred the property), he or she must accept that ownership to such property cannot be kept.

This general principle, however, has numerous exceptions. They are spread all over the different chapters of CL. For instance:

“[I]f one spouse disposes of or pledges the movable property of the other spouse, the person who has received such shall be acknowledged as having acquired that property or pledge in good faith, if he or she did not know or ought not to have known that the property was that of the other spouse or of both spouses and that it had been disposed of or pledged contrary to the volition of the other spouse.”⁴;

“Where landowners in good faith utilise another person’s materials for some structures on their own land, then, even though these become their property, they shall reimburse the former owner for the costs of the materials to the extent they have enriched themselves from them; but, if the landowner has utilised the materials in bad faith they shall reimburse all losses caused to the former owner.”⁵;

“Where landowners in good faith seed their land with the seeds of another person or plant their land with the plants of another person, thus depriving the earlier owners of their property⁶, they shall compensate the latter for the value of the seeds or plants to the extent they have enriched themselves from them. However, if they have sown the seeds or planted the plants in bad faith, they shall compensate for all of the losses they have caused, in full.”⁷;

“If the joining of property to the property of another person has been done in good faith and carried out without artistic or skilled work, ownership of the property thereby created shall accrue to the person who has made it, provided that their own materials added thereto are manifestly more valuable than those of the other person. But at the choice of the owner of the materials, they shall be obliged to either return an equal amount of materials of the same kind and quality, or pay such price for these materials as was the highest regarding them at the time when the joining took place, and, in addition, to compensate the owner of the materials regarding losses occasioned to such owner.”⁸;

“If, through the artistic or skilful processing in good faith of the materials of another person, something new has been created, such that the materials used in the composition thereof have lost their former and acquired a new form, then, irrespective of whether the materials of the other person can or cannot

² Rudāns, S. Nekustamā īpašuma labticīga iegūšana. *Jurista Vārds*, Nr. 22(425), 2006. gada 6. jūnijs.

³ Section 1053 of the CL.

⁴ Section 122 of the CL.

⁵ Section 971 of the CL.

⁶ Sections 973 and 976 of the CL.

⁷ Section 977 of the CL.

⁸ Section 983 of the CL.

be separated from it, such new thing shall, in all cases, become the property of the processor, but subject to the duty to provide compensation on the basis of Section 983 to the owner of such other person's materials."⁹;

*"An ownership action may not be brought if the owner has, in good faith, entrusted a move-able property to another person, delivering it pursuant to a lending contract, bailment, pledge or otherwise, and such person has given possession thereof to some third person. In this case, there may be allowed only an action in personam against the person to whom the owner has entrusted his or her property, but not against a third person who is a possessor in good faith of the property."*¹⁰

The above exceptions from the principle of causality are of different nature and significance. The cases, which can be brought, if somebody utilises another person's materials¹¹ or seed their land with the seeds of another person¹² must have happened extremely rarely, if at all: during the period of two decades after reinstatements of CL, the author of this article has never come across of a single case where the aforementioned norms should have been applied. The same should be referred to the processing of the materials of another person in good faith¹³. As an ownership claim is practiced almost exclusively in the area of immovable property, Section 1065 of the CL is also applied extremely rarely. Perhaps, more frequently one would come across Section 1066 that corresponds to the relevant sections in special laws regulating different transport contracts.

All but one¹⁴ of the abovementioned exceptions clearly state that in a specific relevant situation a person who has acquired property in good faith can keep it, as long as she or he compensates the previous owner for the incurred losses. Only Section 122 of the CL does not provide a clear answer, and the situation can be solved in both ways – either the third person maintains the ownership rights acquired in good faith, or vice versa.

Implementation of acquisition in good faith in the family law, as well as of the exception mentioned above under Section 122 of the CL has its own controversial history.

Family law chapter was significantly rewritten before it was reinstated. Instead of separation of property rights by each spouse like it was in the initial version of CL back in 1938, where the joint property of spouses was regarded as exception rather than a norm, the opposite prevailed in the newly reinstated version of the family law chapter of CL.

This brand new part of CL went through different stages of interpretation by the courts. Such interpretations, in turn, left the impact, *inter alia*, upon how to interpret the land register data. At first, it was presumed that the one who was registered as the sole owner of the immovable property, must be regarded as such, unless the other spouse proves that in fact the property belongs either to this other spouse, or it is a joint property.¹⁵

⁹ Section 985 of the CL.

¹⁰ Section 1065 of the CL.

¹¹ Section 971 of the CL.

¹² Section 977 of the CL.

¹³ Section 983 and 985 of the CL.

¹⁴ Section 122 of the CL.

¹⁵ *Grūtups, A. Latvijas Republikas Civillikuma komentāri. Īpašums. (927.–1129. p.). Rīga: Mans īpašums, 1996, 74. lpp.*

Gradually, the opposite view took the upper hand. This new approach brought amendments to the CL:

“A spouse may assign his or her property or his or her share of the joint property of the spouses to be administered by the other spouse who shall preserve and protect such property with all of his or her resources. If the joint immovable property of the spouses is recorded in the Land Register in the name of one of the spouses, it is presumed that the other spouse has assigned his or her share in such property to be administered by him or her.”¹⁶

At that time, there was a wide range of publications reflecting rather polarized views between the two extremes: 1) presumption of joint ownership and 2) presumption of individual ownership by one spouse. The first one was based on the assumption that, notwithstanding what was recorded in the Land Register, – either the immovable property was registered in the Land Register as the ownership of one of the spouses or both, it must be regarded as a joint ownership anyway;¹⁷ while the second view was based on a general principle that only such persons shall be recognised to be the owners of immovable property, as are registered in the Land Register as such owners.¹⁸

The first opinion manifests that the property shall be regarded as the joint property of both spouses (presumption of joint property by both spouses). The other theory claims that in such cases the court shall be guided by the assumption that the immovable property is owned by that person, who is recorded as the owner in the Land Register (presumption of ownership rights by one spouse). One of the supporting authors has also put forward a term “latent ownership rights”.¹⁹

Thus, we can draw a conclusion that, on the one hand, there is no defence for the acquirer in good faith as a general clause in the CL, but on the other hand, there are quite a few specific clauses stating the contrary. Apart from those specific cases, there is only one way for the acquirers in good faith to have their acquisition become irreversible in the CL – through prescription.

“In order to acquire a property through prescription, it must be possessed in good faith, i.e., not knowing of impediments, which do not allow acquiring ownership of it.”²⁰

“In order to acquire ownership through prescription, it is not sufficient that a possessor acquires his or her possession in good faith, but it is also necessary that his or her good faith continue during the entire specified prescriptive period, and accordingly prescription is interrupted by bad faith appearing during such period.”²¹

¹⁶ Section 93 of the CL with amendments of December 12, 2002 that came into force on January 1, 2003.

¹⁷ Višņakova, G. Par laulāto likumiskajām mantiskajām attiecībām. *Jurista Vārds*, Nr. 29, 1999. gads.

¹⁸ Section 994 of the CL; Kalniņš, E. Laulāto manta laulāto likumiskajās mantiskajās attiecībās. Grām.: Privāttiesību teorija un prakse. Rīga: TNA, 2005; Briedis, E. Par nekustamo īpašumu kā laulātā atsevišķo mantu. *Jurista Vārds*, Nr. 10(243), 12(245), 2002. gada 18. jūnijs.

¹⁹ Paļčikovska, M. Laulāto likumiskās mantiskās attiecības un to risinājums. *Jurista Vārds*, Nr. 36(189), 2000. gada 21. novembris.

²⁰ Section 1013 of the CL.

²¹ Section 1015 of the CL.

2. Acquisition in Good Faith as a Remedy for a Non-Owner in Case Law

Notwithstanding the above mentioned limitations for protection of the acquirer in good faith established by Latvian CL, the case law shows the opposite: the good faith acquirer should be protected unless specific obstacles preclude such protection. Somehow, this attitude still coexists with a significant number of court rulings insisting on the opposite.

Jurisdiction did not arrive at such conclusion without hesitation, nor is it a clear-cut solution for the problem. The court practice initially followed the view that “the true owner may claim both invalidation of the [...] alienation agreement and rectification of the wrong record of the property”²² (i.e., the so-called “rectification claim”). Only after some time, this practice gradually changed, giving way to protection of the interests of the acquirer in good faith,²³ although it seems that this practice failed in working out definite criteria for separating cases, in which the preference must be given to the interests of the acquirer in good faith from those where no one can transfer more rights (to another) than possessed by themselves.

It seems that neither the first, nor the second alternative was actually understood or defined, although it was obvious from the very beginning that both of them – protection of property rights acquired in good faith and causality – are incompatible.

Although acquisition in good faith was quite frequently mentioned in court decisions of that period, there was no particular definition or strict criteria for what exactly made the court establish that the rights *in rem* had been acquired in good faith.

Sometimes, however, the courts attempted under Section 1 of the CL to subsume the acquisition in good faith and, in doing so, ignored the substantial difference between the good faith as objective standard of behaviour, as it is defined by the aforementioned Section 1 (which is remotely similar to the meaning of good faith in § 242 BGB²⁴ and the Swiss Civil Law, Section 1), and the good faith as subjective belief that the right *in rem* had passed to the acquirer although in fact it did not, i.e., the meaning that is similar to the one found in § 932 I BGB.²⁵

Although Section 1 of the CL does not deal with good faith in subjective meaning at all (as it will be demonstrated in Chapters 3 and 4 of this article), the court practice has tried to impose this norm on several occasions, discharging claims by the title owner against the good faith acquirer. Legal grounds were formulated by the court rather characteristically: “according to the good faith principle a person may be denied of execution of the subjective rights or duties

²² Grūtups, A. Kalniņš, E. Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. Otrais papildinātais izdevums. Rīga: TNA, 2002, 222. lpp.

²³ Rozenfelds, J. Ownership Claim. *Journal of the University of Latvia* No. 6. Law. Lazdiņš, J. (Editor-in-Chief). Rīga: University of Latvia Press, 2014, pp. 94–95.

²⁴ Bürgerliches Gesetzbuch [German Civil Code, hereinafter – BGB]. Available at https://www.gesetze-im-internet.de/englisch_bgb/ [last viewed 08.08.2017].

²⁵ Latvijas Republikas Augstākās tiesas Senāta 2005. gada 5. oktobra spriedums lietā Nr. SKC-625/2005. Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2005. Rīga: Tiesu namu aģentūra, 2006, 134.–138. lpp.

provided that the interests of the other party shall be regarded as more important pursuant to aim of the law and particular circumstances”.²⁶

Here a clear replacement of protection of a wrongly acquired property with the (wrongly understood) “objective” good faith can be observed. The case was not solved in favour of the claimant (the acquirer in good faith), because the person whose right was affected by such transaction (a spouse of the seller) enjoyed rights, which must have been protected, but admitted that the property right, although acquired by the claimant, should not be executed.

Latvian court practice must be regarded as wrong, due to protecting the acquirer in good faith through Section 1 of the CL. This has joined the long list of vague and inconsistent judgements, which have not solved the problem for protection of the acquirer of property in good faith.²⁷

3. What Does Good Faith Actually Mean?

We see that so far sufficient attention has not been devoted to the meaning of the concept, let alone a uniform definition of good faith. To begin with, there are at least two different meanings of the same phrase “good faith”.

“[O]ne thing is clear [...] good faith in the sense of Treu und Glauben must be distinguished from good faith in the sense of guter Glaube. The later notion (often dubbed subjective good faith) has to do with knowledge. Thus, a person to whom a non-owner has transferred property can still acquire ownership if he is “in good faith” (§ 932 I BGB); and he is not “in good faith” if he knows, or as a result of gross negligence does not know, that the piece of property does not belong to the transferor (§ 932 II BGB). “Objective” good faith (Treu und Glauben), on the other hand, constitutes a standard of conduct to which the behaviour of a party has to conform and by which it may be judged; and our present study is only concerned with good faith in this objective sense.”²⁸

It follows, that one must distinguish between “good faith” in its objective and subjective meaning. If we were to apply this distinction to the Latvian law and practice, we would inevitably find out that although no one has denied such dual meaning of the same wording, nevertheless, no serious efforts have been made to distinguish one from another. We can also establish that disproportionately more attention is devoted to “good faith” in the objective meaning in the legal doctrine, while in the case law the opposite can be observed, where the exercise of “good faith” in subjective meaning prevails. Latvian scientists have mainly reviewed objective rather than subjective meaning of the good faith, although it is not always possible to make a clear distinction between the two in Latvian law.

One must also keep in mind that such distinction plays a different role, if applied to the exercise of subjective rights in general (i.e., in objective sense) or if treated as

²⁶ Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2005. gada 9. februāra spriedums lietā Nr. SKC-75. Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2005. Rīga: Tiesu namu aģentūra, 2006, 175.–181. lpp.

²⁷ Rozenfelds, J. Reform of the Property Law Chapter of the Civil Law of Latvia: Problems and Solutions.” Latvijas Universitātes 71. zinātniskās konferences rakstu krājums “Tiesību interpretācija un tiesību jaunrade”. Rīga: LU Akadēmiskais apgāds, 2013, pp. 35–41.

²⁸ Zimmermann, R., Whittaker, S. Good faith in European Contract Law: Surveying the Legal Landscape. – Good Faith in European Contract Law. Cambridge Studies in International and Comparative Law. The Common Core of European Private Law. Zimmermann R., Whittaker, S. (eds.). New York: Cambridge University Press, 2008, p. 30.

a specific tool for protection of the acquirer in good faith (i.e., in subjective sense). The latter to a greater extent depends upon whether it is applied to movable or immovable property, whereas the former as a universal guide is applied to any kind of rights, notwithstanding their nature.

With this in mind, one can see the obvious difference between regulation of property rights in German and in Latvian legislation. The difference between the two systems does not allow jumping to a conclusion that what is feasible under the German law will also work under the Latvian law. German law treats movable property strictly separately from immovable property, which is not the case in Latvian law. Consequently, we must regard any attempt of borrowing something from German law with utmost caution. Due to the clear distinction between the transactions over movable and immovable property in German legislation, almost nothing of what was said above regarding the transfer of movable property²⁹ should be applied to transactions involving immovable property. The idea of good faith is not mentioned under Division 2 of the BGB at all (“General provisions on rights in land”). The sole instrument that guarantees that the rights *in rem* to the land have been acquired is not a good faith but statutory presumption³⁰. One cannot find any reference to good faith in this part of BGB³¹ as applied to acquisition of land. We can spot this term only when applied to “Accessories of the plot of land”³².

We do not find anything like this in Latvian legislation regarding treatment of transfer of property rights by the CL³³. Only few specific exceptions can be found on immovable property (mainly as additions to the ancient text of previous legislation during updating process of the CL, which we do not find in previous codification).

Whether “faith” is the right term for defining something that has to do with knowledge is another question. Faith and knowledge are tools which operate in different environment. If you know something, there is no space for faith, and vice versa. This leads us to the conclusion that only so-called good faith in objective sense is worth to be addressed by term “good faith”, whereas the so-called “good faith” in subjective meaning, as it is used in § 932 of the BGB, is not. “Good faith” in the latter meaning could be better understood as “lack of knowledge” by the acquirer of certain facts which – should he know them – would be regarded as an obstacle towards acquiring property. However, lack of this knowledge paradoxically somehow removes this obstacle.

Then there is also a question of *onus probandi* – whether the acquirer must actively seek some facts that prove his lack of knowledge of certain facts or on the contrary – the acquirer must remain passive and wait for the other party to provide the relevant evidence. Probably, we must come to the conclusion that the latter is the case and the very attempt by the acquirer of property to try to actively prove that he was unaware of certain facts, which can overturn acquisition of his property right, as such can be used against the acquirer. The latter is in “catch twenty two” trap – if he does nothing, he cannot prove anything, if he does anything – the very attempt to prove that he “knew nothing” will be turned against him as a proof that he did know.

²⁹ § 932–934 of the BGB.

³⁰ § 891 of the BGB.

³¹ § 873–902 of the BGB.

³² § 926 of the BGB.

³³ Sections 930–1031 of the CL.

Nevertheless, the CL suggests that the acquirer in good faith is proactive. There is a specific regulation³⁴, which does allow the acquirer in good faith to make certain efforts and spending in order to corroborate his or her “good faith”. More than that – to make this “faith” irreversible and permanent, this norm envisages that special procedure will do the trick. The one, who is interested in corroborating his or her “good faith” during acquisition of the property, can after his or her property rights are registered in the Land Register, make an application to the court in order to carry out specific procedure called Summoning Procedures Regarding Extinguishing of Rights.³⁵ Then “after the court has printed an announcement in the newspaper “Valdības Vēstnesis” that the persons with objections should come forward within six months’ time. When it is clear that no objections have been brought forward during this period, a decision shall be taken to recognise the transaction as in effect and all subsequent contests against it shall be dismissed.”

Consequently, the recipe for the “acquirer in good faith” is not to “lay low and keep silent”. On the contrary – he or she can even improve upon their “good faith” by advertisement simultaneously taking a risk that this “good faith” will collapse in due course, i.e., if somebody will come forward within six months’ period to contest this faith.³⁶

This once again proves how inadequate is the term “good faith” in the given situation. Usually, we do not say about somebody who is totally unaware of some unwelcome consequences for him that due to his unawareness he is in “good faith”. However, when the one who is asked, confirms that he is “in good health”, he is confirming exactly that. This means that “good faith” is contrary to the main principles, on which legal liability is based – any wrongdoer’s unawareness of the prohibition of the wrong he had committed will not be an excuse for him but for the “acquirer in good faith” it will achieve exactly that result.

But again, we must point out that the key which releases the “acquirer in good faith” from unwelcome consequences of the fact that he/she has acquired the property in a way which is contrary to the positive prohibition by the law, is the lack of knowledge about the existing obstacles which, provided that he/she knew them, would preclude him/her from acquiring the property.

This leads to the conclusion that “good faith” is neither faith but unawareness, and nor is it “subjective”. Rather, it is the assumption that the person who acquired property in good faith did not know of something that would have precluded him from the same acquisition at the time when the acquisition took place.

The question arises – what is so important about somebody’s ignorance that it is considered as an excuse for acquiring the property contrary to objective hurdles the acquirer was aware of?

Probably, the very fact that public interest in stability of legally acquired property rights prevails over the need to punish subjective mistakes! This conclusion causes a necessity to once more compare conclusions achieved so far about the good faith in objective sense. After all, if the element of public interest could be found here, then

³⁴ Section 1481 of the CL.

³⁵ 14.10.1998. Civilprocesa likums [Civil Procedure Law]. Available at <https://likumi.lv/doc.php?id=50500> [last viewed 08.08.2017]; Section 293–297 of the Civil Procedure Law.

³⁶ *Davidovičs, G.* Civilprocesa likuma komentāri. II daļa (29.–60¹.) nodaļa. Lietas par tiesību dzēšanu uzaicinājuma kārtībā. Sagatavojis autoru kolektīvs Prof. K. Torgāna zinātniskajā redakcijā. Rīga: TNA, 2012, 318.–330. lpp.

it is almost certain that there must be public interest in the exercise of rights in good faith in objective sense.

4. Exercise of Rights in Good Faith in Objective Sense (So-called General Clause of CL) As A Surrogate Protection of Acquisition in Good Faith

Contrary to good faith as one of the preconditions for protection of the acquirer in good faith as described above to be found in previous legislation and apparently borrowed from there,³⁷ there is a completely new clause in CL not to be found in previous legislation and regarded as “good faith principle” or “general clause” of CL. It was admitted that the very location of the good faith principle under the CL Section 1 in the very beginning of the CL testifies about the great importance of the good faith principle in executing civil law,³⁸ which is mainly understood as “prohibition clause for abuse of rights”,³⁹ but also as a universal legal mechanism, through which the judge shall create a norm in a constructive way guided by the system and spirit of law instead of being a legislator himself.⁴⁰

Section 1 of CL does not deal with good faith in subjective meaning altogether, because it was designed for a completely different purpose, which has nothing to do with protection of a person who has acquired property in good faith being unaware that his/her counterparty was not entitled to the property right and, knowingly or without any knowledge about this defect, had handed over it to the acquirer. Section 1 of CL does not deal with someone who is exercising rights which actually do not belong to him/her as is case with the acquirer of property in good faith where his/her title exists only in the acquirer's ill guided subjective beliefs. On the contrary, this Section precludes a person from using rights that definitely belong to him/her. The law precludes him/her from exercising those rights not because someone is in doubt about their existence but because this can lead to the abuse of rights.

One of the first authors, who has paid attention to the exercise of rights in good faith in objective sense (so called general clause of CL) was M. Krons, whose view was relatively new at the time he published his article. M. Krons has specially underlined that

*“the Civil law has not taken over the provision under the Swiss Civil Law Section 1 about a judge's function to create new norms of law in case of a defect in law. It is exactly the other way round – the Civil law Section 4 provides that the provisions of this Law shall be interpreted firstly in accordance with their direct meaning; where necessary, they may also be interpreted in accordance with the structure, basis and purposes of this Law; and, finally, they may also be interpreted through analogy”.*⁴¹

³⁷ Rozenfelds, J. Reform of the Property Law Chapter of the Civil Law of Latvia: Problems and Solutions. Latvijas Universitātes 71. zinātniskās konferences rakstu krājums “Tiesību interpretācija un tiesību jaunrade”. Rīga: LU Akadēmiskais apgāds, 2013, p. 30.

³⁸ Balodis, K. Labas ticības princips mūsdienu Latvijas civiltiesībā. *Jurista Vārds*, Nr. 24(257), 2002. gada 3. decembris, 14. lpp.; the similar opinion expressed also by another author M. Krons (*Krons, M. Civillikuma pirmais pants (Laba ticība kā tiesiskās rīcības kritērijs)*. Tieslietu Ministrijas Vēstnesis, 1937, 270. lpp.).

³⁹ Sniedzīte, G. Tiesību normu iztulkošana *praeter legem* (II). *Likums un Tiesības*, 7. sēj. Nr. 11(75), Novembris 2005, 356. lpp.

⁴⁰ Krons, M. Civillikuma pirmais pants. *Tieslietu ministrijas Vēstnesis*, Nr. 2, 1937, 242. lpp

⁴¹ Ibid.

Thus, as pointed out by M. Krons, in case of defect in law the judge shall create a norm in a constructive way, guided by the system and spirit of law, instead of being a legislator himself. M. Krons writes:

“bearing in mind that the source for the Civil law Section 1 – Section 2 of Z.G.B. – does not contain a norm that would assign the judge with a right to create new law and that the respective Z.G.B. Article was not taken over *into* the Civil law, one shall come to conclusion that the CL Section 1 does not contain provision about the court’s function to create new law. While the norm developed by the judge in a constructive way and based on the general reasoning of the law resulting from the CL Section 1 shall be coordinated with the “good faith” preconditions”.⁴²

It follows from the above that the application of the good faith principle in circumstances when it comes into conflict with a clear and obvious precondition of a legal norm would not be possible. And why should it, if Section 1 of the CL is not about implementation of specific law by any institution like the court, but mainly about exercising of rights by an individual? Nevertheless, after re-establishing of the CL in 1992, discussion took up a completely new direction as if the intention of the law maker were to create a guide for establishing a new law beyond the existing one (*praeter legem*).

Several modern authors have expressed their opinion based on the good faith principle. Jānis Neimanis claims that *praeter legem* is applicable only when in some specific matter the silence of law does not touch upon a specific legislator’s decision. It is possible that the legislator’s intention was exactly to express by such silence that definite lawful consequences may not be referred to the problem situation. In such cases, a judge’s *praeter legem* would be inadmissible revolt against the legislator, but the judge’s ruling would be in conflict with the law. Application of such type of rights is called *contra legem*.⁴³ The author refers in this way to the judge’s capacity to supplement the existing norm of law only in case when filling in of a defect is necessary. However, the quoted author does not refer to the CL Section 1 to be the grounds for such creativeness.

E. Kalniņš has expressed a more radical opinion in this matter, admitting a possibility to re-create existing regulation by the use of *praeter legem*. At the same time, E. Kalniņš argues that the pre-condition for *praeter legem* shall not only be a lawfully important situation of life having the law defect, but also a conclusion that the mentioned defect in law may not be filled in by analogy or in a way of teleological reduction.⁴⁴

In the latter publication, E. Kalniņš, having analysed this method in detail with regard to the good faith principle under the CL Section 1, as well as by referring to the major part of the Senate’s judgments, underlines the connection of this general clause with other norms and principles of law, as well as states that in order to solve a particular life situation, one shall always carry out concretization of the respective general clause. In cases, when the judge cannot find more or less typical precedents, he shall judge according to his conviction taking into account the existing criteria and grounding the judgment on such legal evaluations that sufficiently justify one or another legal solution.

⁴² Krons, M. Civillikuma pirmais pants. *Tieslietu ministrijas Vēstnesis*, Nr. 2, 1937, 242. lpp.

⁴³ Neimanis, J. Ievads tiesībās. Rīga : zv. adv. J. Neimanis, 2004, 144. lpp.

⁴⁴ Kalniņš, E. Tiesību tālākveidošana – juridiskās metodes pamati. Grām.: Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā: Rakstu krājums. Rīga: LU, 2003, 170. lpp.

At the same time, he also notes that the current Latvian court practice presents a very poor reference and comparative material that a judge could use to concretize the good faith or good virtues general clauses.⁴⁵

G. Sniedzīte also has analysed the good faith general clause, establishing that this principle was incorporated in the CL from the respective Swiss Civil Law norm, besides, the author argues that the good faith clause in the international human rights documents may often be found under the title “prohibition clause for abuse of rights”. It may be found, for example, under Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms and under Article 54 of the Second section of the EU Fundamental Rights Charter.⁴⁶

Apart from the very complicated issue, whether Section 1 of CL must indeed be regarded as a guideline for judges (which is the dominant view reflected in above mentioned quotations), or is it simply a moral compass for the individuals (as it follows from the wording of Section 1 of the CL), we do not find any argument in favour of the good faith acquirer of property.

All we find on the subject only adds a new weight to the argument already pointed out under Chapter 2 of this article – that the exercise of a right by some individual “in good faith” has nothing to do with the protection of the acquirer of property in good faith – the only link between the two is the very term “good faith”, and this, in turn, is misleading.

Nevertheless, it does not mean that although there is hardly any internal connection between the so-called good faith in objective and subjective meaning apart from the very term “good faith” (albeit misleading in the latter case), there would be no point in protecting the acquirer in good faith. Still, the problem has not been solved so far – there is no adequate answer in CL (nor is it in literature or in case law) as to why such interest should be protected and, if so, – what would be an adequate mechanism to ensure it?

5. General Description of Acquisition in Good Faith by Law

Description of the acquisition in good faith may be found in Family law chapter, Section 122 of the CL:

“the person who has received such shall be acknowledged as having acquired that property or pledge in good faith, if he or she did not know or ought not to have known that the property was that of the other spouse or of both spouses and that it had been disposed of or pledged contrary to the volition of the other spouse”.

One could wonder why this case is specific with relationship between a husband and a wife, and cannot be found as a part of standard regulation regarding any proprietor.

Reluctance by CL to establish protection for acquisition in good faith as a general principle has also resulted in practice. The case law has not worked out such protection to be a general principle, although sometimes in certain court decisions a wording “good faith” is used as a pretext for allowing the acquirer to retain the property, which otherwise should have been reverted to another person.

⁴⁵ Kalniņš, E. Privāttiesību teorija un prakse. Rīga: TNA, 2005, 380. lpp.

⁴⁶ Sniedzīte, G. Tiesību normu iztulkošana *praeter legem* (II). *Likums un Tiesības*, 7. sēj. Nr. 11(75), Novembris 2005, 356. lpp.

The situation described above can be relevant not only with regard to movable but also immovable property. With respect to immovable property, there is a presumption that, notwithstanding whether only one of the spouses is entitled to the immovable property according to the land register, still, this property must be regarded as a joint property:

“[I]f the joint immovable property of the spouses is recorded in the Land Register in the name of one of the spouses, it is presumed that the other spouse has assigned his or her share in such property to be administered by him or her.”⁴⁷

It is established by case law that this norm does not stipulate that “assigning” means handing over the property rights, but that such property is still jointly owned by both spouses. Record of such property in the Land Register in the name of only one of the spouses simply means that the property is entrusted by one spouse to another “for administration”.

Such reading of CL is somewhat misleading, because it entirely ignores the principle that

“[O]nly such persons shall be recognised to be the owners of immovable property, as are registered in the Land Register as such owners.”⁴⁸

The relationship among different parts of the CL has always been a difficult issue for Latvian legal science, as well as practice. Having noticed that there is contradiction in regulation of joint property rights enjoyed by spouses,⁴⁹ on the one hand, and the rights of co-owners of the same object,⁵⁰ on the other hand, it was explained in literature by relation of the former norm towards the latter as the “special” towards the “general”,⁵¹ which actually does not explain anything. The author of this view did not bother to explain what is so “special” about Section 93 and why something, which is located at the very beginning of a national civil code, must be regarded as “special”. Also – why all this could not be interpreted the other way round in other circumstances?⁵²

So far, we have established that “good faith” in context of the acquirer of property in good faith may be anything but the “good faith”.

We have also found that “good faith” as a general clause described in Section 1 of CL has nothing in common with “good faith” in context of the acquirer of property in good faith.

We have also noticed that almost all the attempts to use “good faith” as a tool for protection have turned out to be doomed to fail so far.

As to the general principle of acquisition of property in good faith, we have established, in turn, that it does not protect the acquirer against the claims brought by previous owner.⁵³ Apart from the abovementioned exceptions, good faith can

⁴⁷ Section 93 of the CL.

⁴⁸ Section 994 of the CL.

⁴⁹ Section 124 of the CL.

⁵⁰ Section 1067 of the CL.

⁵¹ *Grūtups, A.* Latvijas Republikas civillikuma komentāri. Īpašums (927.–1129.p.) Rīga : Mans īpašums, 1996, 147.–148. lpp.

⁵² “Reversible presumption” – *Kalniņš, E.* *Laulāto manta laulāto likumiskajās mantiskajās attiecībās.* Rīga: TNA, 2010, 184.–190. lpp.

⁵³ Section 1065 of the CL.

only serve as a protective shield for the acquirer in good faith to be one of the six preconditions for the acquisition of property through prescription.⁵⁴

From this brief observation of law, we can conclude that apart from very specific exceptions,⁵⁵ acquisition of an object in good faith does not protect the acquirer from vindication.

6. Dual Meaning of “Faith” in CL

Acquisition of property rights in good faith is not the only understanding of “good faith” in subjective meaning to be found in CL. There is another usage of the term “faith”, which may lead to further misunderstandings.

Possession is in good faith or it is in bad faith.⁵⁶ At the first sight, it is the same “good faith” in subjective sense that we are already familiar with. In fact, however, it is something different. So far, good faith in subjective sense was understood as something to do with knowledge about certain rights. Possession in good faith is about knowledge of facts. Acquisition of property rights in good faith and acquisition of just possession in good faith is not easy to distinguish. It can be observed that even in Latvian case law, the distinction between the two are sometimes blurred. Mixing these two meanings up may lead to far-reaching mistakes.

Distinction between the two meanings is difficult due to several reasons, also for the pure wording to be found in the CL.

“Possessors in good faith are those who are convinced that no other person has a greater right to possess the property than they, but possessors in bad faith are those who know that they do not have the right to possess the property or that some other person has greater right in this respect than they.”⁵⁷

However, it is not about rights altogether. It is easy to miss the whole point if in interpreting this norm one overlooks what is already said about “legal or illegal” possession:

“possession acquired by force or in secret⁵⁸ from persons from whom an objection could be expected, is illegal.”⁵⁹

The distinction between the two meanings of good faith becomes more apparent, if one takes a closer look towards acquisition of property through prescription (adverse possession):

“In order to acquire ownership through prescription, it is not sufficient that a possessor acquires his or her possession in good faith, but it is also necessary that his or her good faith continues during the entire specified prescriptive period, and accordingly prescription is interrupted by bad faith appearing during such period.”⁶⁰

Here it must become clear that possession in good faith is something that lasts throughout the whole period of prescription, whereas acquisition of property in

⁵⁴ Sections 998–1031 of the CL.

⁵⁵ Section 122 and 1065 of the CL.

⁵⁶ Section 910 of the CL.

⁵⁷ Section 910 of the CL.

⁵⁸ Possession acquired in secret can also be translated as possession acquired by stealth.

⁵⁹ Section 909 of the CL.

⁶⁰ Section 1015 of the CL.

good faith is completed as soon as a person has acquired the property rights. This is the whole point. If acquisition in good faith contains something worth defending against the true owner, then it is different from the possession in good faith, which evaporates as soon as this crucial obstacle is found out in the way of acquiring property rights through prescription.

Strictly speaking, it must be added that CL is slightly inaccurate also in using the term “good faith” without distinction both in Chapter 2, Sub-chapter 4 (Forms of Possession) and in Sub-Chapter 3 of Part Three (Property Law), because the meanings used in those chapters are not compatible.

However, the difference between the meaning of possession in good faith, as applied to the defence of the possessor in good faith, when compared with the possession of good faith as a precondition for the acquisition of property through prescription is not such a significant mistake, as is the difference between the meaning of possession in good faith, as applied to the defence of the possessor in good faith, and the acquisition of property in good faith.

The difference between the two meanings becomes apparent, if we think about the acquisition of property rights as a momentary act compared with the possession as a lasting process. The former is completed as soon as property rights are acquired. The latter can last for an unlimited period of time. Acquisition of property rights is either performed in good faith once and forever, or it is not. Possession in good faith can turn into its opposite at any time. It is obvious from this comparison that the possession in good faith cannot be applied to the acquisition of property rights in good faith, because one cannot apply lasting condition to a momentary event.

Nevertheless, there is a case law, where courts confuse these things even after it was pointed out in legal literature that these two meanings of good faith are not interchangeable.⁶¹ By using the test of “possession in good faith” as a criterion of whether property rights were acquired in good faith, the courts have deprived themselves of any firm criteria to distinguish between the cases where the property should remain with the acquirer in good faith⁶² from those, where the property has to be reversed to the previous owner.⁶³

Little attention has been paid to ambiguity of the abovementioned criteria, as well as to the fact that a wide range of case law where the above thesis is supported by the Supreme Court can be easily covered with equally impressive range of decisions stating the contrary, i.e., that good faith does not always count. It is even impossible to come to the conclusion that the case law has changed – it is still lingering.

The only difference between the situation today as compared with that of the previous decade, perhaps is that one can find more cases dealing with the issue of determining whether acquisition in good faith has taken place. However, these decisions co-exist with those, where arguments of the defendant over the issue of acquisition in good faith fall on deaf ears and are still approved by higher instances

⁶¹ *Rozenfelds, J.* Valdijuma teorijas [Possession Theories]. Latvijas Universitātes Zinātniskie raksti. 740. sējums. Prof. *Lazdiņš, J.* (Editor-in-Chief). Rīga: Latvijas Universitāte, 2008, 42.–60. lpp.

⁶² “Par nekustamā īpašuma labticīga ieguvēja aizsardzības priekšnoteikumiem”: Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2010. gada 12. maija spriedums lietā Nr. SKC-11/2010. *Jurista Vārds*, Nr. 39(634), 2010. gada 28. septembris.

⁶³ Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2012. gada 1. februāra spriedums lietā Nr. SKC-10/2012. Available at: http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/hronologiska-seciba_1/2012-hronologiska-seciba/ [last viewed 02.05.2016].

as compatible with the “established case law”, whatever it means. The Supreme Court has recently declared that particular court decisions must be reviewed on the grounds that by examining the ownership claims, the courts have refused to investigate, whether the defendant has acquired the property in good faith. The Supreme Court asserted that the case law has changed since 2005, and that in reviewing ownership claim the court was obliged to examine, whether the defendant had acquired property in good faith, even if it was acquired illegally. Unfortunately, by insisting that acquisition in good faith should be examined, the Court has nevertheless failed to put forward any strict criteria except registration of the immovable property and possession of the movables. This argument seems inadequate given that the purpose of an ownership claim is to overthrow and destroy the argument of a defendant that he or she is registered as an owner of the immovable property in the Land Register⁶⁴, or is in possession of the property at issue⁶⁵. Thus, by claiming rightfully to review the case, the court has used circular reference as an argument to support its decision.⁶⁶

A clear sign that there is something missing in the law regarding the argument of acquisition in good faith are the recent attempts to amend the CL.

7. Attempts to Implement “Subjective Good Faith” in Law as a Universal Principle

The radical solution proposed in the research initiated by the Ministry of Justice in 2008 intended to replace Section 996 of the CL with an absolutely new one:

“A third person, who through a legal transaction and in good faith relying on the Land Register records, acquires ownership rights to immovable property, shall also be protected, if the Land Register records do not correspond with the actual legal situation. The third person cannot in good faith acquire ownership rights to an illegally acquired immovable property.

These provisions shall be respectively applied also to other acquisitions of ownership rights to immovable property in good faith”⁶⁷

The present proposal excludes an exception regarding immovable property acquired illegally – it is not because it would not be topical any longer in the opinion of the author of this proposal, but rather due to the fact that this part of the proposal was much criticised, besides – from totally different standpoints.

The main drawback of this proposal, however, was that it *per se* could not ensure uniformity in courts’ interpretation of mutually colliding legal norms due to highly unclear wording of Section 1480.⁶⁸

The proposed solution, which was supported by the good intention to follow German law as a raw model, ironically turns out to be very “un-German” in

⁶⁴ Section 994 of the CL.

⁶⁵ Section 1044 of the CL.

⁶⁶ Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2012. gada 18. aprīļa spriedums lietā Nr. SKC-136/2012. Latvijas Republikas Augstākās tiesas Senāta spriedumi un lēmumi 2012. Rīga: TNA, 2013, C, 55. lpp.

⁶⁷ Kalniņš, E. Pētījums par Civillikuma lietu tiesību daļas pirmās, otrās un trešās daļas modernizācijas nepieciešamību. Available at <http://at.gov.lv/lv/resursi/petijumi/> [last viewed 29.04.2016].

⁶⁸ Rozenfelds, J. Reform of the Property Law Chapter of the Civil Law of Latvia: Problems and Solutions. Latvijas Universitātes 71. zinātniskās konferences rakstu krājums “Tiesību interpretācija un tiesību jaunrade”. Rīga: LU Akadēmiskais apgāds, 2013, 43. lpp.

substance, given that there are at least two distinctive features of BGB, which we do not find in CL (let alone the main difference that CL is based on principle of causality, but BGB – on principle of abstraction). Firstly, CL makes no distinction between transfer of movable and immovable property, with a few exceptions like the abovementioned Section 1065 of the CL. Secondly, CL does not stipulate that the one who actually holds the object, must be presumed to be the owner. On the contrary – instead of presumption, the *onus* of proof lays on anyone who claims that he/she is a proprietor. Instead of presumption of rights, CL claims that one must prove not only that he or she has actually acquired such rights through a lawful procedure, but, furthermore, if a claimant alleges that he or she acquired the property through delivery or inheritance from another person, then he or she must also prove that his or her predecessor was the owner of it (Section 1060 of the CL), i.e., the so-called *probatio diabolica*⁶⁹ abandoned by other legislations centuries ago.

Conclusions

It is very unlikely that proposals regarding acquisition in good faith will turn into real amendments to the CL. Probably, it will never happen.

*“As so often happens, the questions historians have asked have not been definitely resolved; but they do not seem quite as urgent any more as they once did, and people have begun to ask different questions or, perhaps, the same questions as before, but in a different form and with a different emphasis.”*⁷⁰

Looking back into the recent history of the preconditions for defence of the acquirer of property in good faith, one can notice at least three different stages: 1) undisputable dominance of ownership rights over acquisition in good faith; 2) indecision between the defence of the true owner and the acquirer of property in good faith; 3) admission that the acquirer of property in good faith must be always defended (albeit without working out strict criteria of good faith). While regulation of the issue by CL has remained unchanged, the case law has undergone a dramatic turn from one extreme to another. It remains to be seen, whether this trend will lead further towards more or less coherent and predictable case law in the near future.

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French Liberal School of the Second Half of 19th Century. On Political Freedom

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The article seeks to analyze political and legal views of the French liberal school of the second half of 19th century on freedom as a whole and on political freedom in particular.

Keywords: liberalism, liberal school, freedom, individualism, constitution, parliamentarism, political regime.

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Introduction

Over the two recent centuries, France has developed a rule-of-law state, which is based, *inter alia*, on the provision of human rights and freedoms. The Declaration of the Rights of Man and of the Citizen (1789) was the first to enshrine rights and freedoms, since then it became a constitutional principle. In this regard, studies of political and legal concepts of human rights and freedoms never become irrelevant.

This article explores the political and legal narrative of the French liberal school of the second half of the 19th century regarding political freedom. When developing these issues, the following methods were used: dialectical, functional, formal and dogmatic, legal and historical, comparative historical, method of systemic analysis, etc.

Thus, formation of the political and legal concept of liberalism was tightly linked to the evolving capitalism of 17th–18th centuries. Liberalism defied absolutism for several reasons. Firstly, liberalism counterposed the idea of social strata to the concept of natural law. Secondly, it supported the idea of individual freedom and

proved the existing governance inefficient. Thirdly, it criticized the arbitrary rule, whereby authorities stood above the law.¹

By the 19th century, main principles of classical liberalism had either been articulated or already enshrined in legislation. They were: absolute value and equality of human personality; autonomy of individual will, existence of inalienable human rights; contractual nature of state-individual relations; rule of law as an instrument of social control; restriction of the state domain and range of its functions; immunity against state intervention into private life and freedom of action (as permitted by law) in every area of public life.²

1. French Liberal School of the Second Half of 19th Century

French liberalism as a political movement originated in the first decade of the 18th century after the Bourbon Restoration and was formed by G. de Staël, B. Constant, F. Guizot, A. de Tocqueville, etc.

Generally, the 19th century is viewed as the “golden age” of French liberalism.³ Representatives of French liberalism in their works sought to understand the legitimacy of governmental power and the limits thereof; they also proved the necessity to restrict political power in order to protect individual freedoms.

The middle of the 19th century witnessed a certain transformation of French liberalism, caused by political changes taking place in France. Liberals “were opposed both to the democratic ideas that fuelled the 1848 Revolution and to the establishments that appeared after the coup d’état of 1851.”⁴ French liberal school was formed in the middle of the 19th century. Its representatives include L. A. Prévost-Paradol, É. R. de Laboulaye, E. Vacherot, J. Simon.⁵

A central place in the political and legal thought of the second half of the 19th century is attributed to rights and freedoms, their classifications and, above all, to political freedom. The terminology articulated by P. Rossi in late 1830s to early 1840s became widespread in France. According to him, rights and freedoms can be divided into private, public (social), and political. Private rights belong to the field of civil law. Rights “that belong to individuals, but cannot be thought of without a society, because they reflect the development of human capabilities in the society and the development of humans themselves”⁶ are a group of public rights that includes liberty of an individual, property right, freedom of expression, religious freedom. Political rights in their turn “are constituted by participation in political power”⁷ E. Vacherot classified all rights into social and political, and thought that they defined the ideal of human and society.⁸ E. Olivier, an outstanding political figure in France at that time, noted that “rights of an individual that are not controlled by the state, constitute individual freedom; whereas rights used

¹ *Ballestrem, K. G.* Predposylki i predely demokratii // *Voprosy filosofii.* 1994. # 7-8, s. 238.

² *Hallowell, J. H.* Main Currents in Modern Political Thought. NY: Henry Holt and Company. 1950, pp. 10–11.

³ *Laine, M.* Préface // R. Leroux et D. Hart, *L'âge d'or du libéralisme français*, Paris: Ellipses, 2014, pp. 3.

⁴ *Mishel' A.* Ideja gosudarstva. Kriticheskij opyt istorii social'nyh i politicheskijh teorij vo Francii so vremeni revoljucii. M.: Izdatel'skij dom «Territorija budushhego», 2008, s. 315.

⁵ *Rosanvallon, P.* Guizot et la question du suffrage universel au xix siècle // *François Guizot et la culture politique de son temps.* Colloque de la Fondation Guizot. Paris: Gallimard & Le Seuil, 1991, p. 134.

⁶ *Rossi, P.* Cours de droit constitutionnel. T. 1. Paris: Librairie de Guillaumin et C, 1866, p. 10.

⁷ *Ibid.*, p. 11.

⁸ *Vacherot, É.* La démocratie. Paris: F. Chamerot, 1860, p. 20.

by individuals to control power constitute political freedom”.⁹ Similar ideas were expressed by J. Simon, who divided rights and liberties into natural or inalienable rights, and political rights.¹⁰ Thus, French liberal scholars of the second half of the 19th century thought that rights and freedoms, when systemized, represent a dichotomy that shows itself, on the one side, in exercising private rights and on the other side, in the degree of participation in political life.

The most complete and feasible political and legal concept of political freedom was set forth by L. A. Prévost-Paradol and É. R. de Laboulaye, prominent French liberal scholars.

Political and artistic activities of Lucien-Anatole Prévost-Paradol (1829-1870) reached its peak in the 1860s, when he became member of the French Academy, run for Legislative Corps at the 1863 and 1869 parliamentary elections and was appointed ambassador in the US. His most famous work was “The New France”, published in 1868, which made its author “the leading political writer.”¹¹ The Book was “dedicated to general politics; complete and beautifully written, it summarized all the ideas of the liberal party.”¹² It is worth noting, that L. A. Prévost-Paradol was “not that much concerned with abstract thoughts about the correlation between rights and equality or with forms of governance; he would rather focus on more specific issues: political institution reforms, moral and intellectual progress of the society.”¹³ L. A. Prévost-Paradol is considered to be the “spiritual father” of the 1875 Constitution.¹⁴ Many of his ideas found their reflection in constitutional laws of 1875. They were implemented in establishing a bicameral parliament, electing a Chamber of Deputies on the basis of general direct voting, as well as in collegial liability of ministers to the parliament (articles 1 and 6 of the Constitutional Law “The organization of government” from 25 February 1875).¹⁵

Édouard René Lefèbvre de Laboulaye (1811-1883) – a French scholar, legal activist and politician. Like L. A. Prévost-Paradol, he was elected active member of the French Academy, taught at the Chair of Comparative Legal Studies at Collège de France. From late 1850s to late 1860s he run for Legislative Corps four times, but was unsuccessful.

After the Third Republic had been proclaimed in France, at the additional elections of 1871, E. Laboulaye was elected a deputy of the National Assembly, where he was a leader of the Centre Left, headed the commission on reforming higher education. E. Laboulaye was one of the authors of the 1875 Constitution; he presented national law “Relations between governments” to the National Assembly. In December 1875, he was elected lifelong senator.

The most prominent of his works, containing his political and legal views are “Liberal Party, Its Program and Its Future”, “Constitutional Thought”, “The State and Its Limits”, “French Administration and Legislation”, etc.

⁹ Ollivier, É. *Démocratie et liberté* Paris: A. Lacroix, Verboeckhoven & C., 1867, p. 384.

¹⁰ Simon, J. *La liberté politique*. 5-e éd. Paris: Librairie hachette et C. 1881, p. 164.

¹¹ Giquel, J.-É. *Les idées constitutionnelles de Prévost-Paradol* // *La Revue administrative*. 2000. № 316, p. 395.

¹² *Istorija XIX veka*. / pod red. Lavissa i Rambo. T. 6. M.: Socjkegiz, 1938, c. 453.

¹³ Fedorova, M. M. *Modernizm i antimodernizm vo francuzskoj politicheskoj mysli XIX veka*. M.: COP Instituta filosofii RAN, 1997, c. 90.

¹⁴ Morabito, M. *Histoire constitutionnelle de la France de 1789 à nos jours*. 12-e éd. Paris: Montchrestien, 2012, p. 311.

¹⁵ *Constitution de 1875, IIIe République*. Available at www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1875-iii-e-republique.5108.html [last viewed 05.11.2016].

In his works, E. Laboulaye tends to analyze the category of freedom, definition of the state power, differentiation between private and public interests.

Overall, despite diverging views on a number of separate issues, the general ideas of L. A. Prévost-Paradol and E. Laboulaye are quite similar to each other.

2. Freedom as Understood by French Liberalism of The Second Half of the 19th Century

French liberals viewed freedom as an individual notion, because it “is enshrined in the right of every individual to develop themselves and do whatever is possible, given their physical, intellectual and moral capabilities”.¹⁶ Besides, freedom is considered as a panhuman notion: “Inventing a purely French political regime is as unreasonable as inventing a purely French industry, thus defying all the experience given to the Americans and the Englishmen. Since industry has no homeland, neither has liberty; both belong to the common legacy of the Christianity.”¹⁷

It is worth mentioning that L. A. Prévost-Paradol in “The New France” paid far less attention to the notion of freedom than E. Laboulaye. Like the majority of French law scholars of the second half of 19th century, who thought that parliamentarism was “an instrument of freedom”, effecting through “representative government control of both parliamentary chambers and public discussions,”¹⁸ L. A. Prévost-Paradol also supposed that it is parliamentarism that makes nation free.¹⁹ Besides, the author of “The New France” did not raise the issue of setting up a particular regime. The key idea was that “people rule themselves within a republic or a monarchy with the help of an elected assembly and a liable ministry.”²⁰ Thus, L. A. Prévost-Paradol defined parliamentarism as a type of representative government.

Neither did E. Laboulaye think of a particular regime, because what mattered was “the spirit of freedom, neither English, nor French, that is, however, a common value and glory of civilization.”²¹ The spirit of freedom can find its expression only in parliamentarism or, as said by E. Laboulaye, in constitutional rule.²²

In his definition of freedom, E. Laboulaye proceeded from the articles of the 1789 Declaration of human and civic rights, which was based on the natural law theory. The Declaration supported the concept of inalienable human rights that are given to people by birth, not by law. At the same time, the contemporary French constitutionalists note that “definitions of various rights provided in the Declaration present an individualistic social concept. Everything is aimed at reaching maximal independence of people from each other and at limiting state prerogative power.”²³

E. Laboulaye presented and proved his own classification of freedoms, based on the assumption that they can be of primary or secondary, or derived nature.

¹⁶ *Labulje, Je.* Gosudarstvo i ego predely. V svjazi s sovremennymi voprosami administracii, zakonodatel'stva i politiki. SPb.: Izdanie N. I. Lamanskogo, 1868, c. XXVII.

¹⁷ *Laboulaye, E.* Le Parti libéral. Son programme et son avenir. 8-e éd. Paris: Charpentier et C, 1871, p. 129.

¹⁸ *Laffitte P.* Le suffrage universel et le régime parlementaire. Paris: Librairie Hachette, 1888, p. 180.

¹⁹ *Prévost-Paradol, L.-A.* La France nouvelle. Paris: Michel Lévy frères, 1868, p. 104.

²⁰ *Ibid.*, p. 153.

²¹ *Laboulaye, E.* Le Parti libéral. Son programme et son avenir. 8-e éd. Paris: Charpentier et C, 1871, p. 130.

²² *Ibid.*, p. 127.

²³ *Hamon, F., Troper, M.* Droit constitutionnel. 36-e éd. Paris: LGDJ, 2015, p. 329.

He distinguished between two types of freedoms: “the first type exists on its own (i.e., by birth – S.B.); they are what we today call social, individual, municipal freedoms, etc.; the other type provides guarantee for the freedoms of the first type: they are political freedoms”.²⁴ E. Laboulaye calls the freedoms of the first type civil freedoms; they are natural, because “for us they mean only the right to live and to be masters of our life”.²⁵ In addition, civil freedoms were considered from the point of view of individualism that allows to shield people from abuse of authorities in power.

Unlike civic freedoms, political freedoms are apt to change, because they are directly dependant on a certain historical epoch and on political institutions of various states.

3. Concept of Political Freedom by E. Laboulaye and L. A. Prévost-Paradol

Political freedoms as understood by E. Laboulaye included four elements. They were: electoral law; free election of national representatives with broad control capabilities; independent judicial system; free press, devoid of any administrative restrictions.

E. Laboulaye stated that political freedoms should protect civil freedoms; however, the first should not replace the last.

Both E. Laboulaye and L. A. Prévost-Paradol stood for universal suffrage. Nevertheless, they differed in opinion regarding electoral system that was in place in France. E. Laboulaye was sure that the 1852 Constitution “preserved universal suffrage, which is the guiding principle of our government. Empire is a democracy that has hereditary sovereign and representative institutions. This is a new unprecedented political system”.²⁶ In his opinion, electoral system required only minor amendments.

A major disadvantage of the universal suffrage law, according to L. A. Prévost-Paradol, was “exclusion from the chamber of outstanding figures, who often represent the minority.”²⁷ However, he thought unacceptable to establish two categories of deputies within the parliament, with one of them having specific mandates”. The author of “The New France” also rejected the voting system, whereby “value of the vote of every citizen would be proportionate to their authority and their individual status”,²⁸ which was defined by the income tax.

L. A. Prévost-Paradol offered to introduce the system of cumulative suffrage in France (*suffrage accumulé*),²⁹ which would comply with the idea of justice and public interest on the one side, and provide for proportionally represented minority on the other side. Such a system would allow the electors divide the available votes between different candidates and “give the minority a chance to obtain a relevant majority of

²⁴ Laboulaye, E. *Le Parti libéral. Son programme et son avenir*. 8-e éd. Paris: Charpentier et C, 1871, p. 11.

²⁵ *Ibid.*, p. 122.

²⁶ *Ibid.*, p. 135.

²⁷ Prévost-Paradol, L.-A. *La France nouvelle*. Paris: Michel Lévy frères, 1868, p. 63.

²⁸ *Ibid.*, p. 66.

²⁹ Baysseance, A. *Représentation proportionnelle des minorités au moyen d'une nouvelle method de scrutin*. Paris: Libraire Sandoz et Fischbacher, 1879, p. 4.

votes by dividing them among few candidates”.³⁰ The number of votes the electors had would equal the number of deputies to be elected. Every elector could divide their votes between several candidates or support the only one with all the votes they have. According to their choice, electors should write several names on the voting card or write the same name repeatedly several times. In the latter case, the candidate would receive as many votes as many times his name appeared on the card. “We see, – L. A. Prévost-Paradol concludes, – that *cumulative suffrage* (italics – L. A. P. P.) is the most genial way to develop the representative system”.³¹

The second element of political freedoms, which is closely connected to the first one was national representation.

Views of E. Laboulaye and L. A. Prévost-Paradol on this issue are alike. Both supported bicameral structure of the parliament, empowerment of the elected (lower) chamber. It is worth noting that according to the effective Constitution of 1852, the only function of the Legislative Corps was to discuss and pass draft laws, including taxation laws (Art. 39).³² However, L. A. Prévost-Paradol underlined that “this right is restricted at the moment”.³³ E. Laboulaye wrote that “it (Legislative Corps – S.B.) has neither right of initiative, nor right of amendment, right of accepting claims or right of interpellation”.³⁴ These rights were proposed to the lower chamber.

As to the upper chamber, L. A. Prévost-Paradol thought it should “share the legislative power with the other chamber”.³⁵ The law should pass only with consent of both chambers. Any disputes on the draft law should be settled by conciliatory commissions. He emphasized that the upper chamber “would not be endowed with any special rights that are already assigned to the other chamber”.³⁶

When considering the authorities of the upper chamber, E. Laboulaye proceeded from the Article 25 of the 1852 Constitution, which appoints Senate to serve as “warrant of the Fundamental law and public freedoms. No law could be promulgated before the Senate considers it”.³⁷ However, “if the Chamber makes a poor judgment, if the voting is rushed or if the decision is unsavoury – the flaw is irretrievable; here come disadvantages of a single assembly. The Senate cannot [...] hold a second discussion and amend the law. This is a disadvantage both for the state and the government, to say more, it is an incorrigible disadvantage”.³⁸ E. Laboulaye proposed to solve this problem by endowing the Senate with the powers identical to those held by the Legislative Corps.

³⁰ Gessen V. M. Osnovy konstitucionnogo prava. Petrograd: Juridicheskij knizhnyj sklad «Pravo», 1917, c. 295.

³¹ Prévost-Paradol, L.-A. La France nouvelle. Paris: Michel Lévy frères, 1868, p. 74–75.

³² Constitution de 1852, Second Empire. Available at www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1852-second-empire.5107.html [last viewed 22.11.2016].

³³ Prévost-Paradol, L.-A. La France nouvelle. Paris: Michel Lévy frères, 1868, p. 95.

³⁴ Laboulaye E. Le Parti libéral. Son programme et son avenir. 8-e éd. Paris: Charpentier et C, 1871, p. 163.

³⁵ Prévost-Paradol, L.-A. La France nouvelle. Paris: Michel Lévy frères, 1868, p. 112.

³⁶ Ibid.

³⁷ Constitution de 1852, Second Empire. Available at www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1852-second-empire.5107.html [last viewed 12.11.2016].

³⁸ Laboulaye, E. Le Parti libéral. Son programme et son avenir. 8-e éd. Paris: Charpentier et C, 1871, pp. 200–201.

E. Laboulaye and L. A. Prévost-Paradol supported parliamentarism and were convinced that France needed an accountable government: “[...] a homogeneous, accountable ministry that can be altered is the key instrument of parliamentary rule and a warrant of political freedom”.³⁹ Unlike E. Laboulaye, who did not propose any particular system of interaction between executive and legislative branches of power, saying that “ministers have nothing in common with the chambers, the two branches of power are totally isolated”,⁴⁰ L. A. Prévost-Paradol established a solid concept of parliamentarism that was based on two principal elements: political liability of the government to the lower chamber of the parliament and right of the government to dissolve the parliament. These ideas were later reinforced in the Constitution of the Third Republic.

E. Laboulaye stood for independent judicial system and saw its main function in protecting individual freedoms. L. A. Prévost-Paradol also thought that judicial power should be independent. Independence of judges, which is “crucial for maintaining public order and proper law administration”,⁴¹ is guaranteed by the way they are elected or appointed. In particular, he proposed a system, whereby cooption could be combined with election: whenever a vacancy appears, courts that have equal authorities, propose several candidates, then the executive appoints one of them who they think best suits the position. L. A. Prévost-Paradol wrote that this “perfect combination is better adapted than any other system”.⁴²

Finally, the fourth element of political freedom is free press, which is a “driver of the modern civilization”⁴³ and “higher warrant of all the freedoms”.⁴⁴ Press can be free, when it is not bound by any administrative restrictions. L. A. Prévost-Paradol listed free press among the prerequisites for universal suffrage and underlined that it “should come at a comparatively low cost in order to penetrate into the population”.⁴⁵ According to him, press could be called free when it could reflect various opinions.

Both scholars emphasized that political freedoms could be executed only with the consent of the state, or rather with its explicit consent enshrined in constitution. Constitution for E. Laboulaye is a “warrant of freedom, a border, dividing public authorities”.⁴⁶ However, that is not enough: “Speaking about constitution, the nature of the state should be taken into consideration, for the constitution can be liberal on paper, while in reality the government can be tyrannical and freedom would only be an empty phrase”.⁴⁷ Interestingly, both authors distinguish between the society and the government, because “the society cannot be democratic, unless it has a democratic government and democratic institutions”.⁴⁸ At the same time, both political and civil freedom can be implemented only in a democratic state, that is defined by E. Laboulaye as a Christian or an enlightened state, that can be opposed

³⁹ Prévost-Paradol, L.-A. *La France nouvelle*. Paris: Michel Lévy frères, 1868, p. 101.

⁴⁰ Laboulaye, E. *Le Parti libéral. Son programme et son avenir*. 8-e éd. Paris: Charpentier et C, 1871, p. 193.

⁴¹ Prévost-Paradol, L.-A. *La France nouvelle*. Paris: Michel Lévy frères, 1868, p. 156.

⁴² *Ibid.*, p. 164.

⁴³ Laboulaye, E. *Le Parti libéral. Son programme et son avenir*. 8-e éd. Paris: Charpentier et C, 1871, p. 78.

⁴⁴ *Ibid.*, p. 122.

⁴⁵ Prévost-Paradol, L.-A. *La France nouvelle*. Paris: Michel Lévy frères, 1868, p. 53.

⁴⁶ Labulje Je. *Francuzskaja administracija i zakonodatel'stvo*. SPb.: Izdanie N. I. Lamanskogo, 1870, c. 22.

⁴⁷ *Ibid.*

⁴⁸ Prévost-Paradol, L.-A. *La France nouvelle*. Paris: Michel Lévy frères, 1868, p. 6.

to brutal revolutionary democracy, and rule of the crowd: “Christian democracy [...], that teaches people to rule over themselves, that teaches those who have power to protect everyone’s rights and individual rights and that makes power the custodian of the law. This is the democracy that liberal party desires and seeks to create”.⁴⁹ According to L. A. Prévost-Paradol, democratic rule is “the last word in civilization and the best means to provide for peace and happiness in a political society”⁵⁰ and all the societies “seek to establish a democratic state and democratic rule to form a democratic government that is able to give them order and freedom”.⁵¹

Conclusions

French liberal school of the second half of the 19th century tends to consider political freedom as an instrument required to restrict the authorities of state in power. Simultaneously, the implementation of political freedom depends firstly on effective constitution, and secondly, on democratic regime, because democratic rule complies with the law and the will of the majority.

Summary

1. Over the previous two centuries, France has rapidly developed the rule of law, based on the observation of human and civil rights. The 1789 Declaration of civic and human rights has turned the protection of rights and freedoms into a constitutional principle in France. In this regard studies of political and legal concepts of human rights and freedoms remain critical.
2. French liberal school of the second half of the 19th century assigned a key role to the notion of political freedom. Among the most relevant representatives of the school were L. A. Prévost-Paradol and E. Laboulaye, whose views were quite similar. Their works “New France” and “Liberal party, its programme and future” influenced the formation of constitutional institutes in the French Third Republic. In particular, the 1875 Constitution initiated a bicameral parliament, an election of the lower chamber through direct general voting and a political liability of ministries to the parliament.
3. French liberals viewed freedom as an individual notion. Besides, the political freedoms as opposed to the civil freedoms are apt to change, because they are directly dependent upon the given historical epoch and on political institutions of the state. Political freedoms, as understood by E. Laboulaye, included four major elements: electoral law; free election of national representatives with broad control capabilities; independent judicial system and free press. These conditions can be ensured only with the governmental consent, which is explicitly stated in constitution. French liberal school states that political freedom can be observed only when effective constitution and democratic regime are in place.

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⁴⁹ *Laboulaye, E.* Le Parti libéral. Son programme et son avenir. 8-e éd. Paris: Charpentier et C, 1871, p. 7.

⁵⁰ *Prévost-Paradol, L.-A.* La France nouvelle. Paris: Michel Lévy frères, 1868, p. 22.

⁵¹ *Ibid.*, p. 45.

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Excerpts from History of the Chair of Ecclesiastic Law at Dorpat (Yuriev) University in Late 19th – Early 20th Centuries

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The article defines the modalities of ecclesiastic law studies, the course that was introduced in 1835 at legal departments of Russian universities, including that of the University of Dorpat (Yuriev). The example of the Chair of Ecclesiastic Law showcases the special status of the University of Dorpat (Yuriev), which was not subject to university charters of 1804, 1835, 1863 and 1884. The major tracks of religious policy in the Baltic region and the real religious landscape that had an impact on education are studied in the context of the work of M. E. Krasnozhen, a professor at the Chair of Ecclesiastic Law.

Keywords: ecclesiastic law, Chair of Ecclesiastic Law, the University of Dorpat (Yuriev), Baltic region, Orthodoxy, non-Orthodoxy, Protestantism, Catholicism.

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Introduction

In the 19th century, the Russian Empire developed a new system of ecclesiastic law, which rested both on church canons (sacred scripture, decrees of the church councils, apostolic tradition and other sources) that were recognized by the state, and upon state ordinances that were related to the church.

Russian ecclesiastic law flourished for several reasons. Firstly, systematization of Russian law initiated by Mikhail Speransky among others regulated clerical and legal norms. Secondly, historic school of law fostered ecclesiastic law as a part of legal rather than theological studies. Thirdly, as of 1835, Orthodox Ecclesiastic Law was introduced as an obligatory course at the legal departments of Russian universities.

The government viewed studies of ecclesiastic law as a matter of state significance. For one thing, it maintained the “pre-eminent and predominant” status of Russian Orthodox Church, which was envisaged in the Digest of Laws of the Russian Empire. According to V. N. Kudryashov, the second part of the 19th century brought “a movement that saw the subject of all Russian national processes in the Russian state that purposefully shaped the nation, rather than in the Russian nation as an ethnic and religious unity.”¹ Besides, ecclesiastic law studies ought to promote Orthodoxy in “non-Orthodox” regions, thus functioning as missionary activities. In 1907, an anonymous brochure was published in Moscow. It read, that “Russia had nine universities, none of them being Russian by staff, goals or teaching.”² This idea certainly belonged to Russian nationalists; however, it partly reflected the circumstances under which ecclesiastic law studies developed. Yuriev, Kazan, Kiev, Kharkov, Odessa were, to a large extent, populated by non-Orthodox citizens, that is why the newly introduced Orthodox clerical law studies showcased numerous political problems, existing in the multiethnic and multireligious country. Those problems inevitably affected canonists.

Orthodox clerical law studies in Russia in late 19th – early 20th centuries concentrated at the universities (in Moscow, Yuriev, Kazan, Kharkov, St. Petersburg, Kiev, Tomsk), ecclesiastical academies and several educational institutions that taught clerical law (Demidov’s Legal School in Yaroslavl, Military and Legal Academy and Legal School in St. Petersburg).

1. Religious Landscape and Confessional Policy in the Baltic Region, Late 19th – Early 20th Centuries

Russia’s religious policy of that epoch until today has been assessed controversially. Some think that it was based on tolerance³, others assume that the Empire could be characterized as a “prison for nations.”⁴ Consequently, more and more researchers underline that religious issues should be analyzed only in the context of a particular period and region, taking into account the vast potential that kept the great Empire afloat for such a long time. Therefore, this topic has gained attention of foreign researchers. As Japanese researcher Kimitaka Matsuzato writes,

¹ *Kudrjashev, V. N. M. N. Katkov v rossijskom imperskom diskurse vtoroj poloviny XIX veka // Vestnik Tomskogo gosudarstvennogo universiteta. Serija: Istorija. 2012, # 4(20), s. 40.*

² *O preobrazovanii Imperatorskogo Moskovskogo universiteta na nachalah russkoj gosudarstvennosti i russkoj narodnosti. M., 1907, s. 4.*

³ *Romanovskaja, L. R. Veroterpimost’ kak princip gosudarstvennoj konfessional’noj politiki Rossijskoj imperii // Innovacii v gosudarstve i prave Rossii. Materialy Mezhdunarodnoj nauchno-praktičeskoj konferencii / Petrov, A. V. (otv. red.). Nizhnij Novgorod: Nizhegorodskij gosudarstvennyj universitet im. N. I. Lobachevskogo, 2008, s. 209–212.*

⁴ *Mihajlov, V., Mihajlova, N. Byla li carskaja Rossija «tjur’moj narodov»? // Svobodnaja mysl’. 2013, # 6(1642), s. 143.*

“the policy of the Russian Empire can be viewed neither through the lens of “prison for folks”, nor with the assistance of a bipolar opposition “oppression – resistance.”⁵

According to L.I. Rosenberg, the Baltic region (including the governorates of Estonia, Livonia, Courland, the districts of Rēzekne, Ludza, Dvinsk in Vitebsk region, as well as undistinguished town of Narva in the Yamburg district of the St. Petersburg governorate) that followed the footsteps of central European regions, on the one hand, was “a thorn in the side” of the Russian state mechanism, but on the other hand, it performed a special role of building bridges and establishing patterns to “westernize” Russia.⁶

Russian population there was scarce. The First Nationwide Census of 1897 indicated that in the Estonian governorate the Russian language was perceived as native only by 4.95% of the population, in the Livonian Governorate – by 5.24%, in the Courland Governorate – by 3.8%.⁷

The majority of the population were Lutherans or Catholics, although the overall number of Catholics in Russia was 11 506 834 (9.15% of population), Lutherans constituted 2.83 % (3 572 653 individuals).⁸ The legal system treated Catholics and Protestants absolutely differently. Protestants did not experience any political or civil restrictions; the government tolerated even Protestantism-based cults. For example, the Digest of Laws of the Russian Empire marked the cult of Moravian Church as “tolerable”. This cult evolved from the Lutheran Church in 1772 in Saxony and spread into the Baltic region. Moravian Church recognized the Augsburg confession, however, they accentuated “the religion of the heart” – an intimate and emotional experience of feeling unity with Christ – the patron and the saviour of the world, whereas Catholic Church and its adepts was viewed as an opponent. In 1905, the Ministerial Committee of the Russian Empire defined it as a “militant faith”⁹

The Baltic region was a centre to Old Believers, who arrived at the 17th century after they had been oppressed in Russia. In the 19th century, the Old Believers found active support with the local Lutheran authorities, who saw in Orthodoxy “the face of the enemy”.¹⁰ Besides, the ranks of the Old Believers were replenished by refugee serfs who sought shelter in Old Believer communities.

The Baltic region raised the issue of the legal status of Hebrews, as well. Firstly, a part of Baltic lands was assigned to the Jewish Pale. Initially, in 1804 the areas were defined where Hebrews could live (the final decision was made in 1835). Among others, Lithuania was defined as such an area. Besides, local Jews could live in the Courland governorate. Furthermore, the total number of Jews was not clarified. According to the 1897 Census, the western part alone was a home to

⁵ *Leont'eva, O. B.* Nacional'naja i konfessional'naja politika Rossijskoj imperii v sovremennoj istoriografii // Vestnik Samarskogo gosudarstvennogo universiteta. 2012, # 8–2(99), s. 28.

⁶ *Rozenberg, L. I.* Rossijskij faktor v Pribaltijskom krae (XIX – nachalo XX v.) // Rossiija i sovremennij mir. 2007. # 1, s. 140–141.

⁷ Pervaja vseobshhaja perepis' naselenija Rossijskoj imperii 1897 g. Raspredelenie naselenija po rodnomu jazyku i uezdam 50 gubernij Evropejskoj Rossii // *Demoskop Weekly*, 2014, # 599–600. 19 maja–1 ijunja. Available at http://demoscope.ru/weekly/ssp/rus_lan_97_uezd.php?reg=1727 [last viewed 30.01.2017].

⁸ *Rubakin, N. A.* Rossiija v cifrah. Strana. Narod. Soslovija. Klassy (Na osnovanii oficial'nyh i nauchnyh issledovanij). SPb., 1912, s. 76.

⁹ Rossijskij gosudarstvennyj istoričeskij arhiv (RGIA). F.1263 (Komitet ministrov). Op. 2. D.5758, l.156 ob.

¹⁰ *Krastelev, M.* (igumen). Staroobradčestvo v Liflandii v jepohu Nikolaja I. Uchrezhdenie Rizhskogo vikariatstva // Cheljabinskij gumanitarnij. 2010. T. 1. # 10, s. 160.

433 726 Hebrews, although Pyotr Svyatopolk-Mirsky, the Governor-General of Vilnius, Kaunas and Grodno, reported that the real number amounted to 700 000.¹¹ Thus, the Hebrews living in the Baltic region were affected by restrictions imposed on their area of residence,¹² the right to buy and rent realty,¹³ and upon the right to enrol at universities.

Legal regulation of religious issues in the Baltic region was hallmarked by features that were not characteristic of the other parts of the Empire. For instance, elsewhere in Russia in all sorts of religious disputes the state stood with Orthodoxy. If a baby born to unknown parents had to be baptized, it would be christened by the Orthodox clergy. In the Baltic region, however, the baby could be baptized following the Lutheran tradition.

2. Personnel of the Chair of Ecclesiastic Law of the University of Dorpat (Yuriev) in Late 19th – Early 20th Centuries

The University of Dorpat (from 1893 – University of Yuriev) was not subject to university charters of 1804, 1835, 1863 and 1884; it had a charter of its own. Therefore, the Chair of Ecclesiastic Law at the University of Yuriev was established later than at other universities of the country. However, in addition to four major departments that were present at the other universities, as well (Departments of Historic and Language Studies, Physics and Mathematics, Legal Department and Medical Department),¹⁴ the University of Yuriev established a Theological Department, following the pattern of Catholic and Protestant universities.

The complicated theological “landscape” of the Baltic region influenced the development of the Orthodox law school.

Professors of ecclesiastic law at the University of Yuriev were exposed to additional pressure, because the majority of their students were non-Orthodox. For example, in 1907 the university had 2734 students; 1536 of them were Orthodox Christians, 635 were Lutherans, 272 – Catholics, 11 – Reformed Protestants, 19 – Evangelists of Augsburg confession, 11 – adherents of Armenian-Gregorian Church, 243 – Hebrews, 1 – Old Believer, 2 – adherents of Edinoverie (coreligionists), 2 – Karaites, 1 – Baptist, 1 – Muslim.¹⁵ Gradually, the statistics started to change and the number of non-Orthodox students increased. In 1912, among the 2467 students of the university 919 were Orthodox, 952 – Lutherans, 295 – Catholics, 19 – Reformed Protestants, 20 – Evangelists of Augsburg confession, 40 – adherents of Armenian-Gregorian Church, 209 – Hebrews, 4 – Old Believers, 1 – adherent of Edinoverie, 1 – Karaite, 3 – Anglicans, 1 – Muslim, 1 – adherent of Armenian-Catholic Church, 2 – Mennonites.¹⁶

The first Professor of Orthodox ecclesiastic law was Lev Aristodovich Kasso. He had received Bachelor’s degree at Paris University, then participated at the courses of

¹¹ Biblioteka Rossijskogo gosudarstvennogo istoricheskogo arhiva (RGIA). Pechatnye zapiski. # 2466, d. 68.

¹² *Ivanova, N. Ju.* K voprosu o cherte osedlosti evreev v Rossijskoj imperii // Migracionnoe pravo. 2012, # 1, s. 37–40.

¹³ *Ivanova, N. Ju.* Narushenie prav evreev na priobretenie i arendu nedvizhimyh imushhestv v cherte postojannoj osedlosti v konce XIX veka // Istoricheskie, filosofskie, politicheskie i juridicheskie nauki, kul’turologija i iskusstvovedenie. Voprosy teorii i praktiki. 2012. # 8–2, s. 73–77.

¹⁴ Svod zakonov Rossijskoj imperii. T. XI. Ch.1. St.403.

¹⁵ Lichnyj sostav Imperatorskogo Jur’evskogo universiteta. 1907 god. Jur’ev, 1907, s. 68.

¹⁶ Otchet o sostojanii i dejatel’nosti Imperatorskogo Jur’evskogo universiteta za 1912 g. Jur’ev, 1913, s. 61.

Heidelberg and Berlin Universities. In 1889, he became a Doctor of Law. On 29 July, he was appointed acting Associate Professor of ecclesiastic law at Dorpat University, however, on 1 July 1893 he transferred to the Chair of Local Law of the governorates of Estonia, Livonia and Courland. Later, he completely switched to civil law.¹⁷ Finding a Professor of ecclesiastic law turned out to be a difficult task.

The University of Yuriev made a valuable acquisition by hiring Michail Egorovich Krasnozhen (1860–1934), who spearheaded the studies of ecclesiastic law in the Baltic region. Unlike many of his colleagues, he did not belong to clergy. In 1881, he finished Kaluga High School with distinction and enrolled in the Moscow University's Legal Department. As a fourth year student, he began the studies of ecclesiastic law under Professor Pavlov and was even awarded a golden medal for his essay on this topic. Upon graduation, he remained at the Chair of ecclesiastic law to prepare for professorship. Consequently, Mikhail Krasnozhen, who had a legal, not theological education, made a conscious decision to occupy himself with ecclesiastic law.

In 1889, he passed the master's examination and went abroad to write his thesis "Glossarists of the Canonical Code of the Eastern Church: Aristenos, Zonaras, Balsamon". Mikhail Krasnozhen spent much time working in archives and libraries of Vienna, Munich, Rome and Florence. After two and a half years, he returned to Russia, defended his thesis and became a freelance lecturer at the Chair of Ecclesiastic Law of Moscow University. He taught a mandatory course for the fifth-year students of the Legal Department. Alongside this, for five years he acted as an assistant for attorneys-at-law (A. K. Vulfert and F. N. Plevako).

In 1893, Mikhail Krasnozhen was invited to hold a post of Professor Extraordinary of Ecclesiastic Law at Yuriev University, two years later he became Professor in Ordinary. In 1899, he gained the Dean's post at the Legal Department; however, he did not give up his research activities: in 1897, 1901, 1902 he went abroad to continue his studies of Greek Canon manuscripts.

On 22 April 1901, Professor Krasnozhen defended his doctoral thesis at the Kazan University. The main conclusion that he arrived at was that adherents of all non-Orthodox confessions in Russia were treated with tolerance. His official opponents, including I. S. Berdnikov, a renowned expert in ecclesiastic law, gave a high assessment of the paper,¹⁸ however, subsequently a discussion broke out. Professor Zagoskin, a famous expert in the history of Russian law, assessed the thesis as unsatisfactory. Prince Ukhtomsky, who represented the public, pointed out that recent eviction of thousands of Doukhobors from Russia, as well as anathema of Lev Tolstoy contradicted the conclusions of the thesis. Despite this, Professor Krasnozhen received the academic degree he applied for.¹⁹

Mikhail Krasnozhen was also engaged in public activities: from 1898, he was a church warden of the University Church of St. Alexander Nevsky; from 1902, he chaired the Student Literary Society at Yuriev University.²⁰

¹⁷ *Biograficheskij slovar' professorov i prepodavatelej Imperatorskogo Jur'evskogo, byvshego Derptsokogo, universiteta za sto let ego sushhestvovaniya (1802–1902)*. Jur'ev, 1902. T. 1, s. 650–651.

¹⁸ *Uchenye zapiski Imperatorskogo Kazanskogo universiteta*. 1901, Ijul'-avgust. S. 17–20.

¹⁹ *Sankt-Peterburgskie vedomosti*. 1901, 27 aprelja.

²⁰ *Petuhov, E. V. Imperatorskij Jur'evskij, byvsnij Derptsokij, universitet v poslednij period svoego stoletnego sushhestvovaniya (1865–1902 gg.)*. Istoricheskij ocherk. SPb., 1906, s. 109, 176.

3. Characteristic Features of Ecclesiastic Law Studies at Yuriev University (Professor Mikhail Krasnozhen's Case Study)

A professor of the Chair of Ecclesiastic Law at Yuriev University faced numerous problems both in private and professional activities.

Firstly, he had to struggle for inclusion of ecclesiastic law into the curriculum of the Legal Department. The true attitude towards this course can be observed, if one analyses "Biographical Dictionary of Professors and Lecturers" of the University of Yuriev that was dedicated to the centennial of the university. The Dictionary assigned 179 pages to the professors of the Legal Department, only the final five of which were dedicated to the Chair of Ecclesiastic law.²¹ Mikhail Krasnozhen sought to promote his course to a new status.²² He would welcome any compromise. Although being opposed to the existence of the Theological Department at the university,²³ he would agree to preserve it, if he could establish a Chair of Ecclesiastic law there. His reasoning ran, as follows: "Many perpetrators who act against the regulations of the ruling Church justify their actions by being ignorant of clerical and civil norms."²⁴ This was a successful path, which ended in creation of the Chair of Ecclesiastic Law at the University of Yuriev. Apart from that, the course of ecclesiastic law received more academic hours. In 1912, spring and autumn trimesters, Professor Krasnozhen had four hours of lectures a week, besides, in autumn trimester he introduced practical seminars, lasting two hours per week and a special course on family law (one hour per week).²⁵ To compare, in 1913 the academic load was even throughout the year and consisted of four hours of lectures and two hours of practical seminars per week.²⁶

Secondly, Mikhail Krasnozhen was the only professor of ecclesiastic law at the university. In order to replenish the number of teaching staff, he made the following proposal: "Young people, who show best academic progress by the end of the course (by excellent conduct), should be invited to stay at the university (on allowance) to prepare for professorship at the chairs that lack professors (following the positive practice of our Ecclesiastical Academies)."²⁷ Professor Krasnozhen performed a great deal of work in this area; he tried to attract the students' attention by studying the most pressing topics. In 1909, the Legal Department offered its students to write essays on two topics: "Human Mistakes and Their Influence by Inculcation" (criminal law) and "On Special Office Established Under the Holy Synod to Consider Issues, Subject to Russian National Council" (ecclesiastic law).²⁸ On the one hand, this topic could not cause any demur from the Holy Synod, but on the other hand, it brought about a lot of "traps and pitfalls."

²¹ *Biograficheskij slovar' professorov i prepodavatelej Imperatorskogo Jur'evskogo, byvshego Derptskego, universiteta za sto let ego sushhestvovaniya (1802–1902)*. Jur'ev, 1902, T. 1, s. 475–654.

²² *Zakljuchenie juridicheskogo fakul'teta imperatorskogo Jur'evskogo universiteta po voprosam, predlozhenym Gospodinom ministrom narodnogo prosvshhenija otnositel'no zhelatel'nogo ustrojstva universitetov*. B/m., b/g, s. 4.

²³ *Osoboe mnenie dekana juridicheskogo fakul'teta M. E. Krasnozheny po voprosu 19-omu (o bogoslovskom fakul'tete)*. Jur'ev, 1907, s. 1.

²⁴ *Osoboe mnenie dekana juridicheskogo fakul'teta M. E. Krasnozheny po voprosu 19-omu (o bogoslovskom fakul'tete)*. Jur'ev, 1907, s. 2.

²⁵ *Otchet o sostojanii i dejatel'nosti Imperatorskogo Jur'evskogo universiteta za 1912 g.* Jur'ev, 1913, s. 41.

²⁶ *Otchet o sostojanii i dejatel'nosti Imperatorskogo Jur'evskogo universiteta za 1913 g.* Jur'ev, 1914, s. 40.

²⁷ *Osoboe mnenie dekana juridicheskogo fakul'teta professora M. E. Krasnozheny po nekotorym voprosam, kasajushhimsja Universitetskogo ustava*. Jur'ev, 1905, s. 2–3.

²⁸ *Kratkij otchet Imperatorskogo Jur'evskogo universiteta za 1908 g.* Jur'ev, 1909, s. 6.

On the whole, the improving role of ecclesiastic law studies at the University of Yuriev was Professor Krasnozhen's solely credit. The Chair of Ecclesiastic Law was perceived as similar to a volcano. Russian State Archive stores a letter of E. N. Temnikovskiy, a prominent ecclesiastic law expert to M. P. Chubinskij, the Rector of Demidov Legal School, where he dwells on his prospective appointment to the position of Professor Krasnozhen: "[...] I am slightly puzzled at the article in "Moskovskie vedomosti". It reads that Yuriev University awaits personnel changes. Krasnozhen is likely to be promoted, probably to become director... I am preparing myself for an unpleasant surprise – a trip to Yuriev."²⁹

Thirdly, during his stay in the Balkan region, Professor Krasnozhen was the first researcher to point out the new pressing issues and to describe them in his works: "Old and New Issues on Marriage (concerning Articles 352, 440, 441 and 359 of the new Criminal Code Project)" (Yuriev, 1898); "On Divorce in Russia" (Moscow, 1899); "Estonians and German in the Baltic Region" (Yuriev, 1900); "Orthodox Church's Attitude to Non-Orthodox" (Yuriev, 1900); "Attitude of the Russian Church and State Authorities to Non-Orthodox" (Yuriev, 1900); "Non-Orthodox in Ancient Rus" (Yuriev, 1903); "Old and New Laws on Divorce. Dedicated to the New Civil Code Project" (Yuriev, 1904), and others.

Fourthly, the University of Yuriev seemed to be short of funds to purchase study books in Russian. For example, in February 1902, members of the Russian Students' Circle wrote a letter to M. P. Chubinskij, a professor at the University of Kharkov, which read as follows: "The Russian Students' Society is interested in your book "Motives of Criminal Activity and Their Meaning", however, the Circle has no opportunity to buy the book because it is short of funds. Could you, please, send us a free copy of your work?"³⁰

Finally, the revolution of 1905–1907 and changes to legislation that it introduced, inevitably affected Professor Krasnozhen, because he stood in constant contact with students and had to answer their "tricky" religious questions, so he felt the disposition of Baltic people and their attitude to the decree from 17 April 1905 on "Fostering Religious Tolerance". Interestingly, in May 1905, Professor Krasnozhen addressed the Minister of National Education V. G. Glasov with a request to present his book "On Religious Freedom and Tolerance; Non-Orthodoxy in Russia" to Emperor Nicolas II. His request was met, and the Emperor received the book.³¹ At that time, Professor Krasnozhen delved into research; he published the works "Current Issues – Marriage and Divorce – Adultery – Freedom of Conscience and Religion – Research and Politics" (Yuriev, 1905); "The Newest Legislation on Russian Orthodox Church" (Yuriev, 1909), "The University Issue" (Yuriev, 1909) and others. The last known work by Mikhail Krasnozhen was written during World War I and was entitled "Fate of Macedonia" (Yuriev, 1915).

In 1918, the Baltic countries became independent and ecclesiastic law ceased to be the subject of specialized research.

²⁹ RGIA. F.1081 (Lichnyj fond M. P. Chubinskogo). Op. 1. D.427, l.4–4 ob.

³⁰ RGIA. F.1081 (Lichnyj fond M. P. Chubinskogo). Op. 1. D.529, l.1–1 ob.

³¹ RGIA. F.744 (Vysochajshie ukazy, reskripty i vsepodannejšie doklady po Ministerstvu narodnogo prosveshhenija). Op. 1. D.220, l.113.

Conclusions

The University Yuriev was the centre of ecclesiastic law studies in the Baltic region. Despite all the effort, the attempts to establish a research school for ecclesiastic law failed. Religious problems characteristic to Russia were concentrated in this region, where the majority of population was non-Orthodox. Besides, the Chair of Ecclesiastic Law had only one professor, which allowed no succession of teachers. However, the Chair of Ecclesiastic Law illustrated the importance of a single researcher in the development of the whole area of expertise.

Summary

1. Ecclesiastic Law in Russia existed as a legal system, containing church canons that were recognized by the state and state ordinances that were related to church.
2. As of 1835, Orthodox Ecclesiastic Law was introduced as an obligatory course at legal departments of Russian universities. Orthodox clerical law studies in Russia in late 19th – early 20th centuries revolved around universities (in Moscow, Yuriev, Kazan, Kharkov, St. Petersburg, Kiev, Tomsk), ecclesiastical academies and several educational facilities that taught clerical law (Demidov's Legal School in Yaroslavl, Military and Legal Academy and Legal School in St. Petersburg).
3. The University of Dorpat (from 1893 – University of Yuriev) was not subject to university charters of 1804, 1835, 1863 and 1884; it had a charter of its own. Characteristic of the University of Yuriev was the absence of a Chair of Ecclesiastic Law. It was established only in 1892.
4. In the late 19th – early 20th centuries, Michail Egorovich Krasnozhen (1860–1934) was the leading researcher of ecclesiastic law at the University of Yuriev, and he made a valuable contribution to the studies of the legal status of non-Orthodox religions in the Russian Empire.
5. All the religious challenges that existed in Russia were well reflected in the Baltic region, because the majority of its population was Protestant and Catholic.
6. In 1918, the Baltic countries became independent, and the ecclesiastic law ceased to be the subject of specialized research.

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Clashes of Opinion at the Time of Drafting the *Satversme* of the Republic of Latvia

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The article is dedicated to the 95th anniversary of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme* or basic law), adopted on 15 February 1922. According to constant jurisprudence of the Constitutional Court of the Republic of Latvia and Latvian legal doctrine, the *Satversme* must be interpreted as a basic law void of internal contradictions or as “a coherent whole”. This does not apply to the procedure of drafting and adopting the *Satversme*. Adoption of a number of Articles caused noteworthy debates and clashes of opposite opinions at the Constitutional Assembly (*Satversmes Sapulce*). In particular, these were Articles on the procedure for electing the President, guarantees for independence of the judicial power, as well as the freedom to strike. This research focuses upon analysis of these issues.

Keywords: *Satversme* of the Republic of Latvia, President of the State, judicial power, independence of judges, freedom to strike.

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Introduction

February 15 of this year was the 95th anniversary of the adoption of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme*).¹ The author believes that no one has surpassed the description of the importance of the basic

¹ Latvijas Republikas *Satversme* [*Satversme* [Constitution] of the Republic of Latvia] (15.02.1922). *Valdības Vēstnesis*. 1922, No. 141, pp. 1–2.

law in the history of any nation by Prof. Immanuel Kant. I. Kant held that the constitution (*Verfassung*) was “[...] an act of general will, by which a crowd turns into a nation”². Thus, constitution is the foundation for legal relations of society.³ As the foundation of social relations, the *Satversme*, pursuant to the principle of unity of the constitution⁴ “[...] is a coherent whole, and norms that it comprises require systemic interpretation”⁵. “Understanding of the *Satversme* as a coherent whole also means that no contradictions exist between norms of the *Satversme* and that all norms of the *Satversme* can be arranged in a harmonious and internal system”⁶. “The principle of the *Satversme*’s unity prohibits interpreting some constitutional norms in isolation from other norms of the *Satversme*, because the *Satversme* as a united document influences the scope and the content of each particular norm”⁷.

Democracy governed by the rule of law is inconceivable without a person’s right to freedom of speech. However, in human relationships the freedom of speech often means as many opinions as there are persons. Thus, the truth can be born only in dispute, as Socrates, the philosopher of Athens (469–399),⁸ fairly noted already in Ancient Greece. Although the valid *Satversme* must be examined as “a coherent whole”, that did not mean that adoption of the *Satversme* at the Constitutional Assembly proceeded in mute unanimity. On the contrary, a significant number of articles of the *Satversme* at the time of their adoption by the Constitutional Assembly caused significant discussions and clashes of opposite opinions. On the one hand, this was a proof that the *Satversme* was adopted in a democratic procedure, on the other hand, it pointed to “weaknesses” in the *Satversme*. Identification of the “the weaknesses” leads to a better understanding of possible solutions for improving the basic law. Thus, “eternal return” to analysing issues in adoption of the *Satversme* has not lost its relevance almost 100 years after the basic law entered into force.

The author’s goal in the current article is to analyse clashes during “the brainstorm” of the members of the Constitutional Assembly at the time of adopting some articles of the *Satversme*. In view of the limited scope of this paper, analysis of the drafting of the *Satversme* will be limited to three aspects, i.e.:

- 1) the institution of the President of the State;
- 2) the judicial power;
- 3) the freedom to strike.

² Kant, I. Zum ewigen Frieden. Ein philosophischer Entwurf. Herausgegeben von Rudolf Malter. Stuttgart: Philipp Reclam jun., 2010, p. 13.

³ Kant, I. Die Metaphysik der Sitten. Mit einer Einleitung herausgegeben von Hans Ebeling. Stuttgart: Philipp Reclam jun., 2011, p. 167, § 43.

⁴ Pleps, J. *Satversmes vienotības princips* [Principle of the Unity of the *Satversme*]. *Jurista Vārds*, 2007, No. 4(457). Available at <http://www.juristavards.lv/doc/151838-bsatversmes-vienotibas-principsb/> [last viewed 07.02.2017].

⁵ Latvijas Republika *Satversmes tiesas* [Constitutional Court of the Republic of Latvia] (hereinafter – LRST) 2002. gada 22. oktobra spriedums lietā [Judgement of 22 October 2020 in case No. 2002-04-03], secinājuma daļas 2. pkt. [para. 2 of the Findings]. Available at http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2002-04-03_Spriedums.pdf [last viewed 07.02.2017].

⁶ Pleps, J. *Satversmes vienotības princips*, p. 3.

⁷ LRST 2006. gada 16. oktobra spriedums lietā [Judgement of 16 October 2006 in case No.] Nr. 2006-05-01, 16. pkt. [para. 16]. Available at <http://likumi.lv/doc.php?id=146217> [last viewed 07.02.2017].

⁸ Böckenförde, E.-W. *Geschichte der Rechts- und Staatsphilosophie. Antike und Mittelalter*. 2., überarbeitete und erweiterte Auflage. Tübingen: Mohr Siebeck, 2006, pp. 63–64.

1. On the Institution of the President of the State

When the institution of the President was discussed, “swords were crossed” over two matters. Firstly, whether the State of Latvia needed the institute of the President; and, secondly, if it was necessary, who should have the right to elect the President.

1. Social democrats and other representatives of the left-wing politics (hereinafter – the Leftists) were convinced that a discrete institution of the President was redundant in Latvia. They held that the Speaker of the *Saeima* [the Parliament] could perform also the President’s duties. Although it might seem peculiar, the Leftists saw in the President, elected by the people and vested with the sole right to dissolve the *Saeima*, continuity of public administration based on the principle of monarchy.⁹ This assumption, indisputably, was erroneous. However, there is a certain explanation for it. Fear of a person’s sole right to dismiss the legislator was rooted in the recently experienced reorganisation of public administration in the Russian Empire and the Leftists’ fight against it. Although on 23 April 1906 “Supremely Approved Basic State Laws”¹⁰ or the Constitution of the Russian Empire were promulgated, from 1906 to 1917 Nicholas II Romanov¹¹ dismissed four convocations of the State Council (the lower house of the Parliament) without an obvious reason.

The Leftists’ conviction was reinforced by Prof. Kārlis Dišlers, the most prominent scholar of state law of the inter-war period. He saw in the institution of the President, elected by the people, which was envisaged in the draft *Satversme*,¹² “an illogical and dangerous” model of separation of the State powers,¹³ highlighting incompatibility of the principle of monarchy with that of the people’s sovereignty in a democratic state.¹⁴

At the Constitutional Assembly this opinion was represented by the Leftists’ “staff spokesman” Fēlikss Cielēns. In his opinion, a President elected by the people:

- 1) will be only “[a]s a surrogate of the second [upper] house”, who will only impede the process of legislation and reinforce the position of the executive power in case of a conflict with the parliament;¹⁵
- 2) will not be responsible before any class or a political party representing the President. Thus, if the President is unable to express the people’s will,

⁹ Šilde, Ā. Latvijas vēsture [The History of Latvia], 1914–1940. Valsts tapšana un suverēnā valsts [Formation of the State and the Sovereign State]. Stockholma: Daugava, 1976, p. 354.

¹⁰ Vysochajšhe utverzhdennye osnovnye gosudarstvennye zakony [Supremely Approved Basic State Laws]. In: Hrestomatija po istorii otechestvennogo gosudarstva i prava (X vek – 1917 god). Sostavitel’: doktor juridicheskikh nauk, professor V. A. Tomsinov. [Reader on the History of the Home State and Law (X century – 1917. Compiled by doctor of law, professor V. A. Tomsinov), Moskva: Zercalo-M, 2004, p. 317.

¹¹ Nikolaj II Aleksandrovich Romanov, 1868–1918, period of rule: 1894–1917.

¹² The commission for drafting the *Satversme* had worded Article 35 of the *Satversme*, as follows: “*The President shall be elected by the people for the term of five years in general, equal, direct and secret vote.*” See: Latvijas Satversmes Sapulces stenogrammas. Satversmes Sapulces isdebums. [Transcripts of the Latvian Constitutional Assembly. Publication of the Constitutional Assembly] Rīgā. (hereinafter – LSSS), 1921, 18. burtnīca [Part] (hereafter – burtn.), p. 1703.

¹³ Dišlers, K. Dažas piezīmes pie LR Satversmes projekta. Raksti par LR Satversmi [Some Comments to the Draft *Satversme* of the Republic of Latvia. Articles on the *Satversme* of the Republic of Latvia]. Rīga: Tiesu namu aģentūra, 1998, 25, pp. 27–29.

¹⁴ Dišlers, K. Konstitūcija un satversmes vara [Constitution and Constitutional Power]. Teesleetu Ministrijas Wehstnesis, 1921, No. 1–3, p. 6.

¹⁵ LSSS, 1921, 15. burtn., p. 1387.

a concern was expressed as to the possible inclination of the President to usurp the state power.¹⁶

Social democrat (Menshevik) Andrējs Petrevics, another representative of the Leftists, “chimed in with” F. Cielēns:

“[...] compared to the American President, our President, the President of Latvia, will be a minor and insignificant person. I underscore – a very minor and insignificant person in terms of rights. [and raised a rhetoric question] In order to perform representative functions, is a President elected by the people necessary, is there a need to set into motion the huge machinery of election in the nation for that purpose?”¹⁷

Although the Leftists could refer to “historical experience” and enjoyed certain support by scholars, their proposal – “The Speaker of the *Saeima* shall perform the tasks of the President” – was rejected at the Constitutional Assembly with a noteworthy majority of votes.¹⁸

2. Contrary to the Leftists, the Rightists saw a constitutional value in the institution of the President elected by the people:

- 1) the President elected by the people can prevent parliamentary dictatorship, simultaneously protecting the *Saeima* against arbitrariness of the executive power (Arveds Bergs, non-party group);¹⁹
- 2) the President elected by the people will be “[...] a political symbol of unanimity of the Latvian national state” (Jānis Purgals, Union of Christian Democrats);²⁰
- 3) the President elected by the people would better sense the people’s sentiments and will be able to take a decisive step – dismiss the *Saeima*. A President elected by the *Saeima*, on the contrary, will hardly decide to dismiss the *Saeima*, since “can a servant drive the master out of the house” (Jānis Goldmanis, Farmers’ Union);²¹
- 4) will be able to guard democracy against radicals in the *Saeima*. “[...] the right of the Head of the State in such a case to intervene and dismiss the Parliament, by this he is also given the right to guard the principle of democratism” (Oto Nonācs, non-affiliated deputy).²²

The proposal made by the Rightists – “The President shall be elected by the people for the term of five years in general, equal, direct and secret election”²³ – similarly to the proposal of the Leftists did not gain support of the majority of

¹⁶ LSSS, 1921, 14. burtn., p. 1329.

¹⁷ LSSS, 1921, 18. burtn., pp. 1709–1710.

¹⁸ Voting on the proposal by the Left in the third reading of the draft *Satversme*: “for” 55 votes, “against” 85 votes. See: 1921, 18. burtn., p. 1720.

¹⁹ LSSS, 1921, 15. burtn., p. 1371.

²⁰ LSSS, 1921, 15. burtn., p. 1426.

²¹ LSSS, 1921, 15. burtn., p. 1360.

²² LSSS, 1921, 14. burtn., p. 1350.

²³ LSSS, 1922, 4. burtn., p. 367.

the *Satversmes Sapulce* (Constitutional Assembly) members.²⁴ As opposed to the Leftists, the Rightists lacked only two votes needed to have the people elect the Head of State in Latvia.²⁵

In a situation, where none of the dominant political forces held the majority, compromise determined everything.²⁶ A compromise proposal, strange as it may sound, was “brought to the table” by the same O. Nonācs, who had defended the idea of a President elected by the people a short while ago. Thus, the following wording became historical in the second reading of the draft *Satversme* – “The *Saeima* shall elect the President for a term of three years”.²⁷ The current Article 35 of the *Satversme* has the same wording, the only difference being that today the President’s term in office has been extended to four years.²⁸

A certain theoretical substantiation for the rights of the *Saeima* to elect the President was also found. The same O. Nonācs proposed a thesis regarding the ease of subjecting the people to fraudulent statements, “[t]o the contrary, if the President is elected by the *Saeima*, then demagoguery and dark propaganda will have no place in presidential election”.²⁹

For a long period after the independence of the State of Latvia was restored *de facto*, this O. Nonācs’ claim was quite powerful. It could be used as an excuse for endowing the *Saeima* and not the people with the duty to elect the President. However, there is only one truth – O. Nonācs’ thesis lacks proof. Until now, no one has studied, whether the *Saeima* or the people are more susceptible toward demagoguery. Since the institution of a President elected by the people was rejected, the President elected by the *Saeima* was not given the sole right to dismiss the legislator. Again, upon O. Nonācs’ proposal, the President’s right to initiate dismissal of the *Saeima* in a referendum was supported.³⁰

²⁴ The proposal by the Right in many ways was consistent with the status of the President in the so-called “Constitution of Weimar Republic” of Germany (Weimarer Reichsverfassung / Die Verfassung des Deutschen Reiches). See: *Laufs, A. Rechtsentwicklungen in Deutschland*. 6., überarbeitete und erweiterte Auflage. Berlin: De Gruyter Recht, 2006, pp. 354–355; *Frotscher W., Pieroth B. Verfassungsgeschichte*. 11., überarbeitete Auflage. München: Verlag C.H. Beck, 2012, pp. 264–265 or *Die Verfassung des Deutschen Reiches* (“Weimarer Reichsverfassung”). Available at <http://www.verfassungen.de/de/de19-33/verf19.htm> [last viewed 24.02.2017].

²⁵ Voting in the third reading of the draft *Satversme* for the proposal made by the Right’s representatives J. Goldmanis and A. Bergs: “for” 67 votes, “against” 70 votes. See: LSSS, 1922, 4. burtn., p. 379. A proposal similar to the one made by J. Goldmanis and A. Bergs was submitted by Dr. G. Reinharde and K. Irbe – “The President shall be elected: for the first time by the *Saeima*, but subsequently by the people in general, equal, direct and secret election for the term of five years. The proposal was rejected by 64 votes “for” and 70 votes “against”. See: LSSS, 1922, 4. burtn., p. 379.

²⁶ *Lazdiņš, J. Rechtsoilittische Besonderheiten bei der Entstehung des lettischen Staates und seiner Verfassung. Journal Of The University Of Latvia. Law*, 2014, No. 7, p. 14.

²⁷ 72 votes “for” and 67 votes “against”. See: LSSS, 1921, 18. burtn., p. 1707.

²⁸ In contrast with the original wording, the President’s term in office has been extended by one year, i.e.: the President is elected for the term of four years. See: *Latvijas Republikas Satversme [Satversme of the Republic of Latvia]* (15.02.1922.). Available at <http://likumi.lv/doc.php?id=57980> [last viewed 27.01.2017].

²⁹ LSSS, 1921, 18. burtn., p. 1707.

³⁰ LSSS, 1921, 19. burtn., pp. 1750., 1757–1758; LSSS, 1922, 4. burtn., pp. 427–432.

2. On the Judicial Power

“The State is a legal order”.³¹ The legislator has “the first say” in establishing law; however, “the final word” rests with the judicial power.³² Therefore, a democracy governed by the rule of law is inconceivable without independent judicial power. However, only honest and competent judges are able to consolidate the foundations of a state governed by the rule of law. Regretfully, not all the judges appointed to the office are like that. When Chapter VI of the draft *Satversme* – The Court – was discussed, the first sentence of Article 84 of the *Satversme* “Judicial appointments shall be confirmed by the *Saeima* and they shall be irrevocable” – caused noteworthy debates.³³

The Leftists were categorically against this wording. Thus, social democrat Kārlis Dzelzītis saw in the appointment of judges for life a contradiction with the principle of a democratic state, because “[...] the principle of democracy in general is elected courts”.³⁴ He held that judges should be elected only for a fixed period – six years. That would allow getting rid of incompetent or otherwise unfit members of the judicial power. Good judges could anyway be re-elected into the office for the whole of their lives.³⁵ Therefore, on behalf of social democrats, Menshevik A. Petrevics persistently asked the *Satversmes Sapulce* (Constitutional Assembly) to give up the idea of including the principle of judges’ irrevocability in the *Satversme*.³⁶

Representative of the Christian national union Jānis Purgalvs provided counter-arguments to this opinion:

“We need an independent court. Therefore we must introduce such procedure for appointing judges that would guarantee this independence. [...] In those few cities and regions in Russia where judges of magistrate’s courts were elected, it

³¹ “Der Staat ist eine Rechtsordnung”. See: *Kelsen, H.* Reine Rechtslehre. Studienausgabe der 1. Auflage 1934. Herausgegeben von Matthias Jestaedt. Tübingen: Mohr Siebeck, p. 118.

³² *Rüthers, B.* Das Ungerechte an der Gerechtigkeit. Fehldeutung eines Begriffs. 3., überarbeitete und ergänzte Auflage. Tübingen: Mohr Siebeck, p. 116.

³³ Other articles related to the judicial power were adopted in great unanimity. Articles of the *Satversme* with the following content were adopted unanimously: “Likuma un tiesas priekšā visi pilsoņi ir vienlīdzīgi” [All citizens shall be equal before law and court], “Tiesu var spriest tikai tie orgāni, kuriem šis tiesības piešķir likums, un tikai likumā paredzētā kārtībā” [Decisions in court proceedings may be made only by bodies upon which jurisdiction regarding such has been conferred by law, and only in accordance with the procedures provided for by law] and “Tiesneši ir neatkarīgi un vienīgi likumam padoti” [“Judges shall be independent and subject only to law”]. See: LSSS, 1921, 20. burtn., p. 1875. The original wording of Article 85 of the *Satversme* was also adopted unanimously – “Latvijā pastāv zvērīnāto tiesas uz sevišķa likuma pamata” [Jurors’ courts shall exist in Latvia on the basis of a special law]. This is the only Article of the *Satversme* that was drafted and adopted, but not implemented. Jurors’ courts were not introduced in Latvia. See more: *Kalve, L.* Zvērināto, šefenu un tīrās valsts tiesas. [Jurors’ Courts, Courts of Lay Assessors and Pure State Courts]. *Tieslietu Ministrijas Vēstnesis*, 1938, pp. 662.–683; *Lazdiņš, J.* Continuity of the Jurical Power in the Republic of Latvia. Preconditions and Necessity. *Journal Of The University Of Latvia. Law*, 2014, No. 9, pp. 66–70. or *Lazdiņš, J.* Tiesu varas pēctecība kā viens no valsts kontinuitātes pamatiem [Succession of the Juridical System as a Cornerstone of Latvia’s Continuity]. The 5th International Scientific Conference of the University of Latvia Dedicated to the 95th Anniversary of the Faculty of the University of Latvia. Jurisprudence and Culture: Past Lessons and Future Challenges. Riga 10–11 November, 2014. Rīga: LU Akadēmiskais apgāds, 2014, pp. 637–642.

³⁴ LSSS, 1921, 20. burtn., p. 1876.

³⁵ LSSS, 1921, 20. burtn., p. 1876.

³⁶ LSSS, 1921, 20. burtn., p. 1875.

was observed that the judges always depended upon the group of voters electing them".³⁷

Readings of the draft *Satversme* show that the view on appointment of a judge into office for life was not unequivocal. Thus, for example, F. Cielēns and A. Petrevics, on behalf of the Leftists, submitted a proposal at the third (last) reading of the draft *Satversme* to elect judges for a set term of six years. The proposal was rejected by 49 votes "for", 45 "against" and 8 "abstaining" votes (votes "against" and "abstaining" made up 53 votes in total).³⁸ Consequently, appointment of judges to office for life or for a term set in law was decided by the majority of four votes in favour of electing judges for life. Luckily, the Leftists ended as minority.³⁹ This laid down solid foundations for independence of the judicial power in the *Satversme*. "The most effective measure to be integrated into the order of the State to ensure firm, fair and objective enforcement of law is irrevocability of judges, insofar as their behaviour is impeccable. This is the greatest barrier against violations and arbitrariness by representatives elected by the people."⁴⁰

On 4 May 1990, the Republic of Latvia restored its independence *de facto*.⁴¹ On 6 July 1993, the *Satversme* entered into force in full scope.⁴² This ensured continuity of the basic principles in functioning of the judicial power. After giving up the "legacy" of the Soviet rule, independent judicial power was restored in Latvia. On 15 December 1992, on the basis of fundamental principles established by the *Satversme*, judicial system that existed prior to the occupation⁴³ and international standards,⁴⁴ the law "On Judicial Power" was drafted.⁴⁵ The first Section of this Law provides – "And independent judicial power exists in the Republic of Latvia, alongside the legislative and the executive power". The significance of independence of the judicial power is clearly characterised by Gvido Zemribo, the first Chief Justice of the Supreme Court of the Republic of Latvia, which had restored its independence:

*"In the absence of an independent judicial power, existing alongside the legislative and the executive power, existence of a democratic state governed by the role of law is inconceivable. Therefore Section 1 of the Law [On Judicial Power] underscores that independent judicial power exists in Latvia alongside the legislative and the executive power."*⁴⁶

³⁷ LSSS, 1921, 20. burtn., pp. 1876–1877.

³⁸ LSSS, 1922, 4. burtn., p. 462.

³⁹ LSSS, 1921, 20. burtn., pp. 1877–1879; LSSS, 1922, 4. burtn., pp. 461–463.

⁴⁰ Pleps, J., Pastars, E., Plakane, I. Konstitucionālās tiesības. Papildināts un pārstrādāts izdevums [Constitutional Law. Expanded and Revised Edition]. Rīga: *Latvijas Vēstnesis*, 2014, p. 394.

⁴¹ Par Latvijas Republikas neatkarības atjaunošanu [On the Restoration of Independence of the Republic of Latvia] (04.05.1990). Available at <https://likumi.lv/doc.php?id=75539> [last viewed 28.01.2017].

⁴² The first sitting of the 5th convocation of the *Saeima* of the Republic of Latvia. Available at http://www.saeima.lv/steno/st_93/060793.html [last viewed 27.02.2017].

⁴³ Lazdiņš, J., Kučs, A., Pleps, J., Kusiņš, G. Latvijas valsts tiesību avoti. Dibināšana – neatkarības atjaunošana [The Sources of Latvian State Law. Establishment of the State – Restoration of Independence]. Rīga: Tiesu Namu Aģentūra, 2015, pp. 299–301.

⁴⁴ Zemribo, G., Guļevska, L. Darbs dara cilvēku [Work Makes a Man]. Rīga: Jumava, 2015, pp. 124–127.

⁴⁵ Par tiesu varu [On Judicial Power] (15.12.1992.). Available at <https://likumi.lv/doc.php?id=62847> [last viewed 01.03.2017].

⁴⁶ Intervija ar Gvido Zemribo. *Jāņa Lazdiņa personiskā arhīva materiāli* [Interview with Gvido Zemribo. Materials from Jānis Lazdiņš personal archive].

After independence of the state was restored, electability of judges for life and, thus, independence of the judicial power have not been contested.

3. On the Freedom to Strike

Similarly to the range of issues examined above, the issue of the freedom to strike caused clashes between the opinions of the Leftists and the Rightists.

The Leftists supported the freedom to strike as workers' tool in fighting employers. They, however, were not satisfied with the narrow scope of the freedom to strike established in the *Satversme* – “Strike is a legal means of economic fight”.⁴⁷ Social democrat Ansis Rudēvics, referring to equality of all citizens before law, asked the *Satversmes Sapulce* (Constitutional Assembly):

“[...] does our law aim to implement the principle that private owners and entrepreneurs are granted a total right to exploit a worker to their hearts content, but a worker has been deprived of all rights to defend himself [?]”⁴⁸

To prevent this, A. Rudēvics, on behalf of the social democrats' faction, proposed the following wording of Article 104 of the *Satversme*: “Strike is a legal means of fight”.⁴⁹ This would mean that strike would be a legal means of economic and political fight. It was supported by the independent workers' representative Vilis Dermanis. “[...] in a modern state, be it as democratic as it will, the state power, through its executive power, time and again takes the side of employers, not that of workers, and therefore laws, which are democratic, are often interpreted not to the advantage of workers, but for something else.”⁵⁰

The Rightists, as opposed to the Leftists, had a negative attitude towards enshrining the freedom to strike in the *Satversme*. Farmers' parties showed a particularly strong resistance.⁵¹ In author's opinion, the most original view on this matter was expressed by Francis Trasuns from Latgale Union of Christian Farmers:

“We already have the freedom to work and the freedom not to work. [...] It is incomprehensible that we want to introduce it into our constitution, so that we could force, on the basis of law, not to work those wishing to work [...] What is, in fact, a strike? [...] Let's take as an example a political strike. On one fine day they, civil servants of this State, take into their minds to declare a strike for 2 to 3 weeks. What then? That would be a collapse of the State.”⁵²

J. Purgals revealed the true antipathies of the Rightists towards the right to freedom of strike: “All these freedoms, rights, all political demands to a large extent are borrowed from the German Constitution. [And yet] there is nothing in the German Constitution about the freedom to strike having been recognised in Germany.”⁵³ Why? Because in Germany communists, helped by independent socialists, organised an impressive number of strikes in the name of economic demands, but with the aim of seizing political power. The leader of social democrats President Friedrich Ebert and Prime Minister Philipp Scheidemann had to turn to workers and ask them not to strike to prevent “the Reds” from coming into power.

⁴⁷ LSSS, 1922, 2. burtn., p. 95.

⁴⁸ LSSS, 1922, 2. burtn., p. 97.

⁴⁹ LSSS, 1922, 2. burtn., p. 97.

⁵⁰ LSSS, 1922, 2. burtn., p. 99.

⁵¹ *Šilde*, A. Latvijas vēsture, p. 362.

⁵² LSSS, 1922, 2. burtn., pp. 97–98.

⁵³ LSSS, 1922, 2. burtn., p. 123.

Thus, “[...] a strike is needed only by those, who organise strikes pretending to aim at improving economic conditions, but in fact intend to take political dictatorship in their own hands.”⁵⁴ Communists’ true intentions are seen in the Soviet Russia. “There the communist government has put all workers under the conditions of slaves.”⁵⁵

Understanding that the majority of the Constitutional Assembly did not want to support the idea of freedom to strike, part of the Leftists mitigated their position and no longer demanded a strike as a political means of fight.⁵⁶ In this stance they were supported also by some politicians of the Rightist parties. In order not to give up the freedom of strike as a basic human right,⁵⁷ A. Bergs proposed a compromise of “utmost necessity”:

*“A strike is a legal means of economic fight. The freedom to strike may be restricted on the basis of a special law. A strike in enterprises of public necessity shall be punishable”*⁵⁸

A. Bergs’ proposal, regrettably, was not supported.⁵⁹ “The spectre of communism” had done its job. The majority of deputies voted against anything that could be even seemingly linked to communism.⁶⁰ It can be assumed that the negative vote was “reinforced” also by A. Purgals’ conclusion that “[...] it is extremely difficult to draw a line between an economic and a political strike”⁶¹ and the statement made by Mārtiņš Antons from labour party that “[...] the best economic conditions cannot be attained by a political strike, but by parliamentary government, parliamentary majority, and legislation.”⁶²

During the years of totalitarian Soviet power, the right to strike was not relevant. The situation changed after *de facto* restoration of the state’s independence. After Declaration of Independence of 4 May 1990 was proclaimed, a large number of laws guaranteeing human rights were adopted, for example, “Law on Religious Organizations”, “Law on the Press and Other Mass Media”, the constitutional law “Rights and Duties of People and Citizens”, etc.⁶³ On 15 October 1998, significant amendments were introduced also to the *Satversme*.⁶⁴ Such rights as the right to peaceful assemblies, street processions and pickets, as well as the freedom to strike were included in the Chapter on fundamental human rights.⁶⁵

⁵⁴ LSSS, 1922, 2. burtn., p. 123.

⁵⁵ LSSS, 1922, 2. burtn., p. 124.

⁵⁶ LSSS, 1922, 8. burtn., p. 1193.

⁵⁷ *Kučs, A.* Protection of Fundamental Rights in the Constitution of the Republic of Latvia during the Interwar Period and after the Restoration of Independence. *Journal of the University of Latvia. Law*, 2014, No. 7, pp. 54–60.

⁵⁸ LSSS, 1922, 8. burtn., p. 1195.

⁵⁹ Par A. Berga priekšlikumu tika nodotas tikai 23 balsis “par”. [Only 23 votes “for” were cast for A. Bergs’ proposal.] LSSS, 1922, 8. burtn., p. 1196.

⁶⁰ See: LSSS, 1922, 2. burtn., p. 124; LSSS, 1922, 8. burtn., p. 1195.

⁶¹ LSSS, 1922, 8. burtn., p. 1195.

⁶² LSSS, 1922, 2. burtn., p. 122.

⁶³ See more: *Balodis, R., Kārklīņa, A., Danovskis, E.* The Development of Constitutional and Administrative Law in Latvia after the Restoration of Independence. *Journal of the University of Latvia. Law*, 2013, No. 5, pp. 64–70.

⁶⁴ Grozījumi Latvijas Republikas Satversmē [Amendments to the *Satversme* of the Republic of Latvia] (15.10.1998.). Available at <https://likumi.lv/ta/id/50292-grozijumi-latvijas-republikas-satversme> [last viewed 01.03.2017].

⁶⁵ See: Article 103 and Article 108 of the *Satversme* of the Republic of Latvia.

Summary

1. The right of the *Saeima* to elect the President, enshrined in the *Satversme*, is a political compromise, ensured by a small majority of vote. The compromise meant that the institution of the President was included in the *Satversme*; however, the people were denied the right to elect President.
2. Election of judges for life and not for the term of six years was decided by a majority of only four votes in favour of electing judges for life. Although not convincingly, nevertheless, a solid foundation was laid for independence of the judicial power in the Republic of Latvia with a small majority of vote.
3. Negative attitude of the majority of the *Saeima* members toward including the freedom to strike in the original wording of the *Saeima* was politically motivated and not legally substantiated. There were concerns that communists could use the freedom to strike in their own interests with the aim of establishing communist dictatorship.

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Samesame but different? Consumer Sales Contracts and Burden of Proof Regarding the Damage in EU Member States

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The EU internal market brings companies the possibility to offer goods and services on a market of 28 member states without facing considerable additional costs. Correspondingly, consumers benefit from enhanced competition, which leads to a broader variety of goods, higher quality and lower prices. Against this backdrop, it was also necessary to adjust or harmonize the legal regimes regarding the obligations of producers/companies and the rights of consumers, to avoid different standards in different places in the internal market. One of the instruments aiming at the harmonization of consumer rights was the Consumer Rights Directive 1999/44/EC. However, directives frequently bring along the question, whether the application in 28 member states succeeds to achieve the same standards regarding the aims and legal content of the directive. In 2015, this aspect became subject of a dispute in the Netherlands, making it necessary to request clarification by the Court of Justice of the European Union (CJEU) regarding the reach of Art. 5(3) of Directive 1999/44/EC and thus implicitly comment on the application of this provision in the EU member states. The decision regards a provision shifting the burden of proof in favour of the consumer. The article presents this CJEU-decision and, with a view to a relevant recent decision of the German Bundesgerichtshof (BGH) compares the current legal situations in Germany and Latvia.

Keywords: Consumer protection, sales contract, European Union law, internal market, comparative law, German civil law, Latvian civil law.

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1. Samesame: The EU, Directives, Consumer Sales and the Problem

When shopping on the streets of Bangkok, a tourist asking about the differences of two seemingly identical products with different prices, (s)he frequently receives the friendly answer “samesame but different”.² Mostly, further inquiries about the actual meaning of this information are not fertile, hence, one may ask, what “samesame but different” may mean. In the context of EU law however, “samesame but different” may make surprisingly much sense when describing the transposition and application of directives in EU member states. Even though the national transposing acts may look different, the content and legal consequences of their application should eventually lead to the same result. When it comes to the correct transposition of directives, consumer protection is one of the fields where frequently questions may appear, if consumers enjoy the rights they should be granted by EU law.

The EU internal market brought companies the possibility to offer goods and services on a market of 28 member states without facing considerable additional costs. Correspondingly, consumers benefit from enhanced competition, which – at least theoretically³ – leads to a broader variety of goods, higher quality and lower prices. Accordingly, every day millions of contracts with cross-border elements on goods and services are concluded. Against this backdrop, it was also necessary to adjust or harmonize the legal regimes regarding the obligations of producers/companies and the rights of consumers, to avoid different standards in different places in the internal market. One of the instruments aiming at the harmonization of consumer rights was the Consumer Rights Directive 1999/44/EC, which has been transposed by all member states.⁴ Notwithstanding their timely transposition, directives frequently bring along the question, if the application in 28 member states succeeds to achieve the same standards regarding the directives’ aims and legal content. In 2015, this aspect became subject of a dispute in the Netherlands (II.1.), making it necessary to request clarification by the Court of Justice of the European Union (CJEU) regarding the reach of Art. 5(3) of Directive 1999/44/EC and thus implicitly comment on the 13 year-long application of this provision in the EU member states. The decision regards a provision shifting the burden of proof in favour of the consumer and that may at first glance seem somewhat specific, which however is of uttermost relevance for consumers in daily life as it deals with the following standard situation: A consumer purchases a good and, within six months, the good reveals a material defect. Upon the notice of the defect by the consumer,

² This is one of the most common examples for “tinglish”, a mix between Thai and English, see, for instance, <https://en.wikipedia.org/wiki/Tinglish> [last viewed 20.06.2017].

³ Benz, M. Diskriminierung bei Markenprodukten Der «Abfallkübel Europas» begehrt auf. Neue Züricher Zeitung, 01.3.2017. Available at <https://www.nzz.ch/wirtschaft/diskriminierung-bei-markenprodukten-der-abfallkuebel-europas-begehrt-auf-ld.148357> [last viewed 20.06.2017]; on 15.04.2016, Inese Vaidere published similar information from a Latvian perspective on her blog at <http://www.inese-vaidere.lv/2016/04/produktu-kvalitate-latvija-nedrikst-atskirties-no-rietumeiropa-noperkamajiem/> [last viewed 20.06.2017].

⁴ Art. 11 of the Directive 1999/44/EC stipulates 1 January 2002 as the deadline for transposition.

frequently, the seller is tempted to reply that the defect is the result of incorrect use or intentional damage. Consequently, as a precondition before the consumer may invoke respective claims, one needs to clarify, who bears the burden of proof that there actually is/was a defect of the good.

It was precisely this aspect, which was central to the CJEU decision in 2015⁵ (II.1), and of a subsequent decision of the German Supreme Court (Bundesgerichtshof, BGH) in October 2016,⁶ causing it to reverse its constant jurisprudence (II.2). Accordingly, the directive non-conform interpretation in various EU-member states raises the curiosity of comparative lawyers, if – different to the Netherlands and Germany – Latvia applied the provision in a manner conforming to EU law (II.3).

2. Corresponding Law and Jurisprudence in Member States Regarding Implementation and Application of Directive 1999/44/EC: Samesame but Different?

The central provision regarding the burden of proof in consumer sales contracts is to be found in Art. 5(3) of Directive 1999/44/EC which stipulates:

“Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.”

Accordingly, the national courts must interpret the relevant national norm in the light of the directive and decide accordingly, who bears the burden of proof regarding the ‘lack of conformity of the good’.

2.1. Case Faber/Hazet (C-497/13)

As has been indicated, in the case Faber/Hazet (C-497/13), a preliminary ruling procedure, the CJEU had to deal with this aspect. The basic facts regarding this particular problem were, as follows:⁷

Ms Faber had purchased a second-hand vehicle at a garage. After four months, the vehicle caught fire during a journey and was completely destroyed. It was towed to the seller’s garage and later, at the request of that garage, to a scrapyard, where it was kept. A technical investigation into the cause of the vehicle fire could not take place, as the vehicle had been scrapped in the meantime.

In the course of events, Ms Faber and the seller disputed about the liability. Having had doubts regarding the correct application regarding secondary EU law, the national court dealing with the matter⁸ decided to refer several questions to the CJEU for a preliminary ruling. One of these questions concerned the burden of proof of the existence of the “lack of conformity”.

Here one needs to note that the Dutch rule required the consumer to prove that he informed the seller of the lack of conformity in good time and additionally, that

⁵ CJEU, Case Faber/Hazet (C-497/13)

⁶ BGH Urteil vom 12. Oktober 2016, VIII ZR 103/15. Available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&sid=c2c649c75f79e82447da3d7e2fac47be> [last viewed 20.06.2017].

⁷ Short version, based on the CJEU press-release on the case, is available at: curia.europa.eu/jcms/jcms/P_159405/en/ [last viewed 20.06.2017].

⁸ Gerechtshof (Regional Court of Appeal) Arnhem-Leeuwarden, Netherlands.

it was “in principle for the consumer, if there is a challenge by the seller, to furnish evidence that he informed the seller of the lack of conformity of the goods delivered within a period of two months after the discovery of the lack of conformity.”⁹

The CJEU ruled, as follows:

Firstly, *“that the obligation imposed on the consumer is limited to that of informing the seller that a lack of conformity exists. The consumer is not required, at that stage, to furnish evidence that a lack of conformity actually adversely affects the goods that he has purchased or to state the precise cause of that lack of conformity.”*

Secondly, regarding the burden of proof and in particular, which matters it is for the consumer to establish, the Court stated that

*“[...] if the lack of conformity has become apparent within six months of delivery of the goods, the directive relaxes the burden of proof which is borne by the consumer by providing that the lack of conformity is presumed to have existed at the time of delivery. In order to benefit from that relaxation the consumer must nevertheless furnish evidence of certain facts.”*¹⁰

The CJEU further explained, what is to be understood hereunder:

“Firstly, the consumer must allege and furnish evidence that the goods sold are not in conformity with the contract in so far as, for example, they do not have the qualities agreed on or even are not fit for the purpose which that type of goods is normally expected to have. The consumer is required to prove only that the lack of conformity exists. He is not required to prove the cause of that lack of conformity or to establish that its origin is attributable to the seller.

Secondly, the consumer must prove that the lack of conformity in question became apparent, that is to say, became physically apparent, within six months of delivery of the goods.

Once he has established those facts, the consumer is relieved of the obligation of establishing that the lack of conformity existed at the time of delivery of the goods. The occurrence of that lack of conformity within the short period of six months makes it possible to assume that, although it became apparent only after the delivery of the goods, it already existed ‘in embryonic form’ in those goods at the time of delivery.

*It is therefore for the professional seller to provide, as the case may be, evidence that the lack of conformity did not exist at the time of delivery of the goods, by establishing that the cause or origin of that lack of conformity is to be found in an act or omission which took place after that delivery.”*¹¹

In addition, for national courts it is important to note that the Court confirmed that the national court may of its own motion raise Art. 5(3) of Directive 1999/44/EC in the context of an appeal.¹²

With regard to these clarifications, the German Supreme Court, the BGH, later had the opportunity to integrate the findings of the CJEU-Faber decision, when interpreting the relevant German law.

⁹ Cited after CJEU press release, *supra* note, CJEU, C-497/13, para. 11, 12.

¹⁰ CJEU, C-497/13, para. 68, 69.

¹¹ CJEU, C-497/13, para. 7073.

¹² CJEU, C-497/13, para. 15.

2.2. Corresponding Case Decided by BGH in Germany

The facts of the case the BGH had to rule on were, as follows: The complainant had bought a used car for 16.200 €. After five months, a defect manifested itself, which involved improper functioning of the automatic gear box, causing the motor to stall. Subsequently, the parties, among other things, disputed, who had to bear the burden of proof, given that the seller claimed that the defect was caused by the buyer (consumer) through undue use.

Eventually, in the last instance, the BGH had to rule on the matter, applying the relevant German norm transposing Art. 5(3) of Directive 1999/44/EC, Section 476 BGB, which stipulates:

“If, within six months after the date of the passing of the risk, a material defect manifests itself, it is presumed that the thing was already defective when risk passed, unless this presumption is incompatible with the nature of the thing or of the defect.”

Firstly, the BGH expressly referred to the CJEU decision Faber and the interpretation of Art. 5(3) of Directive 1999/44/EC. It explained that it subsequently would adopt the directive-conform interpretation regarding the reversal of the burden of proof in favour of the consumer. In the following, the BGH expressly clarified, that this constituted an adjustment of its previous jurisprudence regarding the interpretation of this norm. Explicitly, the BGH recurred to the findings of the CJEU quoted above that, *“The consumer is not required, at that stage, to furnish evidence that a lack of conformity actually adversely affects the goods that he has purchased or to state the precise cause of that lack of conformity.”*¹³

Furthermore, it referred to the six-month period, in which the defect manifested itself, for which the consumer neither needed to prove the cause of the defect, nor that it falls within the responsibility of the seller. The BGH also stated that a directive-conform interpretation brought along the assumption that a defect, which manifests within this six months period, had in some form already existed when risk passed. Again, the BGH expressly highlighted that this constituted a reversal of its own previous jurisprudence.¹⁴

Summarizing this new line of jurisprudence, the BGH explained that it thus was the duty of the seller to prove that a defect had not been immanent to the good when risk was passed, and that the defect was caused by an activity or omission of the consumer. In addition, the seller may invoke the last sentence of Section 476 BGB that “[...] this presumption is incompatible with the nature of the thing or of the defect.”

2.3. Situation in Latvian Consumer Law

Having acceded to the EU in 2004, also Latvia transposed Art. 5(3) of Directive 1999/44/EC into national law, namely, with Article 13(3) of the Consumer Rights Protection Law.¹⁵ This norm, which amended a previous formulation and entered into force on 1 January 2016, stipulates :

¹³ BGH Urteil vom 12. Oktober 2016, VIII ZR 103/15, para. 36, also in a) (Leitsatz).

¹⁴ BGH Urteil vom 12. Oktober 2016, VIII ZR 103/15, para. 56.

¹⁵ Patērētāju tiesību aizsardzības likums, 13(3): “Ja preces neatbilstība līguma noteikumiem atklājas sešu mēnešu laikā pēc preces iegādes, uzskatāms, ka tā eksistēja preces iegādes dienā, izņemot gadījumu, kad šāds pieņēmums ir pretrunā ar preces raksturu vai neatbilstības veidu.”

“If non-conformity of goods with the provisions of a contract is discovered within six months after the purchase of goods, it shall be considered that it existed on the day when the goods were purchased, except the case when such assumption is in contradiction with the nature of goods or type of non-conformity.”

The provision thus resembles the German provision, mainly with the exception that the former refers to “the passing of risk” and the Latvian to “the purchase of goods”. Given that this norm has only recently taken effect, so far, there are no relevant decisions.

Previously, Article 13(3) of the Consumer Rights Protection Law¹⁶ was formulated, as follows:

“If non-conformity of goods [...] with the provisions of a contract is discovered within six months after the purchase of goods, it shall be considered that it existed on the day when the goods were purchased, except for the cases when the producer, seller or service provider himself, in according to law, with assistance of official expertise proves the contrary.”

Hence, the previous wording of the norm explicitly provided that it was to the producer, seller or provider of service, to prove that the good was in a condition conform to the consumer sale. Accordingly, courts usually¹⁷ followed the clear stipulation of the former Article 13(3) of the Consumer Rights Protection Law ruling that, if the producer or seller could not provide the evidence, the consumer would win the case.¹⁸ Furthermore, there are several cases, where the consumer provided evidence and won the case.¹⁹ With regard to the wording of the norm, in principle, these proofs would have been unnecessary, even without referring to the CJEU-jurisprudence.

In conclusion, it is to be noted that the Latvian transposition of Art. 5(3) of Directive 1999/44/EC generated a generally directive-conform application. Latvian court practice thereby differed from the constant jurisprudence in Germany. With regard to the recent amendment to Article 13(3) of the Consumer Rights Protection Law, which removed the precise obligation that “[...] *except for the cases when the producer, seller or service provider himself, in according to law, with assistance of official expertise proves the contrary*”, it remains to be seen, whether the future decisions in Latvia will continue applying this jurisprudence. Given the less clear wording of the amendment, it seems worthwhile to inform courts, sellers and, particularly, consumers of the CJEU decision in the Faber case.

¹⁶ Patērētāju tiesību aizsardzības likums, 13(3): Ja preces vai pakalpojuma neatbilstība līguma noteikumiem atklājas sešu mēnešu laikā pēc preces iegādes vai pakalpojuma sniegšanas, uzskatāms, ka tā eksistēja preces iegādes vai pakalpojuma sniegšanas dienā, izņemot gadījumu, kad ražotājs, pārdevējs vai pakalpojuma sniedzējs normatīvajos aktos noteiktajā kārtībā organizētā ekspertīzē pierāda pretējo.

¹⁷ Notwithstanding, there are also cases where a judge made a reference to the Article 93 of Civil Procedure Law which states that each party has to provide evidences for their own statements (equality of arms article) and did not pay attention to the Article 13(3) of the Consumer Rights Protection Law, judgment of the Riga City Vidzeme District Court of March 31 2016, case No. C30546615.

¹⁸ See, for instance, judgment of the Riga City Vidzeme District Court of 26 September 2011, case No. C30647110.

¹⁹ Expert-examination judgment of the Riga City Vidzeme District Court of December 14 2015, case No. C30403913, judgment of the Riga City Vidzeme District Court of March 31 2016, case No. C30546615, judgment of Cēsu Regional Court of December 9 2013, case No. C11117112.

Conclusions

Reiterating the analogy drawn in the introduction to Thai street vendors, one may conclude that in 2017 in German and Latvian court practice regarding the application of Art. 5(3) of Directive 1999/44/EC is overall identical in the sense of “samesame”, albeit being regulated in slightly different forms.²⁰ Notwithstanding this conclusion, the comparison of German and Latvian jurisprudence prior to October 2016 provide interesting insights, given that it reveals a differing level of consumer protection. Even though one might have expected that in 2015 a directive regarding important matters in an area with a high number of legal disputes, such as consumer protection, should have been sufficiently clarified, the cases presented show that this is not always the case. For national lawyers, these examples illustrate that legal creativity may also require to consult the relevant secondary law forming the basis of a national legal act, potentially in different languages. Furthermore, the cases show that directives generally are efficient instruments to achieving similar standards in the law of member states in the areas vital for the internal market. Still, the comparison between German and Latvian law highlights, that indeed the practice of national judges regarding precisely these matters may considerably diverge, creating weaker and stronger positions for consumers, depending on where they are located. With a view to the stipulation in Art. 26 TFEU to “[...] ensuring the functioning of the internal market...” this aspect requires constant monitoring and reassessment, which may also signify that national courts in case of doubt make use of the preliminary ruling procedure. Finally, as a minor detail, Latvians will be happy to note, that Latvia, only being a EU member state since 2004, has managed to act in conformity with EU law which both the Netherlands and Germany as founding members have failed to achieve.

This contribution does not strive to comment on the effect of the Faber decision on businesses. This aspect – whether consumers are over-protected and businesses are unduly burdened, significantly depends on the subjective point of view and consequently, the reader is invited to consult the comments on the CJEU’s decision.²¹

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²⁰ In Germany, in the course of a reform of the law of obligations, the legislator incorporated the directive in the civil law code, BGB, whereas in Latvian law, the provisions are laid down in a separate legislative act.

However, in Latvian court practice it appears to be somewhat problematic that both parties – seller and consumer – provide evidence in so-called expert-examinations. In this case, the court usually evaluates both expert opinions, however, the practice raises concerns, whether the experts appointed by the parties are objective and independent.

²¹ Regarding the CJEU judgement case No. C-497/13 see for instance: *Fellert, M.* Die Beweislastumkehr des §476 BGB im Lichte der aktuellen Rechtsprechung des EuGH, JA 2015, p. 818; *Besprechungen von Gsell, B.* Beweislastumkehr zugunsten des Verbraucher-Käufers auch bei nur potenziellem Grundmangel, VuR 2015, 446; sowie *Rott, P.* EuZW 2015, S. 556(560); *Podzun, Procedural autonomy and effective consumer protection in sale of goods liability: Easing the burden of consumers (even if they are not consumers);* EuCML 2015, p. 149.

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Expropriation of Property for Public Purposes: Common Interests of the Public and Protection of Owner's Rights

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The right to property is an economic right of the most extensive scope. It is protected not only by the Civil Law, but also the *Satversme* [Constitution] of the Republic of Latvia. Expropriation of property to ensure public needs is admissible, if the owner is compensated for the decrease of assets linked to the loss of property. Legal problems related to protection of the owner's rights in the expropriation of immovable property have been repeatedly dealt with in the judicature of the Constitutional Court of the Republic of Latvia. The legislator, in turn, has amended legal regulation to improve protection of the owner's rights. This article assesses the way in which in Latvia, upon expropriating immovable property for public needs, balance between public interests and the owner's rights is ensured. The article advances a thesis that the primary type of fair compensation is money and not other kind of compensation.

Keywords: *Satversme*, the Civil Law, Expropriation of Immovable Property for Public Purposes, right to property, immovable property, public purposes, fair compensation.

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Introduction

The right to property is the most important economic right held by a person. Property and other objects of the property right constitute the material world, without which human existence is inconceivable. In a state governed by the rule of law, the economic system of which is mainly based upon the principles of free market, the property right is recognised and protected. Although it is not the obligation of the State to grant financial resources to a person for acquisition of property, it must create appropriate conditions, in which natural and legal persons may acquire in their ownership things, preserve and use them to maintain their welfare. Property enables a private person to act autonomously and independently in relationships with other persons and the state.

Immovable property has always had a special meaning and value. Depending upon the type of immovable property, it can serve as a home, means of production or a long-term investment. Immovable property is owned not only by private persons, but also by the state and local governments. Immovable property owned by the state or local governments is often used to perform functions that are important for society as a whole. However, the specific feature of immovable property is that it cannot be multiplied unrestrictedly. New buildings can be constructed; however, a new land plot may be unavailable. When the state or a local government intends to construct an object of public importance, it may turn out that there is no publicly owned immovable property in that location. In such situations, the state, as well as local governments, often turn to expropriation of immovable property. Major infrastructure projects, for example, the railway line “Rail Baltica”, which will connect the Baltic States with the rail network of other Member States of the European Union, cannot be implemented without expropriation of private immovable property at all.

Expropriation of immovable property for public needs is a significant interference into a person’s economic rights. The Constitutional Court has resolved a number of legal disputes regarding applications by owners of immovable property that was expropriated for public needs, which gained attention. Its jurisprudence reflects the most important legal problems linked to expropriation of immovable property for public purposes. This article provides an assessment, based upon findings of legal science and practice, on the way in which in Latvia, upon expropriating immovable property for public needs, balance between the common interests of society (public interests) and the owner’s rights is ensured. A person’s right to a fair compensation will be focused upon in particular, because compensation is the measure that must make up for the decrease of assets linked to loss of property.

1. Evolution of Regulation on Expropriation of Immovable Property for Public Needs

Soon after independence of the Republic of Latvia was restored, the Civil Law of 28 January 1937 was reinstated.¹ The part on property law of the Civil Law entered into force on 1 September 1992.² With the Civil Law, the concept of private property

¹ Civillikums [Civil Law]. *Valdības Vēstnesis*, 41, 20.02.1937.

² Likums “Par atjaunotā Latvijas Republikas 1937. gada Civillikuma ievada, mantojuma tiesību un lietu tiesību daļas spēkā stāšanās laiku un piemērošanas kārtību” [Law “On the Date of Entering into Force and Procedure of Applying Introduction, Parts on Inheritance Law and Property Law of the Restored 1937 Civil Law of the Republic of Latvia”]. *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, 29/31, 30.07.1992.

was again introduced and enforced in Latvia. It was clear that expropriation of private property for public purposes might occur only in a procedure that complies with the principles of a state governed by the rule of law. The purpose of the complex, multi-level procedure of expropriation is to ensure inviolability of property and to deter interested parties (the state, local governments) from the temptation to use the means of expropriation too often.³

After Latvia had regained its independence, the first mentioning of expropriation of property was found in the constitutional law “The Rights and Obligations of a Citizen and a Person”, which was adopted by the Supreme Council of the Republic of Latvia on 10 December 1991. Section 21(3) of this Law provided: “Property may be expropriated only in procedure established by law and by a court’s ruling. If property is expropriated for the purpose of implementing public projects, the owner shall have the right to appropriate compensation”. It must be noted that this law, as to its disposition and nature, was a regulatory legal act adopted in circumstances of transforming the legal system, and its norms, notwithstanding the word “constitutional” in its title, were not of constitutional level.⁴

On 15 September 1992, the Supreme Council of the Republic of Latvia reinstated the law of 1923 “On Expropriation of Immovable Property for the Needs of the State or Society”.⁵ Some provisions of this Law were given more contemporary wording making them compatible with the legal and actual circumstances of the last decade of the 20th century. Section 1 of the law “On Expropriation of Immovable Property for the Needs of the State or Society” allowed expropriation of immovable property for the needs of the state or society in exceptional cases only for compensation and only on the basis of a specific law. Expropriation by a specific law was more suitable to situation in Latvia and as a solution was more favourable to the owners compared to expropriation by a court’s ruling envisaged in the constitutional law “The Rights and Obligations of a Citizen and a Person”.

Adoption of Chapter VIII “Fundamental Human Rights” of the *Satversme* of the Republic of Latvia by the *Saeima* on 23 October 1998 was essential in ensuring protection of the right to property.⁶ With the coming into force of the Chapter on fundamental rights of the *Satversme*, the constitutional law “The Rights and Obligations of a Citizen and a Person” expired. By Article 105 of the *Satversme* the right to property was established as a human right legally protected by the constitution. Article 105 is one of the most frequently applied Articles of Chapter VIII of the *Satversme*.

In accordance with the fourth sentence of Article 105 of the *Satversme*, expropriation of property for public purposes is allowed only in exceptional cases on the basis of a specific law and in return for fair compensation. This norm of the *Satversme* defines four criteria that must be met, if property is expropriated, i.e.,

³ Grūtups A., Kalniņš E. Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. Otrais, papildinātais izdevums [Commentaries to the Civil Law. Part Three. Property Law. Property. Second Revised Edition]. Rīga: Tiesu namu aģentūra, 2002, 166. lpp.

⁴ See: Balodis R., Lazdiņš J. *Satversmes vēsturiskā attīstība. Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi* [Historical Development of the *Satversme*. Commentaries to the *Satversme* of the Republic of Latvia]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: *Latvijas Vēstnesis*, 2014, 77., 78. lpp.

⁵ Likums “Par nekustamā īpašuma atsavināšanu valsts vai sabiedriskajām vajadzībām” [Law “On Expropriation of Immovable Property for the Needs of the State or Society”]. *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, 39/40/41, 15.10.1992.

⁶ Grozījumi Latvijas Republikas Satversmē [Amendments to the *Satversme* of the Republic of Latvia]. *Latvijas Vēstnesis*, 308/312(1369/1373), 23.10.1998.

property may be expropriated only 1) for public purposes, 2) in exceptional cases, 3) on the basis of a specific law, and 4) in return for fair compensation. The fourth sentence of Article 105 of the *Satversme* applies not only to immovable property, but also to expropriation of any other economic assets for public purposes, if these assets are to be recognised as being property in the meaning of the *Satversme*.

An important incentive to legislation was judgement by the Constitutional Court in case No. 2009-01-01 “On Compliance of Para 1 of Section 1 of Law On Expropriation of Immovable Property for the Needs of the Border Checkpoint Terehova with Article 1 of the *Satversme* of the Republic of Latvia”.⁷ The Constitutional Court recognised expropriation of immovable property located in the border area of Latvia as being unconstitutional, because the State had expropriated the whole immovable property of the owner, although it would have been enough to use only part of this property to provide for the public needs.

This Judgement by the Constitutional Court gave food for thought to legislator regarding deficiencies in the regulation on expropriation of immovable property. On 3 November 2010 the *Saeima* adopted Expropriation of Immovable Property for Public Purposes Law, which replaced the law “On Expropriation of Immovable property for the Needs of the State or Society”. As noted in Section 1 of Expropriation of Immovable Property for Public Purposes Law, the purpose of the Law is to establish a transparent, effective and fair procedure for expropriating immovable property for public purposes. The new law of 2010 provides that the state institution or local government, the competence of which includes ensuring that the particular public needs are met, before expropriation of property makes an offer to the owner to conclude an agreement on voluntary alienation of property. The old law “On Expropriation of Immovable property for the Needs of the State or Society” had no mechanism of voluntary alienation. In general, Expropriation of Immovable Property for Public Purposes Law, compared to the previous regulation, expands the scope of an owner’s legal possibilities in the process of expropriation. On 15 March 2011, on the basis of Expropriation of Immovable Property for Public Purposes Law, the Cabinet issued Regulation No. 204 “Procedure for Determining Fair Compensation for Immovable Property to be Expropriated for Public Purposes” (hereinafter also – the Cabinet Regulation No. 204).⁸

Thus, in Latvia since the very beginnings of the 1990s, when the State regained independence, legal regulation, pursuant to which immovable property could be expropriated for public purposes, was consistently developed. Amendments to regulatory legal acts predominantly have been linked to the need to improve the owner’s legal status in the process of expropriation. Article 105 of the *Satversme* is the highest within the hierarchy of these legal norms. The fourth sentence thereof allows expropriating property for public purposes only in exceptional cases on the basis of a specific law for fair compensation. Detailed procedure of expropriation

⁷ Satversmes tiesas spriedums lietā Nr. 2009-01-01 “Par likuma “Par nekustamo īpašumu atsavināšanu Terehovas robežkontroles punkta vajadzībām” 1. panta 1. punkta atbilstību Latvijas Republikas Satversmes 105. pantam” [Judgement of the Constitutional Court in case No. 2009-01-01 “On Compliance of para. 1 of Section 1 of Law On Confiscation of Immovable Property for the Needs of the Border Checkpoint Terehova with Article 105 of the *Satversme* of the Republic of Latvia”]. *Latvijas Vēstnesis*, 170(4156), 27.10.2009.

⁸ Ministru kabineta noteikumi Nr. 204 “Kārtība, kādā nosaka taisnīgu atlīdzību par sabiedrības vajadzībām atsavināmo nekustamo īpašumu” [Cabinet Regulation No. 204 “Procedure for Determining Fair Compensation for Immovable Property to be Expropriated for Public Purposes”]. *Latvijas Vēstnesis*, 48(4446), 25.03.2011.

is established in Expropriation of Immovable Property for Public Purposes Law. Each time, when concrete immovable property needs to be expropriated, the *Saeima* adopts a specific law. One of the most essential elements in expropriation of immovable property is fair compensation, which is regulated by Expropriation of Immovable Property for Public Purposes Law and the Cabinet Regulation, issued on the basis of this Law.

2. Public Purposes and Priority Thereof Over a Person's Right to Property

The need to ensure public purposes is the only reason referred to in the *Satversme* and Expropriation of Immovable Property for Public Purposes Law that justifies expropriation of immovable property. Public purpose is a broad concept, which initially was not fully defined in legal norms. The concept "needs of the state or society" was used in the law "On Expropriation of Immovable property for the Needs of the State or Society". Moreover, the Law did not provide a more detailed description of the State's needs, whereas the concept of society's needs referred to in Section 3 of this Law was linked to the needs of persons residing within the administrative territory of local governments and applied to the fields of culture, education, sports, health care, social protection, development of public transport, environment protection or construction of engineering objects. The Constitutional Court has repeatedly recognised that the legislator has broad discretion to decide, which are the general public needs, which must be ensured to attain special public purposes.⁹

Expropriation of Immovable Property for Public Purposes Law provides a more extensive, but not an exhaustive list of public purposes. Pursuant to Section 2 of this Law, immovable property is expropriated for the needs of national defence, environment protection, health care or social protection, for construction of culture, education and sports facilities that society needs, construction of engineering structures and communications or development of public transport, as well as to ensure other public needs, if this purpose cannot be reached by other means.

Thus, the unfortunate division into the needs of the state and society, typical of the previous regulation, has been eliminated in Expropriation of Immovable Property for Public Purposes Law (hereinafter also – the Expropriation Law). A local government is an element and a derivative of the state. Pursuant to Para 1 of

⁹ Satversmes tiesas sprieduma lietā Nr. 2005-12-0103 "Par Ministru kabineta 2005. gada 11. janvāra noteikumu Nr. 17 "Grozījumi likumā "Par nekustamā īpašuma piespiedu atsavināšanu valsts vai sabiedriskajām vajadzībām"" un 2005. gada 9. jūnija likuma "Grozījumi likumā "Par nekustamā īpašuma piespiedu atsavināšanu valsts vai sabiedriskajām vajadzībām"" atbilstību Latvijas Republikas Satversmes 1. un 105. pantam" 22.1. punkts [Judgement of the Constitutional Court in case No. 2005-12-0103 "On Compliance of the Cabinet Regulation of 11 January 2007 No. 17 "Amendments to the Law "On Expropriation of Immovable property for the Needs of the State or Society" and the Law of 9 June 2005 "Amendments to the Law "On Expropriation of Immovable property for the Needs of the State or Society" with Article 1 and Article 105 of the *Satversme* of the Republic of Latvia, para. 22.1]. *Latvijas Vēstnesis*, 203(3361), 20.12.2005; Satversmes tiesas sprieduma lietā Nr. 2009-01-01 "Par likuma "Par nekustamo īpašumu atsavināšanu Terehovas robežkontroles punkta vajadzībām" 1. panta 1. punkta atbilstību Latvijas Republikas Satversmes 105. pantam" 12.1. punkts [Judgement by the Constitutional Court in case No. 2009-01-01 "On Compliance of Para 1 of Section 1 of Law On Confiscation of Immovable Property for the Needs of the Border Checkpoint Terehova with Article 105 of the *Satversme* of the Republic of Latvia"; Para 12.1]. *Latvijas Vēstnesis*, 170(4156), 27.10.2009.

Section 1 of State Administration Structure Law, a local government is a derived public person established by law with its own autonomous competence, budget and property. Public needs in a local government must conform to public interests of national scale and the common national policy that is implemented in the concrete field. Section 3 of the Expropriation Law provides: “Expropriation of immovable property for public purposes shall be initiated and performed by the state institution or local government, whose competence comprises ensuring that the respective public purposes are met (hereinafter – the institution)”. Thus, public purposes that may exist within a local government and for which the local government may initiate expropriation of property follow from the competence of local governments, which is defined in the law “On Local Governments”.¹⁰ From the perspective of expediency and effectiveness of public administration, it is clear that state institutions and local governments are those institutions that should be able to identify and assess public needs in the field that they are responsible for.

The Expropriation Law provides a non-exhaustive list of public needs, because these needs may be very diverse. Thus, persons must be aware that their property may be expropriated for public purposes also to provide for such public needs that are not directly referred to in law. The Constitutional Court has recognised that the legislator’s broad discretion in defining public needs is not unlimited and that it must be verified, whether this discretion has not infringed upon persons’ right to enjoy their right to property without interference, as defined in Article 105 of the *Satversme*.¹¹ This finding allows concluding that neither a state institution of public administration nor a local government in initiating expropriation of immovable property, nor a legislator in adopting a specific law on expropriation of particular immovable property may define public needs arbitrarily.

The Constitutional Court has also noted that ensuring the rights of another private person will not be considered as being common public interests.¹² It has been recognised in German legal literature that expropriation of immovable property is possible also in the case, if implementation of public interests is organised in a form of private law.¹³ In Latvia’s circumstances it is possible that implementation of some long-term public needs is entrusted to a commercial company owned by the state or a local government, or in the framework of public-private partnership¹⁴ – to a private merchant. Thus, for example, Section 19(4) of the Energy Law provides that an owner’s immovable property necessary for the construction of an object of an energy supply merchant, as well as for the arrangement of demarcated territories may be expropriated.¹⁵ However, expropriation beneficial to a legal person governed by private law should not be allowed in those cases, when economic interests of

¹⁰ Likums “Par pašvaldībām” [Law “On Local Governments”]. *Latvijas Vēstnesis*, 61(192), 24.05.1994.

¹¹ Satversmes tiesas sprieduma lietā Nr. 2009-01-01 “Par likuma “Par nekustamo īpašumu atsavināšanu Terehovas robežkontroles punkta vajadzībām” 1. panta 1. punkta atbilstību Latvijas Republikas Satversmes 105. pantam” 12.2. punkts [Judgement by the Constitutional Court in case No. 2009-01-01 “On Compliance of Para 1 of Section 1 of Law On Confiscation of Immovable Property for the Needs of the Border Checkpoint Terehova with Article 105 of the Satversme of the Republic of Latvia”, para. 12.2.]. *Latvijas Vēstnesis*, 170(4156), 27.10.2009.

¹² *Ibid.*, para. 12.1.

¹³ *Pieroth, B., Schlink, B. Grundrechte. Staatsrecht II. 22. Auflage. Heidelberg: C.F. Müller Verlag, 2006, S. 236; Jarass, H. D., Pieroth, B. Grundgesetz für die Bundesrepublik Deutschland. 8. Auflage. München: Verlag C.H. Beck, 2006, S. 376.*

¹⁴ See: Publiskās un privātās partnerības likums [Law “On Public-Private Partnership”]. *Latvijas Vēstnesis*, 107(4093), 09.07.2009.

¹⁵ Enerģētikas likums [Energy Law]. *Latvijas Vēstnesis*, 273/275(1334/1336), 22.09.1998.

this entity prevail over public needs. It should also be taken into consideration that pursuant to Section 15 of the Expropriation Law, the right to expropriated immovable property is transferred to the state or local government. It cannot be transferred to a legal person governed by private law.

It must be noted that Chapter V of the Expropriation Law envisages such legal mechanism as returning of the expropriated property. Section 34(1) of the Expropriation Law provides: if within a year from the date when the State's or local government's right to expropriated property has been corroborated in the Land Register the institution recognises that the respective immovable property or a part thereof is not necessary, the former owner, by repaying the compensation received, may regain the expropriated immovable property. By introducing the possibility to return property, the legislator, in fact, has taken into account the possibility that a state institution or local government could commit a gross error in identifying public needs and planning implementation thereof. Of course, there could be also objective reasons why an intention to implement public needs fails, for example, lack of financing for an infrastructure project due to unexpected economic recession. However, the mechanism for returning property is favourable to the owner, who should not suffer because of errors made by the state or a local government and who is granted a possibility to regain the expropriated property.

It is noted in legal literature that in Europe in different periods of history the approach to ensuring the individual interests of an owner and the public needs has differed. In a certain period, the protection of a person's right to property has been recognised as a priority, in another – as convenient and effective implementation of public needs as possible has been preferred.¹⁶ Article 105 of the *Satversme* of the Republic of Latvia places an emphasis upon the owner's individual rights rather than the importance of property for society as a whole. The second sentence of Article 105 of the *Satversme* provides that property may not be used contrary to interests of society. This constitutional restriction upon the right to property means that the owner may not use property unlawfully, jeopardising public interests.¹⁷ Article 105 of the *Satversme* does not impose an obligation to promote public interests upon any person who is using his property. Constitutions of some countries and international human rights documents place greater emphasis upon the social function of property. For example, Section 14(2) of the German Basic Law (*Grundgesetz*) notes that property imposes obligations and that the use thereof should at the same time serve general good.¹⁸ It is noted in the second part of Article 1 of Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms that, *inter alia*, the State has the right to issue such laws as it deems necessary to control the use of property in accordance with general interests.¹⁹

¹⁶ Grigore-Bāra, E. Nekustamā īpašuma piespiedu atsavināšana valsts vai sabiedriskām vajadzībām pret atlīdzību [Expropriation of Immovable Property for the Needs of the State or Society for Compensation]. *Jurista Vārds*, 02.08.2016, Nr. 31(934), 27. lpp.

¹⁷ Balodis, K. *Satversmes 105. panta komentārs*. Latvijas Republikas *Satversmes komentāri*. VIII nodaļa. Cilvēka pamattiesības [Commentary to Article 105 of the *Satversme*. Commentaries to the *Satversme* of the Republic of Latvia. Chapter VIII. Fundamental Human Rights]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: *Latvijas Vēstnesis*, 2011, 468. lpp.

¹⁸ Grundgesetz für die Bundesrepublik Deutschland. Available at <https://www.gesetze-im-internet.de/gg/> [last viewed 22.02.2017].

¹⁹ Cilvēka tiesību un pamatbrīvību aizsardzības konvencija [Convention for the Protection of Human Rights and Fundamental Freedoms]. *Latvijas Vēstnesis*, 143/144(858/859), 13.06.1997.

Although the *Satversme* sets a high standard of protecting owners, the possibility of expropriation, allowed in the fourth part of Article 105 of the *Satversme*, as such means that real and valid public needs, for the purpose of which immovable property must be expropriated, has priority over the owner's right. In the majority of cases the need to expropriate immovable property for public purposes is bad news to the owner. Situations, where an owner is interested in getting rid of a property that is cumbersome to him and to receive compensation for it, are also possible. The cases, where private persons have profitably acquired immovable property in a territory, estimating that the state or local government would implement projects of public importance there, and that compensation for expropriation would bring profit, are also possible. Irrespectively of an owner's attitude to expropriation of his immovable property for public purposes, such expropriation is to be considered as being the greatest possible interference with the right to property, i.e., the right to property is substantially deprived. It has been noted in German and also Latvian legal literature that expropriation for public purposes is an interference of public power into the right to property that demands "particular sacrifice" from an individual.²⁰

The provision included in the fourth sentence of Article 105 of the *Satversme* that expropriation can be carried out only in an exceptional case serves to protect an owner. This provision means that public purpose cannot be reached and cannot be duly implemented by any other means.²¹ Immovable property may not be expropriated, if the state or local government does not have a sufficiently concrete plan to be implemented within a specific period involving the use of the respective property for public purposes.

Likewise, there are no grounds for expropriating entire immovable property owned by a person, if public purposes require only a part thereof.²² However, often following expropriation of a part, the functionality of the remaining part of immovable property significantly decreases. In a situation like this, an owner

²⁰ Baur, F., Stürner, R. Sachenrecht. 17. Auflage. München: C.H. Beck'sche Verlagsbuchhandlung, 1999, S. 303; Grigore-Bāra, E. Nekustamā īpašuma piespiedu atsavināšana valsts vai sabiedriskām vajadzībām pret atlīdzību [Expropriation of Immovable Property for the Needs of the State of Society for Compensation]. *Jurista Vārds*, 02.08.2016, Nr. 31(934), 27. lpp. *Jurista Vārds*, 02.08.2016, Nr. 31(934), 28. lpp.

²¹ See: Satversmes tiesas sprieduma lietā Nr. 2009-01-01 "Par likuma "Par nekustamo īpašumu atsavināšanu Terehovas robežkontroles punkta vajadzībām" 1. panta 1. punkta atbilstību Latvijas Republikas Satversmes 105. pantam" 13. punkts [Judgement by the Constitutional Court in case No. 2009-01-01 "On Compliance of Para 1 of Section 1 of Law On Confiscation of Immovable Property for the Needs of the Border Checkpoint Terehova with Article 105 of the *Satversme* of the Republic of Latvia", para. 13]. *Latvijas Vēstnesis*, 170(4156), 27.10.2009; Satversmes tiesas sprieduma lietā Nr. 2016-08-01 "Par likuma "Par nekustamā īpašuma "Kaktiņi", Lēdmanes pagastā, Lielvārdes novadā, daļu atsavināšanu sabiedrības vajadzībām, valsts autoceļa E22 posma Rīga (Tinūži)–Koknese rekonstrukcijas projekta īstenošanai" atbilstību Latvijas Republikas Satversmes 105. pantam" 16. punkts [Judgement of the Constitutional Court in case No. 2016-08-01 "On Compatibility of the Law "On Expropriation of Part of Immovable Property "Kaktiņi" in Lēdmane Parish, Lielvārde County for Public Needs to Implement Reconstruction Project of State Road E22 in the Section Rīga (Tinūži) – Koknese with Article 105 of the *Satversme* of the Republic of Latvia", para. 16]. *Latvijas Vēstnesis*, 243(5815), 13.12.2016.

²² See: Satversmes tiesas sprieduma lietā Nr. 2009-01-01 "Par likuma "Par nekustamo īpašumu atsavināšanu Terehovas robežkontroles punkta vajadzībām" 1. panta 1. punkta atbilstību Latvijas Republikas Satversmes 105. pantam" 13.3. punkts [Judgement by the Constitutional Court in case No. 2009-01-01 "On Compliance of Para 1 of Section 1 of Law On Confiscation of Immovable Property for the Needs of the Border Checkpoint Terehova with Article 105 of the *Satversme* of the Republic of Latvia", para. 13.3]. *Latvijas Vēstnesis*, 170(4156), 27.10.2009.

might be interested in achieving that the entire immovable property is expropriated for public purposes. For example, in 2009, the Constitutional Court received a constitutional complaint of a person, whose part of immovable property needed for constructing access roads to the Southern Bridge over Daugava River in Riga had been expropriated on the basis of a specific law. The Constitutional Court terminated proceedings in this case, because the applicant had legal possibility to turn to a court of general jurisdiction in civil procedure and demand expropriation of the whole property, if the remaining part had become useless or of little value to the owner.²³ Section 6(1) of the Expropriation Law envisages a possibility to expropriate the whole immovable property, if only a part of immovable property is needed for public purposes and the remaining part thereof due to insufficient area, encumbrances, configuration or other circumstances cannot be used in accordance with the spatial plan of the local government. Section 6(2) of this Law, in turn, provides that disputes regarding the necessity to expropriate the whole immovable property are adjudicated by a court in procedure defined by the Civil Procedure Law.

It can be concluded that public purposes, based on which immovable property may be expropriated, may be diverse and the list of these purposes included in the Expropriation Law is not exhaustive. If public purposes cannot be satisfied by other means, then expropriation of immovable property is admissible and the owner must resign to it. In such a case, the public purposes prevail over a person's right to property. To protect an owner, who is deprived of his property, expropriation must be carried out not only with a fair compensation, but also according to due procedure.

3. Forms of Expropriation of Immovable Property for Public Purposes

Expropriation of Immovable Property for Public Purposes Law establishes a detailed procedure of expropriation. In broader sense, there is a single expropriation procedure that includes a number of measures. An expropriation by a specific law is the ultimate measure within it. Initially, an owner is offered to conclude an agreement on voluntary alienation of immovable property.

3.1. Voluntary Alienation of Immovable Property

As provided for in Section 8 of Expropriation Law, after the Cabinet or local government has adopted a conceptual decision on implementing a project necessary for public needs, the institution starts identifying immovable properties that are required to implement the respective project and defines compensation for immovable properties to be expropriated. Pursuant to Section 11(1) of this Law, the institution sends to the owner notification with a request to inform within 30 days about the possibility to conclude an agreement on voluntary alienation of immovable property, indicating in this notification compensation set by the

²³ Satversmes tiesas lēmums par tiesvedības izbeigšanu lietā Nr. 2009-06-01 "Par likuma "Par nekustamā īpašuma atsavināšanu sabiedriskajām vajadzībām – Dienvidu tilta pār Daugavu 3. kārtas būvniecībai" atbilstību Latvijas Republikas Satversmes 105. pantam" [Decision by the Constitutional Court in terminating legal proceedings in case No. 2009-06-01 "On Compliance of the Law "On Forfeit of Property for Public Needs, for the Third Stage of Construction of the Southern Bridge" with Article 105 of the *Satversme* (Constitution) of the Republic of Latvia"]. *Latvijas Vēstnesis*, 110(4096), 14.07.2009.

institution and the offered form of compensation. Pursuant to Section 11(3) of this Law, the term for concluding an agreement set by the institution may not be shorter than two months, counting it from the day when draft agreement has been issued to the owner of immovable property. In the contract on voluntary alienation of immovable property, the institution and the owner agree on the type of compensation and the procedure and terms for vacating the immovable property, as well as other matters, to ensure that the state or local government effectively acquires immovable property in its possession (Section 12(1) of the Expropriation Law).

Thus, the institution, which organises expropriation of immovable property for public purposes, has the obligation to offer to the owner, first of all, the possibility to conclude voluntarily an agreement on alienation. Voluntary alienation does provide a guarantee to an owner a possibility to keep the property; however, in the stage of voluntary alienation the owner may have a better opportunity to achieve mutually acceptable terms of alienation.²⁴ The possibility of voluntary alienation is advantageous to the state or local government and saves their resources. If the owner agrees to alienation, then the state or local government can acquire the immovable property needed for public purposes swiftly and effectively, without adoption of a specific law. The owner may contest the law, on the basis of which immovable property has been expropriated, in the Constitutional Court. However, if the owner has voluntarily agreed to alienation of immovable property, then he has waived the opportunity to turn to the Constitutional Court. The owner, who has agreed to voluntary alienation of immovable property, may contest only the terms of the agreement in a court of general jurisdiction.

An owner's hope that the terms of alienation set in the agreement would be more advantageous than the result in the case of expropriation may not come true. Voluntary alienation of immovable property is more advantageous to the state or local government than to the owner. However, possibility of voluntary alienation helps to reach one of the purposes of Expropriation of Immovable Property for Public Purposes Law, i.e., ensure an affective procedure, in which immovable property is to be acquired for public purposes.

At the same time, it must be noted that voluntary alienation of immovable property has been called voluntary because acquisition of property is done on the basis of an agreement. However, an agreement on voluntary alienation of immovable property is not a typical agreement concluded within the framework of contractual freedom, because equality of parties in concluding it is merely formal. Moreover, pursuant to the Expropriation Law and Cabinet Regulation No. 204, the amount of compensation is defined by the institution, but the owner is only heard. Thus, a coercive element can be discerned in the procedure of voluntary alienation.

It can be concluded that voluntary alienation as a preliminary stage of expropriation falls within the scope of the fourth sentence of Article 105 of

²⁴ Satversmes tiesas sprieduma lietā Nr. 2016-08-01 "Par likuma "Par nekustamā īpašuma "Kaktiņi", Lēdmanes pagastā, Lielvārdes novadā, daļu atsavināšanu sabiedrības vajadzībām, valsts autoceļa E22 posma Rīga (Tīnūži)–Koknese rekonstrukcijas projekta īstenošanai" atbilstību Latvijas Republikas Satversmes 105. pantam" 14.1. punkts [Judgement of the Constitutional Court in case No. 2016-08-01 "On Compatibility of the Law "On Expropriation of Part of Immovable Property "Kaktiņi" in Lēdmane Parish, Lielvārde County for Public Needs to Implement Reconstruction Project of State Road E22 in the Section Rīga (Tīnūži) – Koknese" with Article 105 of the *Satversme* of the Republic of Latvia", para. 14.1]. *Latvijas Vēstnesis*, 243(5815), 13.12.2016.

the *Satversme*. Voluntary alienation may occur only with the aim of ensuring public purposes, in exceptional cases and for fair compensation. Of course, the requirement that immovable property can be expropriated only on the basis of a specific law, does not apply to cases of voluntary alienation. However, similarly to adoption of a specific law, the procedure of voluntary alienation also requires that the owner must be heard, so that terms of agreement that are preferable to the institution would not be unilaterally imposed upon the owner.

3.2. Expropriation of Immovable Property on the Basis of a Specific Law

Immovable property is expropriated by a specific law, if the initiated procedure for voluntary alienation yields no results. If the owner does not give an answer regarding the possibility of voluntary alienation or a contract on voluntary alienation is not concluded within the set term, then, pursuant to Section 13 of the Expropriation Law, the state institution prepares a draft law on expropriation of the particular immovable property, but the local government – a request to the Cabinet to submit to the *Saeima* a draft law on expropriation of the respective immovable property.

It has been underscored in legal literature that depriving an owner of his right to property against his will, on the basis of an act of state power, is a form of losing the right to property that is extraordinary in nature.²⁵ The Constitutional Court has explained that expropriation of property for public purposes in accordance with the fourth sentence of Article 105 of the *Satversme* is admissible only on the basis of a specific law. A specific law is necessary to protect a person against possible arbitrariness on the part of state institutions; moreover, in adopting this law, the legislator must pay special attention to all circumstances of the case and must establish, whether, indeed, expropriation of property complies with all criteria for expropriation referred to in Article 105 of the *Satversme*.²⁶ Prior to adopting the law, the legislator must hear the person, whose property is considered for expropriation.²⁷ The right to be heard means that the person should be given

²⁵ *Rozenfelds, J.* Lietu tiesības. 4. labotais, papildinātais izdevums [Property Law. The 4th Revised, Expanded Edition]. Rīga: Zvaigzne ABC, 2011, 122. lpp.

²⁶ See: Satversmes tiesas sprieduma lietā Nr. 2009-01-01 “Par likuma “Par nekustamo īpašumu atsavināšanu Terehovas robežkontroles punkta vajadzībām” 1. panta 1. punkta atbilstību Latvijas Republikas Satversmes 105. pantam” 13. punkts [Judgement by the Constitutional Court in case No. 2009-01-01 “On Compliance of Para 1 of Section 1 of Law On Confiscation of Immovable Property for the Needs of the Border Checkpoint Terehova with Article 105 of the Satversme of the Republic of Latvia”, para. 13]. *Latvijas Vēstnesis*, 170(4156), 27.10.2009; Satversmes tiesas sprieduma lietā Nr. 2016-08-01 “Par likuma “Par nekustamā īpašuma “Kaktiņi”, Lēdmanes pagastā, Lielvārdes novadā, daļu atsavināšanu sabiedrības vajadzībām, valsts autoceļa E22 posma Rīga (Tinūži)–Koknese rekonstrukcijas projekta īstenošanai” atbilstību Latvijas Republikas Satversmes 105. pantam” 22. punkts [Judgement of the Constitutional Court in case No. 2016-08-01 “On Compatibility of the Law “On Expropriation of Part of Immovable Property “Kaktiņi” in Lēdmane Parish, Lielvārde County for Public Needs to Implement Reconstruction Project of State Road E22 in the Section Rīga (Tinūži) – Koknese with Article 105 of the Satversme of the Republic of Latvia”, para. 22]. *Latvijas Vēstnesis*, 243(5815), 13.12.2016.

²⁷ Satversmes tiesas sprieduma lietā Nr. 2016-08-01 “Par likuma “Par nekustamā īpašuma “Kaktiņi”, Lēdmanes pagastā, Lielvārdes novadā, daļu atsavināšanu sabiedrības vajadzībām, valsts autoceļa E22 posma Rīga (Tinūži)–Koknese rekonstrukcijas projekta īstenošanai” atbilstību Latvijas Republikas Satversmes 105. pantam” 14.2. punkts [Judgement of the Constitutional Court in case No. 2016-08-01 “On Compatibility of the Law “On Expropriation of Part of Immovable Property “Kaktiņi” in Lēdmane Parish, Lielvārde County for Public Needs to Implement Reconstruction Project of State Road E22 in the Section Rīga (Tinūži) – Koknese with Article 105 of the Satversme of the Republic of Latvia”, para. 14.2]. *Latvijas Vēstnesis*, 243(5815), 13.12.2016.

the possibility to express his objections, but the legislator must examine these, taking them into consideration, insofar as possible, or rejecting these by providing sufficient grounds for that.²⁸

As noted before, the laws adopted by the *Saeima* on expropriating a concrete immovable property for public needs are formulated in a very laconic form. The respective immovable property is identified by noting the cadastre number and chapter of the Land Register, the law mentions concrete public purposes for the meeting of which expropriation is done, it also contains a general reference to the fact that the property must be expropriated in the procedure established by Expropriation of Immovable Property for Public Purposes Law. The law also contains a reference on corroboration into the Land Register, but the borders of the immovable property are outlined in the annex to the law. This legislative practice is correct, because expropriation of immovable properties for public purposes must be performed in a uniform procedure, established in the Expropriation Law.

Pursuant to Section 15 of the Expropriation Law, the right to an immovable property, which has been expropriated on the basis of a law on expropriating the particular immovable property, are transferred to the State or local government, however, this right can be corroborated in the Land Register only after the law on expropriation of the particular immovable property has entered into force and the institution has paid compensation to the owner. As regards compensation, it is not set by the *Saeima* in the specific law, but by the institution in accordance with the Expropriation Law and Cabinet Regulation No. 204.

4. Fair Compensation and Forms Thereof

Compensation for expropriation of immovable property for public purposes must be fair, as it is the only way to decrease negative consequences of the violation of the owner's right. In the context of such expropriation, the matter of admissible forms of compensation is also relevant.

4.1. The Concept and Amount of Fair Compensation

A fair compensation is adequate compensation to an owner for the loss of property. The principle of compensation as an element of expropriation follows from the idea of inviolability of private property.²⁹ The word "fair" is used in the fourth sentence of Article 105 of the *Satversme* to characterise compensation, and formally it applies to expropriation. However, the requirement of fair compensation, as concluded above, applies also to those cases, where the owner voluntarily agrees to alienation of immovable property for public purposes. Irrespective of the fact, whether an owner agrees to conclude an agreement of voluntary alienation or property is expropriated on the basis of a specific law, loss of immovable property means significant decrease of assets. Therefore, the owner has the right to fair

²⁸ Satversmes tiesas sprieduma lietā Nr. 2009-01-01 "Par likuma "Par nekustamo īpašumu atsavināšanu Terehovas robežkontroles punkta vajadzībām" 1. panta 1. punkta atbilstību Latvijas Republikas Satversmes 105. pantam" 11.3. punkts [Judgement by the Constitutional Court in case No. 2009-01-01 "On Compliance of Para 1 of Section 1 of Law On Confiscation of Immovable Property for the Needs of the Border Checkpoint Terehova with Article 105 of the Satversme of the Republic of Latvia", para. 11.3]. *Latvijas Vēstnesis*, 170(4156), 27.10.2009.

²⁹ *Grigore-Bāra, E.* Nekustamā īpašuma piespiedu atsavināšana valsts vai sabiedriskām vajadzībām pret atlīdzību [Expropriation of Immovable Property for the Needs of the State of Society for Compensation]. *Jurista Vārds*, 02.08.2016, Nr. 31(934), 28. lpp.

compensation, regardless of the form referred to in the Expropriation Law, in which his immovable property is expropriated for public purposes.

As the Constitutional Court has repeatedly found, the fourth sentence of Article 105 of the *Satversme* imposes upon the State an obligation to establish a fair balance (proportionality) between the interests of society and those of the particular owner by using fair compensation set in a clear and predictable procedure. It has been recognised in scientific literature that a State's interference into the right to property would be fair only if deprivation of the particular assets would not turn into a person's individual material contribution to satisfying public needs.³⁰ It can be concluded that compensation cannot take the form of partial satisfaction for loss, and its amount should be such as to ensure that the owner's economic status does not deteriorate as the result of expropriation. However, the Constitutional Court has noted that the owner should not gain unfounded benefit as the result of expropriation.³¹

The Expropriation Law provides a detailed regulation on setting, disbursing and contesting compensation. The owner himself is interested in the amount of compensation the most. Pursuant to Section 8 of the Expropriation Law, compensation is set immediately after the Cabinet or a local government has adopted a conceptual decision on implementing a project required to ensure public needs. Thus, the owner immediately develops certainty about the sum of money that he will receive as compensation. The Expropriation Law comprises a number of provisions that must ensure that compensation, as to its amount, would be fair. In accordance with Section 21 of this Law, such compensation to the former owner of immovable property should be set that would ensure such economic status that would be equal to his former economic status. Whereas pursuant to Section 22 of the Expropriation Law, compensation consists of the market value of the immovable property and compensation for losses that the owner of immovable property incurs in connection with alienation of the immovable property, and, in case if a part of immovable property is expropriated, for the use of expropriated immovable property. As noted above, an owner may turn to a court of general jurisdiction with regard to compensation established by the institution or the amount of compensation to be disbursed in procedure established by the Civil Procedure Law (see Section 27(2) of the Expropriation Law).

This leads to the conclusion that the Expropriation Law, the norms of which specify the requirements set in Article 105 of the *Satversme* regarding fair compensation, establishes a standard of fair compensation that complies with the owner's interests. It must be noted that this standard, which comprises also an owner's right to compensation for losses, even exceeds the requirements on

³⁰ Grigore-Bāra, E. Nekustamā īpašuma piespiedu atsavināšana valsts vai sabiedriskām vajadzībām pret atlīdzību [Expropriation of Immovable Property for the Needs of the State or Society for Compensation]. *Jurista Vārds*, 02.08.2016, Nr. 31(934), 28. lpp.

³¹ Satversmes tiesas sprieduma lietā Nr. 2005-12-0103 "Par Ministru kabineta 2005. gada 11. janvāra noteikumu Nr. 17 "Grozījumi likumā "Par nekustamā īpašuma piespiedu atsavināšanu valsts vai sabiedriskajām vajadzībām"" un 2005. gada 9. jūnija likuma "Grozījumi likumā "Par nekustamā īpašuma piespiedu atsavināšanu valsts vai sabiedriskajām vajadzībām"" atbilstību Latvijas Republikas Satversmes 1. un 105. pantam" 23.33. punkts [Judgement of the Constitutional Court in case No. 2005-12-0103 "On Compliance of the Cabinet Regulation of 11 January 2007 No. 17 "Amendments to the Law "On Expropriation of Immovable property for the Needs of the State or Society" and the Law of 9 June 2005 "Amendments to the Law "On Expropriation of Immovable property for the Needs of the State or Society" with Article 1 and Article 105 of the *Satversme* of the Republic of Latvia", para. 23.33]. *Latvijas Vēstnesis*, 203(3361), 20.12.2005.

compensation that the European Court of Human Rights has set in its judicature on Article 1 of Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights has noted that compensation should be reasonably connected to the market value of the property; however, Article 1 of Protocol I does not guarantee the right to full compensation in all circumstances.³² These differences are nothing unusual, because States Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms may envisage in their legal systems a broader scope of a person's rights than the minimum defined by the Convention.

4.2. Forms of Fair Compensation

The issue of what kind of fair compensation an owner has a right to ask, in case when his immovable property is expropriated for public purposes, became relevant in Latvia in 2016, when the Constitutional Court reviewed compatibility of the law "On Expropriation of Part of Immovable Property "Kaktiņi" in Lēdmane Parish, Lielvārde County for Public Needs to Implement Reconstruction Project of State Road E22 in the Section Rīga (Tinūži) – Koknese with Article 105 of the *Satversme* of the Republic of Latvia"³³ with Article 105 of the *Satversme* of the Republic of Latvia. The person, who submitted a constitutional complaint to the Constitutional Court, had had a part of her immovable property expropriated on the basis of the said law. She had received monetary compensation and did not object to the amount of compensation. However, the applicant held that her right to demand an equal immovable property as a fair compensation for the part of immovable property that had been expropriated for public purposes followed from Article 105 of the *Satversme*.

Pursuant to Section 26(1) of the Expropriation Law, the institution disburses compensation as a non-cash settlement or, by agreeing with the owner of immovable property, uses another form of fair compensation, i.e., offers another immovable property of equal value, disburses part of the compensation in cash and compensates for a part thereof with another immovable property or uses another form of compensation that is advantageous to both parties, except for the cases, when a collateral has been corroborated with respect to immovable property. Thus, law primarily defines money as the form of compensation. However, the possibility to receive compensation in other form has not been excluded, including immovable property of equal value, if the parties agree so. Legal literature underscores that the owner of immovable property may have various reasons for not wishing to receive compensation in the form of money, but rather to receive another immovable property.³⁴

³² See Eiropas Cilvēktiesību tiesas Lielās palātas 2012. gada 25. oktobra sprieduma lietā "Vistiņš un Perepjolkins pret Latviju", pieteikums Nr. 71243/01, 110.–112. punktu [Judgement of 25 October 2012 by the Grand Chamber of the European Court of Human Rights in case *Vistiņš and Perepjolkins v. Latvia*, Application No. 71243/01, para. 110–112]. Available at <https://www.tiesas.lv/eiropas-cilvektiesibu-tiesas-ect-spriedumi-un-lemumi> [last viewed 23.03.2017].

³³ Likums "Par nekustamā īpašuma "Kaktiņi", Lēdmanes pagastā, Lielvārdes novadā, daļu atsavināšanu sabiedrības vajadzībām, valsts autoceļa E22 posma Rīga (Tinūži)–Koknese rekonstrukcijas projekta īstenošanai" [Law "On Expropriation of Part of Immovable Property "Kaktiņi" in Lēdmane Parish, Lielvārde County for Public Needs to Implement Reconstruction Project of State Road E22 in the Section Rīga (Tinūži) – Koknese"]. *Latvijas Vēstnesis*, 201(5519), 14.10.2015.

³⁴ *Granžē, A.* Īpašuma maiņa piespiedu atsavināšanas gadījumā "Rail Baltica" ietvaros [Change of Ownership in the Case of Expropriation in the Framework of "Rail Baltica"]. *Jurista Vārds*, 02.08.2016, Nr. 31(934), 16. lpp.

The Constitutional Court recognised the law on expropriating a part of immovable property “Kaktiņi” as being compatible with Article 105 of the *Satversme*. It was concluded in the judgement that the fourth sentence of Article 105 of the *Satversme* did not guarantee the right to a person to receive a compensation in particular form of that person’s preference, moreover, that the institution was not obliged to offer to the owner as fair compensation another immovable property of equal value, nor to fulfil every request of the owner with respect to the form of compensation.³⁵ It is underscored in the judgement that an immovable property of equal value may be a form of fair compensation, and such solution may be offered by both parties, however, it requires mutual agreement.³⁶

In the case referred to above, the Constitutional Court had to examine, which of the possible forms of fair compensation was the most important and expedient, however, the context of judgement allowed concluding that it was money. The opinion a summoned person is quoted in the judgement, to the effect that monetary compensation as the general principle and the primary form of compensation exists in a number of European countries in cases of expropriation and that monetary compensation compared to compensation by immovable property of equal value infringes upon an individual’s freedom to a lesser extent.³⁷ The judgement also refers to possible restrictions upon the State’s actions with its immovable property, because the institution must comply with the law “On Prevention of Squandering of the Financial Resources and Property of a Public Person” and the law “On Alienating Property of a Public Person”.³⁸

Undeniably, in certain cases immovable property of equal value may be a form of fair compensation, which is equally advantageous both to the owner and the state or local government. However, in contemporary society the value of immovable property is measured by money and not by things of equal value. If an owner had the subjective right to request immovable property of equal value instead of the property expropriated for public purposes, this would remind of a situation in an archaic society, where people acquired material values through exchange, or conditions in collapsed economy, where money no longer performed its functions. Thus, a fair compensation must be disbursed in money, but compensation in kind is possible only if both parties have agreed so.

Conclusions

Expropriation of property, *inter alia*, immovable property, for public purposes is the greatest possible interference into a person’s right to property, because a person substantially is deprived of this right. In Latvia, since the beginning of the 1990s, when the state regained independence, legal regulation pursuant to which immovable property could be expropriated for public purposes, was consistently

³⁵ Satversmes tiesas sprieduma lietā Nr. 2016-08-01 “Par likuma “Par nekustamā īpašuma “Kaktiņi”, Lēdmanes pagastā, Lielvārdes novadā, daļu atsavināšanu sabiedrības vajadzībām, valsts autoceļa E22 posma Rīga (Tinūži)–Koknese rekonstrukcijas projekta īstenošanai” atbilstību Latvijas Republikas Satversmes 105. pantam” 16.5. punkts [Judgement of the Constitutional Court in case No. 2016-08-01 “On Compatibility of the Law “On Expropriation of Part of Immovable Property “Kaktiņi” in Lēdmane Parish, Lielvārde County for Public Needs to Implement Reconstruction Project of State Road E22 in the Section Rīga (Tinūži) – Koknese with Article 105 of the *Satversme* of the Republic of Latvia”, para. 16.5]. *Latvijas Vēstnesis*, 243(5815), 13.12.2016.

³⁶ See *Ibid.*, para. 16.4.

³⁷ See *Ibid.*, para. 16.4.

³⁸ See *Ibid.*, para. 16.5.

developed. Amendments to regulatory legal acts have been predominantly linked to the need to improve the owner's legal status in the procedure of expropriation. The fourth sentence in Article 105 of the *Satversme* of the Republic of Latvia allows expropriation of property for public purposes only in exceptional cases on the basis of a specific law for fair remuneration. Expropriation of Immovable Property for Public Purposes Law establishes a detailed procedure for expropriation.

Public purposes, for which immovable property may be expropriated, may be different. The list thereof in the Expropriation Law is exemplary and is not exhaustive. However, the state may not define public purposes arbitrarily, they must be real and implementable in practice within a foreseeable period of time. If public purposes cannot be met by other means, then expropriation of immovable property is admissible as an exception and the owner must resign himself to it. In this case, public purposes prevail over a person's right to property. To protect an owner, who is deprived of property, expropriation must occur not only for fair compensation, but also in due procedure.

Pursuant to Expropriation of Immovable Property for Public Purposes Law before commencing the procedure of expropriation, the state institution or local government must make an offer to the owner to conclude an agreement on voluntary alienation of immovable property. This agreement is not a typical agreement concluded in circumstances of contractual freedom, because a coercive element can be discerned also in the procedure of voluntary alienation, i.e., if the owner does not agree to conclude an agreement, expropriation of immovable property on the basis of a specific law is commenced. Therefore, also in case of voluntary alienation the owner is protected by the fourth sentence of Article 105 of the *Satversme*, except for the provision on expropriation on the basis of a specific law. Voluntary alienation must also be initiated only for public purposes, in an exceptional case and for fair compensation.

A specific law on expropriation of immovable property for public purposes is required to protect a person from possible arbitrary acts by state institutions; moreover, in adopting this law, the legislator must pay special attention to all the circumstances of the case and must establish whether, indeed, expropriation of property complies with all criteria for expropriation defined in Article 105 of the *Satversme*. Prior to adopting the law, the legislator is obliged to hear the person, whose property is considered for expropriation. The right to be heard means that the person should be given an opportunity to express his objections, but the legislator must examine these, taking them into consideration, insofar possible, or rejecting these by providing sufficient grounds for that.

Compensation for expropriation of immovable property for public purposes must be fair, as this is the only possibility to protect the owner, decreasing the negative consequences of violation of his rights. A fair compensation is an adequate compensation to the owner for the loss of property. It can be concluded that the provisions of Expropriation of Immovable Property for Public Purposes Law ensure fair compensation to owners by finding a reasonable balance between common public interests and the owner's right to compensation for loss of property. Compensation that ensures the owner with an economic status that is equal to his previous economic status must be set for the owner. The compensation consists of the market value of immovable property and reimbursement of damages incurred to the owner of immovable property. The owner may turn to a court of general

jurisdiction with respect to compensation that has been set and the amount thereof according to the procedure established by the Civil Procedure Law.

In accordance with Expropriation of Immovable Property for Public Purposes Law, the owner is disbursed monetary compensation. By concluding an agreement with the owner of immovable property, another form of fair compensation may be used, *inter alia*, immovable property of equal value. Article 105 of the *Satversme* does not guarantee an owner a right to request a compensation in the form of immovable property of equal value or in other form of compensation in kind. The primary and main form of fair compensation is money, because in the contemporary society the value of material things is measured in money. Both the owner and the institution that performs expropriation of immovable property may offer to transfer the compensation in other assets, in kind. However, a fair compensation in kind is admissible only if both parties agree on it.

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Problems of Classifying an Aggregation of Criminal Offences

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This article analyses an aggregation of criminal offences as one of types of multiplicity of criminal offences and the problems of its qualification. The issue is topical from both theoretical and practical point of view, since the process of applying legal norms is often associated with difficulties in determining whether a separate (unitary) criminal offence has been committed, or a multiplicity of criminal offences is to be established; errors are made in distinguishing a factual aggregation of criminal offences from the legal institute, such as collision of legal norms. By emphasising different elements of the said legal institutes, recommendations correspondent to practice needs, which are based on the legal framework, conclusions of the theory of criminal law and of case-law, as well as analysis of practice are offered. Particular attention is paid to compound criminal offences, the structure of which includes serious consequences, reference to the application of violence or inflicted bodily injuries, and in the process of qualification of which one has to encounter the formation of a conceptual aggregation, which is related to serious problems in practice. Likewise, the authors establish that the legislator, in designing the norms of the Special Part of the Criminal Law, has failed to observe all the conditions of development thereof. Thus, a conceptual aggregation of criminal offences, which, in our opinion, should be an exception in cases of compound criminal offences, becomes a regularity authorised by the legislator. Likewise, the article provides a reasoned opinion on the qualification solution in the event if one criminal offence is a way (tool, method) by which another criminal offence is committed, as well as on the formation of an aggregation of criminal offence stipulated by CL Sections 177 and 178 implemented in practice, thus violating provisions of collision of general and special norms included in CL Section 26 Paragraph five.

Keywords: separate (unitary) criminal offence, multiplicity of criminal offences, conceptual aggregation of criminal offences, factual aggregation of criminal offences, collision of criminal law norms.

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Introduction

The current article analyses an aggregation of criminal offences as one of many types of criminal offences and the problems of its qualification. The issue is topical from both theoretical and practical point of view, since the process of application of legal norms is often associated with difficulties in determining whether a separate (unitary) criminal offence was committed or a multiplicity of criminal offences is to be established; errors are made in distinguishing factual and conceptual aggregation, distinguishing a conceptual aggregation of criminal offences from the legal institute such as collision of legal norms. The aim of this article is to emphasise different elements of the said legal institutes, thus offering recommendations compliant with practical needs, which are based on the legal framework, theory of criminal law and case-law conclusions, as well as the analysis of judicial practice, and, in the opinion of authors, to promote a uniform understanding of norms of criminal law and their application in practice.

1. Separate (Unitary) Criminal Offence and Aggregation of Criminal Offences

According to Section 23, Paragraph 1 of the Criminal Law¹ (hereinafter, also “CL”), a separate (unitary) criminal offence is one offence (act or failure to act), which has the constituent elements of one criminal offence, or two or more mutually related criminal offences encompassed by the unitary purpose of the offender, and which correspond to the constituent elements of only one criminal offence.

This regulatory framework includes a reference to the fact that in criminal law, observing the structure peculiarities of the constituent elements of a criminal offence, separate (unitary) criminal offences are divided into **simple** separate (unitary) criminal offences implemented by one act or failure to act, posing a threat to one object of offence, as well as committed according to one form of guilt and having one harmful consequence,² and **complicated** separate (unitary) criminal offences.

In describing the types of complicated criminal offences, Professor Uldis Krastiņš indicates the following elements: two or more actions, two or more

¹ Criminal Law: Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 199/200, 8 July 1998.

² For more details see: Krastiņš, U., Liholaja, V. Comments on the Criminal Law. Part One (Chapter I–VIII¹). Riga: Courthouse Agency, 2015, pp. 117–120.

objects of threat, two harmful consequences, two forms of guilt, compound body of the criminal offence (the body of one criminal offence includes the elements of several other independent (simple) criminal offences), body of an offence, wherein harmful consequences are included in addition to act or failure to act, and other elements.³ Within the framework of this article, particular attention is paid to compound criminal offences, the structure of which includes serious consequences, reference to the application of violence or inflicted bodily injuries, and in the process of qualification of which one has to encounter the formation of a conceptual aggregation, which is related to serious problems in practice. However, first of all, the understanding of multiplicity and aggregation of criminal offences will be briefly considered.

CL Section 24, Paragraph 1 stipulates that a **multiplicity of criminal offences** is the commission (or allowing) by one person of two or more separate offences (act or failure to act), which correspond to the constituent elements of at least two different criminal offences. **An aggregation of criminal offences** is distinguished as one of the types of multiplicity of criminal offences, which, in accordance with provisions of CL Section 26, Paragraph 1, shall be constituted by one offence or several offences committed by one person, which correspond to the constituent elements of two or more criminal offences, if such person has not been convicted for any of these offences and also a limitation period for criminal liability has not set in. An offence committed by a person, which corresponds to the constituent elements of several different related criminal offences, constitutes a **conceptual aggregation of criminal offences** (CL Section 26, Paragraph 2), while two or more mutually unrelated offences committed by a person, which correspond to the constituent elements of several different criminal offences, constitute a **factual aggregation of criminal offences** (CL Section 26, Paragraph 3). As indicated by U. Krastiņš, “depending on whether several independent criminal offences were committed at the same time, or there was a certain time gap between them, what the relation between them was, an aggregation of criminal offences is classified into factual and conceptual aggregation”.⁴

Since the analysis carried out further in this article will mostly be closely related to the legal evaluation of a conceptual aggregation of criminal offences, it is necessary to emphasise elements that, according to the theory of criminal law, describe this type of aggregation: 1) criminal offences forming a conceptual aggregation are interrelated and are not limited in terms of time; 2) basically, these offences are causally related, since the commission of the first offence causes the commission of some other independent offence; 3) a conceptual aggregation is characterised by that the criminal action commenced by a person is aimed at the attainment of one goal, yet the process of implementation of this action results in some other harmful consequences that were not desired initially, and they do not comprise the constituent elements of one criminal offence, or a threat is posed to other interests protected by law, which are not protected by a particular norm of the Criminal Law;⁵ 4) a conceptual aggregation usually consists of offences that are not

³ Krastiņš, U. Guilt in Complicated Criminal Offences. *Jurista Vārds*, No. 19, 11 May 2010, pp. 13–14. See also: Krastiņš, U. Criminal Offence. Riga: Courthouse Agency, 2000, p. 23.

⁴ Krastiņš, U. Constituent Elements of a Criminal Offence and Qualification of an Offence. Theoretical Aspects. Riga: Courthouse Agency, 2014, pp. 307.

⁵ *Ibid.*, pp. 308–309.

so closely interrelated in terms of their nature for the legislator to join them into one compound criminal offence.

For comparison, it is possible to note that in the criminal law of Lithuania, as Tomass Girdenis writes, a conceptual aggregation of criminal offences is recognised also in cases when several offences are committed one after another within a short period, acting with a single intent. It is also recorded in the decision of the Senate of the Supreme Court of Lithuania dated 30 December 2004 “On judicial practice in criminal cases regarding rape and sexual violence”, specifying that in the event a person first commits an act of sexual intercourse and then sexual gratification or vice versa, these offences form a conceptual aggregation of rape and sexual violence; as well as in a range of decisions of the Supreme Court of the Republic of Lithuania mentioned by the author, critically assessing the understanding of the conceptual aggregation.⁶

Legal literature includes an opinion that the goal and meaning of a conceptual aggregation of criminal offences is to fill in breaches caused by the legislator that has been unable to stipulate all the possible combinations of offences in the norms of criminal law.⁷ It is thought that it is possible to agree to the expressed opinion, which invites the legislator to include as many so-called “legal aggregations” as possible in the structure of legal norms, only partially, since no criminal law is able to reflect all possible combinations of offences in reality; therefore, a conceptual aggregation of criminal offences, which is also called a legal fiction,⁸ is an inevitable institute of criminal law. Moreover, it is suitable to add that these aggregations of criminal offences timely formulated by the legislator, forming compound offences, in practice cause rather many ambiguities.

Hence, it is to be concluded that the legislator of our state has strictly defined principal elements that describe a separate (unitary) criminal offence and an aggregation of criminal offences as a type of multiplicity; they have created their own characteristic and analysis in the theory of criminal law, mostly in the already mentioned and other publications of U. Krastiņš. Furthermore, as suggested by the analysis of judicial practice, problems in the process of qualification of criminal offences are most often caused by peculiarities of constituent elements of criminal offences, forming compound criminal offences that also comply with the fact justifiably emphasised in the theory of criminal law that it is both theoretically and practically difficult to distinguish a conceptual aggregation of criminal offences from a compound criminal offence that poses a threat to two objects or causes two consequences, since the precise qualification of offences depends on the precise delimitation of these cases.⁹ However, it is to be added that, taking into account structure deficiencies of criminal law norms, in the cases referred to a matter is to be resolved on both the distinguishing of a compound criminal offence from a conceptual aggregation of criminal offences and formation of a conceptual aggregation among criminal offences, one of which has already been designed as a compound criminal offence. Several more complex qualification solutions are offered for a wider analysis.

⁶ *Girdenis, T.* New Understanding of a Conceptual Aggregation of Crimes in Criminal Law of Lithuania. *Administratīvā un kriminālā justīcija*, No. 4, 2014, pp. 30–36.

⁷ *Kozlov, A. P., Sevastyanov, A. P.* Single and Multiple Crimes. Saint-Petersburg: Publishing House “Juridichesky Center–Press”, 2011, p. 185.

⁸ *Sharapov, R. D.* Criminal Violence. Moscow: Publishing House “Yurлитinform”, 2009, p. 333.

⁹ *Krastiņš, U.* Constituent Elements of a Criminal Offence and Qualification of an Offence. Theoretical Aspects. Riga: Courthouse Agency, 2014, p. 311.

2. Compound Criminal Offences with a Reference to Serious Consequences

The reason for development and inclusion of compound criminal offences in the Criminal Law is the typicality of joining of offences, distribution of combinations of offences in practice, etc.¹⁰ In the process of development of these elements, in addition to the requirements to be set for any structure of constituent elements of a criminal offence, it is necessary to take into account the set special requirements, for example, balance of sanctions, taking into account the punishability limits of both a joint criminal offence and separate criminal offences included therein, as well as their mutual compliance.¹¹

The matter concerning the structure of legal norms using the category “serious consequences” has a rather great practical significance in the legal evaluation of criminal offences, since the correct qualification of a criminal offence as well as determination of an adequate and just punishment depend on the correct understanding of this element and its equivalent application in practice.¹²

Serious consequences as a qualifying element of a criminal offence are included in 53 norms of the Special Part of the Criminal Law. According to the provisions of Section 24, Paragraph one of the Law On the Procedures for the Coming into Force and Application of the Criminal Law,¹³ liability for a criminal offence stipulated by the Criminal Law that has caused serious consequences shall apply, if the criminal offence has resulted in death of a person, or serious bodily injuries or psychological trauma to at least one person, moderate bodily harm to a number of persons or financial loss on a large scale have been inflicted, which amounted to at least a total of fifty minimal monthly salaries determined at the time in the Republic of Latvia at the moment of the criminal offence, or other serious harm has been caused to the interests protected by law.

As can be seen from the legal explanation of serious consequences, the legislator mostly links this evaluation definition with physical harm (death of a person, serious bodily injuries), as well as with the physical harm of another nature, which can be assessed as a different serious harm, for example, suicide committed by a person or a suicide attempt, serious psychological suffering. The content of serious consequences is directly related to a particular category of criminal offences.¹⁴ Thus, for instance, on 28 February 2016, Section 24 of the Law On the Procedures for the Coming into Force and Application of the Criminal Law was supplemented with Paragraph three, wherein it is explained that liability for a criminal offence stipulated by Section 193² of the Criminal Law, which causes serious consequences,

¹⁰ *Gulieva, N. B.* Compound Crimes in Russian Criminal Law. Author's Summary. Kemerovo, 2006, p. 8–9. Quoted according to: *Ivanchin, A. V.* Integrated Elements of Crimes and Problems of Their Designing. Criminal Law: Origins, Realias, Transfer to Sustainable Development. Materials of the VI Russian Criminal Law Congress. Moscow: Prospekt, 2011, p. 256.

¹¹ *Ivanchin A.V.* Integrated Elements of Crimes and Problems of Their Designing. Criminal Law: Origins, Realias, Transfer to Sustainable Development. Materials of the VI Russian Criminal Law Congress. Moscow: Prospekt, 2011, p. 256.

¹² *Liholaja, V.* Understanding of Qualifying Elements in Criminal Offences Against a Person. Topical Problems in Exercising Rights. Collection of Articles of the 69th Conference of the University of Latvia. Riga: University of Latvia Press, 2011, p. 349.

¹³ On the Procedures for the Coming into Force and Application of the Criminal Law: Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 331/332, 4 November 1998.

¹⁴ For more details, see: *Hamkova, D., Liholaja, V.* Crucial Understanding of Harm: Law, Theory, Practice. *Jurista Vārds*, No. 2, 10 January 2012, p. 11.

shall be imposed, if obtained profit, eliminated losses, total amount of issued orders, value of used financial instruments or immediate goods transaction agreements or total amount of used funds at the moment of commission of a criminal case exceeds a total of fifty minimal salaries determined at the time in the Republic of Latvia.¹⁵

Focusing on the norms of the Criminal Law, wherein the legislator, forming a compound criminal offence, included **serious consequences**, it is to be concluded that their structure is associated with serious problems, since a matter is to be resolved as to in which cases, committing compound criminal offences, the collision of norms of criminal law occurs; when, in accordance with collision regulations, an offence is to be qualified as a separate (unitary) criminal offence; and in which cases the collision of norms and, as a result thereof, a separate (unitary) criminal offence does not occur, yet a conceptual aggregation of criminal offences is to be established, which are different institutes of criminal law with qualification regulations typical thereof.

In explaining the difference between the collision of norms and an aggregation of criminal offences, U. Krastiņš indicates that it is “essentially: in case of collision of norms, one criminal offence corresponds to constituent elements of several independent criminal offences, while in case of a conceptual aggregation of offences – several independent criminal offences are committed by means of one unlawful action”,¹⁶ when each criminal offence is to be qualified separately unlike the collision of norms, when a criminal offence is to be qualified only in accordance with one colliding norm of criminal law.

In forming a compound criminal offence, the qualifying element of which is serious consequences, the legislator included therein constituent elements of criminal offences, formulating, for example, liability for causing of harm to health of a person, which manifests as intentional infliction of a serious bodily injury to at least one person (CL Section 125) or intentional infliction of less serious bodily injuries to several persons (CL Sections 126 and 130). In this case, a part of the norm (narrower content) collides with another whole norm (wider content), when an offence is to be qualified in accordance with the norm of a wider content, yet, taking into account that “the collision of norms of wider and narrower content is to be recognised insofar the colliding norm of a narrower content does not go beyond the limits of a narrower norm due to a more serious harm stipulated in the former”.¹⁷ It means that, in forming a compound criminal offence, the legislator should seriously consider the balance of sanctions, otherwise it is related to uneven judicial practice, violations of the principle of justice, as well as inexpediency of formation of a compound criminal offence.¹⁸

To confirm the aforementioned, for comparison we will first use a sanction determined for rape, which is a complicated compound criminal offence, which is formed by an act and serious consequences as a qualifying element (CL Section 159, Paragraph three), and for the intentional infliction of a serious bodily injury, which is one of criteria of serious consequences (CL Section 125). In this case, the

¹⁵ Amendments to the Law On the Procedures for the Coming into Force and Application of the Criminal Law: Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 31, 15 February 2016.

¹⁶ Krastiņš, U., Liholaja, V. Comments on the Criminal Law. Part One (Chapter I–VIII¹). Riga: Courthouse Agency, 2015, pp. 134.

¹⁷ *Ibid.*, p. 138.

¹⁸ Hamkova, D. Problems of Structure of the Qualified and Compound Element of a Criminal Offence. Effectiveness of Law in Post-Modern Society. Collection of Articles of the 73rd Scientific Conference of the University of Latvia. Riga: University of Latvia Press, 2015, p. 161.

collision of norms of a narrower content and wider content is to be established, i.e., a situation when one criminal offence committed by a person corresponds to several constituent elements of a criminal offence, stipulated in several sections of the Special Part of the Criminal Law or paragraphs (clauses) thereof, from which one that corresponds to the caused harm most fully is to be selected, since only one criminal offence was committed.¹⁹

For a person who commits rape, if serious consequences have been caused thereby, the applicable punishment is a life imprisonment or deprivation of liberty for a term of ten years and up to twenty years. Since for a person who commits intentional infliction of serious bodily injuries without qualifying elements (CL Section 125, Paragraph 1), the applicable punishment is deprivation of liberty for a term up to seven years; for a person who commits a crime stipulated by CL Section 125, Paragraph 2 – for a term of two years and up to ten years, while for a person who commits a crime stipulated by Paragraph 3 of this Section – for a term of three years and up to fifteen years, an offence is to be qualified as a separate (unitary) crime in accordance with CL Section 159, Paragraph three, since this compound criminal offence includes rape and infliction of a serious bodily injury – intentional infliction of a serious bodily injury, including also cases when it resulted in death of a person due to the negligence of the offender, which are independent criminal offences themselves. Moreover, it is necessary to establish the already mentioned one of conditions of collision of narrower and wider norms that the criminal offence stipulated by the norm of a narrower content should be more serious as compared to the criminal offence stipulated by the norm of a narrower content, namely that “the colliding norm of a narrower content, due to a more serious harm stipulated thereby (as compared to the seriousness of sanctions), does not go beyond the limits of a wider norm”.²⁰

At the same time, it is possible to name a range of cases when the sanction stipulated by CL Section 125, which is a norm of a narrower content, is more severe in comparison to the sanction stipulated for a compound criminal offence, which resulted in serious consequences, and when a conceptual aggregation of criminal offences is formed. Thus, for instance, for a person who commits intentional acts using his or her official position in bad faith, if such acts have caused serious consequences, (CL Section 318, Paragraph three), and for a person who, being a public official, commits failing to perform his or her duties, if serious consequences have been caused thereby (CL Section 319, Paragraph 3), the applicable punishment is deprivation of liberty for a term up to five years or temporary deprivation of liberty, or community service, or a fine, which is a less severe sanction even in comparison to the punishment stipulated for intentional infliction of a serious bodily injury without qualifying elements. In other cases, for example, if kidnapping caused serious consequences (CL Section 153, Paragraph 3), serious consequences were caused by adding narcotic or psychotropic substances of new psychoactive substances against the will of a person (CL Section 252, Paragraph 3), or seizing an air or water transport vehicle (CL Section 268, Paragraph 2), the compound sanction is significantly lower than the one stipulated by CL Section 125, Paragraph 3 for intentional infliction of a serious bodily injury which, as a result of

¹⁹ *Krastiņš, U.* Collision of Norms and Conceptual Aggregation of Criminal Offences. Effectiveness of Law in Post-Modern Society. Collection of Articles of the 73rd Scientific Conference of the University of Latvia. Riga: University of Latvia Press, 2015, p. 176.

²⁰ *Ibid.*, p. 179.

the negligence of the offender, has been the cause of death of the victim, which is also covered by serious consequences.

As explained by U.Krastiņš, “thus, the collision of norms is legalised, forming a conceptual aggregation of criminal offences, based on the principle of criminal law that a more serious criminal offence cannot be joined with a less serious one, which, in turn, follows from the principle of justice generally accepted by criminal law within the widest meaning thereof”.²¹ Although the authors of this article arrive at the expressed opinion, since this legal evaluation of criminal offences corresponds to the amount of sanctions determined for a compound criminal offence with serious consequences, and for relevant harm to health or life of a person, it is still impossible to assert that this solution in general is not to be assessed critically, since the legislator, in designing the norms of the Special Part of the Criminal Law, has not observed all the conditions of development thereof.

Criminal law, as compared to other fields of law, is characterised by a particularly strict influence mechanism on offences harmful for society, which sets forth particularly high requirements for the design of norms of the Criminal Law, namely, they must be precisely formulated and stable, likewise, a range of methods of legal technique must be used in the development thereof. The wholeness, i.e. integrity, of any legal system is reflected by the high organisation level, order and mutual compliance of its design elements.²² Non-observance of the listed requirements causes defects of the system of legal norms and their mutual compliance, which, in turn, hinders ensuring the fair regulation of criminal-legal relations. It is suggested also by the fact that, in forming a conceptual aggregation of criminal offences, different legal consequences occur, since every criminal offence as an independent offence is qualified individually depending on the collision of norms, and the final punishment is to be determined according to the aggregation of criminal offences, both including a lighter punishment in a more severe one and applying the full or partial principle of cumulation of adjudged punishments.

3. Qualification of Compound Violent Criminal Offences

The majority of violent criminal offences stipulated by the Criminal Law are the so-called multiple-object criminal offences, since the physical or psychological violence included in the objective side thereof, which is a tool, manner or method for the commission of another criminal offence, poses a threat to the physical or mental security as an additional direct object, at the time, when the main direct object of threat is other interests protected by law – constitutional fundamental rights and freedoms of another person, property interests, administration procedures, etc. Violence aids, facilitates the commission of the principal offence, as it is, for example, in case of a robbery, when violence is applied as a means to paralyse the will of the victim to resist the stealing of property, to suppress the

²¹ *Krastiņš, U.* Collision of Norms and Conceptual Aggregation of Criminal Offences. Effectiveness of Law in Post-Modern Society. Collection of Articles of the 73rd Scientific Conference of the University of Latvia. Riga: University of Latvia Press, 2015, p. 180.

²² *Marchenko, M. N.* System and Systemic Nature of Law. Systematicity in Criminal Law. Materials of the II Russian Criminal Law Congress. Moscow: Prospekt, 2007, p. 17.

resistance of the victim or to retain the property immediately after stealing it.²³ According to the method of description of constituent elements of a criminal offence, they are still compound criminal offences, since they indicate two objects of threat.²⁴

In formulating these compound criminal offences committed with the application of violence, **the violent manner of commission** is often marked with a general reference that a criminal offence has been committed with the application of violence. Since in criminal law violence is classified as physical and psychological violence,²⁵ one should agree to N. Kuznetsova, stating that ambiguities in the process of qualification of criminal offences are caused by the legislator's reference to violence, without specifying its type.²⁶ However, this formulation of the norm of criminal law inevitably causes a question regarding which amount of harmful physical consequences caused as the result of physical violence will be covered by a violent manner in the compound body of a particular criminal offence, and when additional qualification of caused consequences is necessary in accordance with sections of the Criminal Law on general criminal offences against the health, life, and physical freedom of a person, forming a conceptual aggregation of criminal offences.

In criminal law, physical violence means both physical impact on the human body causing physical pain to the victim, manifesting as battering, beating, infliction of bodily injuries of different seriousness, and violence that does not result in the aforementioned, for example, actions that only limit the movements of the victim or his/her freedom of movement, etc.²⁷ There is no doubt that violence without causing physical pain, as well as without inflicting bodily injuries in any case will be covered by the body of a criminal offence stipulated by a relevant section of the Criminal Law, since violence is included therein as a way of committing a criminal offence and is a mandatory element of the objective side. This conclusion is expressed also in case law, specifying in a particular criminal case that Section 317, Paragraph two of the Criminal Law stipulates criminal liability for exceeding official authority, if it is related to violence; in turn, the infliction of bodily injuries is not a mandatory element of the objective side of this criminal offence, i.e., to impose liability in accordance with Section 317, Paragraph two of the Criminal Law, it is necessary to establish the application of violence and it is not necessary for bodily injuries to be inflicted as the result of this violence.²⁸

At the same time, in a situation, when any harm is caused to health of the victim as the result of applying violence, the legal evaluation of a criminal offence

²³ Application of law in criminal cases regarding the stealing of property of another. Decision of the plenum of the Supreme Court No. 3 of 14 December 2001, Clause 3.1. Collection of decisions of the plenum of the Supreme Court of the Republic of Latvia. Riga: Police Academy of Latvia, 2002, p. 70.

²⁴ *Krastiņš, U., Liholaja, V., Niedre, A.* Criminal Law. General Part. Third Enlarged Edition. Riga: Courthouse Agency, 2008, pp. 80–81.

²⁵ For more details see: *Sharapov, R. D.* Criminal Violence. Moscow: Publishing House "Yurlitinform", 2009, p. 124.

²⁶ *Kuznetsova, N. F.* Problems in Qualifying Crimes. Moscow: Gorodets, 2007, pp. 287–288.

²⁷ Application of law in criminal cases regarding the stealing of property of another. Decision of the plenum of the Supreme Court No. 3 of 14 December 2001, Clause 3.2. Collection of decisions of the plenum of the Supreme Court of the Republic of Latvia. Riga: Police Academy of Latvia, 2002, p. 70.

²⁸ Decision of the Department of Criminal Cases of the Senate of the Supreme Court of the Republic of Latvia dated 28 February 2013 in case No. SKK-7/2013; criminal case No. 11819004205.

is not longer unambiguous, since the offence can be qualified as both separate (unitary) criminal offence and conceptual aggregation of criminal offences. Despite that in the last case an offence is legally assessed in accordance with two norms of the Criminal Law, namely, the section stipulating liability for a compound violent criminal offence, and the section stipulating liability for physical violence as a separate criminal offence (murder, intentional infliction of serious or medium-serious bodily injuries), judicial literature indicates that the principle of *ne bis in idem* is not violated and the formation of an aggregation is justified by interconnection of applied violence and the principal offence.²⁹

Formation of an aggregation is based on the seriousness degree of physical harm caused as the result of violence. If it exceeds the degree of harmfulness of a compound violent criminal offence, thus causing of physical consequences goes beyond the body of a compound violent criminal offence and liability for that, and grounds for liability for the caused physical harm are present in a separate norm of criminal law.³⁰ As indicated by V. Malkov, the so-called inclusion of elements and qualification of an offence as a unitary compound criminal offence are possible only provided that the included offence should not lead to a more severe punishment than a criminal offence that has been the way of commission thereof.³¹

The theory of criminal law includes no discussions of the fact that compound criminal offences, which consist of several criminal offences, have a higher degree of harmfulness, and, therefore, the legislator should determine, in the sanction for it, the measure of punishment, which, just as in case of an aggregation, would ensure a more serious criminal liability of the offender, since otherwise it would not comply with the principle of justice and would devalue the idea of a compound criminal offence itself.³²

Theoretically, the sanction stipulated for a particular criminal offence should indicate the significance of the object threatened by a criminal offence and the seriousness degree of harm caused to the object; whereas the sanction for a compound criminal offence should be adequate for the harmfulness degree of criminal offences included therein, which would be determined by both significance of objects of threat and harm caused thereto. If this provision was observed in the process of legislation, the vast majority of compound criminal offences would be qualified as separate (unitary) criminal offences, which, presumably, was the goal of the legislator, forming compound criminal offences, which is suggested by the “tendency to reduce cases of a conceptual aggregation of criminal offences, forming bodies of offences, wherein the constituent elements of two criminal offences are combined, and in the majority of cases, they are qualified as constituent elements of criminal offences”.³³

However, out of all compound criminal offences, wherein violence is a constructive (constitutive) element or a qualifying element, it is possible to mention just a few, the sanction of which allows covering elements integrated

²⁹ Sharapov, R. D. *Criminal Violence*. Moscow: Publishing House “Yurlitinform”, 2009, p. 310.

³⁰ *Ibid.*, p. 311.

³¹ Malkov, V. P. *Aggregation of Crimes: (Matters of Qualification and Determination of a Punishment)*. Kazan: Publishing House of the University of Kazan, 1974, p. 138.

³² Sharapov, R. D. *Criminal Violence*. Moscow: Publishing House “Yurlitinform”, 2009, pp. 308–309; Gorelik, A. S. *Collision of Norms of Criminal Law*. Krasnoyarsk: Publishing House of the University of Krasnoyarsk, 1998, p. 67.

³³ Krastiņš, U., Liholaja, V. *Comments on the Criminal Law. Part One (Chapter I–VIII¹)*. Riga: Courthouse Agency, 2015, p. 132.

therein and forming a separate (unitary) criminal offences, as it is, for instance, in CL Sections 159, 160 and 176. In other cases, the most diverse variations of forming of an aggregation are observed, when a compound criminal offence covers only infliction of minor bodily injuries, harm to health, including moderate bodily injuries without qualifying elements, moderate bodily injuries under qualifying circumstances, serious bodily injuries without qualifying circumstances. Thus, a conceptual aggregation of criminal offences, which, in our opinion, should be an exception in cases of compound criminal offences, becomes a regularity authorised by the legislator.

In certain cases, the legislator has included in the design of a compound criminal offence a reference to bodily injuries of a certain degree of seriousness caused by a criminal offence, or to **the link of an offence to the infliction of bodily injuries**, as it is, for example, in CL Section 231, Paragraph 2, without clarifying the seriousness degree of bodily injuries, which, as it is known, can be minor, moderate and serious bodily injuries. As it has already been mentioned, the criminal law of Latvia includes a conclusion that in case of a compound criminal offence, which is also qualified as hooliganism, a separate (unitary) criminal offence will be present only provided that the punishment for a compound criminal offence is more severe as compared to the punishment for a general criminal offence, while harmful consequences caused by a criminal offence are to be punished more seriously in accordance with another norm of the Criminal Law as compared to a compound criminal offence, a conceptual aggregation will be formed.³⁴ It followed also from Clause 6 of recommendations of the Judicial Practice Summary of the Supreme Court for 2016 “Judicial Practice in Hooliganism Cases”, wherein it is indicated that in cases when hooligan actions are related to the infliction of minor or moderate bodily injuries provided that they have not been committed under aggravating circumstances, the offence is to be qualified only in accordance with Section 231, Paragraph 2 of the Criminal Law, without forming a conceptual aggregation with other criminal offences. In turn, in cases when the offence contains qualifying elements stipulated by Section 126, Paragraph 2 of the Criminal Law, the offence is to be qualified as a conceptual aggregation of criminal offences stipulated by Section 231, Paragraph 2 and Section 126, Paragraph 2 of the Criminal Law.³⁵ This recommendation fully complied with the regulatory framework of criminal law at the time, since for a person who committed hooliganism related to the infliction of bodily injuries the applicable punishment was deprivation of liberty for a term up to seven years, while for a person who committed intentional infliction of a moderate bodily injury under aggravating circumstances, the deprivation of liberty was for a term up to eight years.

An analogous qualification solution is justifiably secured also in case law,³⁶ assessing [pers. A] an offence on 24 May 2011, which complies with the constituent elements of criminal offences and sanctions stipulated by Section 126, Paragraph 1 and Section 231, Paragraph 2 during the preparation of the study, on the day the criminal offence is committed and in the currently applicable wording of the

³⁴ *Krastiņš, U., Liholaja, V.* Comments on the Criminal Law. Part One (Chapter I–VIII¹). Riga: Courthouse Agency, 2015, p. 129.

³⁵ Judicial Practice in Hooliganism Cases. Available at <http://at.gov.lv/lv/judikatura/tiesu-prakses-apkopojsimi/kriminaltiesibas/> [last viewed 20.06.2017].

³⁶ Decision of the Department of Criminal Cases of the Supreme Court of the Republic of Latvia dated 14 June 2016 in case No. SKK-262/2016; criminal case No. 11221195811.

Criminal Law. In the particular criminal case, taking into account the time of commission of the criminal offence, the reference to the formation of a conceptual aggregation of criminal offences stipulated by CL Section 231, Paragraph 2 and Section 126, Paragraph 2 is justified. However, it is possible to discuss a matter concerning the application of provisions of Clause 6 of recommendations of the aforementioned study to a situation if hooligan actions related to intentional infliction of moderate bodily injuries under aggravating circumstances were committed after 1 April 2013, since following amendments introduced to the Criminal Law by the law of 13 December 2012,³⁷ sanctions stipulated by CL Section 231, Paragraph 2 and Section 126, Paragraph t2 fully coincide – deprivation of liberty for a term up to five years or temporary deprivation of liberty, or community service, or a fine and with or without probation supervision for a term up to three years.

The doctrine of Latvian criminal law practically does not discuss this situation; however, several foreign lawyers³⁸ have expressed an opinion that a conceptual aggregation of criminal offences is formed not only if a punishment for a compound criminal offence is less severe as compared to a punishment stipulated for a general criminal offence, but also if punishments in both cases are equal. As an argument for this legal evaluation of offences, it is indicated that components making a compound criminal offence cannot be similar to the principal criminal offence due to their harmfulness, and that a compound criminal offence has to have a higher degree of harmfulness as compared to the harmfulness of its constituent elements. It is thought that this opinion is interesting and discussable, including with regard to the matter concerning whether the formation of a conceptual aggregation does not result in the violation of the principle *ne bis in idem*.

4. Qualification of an Offence That is a Way (Tool, Method) of Committing Another Criminal Offence

The cases when one criminal offence is committed to facilitate or ensure the commission of another criminal offence are often established in practice. This situation can occur, for example, if a person illegally purchases narcotic or psychotropic substances to inebriate and rob the victim, or a firearm is illegally purchased to commit a murder. The theory of criminal law includes a justified conclusion that in the event one criminal offence causes favourable circumstances for the commission of another offence, each of them has to be qualified as an independent offence.³⁹

However, the legal evaluation of a criminal offence is not that unambiguous in the event one criminal offence is a way (tool, method) by which another offence is committed. And one of these criminal offences is forgery of a document, liability for which is stipulated by CL Section 275.

³⁷ Amendments to the Criminal Law: Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 202, 27 December 2012.

³⁸ See, e.g.: Naumov, A. V. Criminal-Legal Purpose of Violence. *Violent Crimes*. Moscow: Spark, 1997, pp. 63–64; Kuznetsova, N. F. Qualification of Compound Elements of Crimes. *Criminal Law*, No. 1, 2000, pp. 26–27, 30; Panov, N. I. Qualification of Violent Crimes. Kharkiv: Kharkiv Institute of Law, 1986, p. 52; Sharapov, R. D. *Criminal Violence*. Moscow: Publishing House “Yurlitinform”, pp. 323, 326.

³⁹ *Ibid.*

Forgery of documents and use of forged documents included in CL Section 275 are two independent alternative objective sides of a criminal offence, and as justifiably noted by N. Kuznetsova, the forgery of document itself, regardless of its purpose of commission, **cannot be** a way of commission of another criminal offence.⁴⁰ Therefore, if a document is forged, for example, before committing a fraud to commit this criminal offence or after the committed fraud to hide it, the offence is to be qualified as a conceptual aggregation of criminal offences stipulated by CL Sections 177 and 275.

In turn, the use of a forged document regardless of whether this forgery was committed by a person charged with fraud or another person does not form an independent body a criminal offence, since it is a way of committing a fraud, it is a part of deceit, a component of a unitary compound criminal offence,⁴¹ which is an integral element of fraud, therefore fraud committed by using deceit (a forged document) is to be qualified as a separate (unitary) criminal offence, rather than as a conceptual aggregation of criminal offences.⁴² This particular explanation followed from Clauses 4.3 and 4.4 of the already mentioned Decision of the plenum of the Supreme Court No. 3 of 14 December 2001 “Application of law in criminal cases regarding the stealing of property of another”, stating that deceit is a type of fraud; deceit can be manifested in writing, orally, can be included in a forged document or can be manifested in the use of this forgery.

In this regard, it is necessary to mention the judicial practice summary in cases regarding fraud and Clause 32 of the Decision of the general meeting of the Department of Criminal Cases and the Court Chamber of Criminal Cases of the Senate of the Supreme Court dated 22 May 2009, indicating the following: “actions of the offender, which manifest as production of forged documents that grant the right or release from duties, as well as use of a forgery for the purposes of committing fraud, is an independent criminal offence to be qualified in accordance with CL Section 275, Paragraph 2 – forgery of a document and/or use of a forged document for the purposes of acquiring property. If the offender both forges the said document and uses it to deceive another person and to obtain property of another or the right to such property by deceit, the offence is to be qualified as an aggregation of criminal offences in accordance with CL Section 175, Paragraph 2 and, taking into account the extent of fraud, in accordance with the relevant paragraph of CL Section 177 or 180. An aggregation of the said criminal offences is to be established also when the offender him/herself has forged documents, seals, stamps for the purposes of using them in fraudulent activities, or knowingly used forgeries produced by other persons”,⁴³

This explanation, in our opinion, is to be assessed critically, taking into account the aforementioned assumptions; moreover, it contradicts both the opinion expressed by the Supreme Court with regard to the qualification of fraud

⁴⁰ Kuznetsova, N. F. Problems in Qualifying Crimes. Moscow: Gorodets, 2006, pp. 291–292.

⁴¹ Bukalerova, L. A. Criminal-Legal Protection of Official Information Exchange. Moscow: Yurlitinform, 2006, pp. 224–260.

⁴² Mežulis, D. Criminal-Legal Protection of Property. Riga: Turība University, 2006, pp. 225–227. Plētiena, E. Problems in Qualifying Forgery of Documents. *Jurista Vārds*, No. 14, 5 April 2016, pp. 23–29. See also: Comments on the Criminal Code of Latvian SSR. Riga: “Avots”, 1982, p. 304.

⁴³ Decision of the general meeting of judges of the Department of Criminal Cases and the Court Chamber of Criminal Cases of the Senate of the Supreme Court dated 22 May 2009 on judicial practice summary in criminal cases regarding fraud. Available at www.at.gov.lv/lv/judikatura/tiesnesu-kopsapulces-lemumi [last viewed 20.06.2017].

and its conclusions in criminal cases of other categories. Thus, for instance, in the summary of the Supreme Court “Judicial Practice in Cases regarding Money Laundering and Evasion of Tax Payments”,⁴⁴ establishing that an aggregation of criminal offences stipulated by CL Section 218 and 219 is formed in practice, indicated the erroneousness of this qualification, justifying it with the fact that Section 1 Clause 14 of the Law On Taxes and Fees⁴⁵ stipulates that evasion of tax or fee payments can be manifested as deliberate provision of false information in tax declarations, which forms the objective side of the criminal offence stipulated by CL Section 218, and additional qualification in accordance with CL Section 219 is unnecessary. In qualifying an offence as an aggregation of criminal offences, fraud committed by deceit is indicated as both stealing of property by using forged documents and use of the tool of a criminal offence stipulated by CL Section 275, Paragraph 2, i.e. a forged document, which is already to be assessed in relation to the observance of the principle of inadmissibility of double jeopardy (*ne bis in idem*).

5. Collision of Norms of Criminal Law or Aggregation of Criminal Offences

Depending on the peculiarities of the structure of criminal offences, the theory of criminal law distinguishes several types of collision of norms. **The collision of norms occurs also if one criminal offence is committed with several qualifying circumstances of these offences**, which are stipulated by different paragraphs of the sections of the Special Part of the Criminal Law, which we will examine by using CL Section 262.

In accordance with amendments to the Criminal Law introduced by the law of 29 October 2015,⁴⁶ CL Section 262 was expressed in a new wording, stipulating liability in Paragraph 1 of the Section for a person who operates a vehicle without a vehicle driving licence (the vehicle driving licence has not been acquired or taken away according to specific procedures), and if the driver is under the influence of alcohol, or narcotic, psychotropic, toxic or other intoxicating substances. In turn, CL Section 262 Paragraphs 2–5 stipulate liability for the violation of road traffic regulations or vehicle operation regulations, if it has been committed by a person who operates a vehicle under the influence of alcohol, or narcotic, psychotropic, toxic or other intoxicating substances, and if it resulted in respectively a minor bodily injury (CL Section 262, Paragraph 2), a moderate bodily injury (Paragraph 3 of the Section), a serious bodily injury (Paragraph 4 of the Section) to the victim or resulted in death of a person (Paragraph 4 of the Section), death of two or more persons (Paragraph 5 of the Section).

If the same violation of road traffic regulations or vehicle operation regulations resulted in consequences to several victims, as stipulated by different paragraphs of CL Section 262, for example, Paragraphs 3 and 4, in accordance with collision regulations, an offence is to be qualified in accordance with the paragraph of the section, which stipulates liability for serious consequences, namely, Paragraph four

⁴⁴ Judicial Practice Summary. Judicial Practice in Cases regarding Money Laundering and Evasion of Tax Payments, 2013. Available at www.at.gov.lv/lv/judikatura/tiesu-prakses-apkopojumi/kriminaltiesibas/ [last viewed 20.06.2017].

⁴⁵ On Taxes and Fees: Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 26, 18 February 1995.

⁴⁶ Amendments to the Criminal Law: Law of the Republic of Latvia. *Latvijas Vēstnesis*, No. 227, 19 November 2015.

of the Section,⁴⁷ which conforms to the principle that the norm stipulating a more serious liability covers less serious consequences or less harmful action,⁴⁸ which is basically observed in the process of qualifying a criminal offence.

However, with the aforementioned amendments coming into force, unfavourable practice will set in with regard to the application of the norm included in CL Section 262, Paragraph 1. For example, in its judgement of 12 August 2016, Riga District Court established that the accused, who has failed to obtain a driving licence pursuant to set procedures, operated a vehicle on 5 December 2015 under the influence of alcohol and committed a violation of road traffic regulations, which resulted in death of the victim. The court qualified the offence of the accused as an aggregation of criminal offences stipulated by CL Section 262, Paragraph 1 and CL Section 262, Paragraph 4.⁴⁹ The same solution for the qualification of the offence can be established in other court rulings as well.⁵⁰ At the same time, there are criminal proceedings, wherein persons are held liable for the commission of similar offences, yet no aggregation of criminal offences is formed and qualification is carried out only in accordance with the Paragraph of CL Section 262 that stipulates liability for an offence that resulted in a particular harm to health or life of the victim.⁵¹

A. Judins, examining qualification problems in relation to CL Section 262, admits that “from the point of view of the theory of criminal law, it is possible to find arguments for both approaches to the qualification of criminal offences and objectively there is a possibility to develop a single practice, both seeing an aggregation of criminal offences in committed actions and qualifying it as a separate criminal offence in accordance with the relevant Paragraph of CL Section 262; however, for solving the problem it is important to understand the purposes of introduced CL amendments and legal consequences, accepting one or the other approach to the qualification of the said offences”.⁵² In reasoning his opinion that the committed criminal offence is to be qualified in accordance with one, i.e. the most serious, Paragraph of CL Section 262, A. Judins justifiably indicates that there are no grounds to recognise crimes described in CL Section 262, Paragraphs 2–5 as qualified elements in relation to the provisions of CL Section 262, Paragraph 1, since “the structure of the qualified element of a criminal offence presumes that all principal constituent elements and in addition stipulate also another feature/other features, due to which more serious liability is stipulated for committing the offence. Likewise, it is to be agreed that the element included in CL Section 262, Paragraph 1, i.e. operating a vehicle without a vehicle driving licence, is not a mandatory feature of the element of criminal offences, qualifying the offence in accordance with CL Section 262, Paragraphs two, three, four or five, and upon establishing it, this fact is to be assessed as one of violations of road traffic regulations and vehicle operation regulations.”⁵³

⁴⁷ Decision of the Department of Criminal Cases of the Senate of the Supreme Court dated 28 December 2010 in case No. SKK-616/2010; criminal case No. 11170054406.

⁴⁸ *Krastiņš, U., Liholaja, V.* Comments on the Criminal Law. Part One (Chapter I–VIII¹). Riga: Courthouse Agency, 2015, p. 140.

⁴⁹ Judgement of Riga District Court of 12 August 2016 in criminal case No. 11520096415.

⁵⁰ See Judgement of Ogre District Court of 24 November 2016 in criminal case No. 11310049016; Judgement of Madona District Court of 5 December 2016 in criminal case No. 11300028116.

⁵¹ See, for example, Judgement of Dobele District Court of 2 November 2016 in criminal case No. 11200053215; Judgement of Liepāja Court of 1 December 2016 in criminal case No. 11261124214.

⁵² *Judins, A.* Criminal Offences against Traffic Safety: Topical Issues of Application of the Law. *Jurista Vārds*, No. 51, 12 December 2016, p. 19.

⁵³ *Ibid.*, p. 20.

In the opinion of authors of this article, this qualification solution can be justified with the fact that norms included in CL Section 262, Paragraphs 2, 3, 4 and 5 are broader in terms of their content as compared to the norm included in Paragraph 2 of this Section, since operating a vehicle without a vehicle driving licence is one of possible violations of road traffic regulations and vehicle operation regulations, and it, in turn, excludes even the theoretical possibility of forming an aggregation of criminal offence stipulated by CL Section 262, Paragraph 1 and other Paragraphs.

Criminal law distinguishes also **the collision of general and special norms**, when, in accordance with conclusions of the theory, a special norm is applied, “wherein a particular act or failure to act is distinguished, for the commission of which the legislator has increased or reduced liability”.⁵⁴ By the law of 13 December 2012, this guideline is enshrined also by standards with the legislator supplementing CL Section 26 with Paragraph five and determining that if one criminal offence corresponds to the general and special norms stipulated by the Special Part of this Law, then an aggregation of criminal offences is not formed and criminal liability is imposed only in accordance with the special norm.

It is to be said that in practice CL Section 26, Paragraph one stipulates the implementation of the guideline is not that unambiguous, which will be illustrated by using the regulatory framework included in CL Sections 177 and 178. We will remind the reader that CL Section 177 stipulates liability for fraud, which is the acquisition of property of another or the right to such property, using trust in bad faith or by deceit, while in Section 178 the legislator, forming a special body of fraud, has stipulated liability for insurance fraud, when, in accordance with Paragraph one of this Section, a person who has intentionally destroyed, damaged or hidden his/her property for the purposes of receiving insurance indemnity is to be held liable. If the same acts are committed with property of another, including property possessed by a person, yet owned by a leasing company, bank, another legal entity or natural person, the acts committed are to be qualified as fraud in accordance with CL Section 177 or 180.⁵⁵ The same conclusions on the limitation of these two bodies of fraud are enshrined in case law, explaining that person’s activities aimed at the unjustified receipt of insurance indemnity, if they are not related to the destruction, damaging or hiding of a vehicle, are to be qualified in accordance with CL Section 177, rather than CL Section 178. In this case, the affiliation of the vehicle has no significance in the qualification of the criminal offence.⁵⁶

U. Krastiņš indicates that insurance fraud is a special type of fraud, since general characteristics of fraud are typical thereof.⁵⁷ D. Mežulis also writes that the legislator, taking into account the peculiarities of offences, has examined the need for distinguishing a special body of property insurance fraud, determining the

⁵⁴ Krastiņš, U., Liholaja, V., Niedre, A. Criminal Law. General Part. Third Enlarged Edition. Riga: Courthouse Agency, 2008, pp. 281.

⁵⁵ Judicial Practice in Criminal Cases regarding Fraud. Judicial Practice Summary of the Supreme Court 2008/2009, p. 54. Available at www.at.gov.lv/lv/judikatura/tiesu-prakses/apkopojumi/kriminaltiesibas/ [last viewed 20.06.2017].

⁵⁶ Decision of the Department of Criminal Cases of the Supreme Court dated 21 June 2016 in case No. SKK-174/2016; criminal case No. 11094107911.

⁵⁷ Krastiņš, U., Liholaja, V., Hamkova, D. Comments on the Criminal Law. Part Three (Chapters XVIII–XXV). Riga: Courthouse Agency, 2016, p. 50; Krastiņš U. Criminal Offences in Economy I. Riga: Police Academy of Latvia, 1999, p. 23.

particular elements of the body of this offence.⁵⁸ In the opinion of authors of this article, there are no doubts regarding that the legislator, by including Section 178 in the Criminal Law, stipulating therein liability for a special body of fraud, taking into account peculiarities of insurance fraud.

Although the intent itself is justified, it is to be assessed nonetheless that the structure of CL Section 178 causes several problems. Firstly, the norm included in CL Section 178 covers only those cases of fraud related to fraud in the field of property insurance, despite that the circle of insurance objects is significantly wider. Secondly, according to the structure of the said norm, insurance fraud formed as a split criminal offence is to be recognised as a finished criminal offence once the owner of the insured property that was destroyed, damaged or hidden has submitted a false claim to the insurer regarding the payment of insurance indemnity, regardless of whether the offender has managed to receive insurance indemnity, whether it has not been received.⁵⁹

Clause 4.6 of Decision of the plenum of the Supreme Court of the Republic of Latvia No. 3 of 14 December 2001 "Application of law in criminal cases regarding the stealing of property of another" explains that in cases when the owner of the property has received insurance indemnity on the basis of this application, his offence is to be qualified as an aggregation of criminal offences in accordance with CL Sections 177 and 178.⁶⁰ This qualification solution is recognised as correct by U.Krastiņš as well, justifying it with the formulation of CL Section 178, as well as indicating that consequences included in CL Section 177 are left outside the body of the offence in CL Section 178.⁶¹ It is to be indicated that legal literature features critical notes regarding the qualification of fraud and insurance fraud according to an aggregation of criminal offences, emphasising that a person, taking into account this qualification variant, has to be liable for several criminal offences, even though only one criminal offence was committed.⁶²

In our opinion, an aggregation of criminal offences stipulated by CL Sections 177 and 178 should not be formed since, thus, collision regulations of general and special norm included in CL Section 26, Paragraph 5 are violated, which is suggested by the following. First of all, taking into account the fact that one criminal offence committed by a person is qualified in accordance with two sections of the Criminal Law, there are grounds for speaking about a conceptual aggregation of criminal offences. And, secondly, the fact that one is a general norm (CL Section 177) and the other one is a special norm (CL Section 178) excludes the possibility of qualification according to a conceptual aggregation of criminal offences, and criminal liability should be imposed only in accordance with a special norm. Otherwise, there is no sense of creating a special norm. The situation can be resolved by supplementing CL Section 178 with a new paragraph, which would stipulate enhanced liability for insurance fraud that resulted in the receipt of insurance indemnity.

⁵⁸ Mežulis, D. Criminal-Legal Protection of Property. Riga: Turība University, 2006, p. 245.

⁵⁹ Application of law in criminal cases regarding the stealing of property of another. Decision of the plenum of the Supreme Court No. 3 of 14 December 2001, Clause 4.5. Collection of decisions of the plenum of the Supreme Court of the Republic of Latvia. Riga: Police Academy of Latvia, 2002, p. 73.

⁶⁰ Ibid.

⁶¹ Krastiņš, U. Theoretical and Practical Issues of Qualification of Property Offences. *Jurista Vārds*, No. 44, 22 November, 2005.

⁶² Mežulis, D. Criminal-Legal Protection of Property. Riga: Turība University, 2006, p. 243.

In conclusion, it is to be noted that topical issues referred to herein are not typical of countries belonging to the system of common law, wherein in similar situations a punishment for several criminal offences is determined by applying the principle of inclusion of a lighter punishment into a more severe punishment. Thus, for instance, in Great Britain, punishments are determined by joining them, if simultaneous similar offences, which are committed simultaneously and are parts of one crime, are committed, or when the commission of one crime is practically impossible without committing another crime.⁶³ Likewise, in Australian law, the principle of inclusion of punishments is applied for several offences committed by means of one offence (*transaction*), recognising as such not only cases when several crimes are committed by one action, but also cases when several crimes are committed by several actions at the same time and place and in relation to the same victim, or these actions are performed one after another.⁶⁴ An analogous solution can be found in the criminal law of USA⁶⁵, as well as Roman-German countries such as Poland⁶⁶ and Spain⁶⁷. It is possible to discuss the introduction of this solution in Latvian criminal law in perspective, thus replacing a conceptual aggregation of criminal offences.

Conclusions

1. A separate (unitary) criminal offence is distinguished from the multiplicity of criminal offences by the fact that it is one offence (act or failure to act) which has the constituent elements of one criminal offence (simple separate (unitary) criminal offences), or also two or more mutually related criminal offences encompassed by the unitary purpose of the offender and which correspond to the constituent elements of only one criminal offence (complicated separate (unitary) criminal offences). In turn, multiplicity of criminal offences is the commission (or allowing) by one person of two or more separate offences (act or failure to act) which correspond to the constituent elements of at least two different criminal offences.
2. An aggregation of criminal offences as one of types of multiplicity is constituted by one offence or several offences committed by one person, which correspond to the constituent elements of two or more criminal offences, if such person has not been convicted for any of these offences and also a limitation period for criminal liability has not set in. An aggregation of criminal offences is classified into a conceptual aggregation, when an offence committed by a person, which corresponds to the constituent elements of several different related criminal offences, and a factual aggregation, which is constituted by two or more mutually

⁶³ Newark, M., Samuels, A., White, S. Sentencing the Multiple Offender: Concurrent and Consecutive Sentences. Northern Ireland Legal Quarterly, 1972, No 23, pp. 143–145.

⁶⁴ Lovegrove, A. Sentencing the Multiple Offender: Judicial Practice and Legal Principle. Research and Public Policy Series, 2004, No. 59, pp. 34–36.

⁶⁵ United States Sentencing Commission Federal Sentencing Guidelines Manual, 2007. Available at <http://www.ussc.gov/2007quid/CHAP3.pdf>, [last viewed 20.06.2017], p. 349. Quoted according to: Girdenis, T. New Understanding of a Conceptual Aggregation in Criminal Law of Lithuania. Administratīvā un kriminālā justīcija, No. 4, 2014.

⁶⁶ Criminal Code of the Republic Poland. Available at www.legislacjonline.org/documents/section/criminal-codes/country/10 [last viewed 20.06.2017].

⁶⁷ Criminal Code of the Kingdom of Spain. Available at www.legislationline.org/documents/section/criminal-codes [last viewed 20.06.2017].

unrelated offences committed by a person, which correspond to the constituent elements of several different criminal offences.

3. Complicated separate (unitary) criminal offences are also compound criminal offences, when one body of the criminal offence includes the constituent elements of other individual (simple) criminal offences, when it is both theoretically and practically difficult to distinguish a conceptual aggregation of criminal offences from a compound criminal offence, which poses a threat to two objects or causes two consequences.
4. The matter as to in which cases, in committing compound criminal offences, the collision of norms of criminal law occurs, when, in accordance with collision regulations, an offence is to be qualified as a separate (unitary) criminal offence, and in which cases the collision of norms and, as a result thereof, a separate (unitary) criminal offence do not occur, and a conceptual aggregation of criminal offences is to be established, what different institutes of criminal law with qualification provisions typical thereof are, is to be resolved also in case when the legislator, in forming a compound criminal offences, included therein reference to severe consequences as a qualifying element.
5. Taking into account that liability for harm to health of a victim (intentional infliction of a serious bodily injury to at least one person, less serious bodily injuries inflicted on several persons, which are the criteria of severe consequences) is stipulated by separate norms of the Criminal Law, the collision of a part of the norm (narrower content) with another whole norm (wider content) occurs, when an offence is to be qualified according to the norm of a narrower content provided that the criminal offence stipulated by the norm of a wider content is more serious as compared to the offence stipulated by the norm of a narrower content.
6. Otherwise, i.e., if harmful consequences caused by a criminal offence, in accordance with another norm of the Criminal Law, are to be punished more severely as compared to a compound criminal offence, as it is often established in the applicable framework of criminal law, a conceptual aggregation of criminal offences is formed, which is justified by the principle of criminal law stating that a more serious criminal offence cannot be covered by a less serious one, which, in turn, follows from the principle of justice generally accepted by criminal law within the widest meaning thereof.
7. An analogous qualification issue occurs also if the formulation of compound criminal offences includes a reference to the application of physical violence or relation to the infliction of bodily injuries, which inevitably results in a question regarding which amount of harmful consequences, caused as the result of physical violence, will be covered by the violent type in the compound body of a particular criminal offence, and when additional qualification of caused consequences is necessary in accordance with sections of the Criminal Law regarding general offences against health, life, personal freedom of a person, forming a conceptual aggregation of criminal offences.
8. Also in these cases the formation of an aggregation is based on the degree of seriousness of the caused physical harm and, if it exceeds the degree of harmfulness of a compound violent criminal offence, the causing of these physical consequences goes beyond the body of a compound criminal offence and liability therefore, while the grounds for liability for caused physical harm

is included in a separate norm of criminal law, then a conceptual aggregation of criminal offences is formed.

9. The theory of criminal law has admitted that compound criminal offences have a higher degree of harmfulness, and therefore, the legislator should determine the measure of punishment for it, which, just as in case of an aggregation, would ensure more serious criminal liability of the offender, since otherwise it would not comply with the principle of justice and would devalue the idea of a compound criminal offence itself. If this provision was observed in the process of legislation, ensuring the balance of sanctions, taking into account the punishability limits of both a joint criminal offence and separate criminal offences included therein, as well as their mutual compliance, a conceptual aggregation of criminal offences should be an exception in cases of compound criminal offences, rather than a regularity authorised by the legislator.
10. If one criminal offence is a way (tool, method), by which another criminal offence is committed, for instance, utilisation of a forged document to compel another to give up his or her property, or the right to such property, an independent criminal offence is not formed. It is a type of fraud, a part of deceit, one component of a compound criminal offence, which is an integral part of fraud, therefore, fraud committed by deceit (using a forged document), regardless of the fact whether this forgery was committed by a person charged with fraud or another person, is to be qualified as a separate (unitary) criminal offence, rather than a conceptual aggregation of criminal offences. The forgery of documents itself regardless of its purpose of commission cannot be a way of commission of another criminal offence, therefore, if a document is forged, for example, before committing a fraud to commit this criminal offence or after the committed fraud to hide it, the offence is to be qualified as a conceptual aggregation of criminal offences stipulated by CL Sections 177 and 275.
11. If one criminal offence is committed with several qualifying circumstances of these offences, which are stipulated by different paragraphs of the section of the Special Part of the Criminal Law, in accordance with collision regulations, an offence is to be qualified in accordance with the paragraph of the section, which stipulates liability for serious consequences, since the norm stipulating more serious consequences covers less serious consequences or less harmful action. However, in comparing constituent elements included in CL Section 262, Paragraph 1 and Paragraphs 2–5 of this Section, it is to be concluded that the norm included in Paragraph 1 is narrower in terms of content, since the operation of a vehicle without a driving licence is one of types of violation of road traffic regulations or vehicle operation regulations, and it excludes even a theoretical possibility of forming an aggregation of criminal offences included in CL Section 262, Paragraph 1 and other Paragraphs, which is sometimes observed in practice.
12. Criminal law also distinguishes the collision of general and special norms, when an aggregation of criminal offences is not formed either, and criminal liability is imposed in accordance with a special norm. In implementing the recognition enshrined in theory and practice that in cases when the owner of the insured property that was destroyed, damaged or hidden has received insurance indemnity on the basis of a false application for the payment of insurance indemnity, his offence is to be qualified as an aggregation of criminal offences in accordance with CL Sections 177 and 178, which are general and special

norms respectively, collision regulations of general and special norms included in CL Section 26, Paragraph 5. The situation can be resolved by supplementing CL Section 178 with a new paragraph, which would stipulate enhanced liability for insurance fraud that resulted in the receipt of insurance indemnity.

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Requirements to be Set for Voters' Legislative Initiatives in the Republic of Latvia: Legal Regulation, Practice, and Recent Findings of Judicature

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The article is dedicated to legal regulation of the practice of voters' legislative initiative in Latvia. The article examines changes to the regulation on this right of a totality of citizens and implementation thereof after 2010, when significant amendments were introduced to "Law on National Referendums, Initiation of Laws and European Citizens' Initiative". The article will provide an analysis of the practice of the Central Election Commission in deciding on registration of draft laws and draft amendments to the *Satversme*, submitted by voters. Since both the *Satversme* and the law provides that a draft law submitted by voters must be fully elaborated, the article examines criteria of assessment leading to the answer, whether the draft law should be recognised as being fully elaborated in its content and form. A special procedure has been established for appealing against decisions by the Central Election Commission, envisaging appeal against these decisions to the Supreme Court, therefore also the findings by the Supreme Court with respect to procedure for exercising the voters' right to legislative initiative will be analysed. Some aspects in the regulation on voters' legislative initiatives have been controversial, therefore the Supreme Court and members of the *Saeima* have submitted applications to the Constitutional Court, request examination of compatibility of regulation established in law with the *Satversme*, therefore the article will provide also an insight into the judicature of the Constitutional Court on issues of voters' legislative initiatives.

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

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Introduction

Pursuant to Article 2 of the *Satversme* [Constitution] of the Republic of Latvia (hereinafter – the *Satversme*), in Latvia the sovereign power is vested in the people of Latvia, and in the name of the people it is exercised by all citizens of the Republic of Latvia who have the right to vote.

Article 64 of the *Satversme* provides that there are two subjects of legislation in Latvia – the parliament (the *Saeima*) and the people. Latvia belongs to the countries, where voters have the right to legislative initiative. Voters' right to legislative initiative did not exist in all the democratic states; also in the European scale this right is not too widespread.¹ Article 78 of the *Satversme* defines the procedure, by which voters exercise the right to legislative initiative granted to the people: “Electors, in number comprising not less than one tenth of the electorate, have the right to submit a fully elaborated draft of an amendment to the Constitution or of a law to the President, who shall present it to the *Saeima*. If the *Saeima* does not adopt it without change as to its content, it shall then be submitted to national referendum.”

This right of the people has existed in Latvia since 7 November 1922, when the *Satversme* entered into force, and this Article has not been amended following adoption of the *Satversme*. A more detailed regulation on the procedure for implementing electors' legislative initiatives has always been defined at the level of laws. Currently, this issue is regulated by the law adopted in 1994 “Law on National Referendums, Initiation of Laws and European Citizens' Initiative”² (hereinafter – the Law), although over time a number of significant amendments have been introduced to it.

It must be noted that at the time of drafting the *Satversme* the Constitutional Assembly initially envisaged applying the voters' right to legislative initiative only to amendments to the *Satversme*; i.e., a wording was proposed that at least one fifth of voters would have the right to submit to the President of the State fully elaborated draft amendments to the *Satversme* [...].³ When the draft *Satversme* was examined article by article, member of the Constitutional Assembly Fēlikss

¹ *Ņikuļceva, I.* Vēlētāju likumdošanas iniciatīva Latvijā [Voters' Legislative Initiative in Latvia]. *Jurista Vārds*, 2009. 8. decembris, Nr. 49.

² Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu: LR likums [Law on National Referendums, Initiation of Laws and European Citizens' Initiative: Law of the Republic of Latvia]. *Latvijas Vēstnesis*, 20.04.1994. Nr. 47(178).

³ In the course of drafting the *Satversme* this article was Article 76. See *Satversmes Sapulces IV sesijas 20. sēdes stenogrammu 09.11.1921* [Transcript of the 20th sitting of the IV Session of the Constitutional Assembly 09.11.1921]. In: *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*. Rīga: Tiesu namu aģentūra, 2006., 467. lpp.

Cielēns at the meeting of November 1921 proposed that the voters' initiative should be also applicable to "all other laws", he further proposed decreasing the necessary threshold of voters to one tenth.⁴ The issue of the number of voters' signatures required in support of a new initiative caused extensive debates, various numbers were offered (*inter alia*, one thirtieth, which many members of the Constitutional Assembly criticised as too low a threshold, which therefore could be used for propaganda purposes and, to quote Otto Nonācs, could "deluge the legislative institution, the *Saeima*, in papers").⁵ As a result of discussions, O.Nonācs' proposed 1/10 as the necessary support for voters' legislative initiative was upheld, and the people were granted this right both with respect to draft laws and amendments to the *Satversme*.

The issue of voters' right to legislate has been studied previously in Latvian legal science,⁶ however, the majority of these studies were done prior to 2012, when significant amendments to the Law were adopted, which have changed the procedure in which this right is exercised. On 8 November 2012, the *Saeima* adopted "Amendments to "Law on National Referendums, Initiation of Laws and European Citizens' Initiative""⁷ and they entered into full force on 1 January 2015. These amendments gradually introduced significant innovations in implementation of legislative initiative, and the procedure, in which voters' initiatives are to be implemented, has become more complex. For example, until amendments to the Law of 2012 were adopted, collecting of signatures to initiate laws was utterly simple – it was conducted in two stages, first of all, voters had to collect 10 000 signatures using their own resources, but further collecting of signatures was organised by the State and financed by the state budget resources. Political events at the end of 2011 proved that some political forces deliberately used this flexible regulation as campaigns to increase their popularity by offering for collection of signatures proposals that were contrary to national interests and constitutional values, for example, a proposal to enshrine in the *Satversme* the Russian language as an official language, as well as immediately after it – a draft law for automatically accepting all Latvia's non-citizens into the Latvian citizenship.⁸ It has been aptly

⁴ In the course of drafting the *Satversme* this article was Article 76. See *Satversmes Sapulces IV sesijas 20. sēdes stenogrammu 09.11.1921* [Transcript of the 20th sitting of the IV Session of the Constitutional Assembly 09.11.1921]. In: *Latvijas Satversmes Sapulces stenogrammu izvilums (1920–1922)*. Rīga: Tiesu namu aģentūra, 2006., 467. lpp.

⁵ See: *Satversmes Sapulces IV sesijas 19.sēdes stenogrammu 08.11.1921* [Transcript of the 19th sitting of the IV Session of the Constitutional Assembly 08.11.1921]. From: *Latvijas Satversmes Sapulces stenogrammu izvilums (1920–1922)*. Rīga: Tiesu namu aģentūra, 2006., 454. lpp.

⁶ For example, in 2012 at the University of Latvia I.Ņikulceva presented her doctoral thesis "Tautas nobalsošana un vēlētāju likumdošanas iniciatīva" [National Referendum and Voters' Legislative Initiative. Thesis]. Available at https://dspace.lu.lv/dspace/bitstream/handle/7/5120/22881-Inese_Nikulceva_2013.pdf?sequence=1 [last viewed 20.07.2017].

⁷ *Grozījumi likumā "Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu": LR likums. Pieņemts 08.11.2012* [Amendments to "Law on National Referendums, Initiation of Laws and European Citizens' Initiative": Law of the Republic of Latvia. Adopted on 08.11.2012]. *Latvijas Vēstnesis*, 27.11.2012., Nr. 186(4789)

⁸ *Čepāne, I.* Latvija ir referendumu paradīze [Latvia is a Paradise for Referendums]. *Jurista Vārds*, 21.08.2012. Nr. 34(733). See also Judgement of 12 February 2014 by the Constitutional Court of the Republic of Latvia in case No. 2013-05-0, para. 18.2 Available at http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-05-01_Spriedums.pdf and Judgement of 12 February 2014 by the Department of Administrative Cases of the Republic of Latvia in case No. A420577912 SA-1/2014 [last viewed 20.07.2017].

noted in legal science that the end of 2011 saw the beginnings of a new era – implementing confrontational people's legislative initiatives.⁹ These processes caused very important discussions on issues of constitutional law, *inter alia*, on mechanism for protecting the constitution as the foundation, the basic value of the State.

This was the reason why the *Saeima* on 8 November 2012 adopted amendments to the Law, establishing a stricter procedure, i.e., introduced a requirement to indicate the initiative group responsible for the draft law, abandoning two stages in signature collection and clearly defining the competence of CEC in registering draft laws. The new regulation was adopted to limit the possibility for submitting low-quality draft laws, with respect to which, moreover, pursuant to procedure established in Article 78 of the *Satversme*, in case these were not adopted, a national referendum had to be held. The Constitutional Court recognised: “[...] if low-quality or unconstitutional draft laws were regularly submitted for national referendums, then the very idea of voters' legislative initiative would be levelled out and, over time, the civic activity of voters could decrease”.¹⁰

These amendments, clearly, make implementation of a legislative initiative more complicated.¹¹ The new regulation has been contested at the Constitutional Court, which recognised it as being compatible with the *Satversme*.¹² The practical relevance of the issue of voters' legislative initiative is revealed also by the fact that in recent years a voters' initiative has been registered for collection of signatures for the third time already – a draft law that envisages revoking of amendments to the Law adopted in 2012.¹³

Issues related to voters' right to initiate draft laws due to different reasons have been repeatedly examined also by the Constitutional Court and the Supreme Court, for example, analysing the issue regarding the content of requirement set for voters' legislative initiatives that the draft law must be “fully elaborated” and the authorisation of the Central Election Commission in the procedure of registering

⁹ Rodiņa, A. Valstiskuma pamatu aizsardzības mehānismi [Mechanisms for Protecting the Foundations of Statehood]. Latvijas Universitātes 71. zinātniskās konferences rakstu krājums. Tiesību interpretācija un tiesību jaunrade – kā rast pareizo līdzsvaru. Rīga: Latvijas Universitāte, 2013, 221., 223. lpp.

¹⁰ Judgement of 18 December 2013 by the Constitutional Court in case No. 2013-06-01, para. 13.2. Available at http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01_Spriedums.pdf [last viewed 20.07.2017].

¹¹ See Brikmane, E. Tautas rosināti referendumi: vai jaunais regulējums tos ierobežo? [Referendums Initiated by the People: Are They Restricted by the New Regulation]? *LV portāls*. 05.02.2015. <http://m.lvportals.lv/visi/skaidrojumi/268528-tautas-rosinati-referendumi-vai-jaunais-regulejums-tos-ierobezo/?size=3> [last viewed 20.07.2017].

¹² Judgement of 12 February 2014 by the Constitutional Court in case No. 2013-05-01. Available at http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-05-01_Spriedums.pdf [last viewed 20.07.2017].

¹³ The first initiative was registered in August 2014; however, within 12 months it did not gain the necessary support for submitting the draft law to the *Saeima*. Available at <https://www.cvk.lv/pub/public/30928.html> [last viewed 20.07.2017]. The second initiative was submitted in August 2015. It did not gain the necessary support by voters within 12 months either (see <https://www.cvk.lv/pub/public/31154.html> [last viewed 20.07.2017]). Also now – in 2017 an third initiative by this association has been registered for active collection of signatures (registered by CEC in September 2016), and voters may sign for it until 18 December 2017. All 3 initiatives were submitted by the same association and they all had identical content – the proposal consists of 1 Article in the following wording: “To revoke the law of 8 November 2012 “Amendments to “Law on National Referendums, Initiation of Laws and European Citizens' Initiative””. See: <https://www.cvk.lv/pub/public/31280.html> [last viewed 20.07.2017].

initiatives. In the framework of this article, the procedure for implementing voters' legislative initiative, which was introduced by amendments of 2012 will be examined; *inter alia*, by analysing the findings of judicature about these issues, as well as decisions by the Central Election Commission on registering initiative groups or refusal to register these groups.

1. Concept of Initiative Groups and Their Role in Elaborating a Draft Law

Amendments of 2012 to "Law on National Referendums, Initiation of Laws and European Citizens' Initiative" introduced a novelty that only initiative groups had the right to propose voters' legislative initiatives. Section 23 of the Law provides that an initiative group must be established for collecting signatures for a draft law or draft amendments to the *Satversme*. The Law specifies that an initiative group may be a political party or an association of parties or a society that has been established by no less than 10 voters and has been registered in procedure defined in "Associations and Foundations Law".

The requirement set for initiative groups to register exists in all European states, where voters have the right to submit draft laws (for example, Spain, Switzerland, Poland, and Lithuania).¹⁴ Registration of initiative groups has the advantage that it allows obtaining precise information about persons, who collect signatures and finance collection thereof; thus, for example, preventing financing collection of voters' signatures from abroad.

An initiative group may be an association or a political party, which has been active before, as well as new subjects, established specifically for this purpose, because the Law does not require previous experience or length of activities. Upon receiving documentation submitted by the initiative group, CEC arrives at a conclusion on whether the submitter can be identified.

Until amendments of 2012 were adopted, usually initiatives were proposed by political parties or trade unions, which an interest group had approached with its ideas. Usually each initiative had one organiser with a relative large number of informal supporters, whereas after amendments of 2012 entered into force, initiatives have been predominantly proposed by associations, and only one of them was proposed by a political party.¹⁵ Practice shows that sometimes initiatives that are rather different as to their content; i.e., pertain to various issues, have been proposed by the same associations.¹⁶

¹⁴ Grozījumi tautas nobalsošanas un likumu ierosināšanas regulējumā. Kādas izmaiņas un kad gaidāmas [Amendments to the regulation on national referendums and initiation of laws. What kind of changes and when are expected?]. Available at <http://www.lvportals.lv/print.php?id=252811> [last viewed 20.07.2017].

¹⁵ Likumprojekts "Par tautas līdzdalību eiro ieviešanas termiņa izlemšanā" [Draft Law "On Participation of the People in Deciding on the Term for Introducing Euro"]. Available at <https://www.cvk.lv/pub/public/30456.html> [last viewed 20.07.2017].

¹⁶ For example, association "Latvija par latu" [Latvia for Lats] has initiated amendments to the *Satversme* to reinforce the national currency – lats, to dismiss the *Saeima*, as well as amendments to Article 68 of the *Satversme* that would envisage that voters could demand holding a national referendum regarding significant changes in the terms for Latvia's participation in the EU.

2. Requirements to Be Set to Draft Laws and Draft Amendments to Satversme to Be Submitted

2.1. Concept of Fully Elaborated Draft Law

Pursuant to Article 78 of the *Satversme*, voters have the right to initiate both draft amendments to the *Satversme* and draft laws. A draft law may be both amendments to an existing law and an entirely new law. Moreover, the procedure of submitting and criteria to be met set for draft amendments to the *Satversme* and a draft law are the same, therefore hereinafter the term “draft law” is to be understood also as draft amendments to the *Satversme*. In Accordance with Section 23(3) of the Law, an initiative group submits to the Central Election Commission a submission and a draft law or draft amendments to the *Satversme*, with respect to which it is planned to collect voters' signatures. It is the obligation of the initiative group to prepare a draft law or draft amendments to the *Satversme* fully elaborated in the form and content, with respect to which they plan to collect voters' signatures. After the initiative group has submitted the submission and a draft law or draft amendments to the *Satversme*, CEC must review the submitted documentation and within 45 days adopt one of the following decisions: 1) to register the draft law; 2) to set a term for correcting any faults in the submission and the draft law or draft amendment to the *Satversme* (for example, in cases, when the title of the law must be specified, the text of the draft law must be corrected in accordance with requirements of the Latvian literary language and orthography, or terminology used in the draft law must be specified¹⁷); (3) to reject registration of the draft law.¹⁸

Pursuant to provisions of Section 23(5) of the Law, the Central Election Commission (hereinafter – CEC) has the right to refuse registration of the draft law or draft amendments to the *Satversme* only in 2 cases: firstly, if the initiative group does not comply with the requirements set for the initiative group (see above regarding requirements set for initiative groups), or, secondly, if the draft law or draft amendments to the *Satversme* is incomplete *in form or in content*.

In practice, initiative groups most often have encountered problems in meeting the criterion that draft must be *fully elaborated*, and because of this CEC has decided to reject the submitted draft law for registration. Information available from CEC shows that since the end of 2012 until the present registration of 8 draft laws

¹⁷ CVK 07.11.2013. Lēmums Nr. 37 “Par biedrības “Sargāsim mūsu bērņus!” iesniegto likumprojektu “Grozījumi likumā “Bērnu tiesību aizsardzības likums”” [Decision by CEC of 07.11.2013 No. 37 “On the Draft Law Submitted by the Association “Sargāsim mūsu bērņus!” “Amendments to “Protection of the Rights of the Child Law””]. Available at <https://www.cvk.lv/pub/public/30672.html> [last viewed 20.07.2017]; See also the decision by CEC of 31.07.2014. No.71. Available at https://www.cvk.lv/pub/upload_file/2014/71.pdf [last viewed 20.07.2017].

¹⁸ CVK 07.11.2013. Lēmums Nr. 37 “Par biedrības “Sargāsim mūsu bērņus!” iesniegto likumprojektu “Grozījumi likumā “Bērnu tiesību aizsardzības likums”” [Decision by CEC of 07.11.2013 No. 37 “On the Draft Law Submitted by the Association “Sargāsim mūsu bērņus!” “Amendments to “Protection of the Rights of the Child Law””]. Available at <https://www.cvk.lv/pub/public/30672.html> [last viewed 20.07.2017]; See also decision by CEC of 31.07.2014. No. 71. Available at https://www.cvk.lv/pub/upload_file/2014/71.pdf [last viewed 20.07.2017].

or draft amendments to the *Satversme* has been refused,¹⁹ whereas 5 initiatives have been registered for collecting signatures.²⁰

In view of the fact that the law provides that the initiative group may appeal against the decision by the Central Election Commission to refuse registration of a draft law or draft amendments to the *Satversme* to the Department of Administrative Cases of the Supreme Court, a number of initiators have exercised this right, and judicature has evolved in Latvia regarding what a draft law should be like in order to be considered as being *fully elaborated*.

It should be noted that in deciding on a draft law or draft amendments to the *Satversme*, CEC may request information, explanations and opinions that are necessary for deciding on this issue from state and local government institutions, as well as to invite experts. This right envisaged in the Law is actively exercised in practice, and it is customary to request faculty members of the law departments of Latvian institutions of higher education to provide opinions on a particular draft law.

2.1.1. Scope of Concept “Fully Elaborated Draft Law in Form”

The criterion that a draft law must be fully elaborated in form requires abiding by requirements of legal technique. The Cabinet Regulation “Regulation on Drafting Regulatory Enactments”,²¹ as well as handbooks on drafting various regulatory enactments²² provide answers to what a draft law should be like in form. As Prof. Kārlis Dišlers concluded in his time, to consider a draft law as being fully elaborated in its form, it should be obvious from the draft law, “which existing laws or sections in laws are revoked or amendment, and the feasible and logically understandable content of the amendments and new sections should be clear”.²³ A draft law must comprise legal norms – it cannot be drawn up as a declarative statement or a conceptual proposal.²⁴

The Supreme Court has noted in its judgement of 2014 that pursuant to provisions of the *Saeima* Rules of Procedure also a draft law or draft amendments to the *Satversme* submitted by a totality of citizens must be drawn up in the form of a draft law. At the same time, it should be taken into account that the formal

¹⁹ Initiatives, the registration of which was refused: <https://www.cvk.lv/pub/public/31296.html> [last viewed 20.07.2017]. Note – here information is provided only with regard to draft laws, but in addition to that CEC has refused to register for collection of signature also proposal to dismiss the *Saeima*, because the criteria set in Article 14 of the *Satversme* for exercising this right of voters were not met.

²⁰ Initiatives registered for collection of signatures: <https://www.cvk.lv/pub/public/31293.html> [last viewed 20.07.2017].

²¹ Ministru kabineta 03.02.2009. noteikumi Nr.108. Normatīvo aktu projektu sagatavošanas noteikumi [The Cabinet Regulation of 03.02.2009 No. 108. Regulation on Drafting Regulatory Enactments]. *Latvijas Vēstnesis*, 17.02.2009. Nr. 26(4012).

²² Normatīvo aktu projektu izstrādes rokasgrāmata [Handbook for Drafting Regulatory Enactments]. Rīga: Valsts kanceleja, 2016. Available at <https://tai.mk.gov.lv/book/1/chapter/23> [last viewed 20.07.2017].

²³ *Dišlers, K.* Vai Centrālajai vēlēšanu komisijai ir tiesība pārbaudīt iesniegtos likumprojektus [Does the Central Election Commission Have the Right to Verify the Submitted Draft Laws]. *Jurists*, 1928, Nr. 5, 135., 136. sl.

²⁴ Latvijas Universitātes Juridiskās fakultātes Valststiesību zinātņu katedras vēstule CVK Nr. 2020-V10-36 [Letter by the Department of State Law of the Faculty of Law, University of Latvia to CEC No. 2020-V10-36]. *Jurista Vārds*, 02.10.2012. Nr. 40(739) 21. lpp.

requirements must be only as high as to exclude such drafts the applicability of which is impossible due to formal deficiencies (for example, the draft is not drawn up as a draft law, the content of the text of the draft law is incomprehensible, the text comprises logical errors, etc.).²⁵

A draft law must comprise also transitional provisions or provisions on entering into force, if such are necessary due to substance of amendments.²⁶ Practice, i.e., CEC's decisions to refuse registering initiatives, shows that initiative groups usually have not encountered problems in meeting formal criteria; however, refusals to register initiatives basically have been linked to the fact that a draft law had not been fully elaborated in its content.

2.1.2. Scope of Concept "Fully Elaborated Draft Law in Content"

Any law, as to its content, must fit into the legal system. This means that a law, in using recognised methodology for applying and, in particular, for interpreting law, should be applicable without causing collisions with norms that a higher in the hierarchy of legal force or legal norms that must applied as a priority.²⁷

In recent years a stable case law has developed in Latvia on the issue, what the content of a draft law should be in order to be considered as being fully elaborated.²⁸ As the Constitutional Court has noted already in its decisions of 19 December 2012 on terminating legal proceedings in the so-called official language referendum case,²⁹ a draft law cannot be considered as being fully elaborated in its content, if: 1) it envisages deciding on such issues that are not to be regulated in law at all; 2) if it were adopted, it would collide with norms, principles, and values included in the *Satversme*; 3) if it were adopted, it would collide with Latvia's international commitments. The Supreme Court also consistently follows these criteria for assessing "a fully elaborated" draft law, in reviewing cases, in which a CEC's decision is appealed against, by referring to this decision by the Constitutional Court. Actually, it should be noted that, although the decision by the Constitutional Court on the need to initiate a case in the so-called case of official language referendum was at the time criticised in legal science,³⁰ it must be concluded that these legal proceedings have contributed significantly to the development of constitutional law, *inter alia*, by developing criteria for assessing a fully elaborated draft law, which are still taken as the basis to assess the degree in which a draft law has been elaborated (compliance with the term "fully elaborated").

²⁵ Judgement of 28.03.2014 by the Department of Administrative Cases of the Supreme Court in case No. SA-3/2014, para. 9.

²⁶ *Pastars, E.* Referendumu nedienas [Troubles with Referendums]. *Diena*, 03.08.2002. Quoted from: Saeimas Juridiskā biroja vēstule Nr. 12/13-3-n/36-11/12 Centrālajai vēlēšanu komisijai [Letter by the Saeima Legal Bureau No. 12/13-3-n/36-11/12 to the Central Election Commission]. *Jurista Vārds*, 02.10.2012. Nr. 40(739), 18. lpp.

²⁷ Judgement of 28.03.2014. by the Department of Administrative Cases of the Supreme Court in case No. SA-3/2014, para. 10, see also Saeimas Juridiskā biroja vēstule Nr. 12/13-3-n/36-11/12 Centrālajai vēlēšanu komisijai [Letter by the Saeima Legal Bureau No. 12/13-3-n/36-11/12 to the Central Election Commission]. *Jurista Vārds*, 02.10.2012. Nr. 40(739), 18. lpp.

²⁸ Judgement of 18.12.2013 by the Constitutional Court in case No. 2013-06-01 and Judgement of 28.03.2014 by the Supreme Court in case No. SA-3/2014.

²⁹ Decision of 19.12.2012 by the Constitutional Court on Terminating Legal Proceedings in case No. 2012-03-01. Available at <https://likumi.lv/doc.php?id=253569> [last viewed 20.07.2017].

³⁰ See *Rodiņa, A.* Valstiskuma pamatu aizsardzības mehānismi [Mechanisms for Protecting the Foundations of Statehood]. Latvijas Universitātes 71. zinātniskās konferences rakstu krājums. Tiesību interpretācija un tiesību jaunrade – kā rast pareizo līdzsvaru. Rīga: Latvijas Universitāte, 2013, 225., 226. lpp.

The Venice Commission of the Council of Europe has also noted that a draft law to be submitted for a national referendum must comply with legal norms of higher legal force, international law, and the principles of the Council of Europe (democracy, human rights, and a state governed by the rule of law).³¹

In practice CEC has repeatedly refused to register draft laws, which had been incompatible with either the *Satversme* or international treaties binding upon Latvia.

For example, registration was refused as being incompatible with the *Satversme*, for collecting signatures to support a draft law submitted by an association that envisaged introduction of personal financial liability of members of the *Saeima*, Ministers and State Secretaries, i.e., envisaged that these officials “shall be personally financially liable for losses caused by the decisions adopted, signed or promoted by these officials”.³² In the particular situation, it was concluded that this draft law would collide with the principle of non-liability of members of the *Saeima*, enshrined in Article 28 of the *Satversme*, because Article 28 of the *Satversme* provides that “[m]embers of the *Saeima* may not be called to account by any judicial, administrative or disciplinary process [...]” This draft law was interesting also because it envisaged establishing liability of these officials, but in the subsequent section provided that “the procedure for applying financial liability shall be elaborated by the Cabinet as a discrete draft law, which shall be submitted to the *Saeima* within six months”. CEC noted with respect to this proposed wording of the section, by referring to findings by the Constitutional Court, that this section would collide with the principle of legal certainty. The requirement that “a legal norm, which establishes restrictions upon a person’s fundamental rights, must be clear and as precise as possible. [...] The issuer of a legal norm must ensure that the legal norm is worded so unambiguously that it could be correctly interpreted and applied, and an individual could be aware of legal consequences of application thereof”³³ follows from the principle of legal certainty. I.e., this article of draft law essentially is a thesis or a goal, but a mechanism for reaching it has not been defined; thus, the draft law was recognised as being declarative and unclear, because voters, signing for the draft law, would have no clarity about its legal consequences and what the practical mechanism for applying material liability would be.

Similarly, a draft law that envisaged defining on the level of law new cases for national referendum was refused registration for collecting signatures as being incompatible with the *Satversme*. It must be noted that over time a number of proposals by various initiative groups were submitted to CEC that were united by one common idea – at the time, when lats was still the national currency of Latvia, initiative groups envisaged introducing on the level of laws a new case of public referendum, i.e., to provide that the issue of changing official currency could

³¹ Code of Good Practice on Referendums, CDL-AD(2007)008rev, Venice, 16-17 March 2007, point III.3. Available at <http://www.venice.coe.int/webforms/documents/?pdf=CDLAD%282007%29008-e> [last viewed 20.07.2017].

³² CVK 19.05.2015. lēmums Nr. 4. un 02.04.2015. lēmums Nr. 3. Par biedrības “Atvērtās pārvaldības partnerība Latvijā” iesniegto likumprojektu “Likums “Par Saeimas deputātu, ministru un valsts sekretāru personisko materiālo atbildību”” [Decision by CEC of 19.05.2015 No. 4 and Decision of 02.04.2015. No. 3 “On the Draft Law Submitted by the Association “Atvērtās pārvaldības partnerība Latvijā” “On the Personal Liability of Members of the Saeima, Ministers and Secretaries of the State]. Available at <https://www.cvk.lv/pub/public/31136.html>; <https://www.cvk.lv/pub/public/31107.html>; <https://www.cvk.lv/pub/public/31134.html> [last viewed 20.07.2017].

³³ See Judgement of 28.06.201 by the Constitutional Court in case No. 2012-26-03, para. 14.

be decided upon only in a national referendum. One of the initiatives, which was submitted in January 2013, envisaged amending the law “On the Bank of Latvia” by providing that lats was the only legal means of payment in Latvia – until the moment, when the people decided otherwise in a referendum.³⁴ Some initiatives envisaged defining holding of a referendum in a special, newly adopted law “On People’s Participation in the Change of Legal Means of Payment in the Republic of Latvia”.³⁵ In all these cases, CEC refused to register these drafts, because CEC validly found that introduction of a new type of national referendum was an issue of amending the *Satversme*, which should be decided upon by the *Saeima* and the totality of the people of Latvia as the constitutional legislator. Thus, the submitted draft laws could not be recognised as being fully elaborated because they envisaged to regulate in law a matter that could be decided only by amendments to the *Satversme*. CEC, on the basis of Article 64 of the *Satversme*³⁶ noted: “Since the *Satversme* exhaustively defines cases, when the totality of citizens as a body of state power participates, other cases of national referendums cannot be envisaged in a law or other regulatory enactment. A new case of national referendum, previously not envisaged in the *Satversme*, is to be introduced only by amending the *Satversme*, on which the *Saeima* or the totality of Latvian citizens must decide on as a constitutional legislator”.³⁷ It must be noted that this decision by CEC also pointed to some aspects that proved that a regulation like this would also collide with international commitments assumed by Latvia.

As mentioned above, it has been recognised in judicature that to recognise a draft law as being fully elaborated in content, it may not collide with international commitments that the State has assumed. In 2013, CEC refused to register an initiative submitted by voters that envisaged amending Article 4 of the *Satversme* by adding to it a sentence “Lats shall be the national monetary unit of Latvia”³⁸ as being incompatible with the international commitments of the State. CEC validly concluded that the issue of means of payment in Latvia was related to Latvia’s accession to the European Union and participation in the Economic and Monetary

³⁴ 18.03.2013. CVK lēmums Nr. 14 Par iniciatīvas grupas iesniegto likumprojektu “Grozījumi likumā “Par Latvijas Banku” [Decision by CEC of 18.03.2013 No. 14 “On the Draft Law Submitted by an Initiative Group “Amendments to the Law “On the Bank of Latvia”]. Available at https://www.cvk.lv/pub/upload_file/14_pilnais.pdf [last viewed 20.07.2017].

³⁵ CVK 31.01.2013. lēmums Nr. 5. Par iniciatīvas grupas iesniegto likumprojektu “Par tautas līdzdalību eiro ieviešanas termiņa izlemšanā” [Decision of 31.01.2013 by CEC No. 5 “ On the Draft Law Submitted by an Initiative Group “On People’s Participation in Deciding on the Term for Introducing EURO”]. Available at https://www.cvk.lv/pub/upload_file/PV%202013/31012013_CVK_lemums_Nr_5_izversts.pdf [last viewed 20.07.2017]; CVK 18.09.2013. lēmums Nr.35 Par biedrības “Latviešu Biedrība” likumprojektu “Par tautas līdzdalību Latvijas Republikas likumīgā maksāšanas līdzekļa nomaiņā” [Decision by CEC of 18.09.2013 No. 35 “On the Draft Law Submitted by Association “Latviešu Biedrība” “On Participation of the People in Replacing the Official Means of Payment in the Republic of Latvia]. Available at https://www.cvk.lv/pub/upload_file/35_pilnais.pdf [last viewed 20.07.2017]. See p. 11.

³⁶ Article 64 of the *Satversme* provides: “The *Saeima*, and also the people, have the right to legislate, in accordance with the procedures, and to the extent, provided for by this Constitution.” I.e., it follows from this Article that the rights of the people as the legislator are limited and exist only in the scope that is set in the *Satversme*.

³⁷ Para. 15, 16. Available at https://www.cvk.lv/pub/upload_file/14_pilnais.pdf [last viewed 20.07.2017].

³⁸ CVK 14.05.2013. lēmums Nr. 17 Par biedrības “Par latu, pret eiro” iesniegto likumprojektu “Grozījums Latvijas Republikas Satversmē” [Decision by CEC of 14.05.2013 No. 17 “On the Draft Law Submitted by the Association “Par latu, pret eiro”, “Amendment to the *Satversme* of the Republic of Latvia”]. Available at https://www.cvk.lv/pub/upload_file/17_pilnais.pdf [last viewed 20.07.2017].

Union. Article 119 of the Treaty on the Functioning of the European Union lists those activities, which the European Union and its Member States perform within the framework of the Economic and Monetary Union. Introduction of common currency is mentioned as one of activities to be implemented by Member States. Thus, the issue of the means of payment in Latvia (retaining lats or introducing euro) applies to terms of participation in the European Union and introduction of euro is a commitment that has been assumed by an international treaty. Thus, CEC concluded that the submitted draft amendment to the *Satversme* was not fully elaborated as to its content, because it collided with Article 73 of the *Satversme* and, if such were adopted, it would collide also with Latvia's international commitments.³⁹ In examining a case, in which this decision by CEC was appealed against, the Supreme Court in its judgement of 2014 strictly stated that "the concept "fully elaborated" of Article 78 of the *Satversme* is to be understood as such that encompasses also such legal initiative by a totality of citizens that respects Latvia's international commitments in such a way that it at the same time envisages measures to ensure that before the law or amendments to the *Satversme* included in the initiative enter into force or, at the latest, simultaneously with it, is possible to prevent possible collision with Latvia's international commitments. A draft law, which in the case of being adopted, would collide with Latvia's international commitments, cannot be regarded as being "fully elaborated"". Due to this, the Supreme Court decided that CEC had had grounds to refuse registration of draft amendments to the *Satversme*, because it would have been incompatible with international commitments, and therefore rejected the plaintiffs' claim to have CEC's decision revoked and to set an obligation to register it for collection of signatures.⁴⁰

It must be noted in addition that with respect to draft amendments to the *Satversme*, in order to consider them as being fully elaborated, it must be taken into consideration that they may not be incompatible either with those provisions of the *Satversme* that the draft does not propose to amend, or the core of the *Satversme*.⁴¹

All draft laws or draft amendments to the *Satversme* that are proposed must also have high quality content – a draft law may not have internal contradictions or be unclear otherwise. Moreover, the entire text of the draft law must comply with the criteria "fully elaborated", and in the case if the draft law even in a part thereof does not comply with the concept of being fully elaborated, then this deficiency cannot be eliminated and it must be recognised that the draft law as a whole does not comply with requirements of Article 78 of the *Satversme*, and this deficiency cannot be eliminated, for example, by deleting the incompatible part from the text of the draft law.⁴² A draft law should be fully elaborated already at the moment, when it is submitted to CEC for registration, and an excuse that following registration

³⁹ CVK 14.05.2013. lēmums Nr. 17 Par biedrības "Par latu, pret eiro" iesniegto likumprojektu "Grozījums Latvijas Republikas Satversmē" [Decision by CEC of 14.05.2013 No. 17 "On the Draft Law Submitted by the Association "Par latu, pret eiro", "Amendment to the *Satversme* of the Republic of Latvia"]. Available at https://www.cvk.lv/pub/upload_file/17_pilnais.pdf [last viewed 20.07.2017].

⁴⁰ Judgement of 28.03.2014 by the Department of Administrative Cases of the Supreme Court of the Republic of Latvia in case No. SA-3/2014.

⁴¹ Ibid.

⁴² See Decision by CEC of 19.05.2015, No. 4, para. 8; Saeimas Juridiskā biroja vēstule Nr. 12/13-3-n/36-11/12 Centrālajai vēlēšanu komisijai [Letter by the Saeima Legal Bureau No. 12/13-3-n/36-11/12 to the Central Election Commission]. *Jurista Vārds*, 02.10.2012. Nr. 40(739), 17. lpp.

it could be improved or improvement thereof could be entrusted to the *Saeima* is inadmissible.⁴³

In conclusion, it must be noted that the requirement that a draft law must be fully elaborated is particularly significant due to the provision of Article 78 of the *Satversme* that in case if a draft law submitted by 1/10 of electorate would not be upheld by the *Saeima* or were adopted with amendments, then such an incomplete draft law would be submitted for a national referendum, and might end with adoption of a probable “defective goods”. In view of the fact that the text of the draft law submitted by an initiative group may not be amended after it has been registered, it must be ensured that a draft that is incompatible with fundamental values of a democratic state governed by the rule of law is not submitted for a national referendum.

2.1.3. Restrictions Upon Content of Voters' Initiatives

The understanding that voters' initiatives cannot pertain to issues that fall within the competence of other bodies of state power has been consolidated in legal science; for example, if the *Satversme* provides that in Latvia amnesty is granted by the *Saeima*, then voters could not initiate a draft law on amnesty, to adopt a law on dismissal of judges from office (because this is an exclusive prerogative of the *Saeima*), etc.⁴⁴ Prof. K. Dišlers in his time specified that a totality of citizens may initiate adoption of only abstract and general legal norms, but not administrative or jurisdiction acts.⁴⁵

Already the pre-war legal science debated, whether voters had a right to initiate issues also with respect to those cases that are referred to in Article 73 of the *Satversme* as those cases that could not be submitted for deciding upon in a national referendum (i.e., budget and laws concerning loans, taxes, customs duties, railway tariffs, military conscription, declaration and commencement of a war, peace treaties, declaration of a state of emergency and its termination, mobilisation and demobilisation, as well as agreements with other nations). For example, professor K. Dišlers in a work that was published in the 1930s had noted that the restrictions referred to in Article 73 of the *Satversme* applied only to national referendums, but not to initiation of laws. The Professor, however, also noted that in practice it would be hard to imagine a situation, where voters submitted proposals regarding the budget or agreements with other nations; however, if the totality of citizens wished to initiate a draft law, for example, concerning introduction of a new tax or annulment of an existing tax, then, in K. Dišlers' opinion, the people could not be denied this right.⁴⁶ The Professor indicated that in such cases the draft law submitted by the voters could become a law only, if the *Saeima* were to adopt it. I.e.,

⁴³ Decision by CEC of 19.05.2015, No. 4, para. 12; see also Decision by CEC of 02.04.2015 No. 3, para. 17.

⁴⁴ Note. I.Nikuļceva has validly concluded that voters' legislative initiative according to Article 78 of the *Satversme* cannot be implemented also on issues that fall within the competence of the EU. See Nikuļceva, I. Tautas nobalsošana un vēlēšanu likumdošanas iniciatīva. Promocijas darbs [National Referendum and Voters' Legislative Initiative. Thesis]. Rīga: Latvijas Universitāte, 2012, 94. lpp. Available at https://dspace.lu.lv/dspace/bitstream/handle/7/5120/22881-Inese_Nikulceva_2013.pdf?sequence=1 [last viewed 20.07.2017].

⁴⁵ Dišlers, K. Nekonstitucionāls ierosinājums [An Unconstitutional Proposal]. *Jaunākās Ziņas*, 17.06.1927. Quoted from: Saeimas Juridiskā biroja vēstule Nr. 12/13-3-n/36-11/12 Centrālajai vēlēšanu komisijai [Letter by the *Saeima* Legal Bureau No. 12/13-3-n/36-11/12 to the Central Election Commission]. *Jurista Vārds*, 02.10.2012. Nr. 40(739), 18. lpp.

⁴⁶ Dišlers, K. Ievads Latvijas valststiesību zinātnē [Introduction to the Science of Latvian State Law]. Rīga: A. Gulbis, 1930, 117. lpp.

in this case, the consequences referred to in the second sentence of Article 78 of the *Satversme*⁴⁷ would not apply, if the *Saeima* did not adopt a draft law submitted by voters without amendments, then it could not be submitted for a national referendum.

This issue has caused polemics also in the contemporary legal science. For example, Inese Nikuļceva has noted in her dissertation that she upholds Prof. K. Dišlers' findings,⁴⁸ being of the opinion that these restrictions, in cases of doubts, should be narrowly interpreted. Then again, the experts of constitutional law Jānis Pleps and Edgars Pastars have noted that restrictions established in Article 73 of the *Satversme* should be applied also to voters' initiatives.⁴⁹ In its judgement of 2014, the Constitutional Court, in examining a case, in which the primary issue to be reviewed did not pertain directly to restrictions upon voters' initiative, noted, *inter alia*, that "voters' right to legislative initiative are not applicable to draft laws, which, pursuant to Article 73 of the *Satversme*, cannot be submitted for a national referendum".⁵⁰

At the end of 2011, when, pursuant to regulation of the time, a draft amendment to the *Satversme*, signed by 1/10 of electorate, was submitted to the *Saeima*, envisaging enshrining the status of the Russian language as the second official language,⁵¹ a discussion began in society and among lawyers, whether voters could initiate draft laws with regard to any issues whatsoever. In September 2012, the Commission of Constitutional Law under the Auspices of the President published its opinion "On the Constitutional Foundations of the State of Latvia and the Inviolable Core of the *Satversme*", which included the conclusion that voters did not have an unrestricted right to initiate any constitutional amendments. I.e., the Commission noted that the constitution comprised such values that were not amendable, the official language being one of them, in view of the fact that Latvia was a nation state and the Latvian language was the identity of this State.⁵² Likewise, the Constitutional Court in its decision of December 2012 on termination legal proceedings in case No. 2012-03-01 has foregrounded the concept of values of the *Satversme*, imposing an obligation upon all subjects of legislation to abide by the principle – to act in accordance not only with norms and principles of the *Satversme*, but also values, by noting that "not only the legislator, which exercises

⁴⁷ Article 78 of the *Satversme* provides: "Electors, in number comprising not less than one tenth of the electorate, have the right to submit a fully elaborated draft of an amendment to the Constitution or of a law to the President, who shall present it to the *Saeima*. If the *Saeima* does not adopt it without change as to its content, it shall then be submitted to national referendum."

⁴⁸ Nikuļceva, I. Tautas nobalsošana un vēlētāju likumdošanas iniciatīva. Promocijas darbs [National Referendum and Voters' Legislative Initiative. Thesis]. Rīga: Latvijas Universitāte, 2012., 94.–95. lpp.

⁴⁹ Pleps J., Pastars E. Vai tauta var Saeimā iesniegt budžeta projektu [May the People Submit to the *Saeima* a Draft Budget]. *Jurista Vārds*, 10.09.2002, Nr. 18(251) un 24.09.2002, Nr. 19(252).

⁵⁰ Judgement of 12.02.2014 by the Constitutional Court in case No. 2013-05-01, para. 14.4. Available at http://www.satv.ties.gov.lv/wp-content/uploads/2016/02/2013-05-01_Spriedums.pdf [last viewed 20.07.2017].

⁵¹ Bērziņš iesniedz Saeimā likumprojektu par divvalodību [Bērziņš Submits to the *Saeima* a Draft Law on Two Official Languages]. LETA, 20.12.2011. Available at http://www.tvnet.lv/zinas/latvija/404238-berzins_iesniedz_saeima_likumprojektu_par_divvalodibu [last viewed 20.07.2017].

⁵² Latvijas valsts kodolu meklējot [Searching for the Core of the State of Latvia]. *Jurista Vārds*, Nr. 6(705), 07.02.2012.; Konstitucionālās tiesību komisijas 17.09.2012. viedoklis par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo *Satversmes* kodolu [Opinion by the Commission of Constitutional Law from 17.09.2012 on the Constitutional Foundations of the State of Latvia and Inviolable Core of the *Satversme*]. Available at http://www.president.lv/images/modules/items/PDF/17092012_Viedoklis_2.pdf [last viewed 07.02.2017].

the right to legislate independently, – the *Saeima*, but also the legislator, which exercises the right to legislate only in some case, – the people, has the obligation to abide by norms or higher legal force and respect constitutional values enshrined therein.⁵³ In the framework of these proceedings, the Ombudsman had also expressed the opinion that voters' entitlement to exercise their right to legislative initiative could not be considered as being unlimited and that it should not be abused, for example, to undermine democratic foundations of the State.⁵⁴

As the Justice of the Constitutional Court Gunārs Kušņiņš has noted, the *Satversme* may be amended in a national referendum, if such an amendment does not delete any element of the core of the *Satversme* or does not collide with any element of this core. "It is possible to add to the core of the *Satversme* through a national referendum; however, a totally different core of the *Satversme* may be established only by adopting a new *Satversme*".⁵⁵

2.2. Authorisation of Central Election Commission and Supreme Court in Evaluating Draft Laws Submitted by Electors

For a long time, legal science could not provide an answer regarding the limits of CEC's authorisation in evaluating draft laws submitted by voters; i.e., whether CEC has the right only to verify the credibility and compliance of submitted signatures or whether it has the right to assess the content of a submitted draft law. Thus, for example, in a publication of 1928 Prof. Dišlers had expressed the opinion that "[...] there could be no doubts that the Central Election Commission has the right to verify, whether the submitted draft itself complies with provisions of Article 78 of the *Satversme* [...] it is the supreme leading institution, which must strictly see to it that all laws that apply to election of the *Saeima*, initiation of laws by the people and national referendum would be correctly applied and enforced".⁵⁶ At the same time, Prof. Dišlers noted that the Central Election Commission had no right to influence or even evaluate the submitted draft law from the perspective of whether the Commission recognised the submitted draft law, as to its content, as being good and preferable, or vice versa.⁵⁷

These discussions resumed with new ardour in 2011, when an initiative was submitted to CEC regarding amendments to the *Satversme* on establishing the status of an official language to the Russian language.⁵⁸ With amendments to "Law on National Referendums, Initiation of Laws and European Citizens' Initiative", which the *Saeima* adopted on 8 November 2012, Section 23 of this Law clearly defines the scope of CEC's rights – to evaluate, whether a draft law or draft

⁵³ *Satversmes tiesas* 2012. g. 19. decembra lēmums Par tiesvedības izbeigšanu lietā Nr. 2012-03-01 [Decision of 19 December 2012 by the Constitutional Court on Terminating Legal Proceedings in case No. 2012-03-01]. *Latvijas Vēstnesis*, 20.12.2012., Nr. 200(4803), 18.3. pkt.

⁵⁴ *Ibid.*, para. 6.

⁵⁵ *Platace, L.* Vēlētāju tiesības ierosināt referendumus pārmaiņu priekšā [Voters' Right to Initiate Referendums in the Wake of Changes]. 25.07.2012. Available at <http://m.lvportals.lv/visi/likumi-prakse?id=250193?show=coment> [last viewed 20.07.2017].

⁵⁶ *Dišlers, K.* Vai Centrālajai vēlēšanu komisijai ir tiesība pārbaudīt iesniegtos likumprojektus? [Does the Central Election Commission Have the Right to Verify the Submitted Draft Laws?]. *Jurists*, 1928. gada oktobris, Nr. 5, 134.-135. lpp

⁵⁷ *Ibid.*

⁵⁸ A.Cimdars, Chairman of CEC, had proposed considering a proposal on the CEC's right to turn to the Constitutional Court to request a preliminary ruling. See: CVK Turpina meklēt atbildi par likumprojekta pilnīgu izstrādātību [CEC Continues Looking for an Answer Regarding a Fully Elaborated Draft Law]. *Jurista Vārds*, 02.10.2012. Nr. 40(739), 13. lpp.

amendments to the *Satversme* is fully elaborated in its form and content, and, thus, whether it can be registered for collecting signatures; the procedure for appealing against a decision by CEC is also defined. It must be noted, however, that before these amendments were adopted, CEC actually conducted assessment of draft laws – it had concluded that this competence followed from Article 78 of the *Satversme* (which provided for voters' right to submit a fully elaborated draft law) and the norms that defined the general competence of CEC.⁵⁹ Moreover, this competence of CEC had been approved also by the Constitutional Court in its decision of 19 December 2012.⁶⁰

CEC's right to assess, whether a draft law is fully elaborated, clearly follows from the current regulation in the law; however, CEC does not have the right to assess the expedience of the draft law and conduct assessment of its acceptability or its political assessment, which may be done only by the legislator – the *Saeima* or the people.⁶¹ In view of the purpose for which CEC was established and its competence, it must conduct only legal assessment of a draft law. As the Constitutional Court has noted, CEC must register all draft laws submitted by voters, except for the cases, when it *obviously* (italics by the author) is not fully elaborated in its content.⁶²

If CEC establishes that a draft law is not fully elaborated, it adopts a decision on refusing to register the draft law. As the Supreme Court has found, the decision by which CEC refuses registration and transfer of a draft law submitted by voters for collection of signatures is not to be recognised as being an administrative act, because it is adopted within the framework of legislative procedure.⁶³

Section 23¹ of the Law provides that the initiative group may appeal against the decision by the Central Election Commission to register a draft law or draft amendments to the *Satversme* to the Department of Administrative Cases of the Supreme Court, where the case is examined as by a first instance court, which means that the case is reviewed on its merits.⁶⁴ Thus, in the framework of such legal proceedings the Supreme Court must examine, whether the draft law submitted by voters is fully elaborated.⁶⁵

In practice, decisions by CEC to refuse registration have been appealed against in court several times; i.e., by requesting the Supreme Court to impose an obligation to submit the proposed law for collection of signatures; the Court has also been requested to enforce compensation for non-pecuniary damages.⁶⁶ It is interesting that the Supreme Court has exercised the right that follows from the

⁵⁹ See, for example, Decision by CEC of 01.11.201 No. 6, as well as Decision of 11 February 2013 by the Supreme Court in case No. A420577912 SA-1/2013.

⁶⁰ *Satversmes tiesas* 19.12.2012. lēmums Par tiesvedības izbeigšanu lietā Nr. 2012-03-01 [Decision of 19.12.2012 by the Constitutional Court on Terminating Legal Proceedings in case No. 2012-03-01]. *Latvijas Vēstnesis*, 20.12.2012. Nr. 200(4803).

⁶¹ Judgement of 18.12.2013 by the Constitutional Court in case No. 2013-06-01, para. 14.3. Available at http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01_Spriedums.pdf [last viewed 20.07.2017].

⁶² *Ibid.*, para. 14.3 and 15.4.

⁶³ Decision of 20.02.2013 by the Senate of the Supreme Court in case No. A420577912 SA-1/2013, para. 9.

⁶⁴ Administratīvā procesa likuma 105. panta pirmā daļa: LR likums [Section 105(1) of the Administrative Procedure Law: Law of the Republic of Latvia]. *Latvijas Vēstnesis*, 14.11.2001. Nr. 164(2551).

⁶⁵ Judgement of 18.12.2013 by the Constitutional Court in case No. 2013-06-01, para. 15.4. Available at http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01_Spriedums.pdf [last viewed 20.07.2017].

⁶⁶ Decision of 11.02.2013 by the Supreme Court of the Republic of Latvia in case No. A420577912 SA-1/2013 Available at at.gov.lv/files/files/1-sa-2013.doc [last viewed 20.07.2017].

Constitutional Court Law⁶⁷ and has submitted an application to the Constitutional Court, requesting examination of compatibility of para. 2 of Section 23(5) and Section 23¹(1) of the Law with Article 1 of the *Satversme*. The Supreme Court expressed concern, whether the legal norm, which established CEC's competence to assess voters' initiatives as to their content and the competence of the Supreme Court to examine complaints regarding such decisions was not incompatible with the principle of separation of the state power.⁶⁸ The Constitutional Court in its judgement of 2013 found that there was no incompatibility between the contested law and the *Satversme*. As the Constitutional Court has noted – the Supreme Court must clarify, whether the draft law submitted by voters, indeed, obviously is not fully elaborated in its content, and whether CEC in its decision on incompatibility of a draft law with the respective requirement provides legal reasoning.⁶⁹ The Constitutional Court also pointed out that it had exclusive competence to recognise legal norms as being incompatible with norms of higher legal force and invalid. However, an administrative court in the framework of each case must also verify the compliance of the applicable legal norm with norms of higher legal force. The *Saeima* has a right to transfer into the jurisdiction of an administrative court examination also such cases, which by their nature are not narrowly administrative. Moreover, it follows from Section 13 of the law “On the Central Election Commission”⁷⁰ that CEC is an institution, upon which norms and provisions of the Administrative Procedure Law are binding.⁷¹ Thus, the Constitutional Court ruled that this regulation complied with Article 1 of the *Satversme*. It must be noted that also during the inter-war period the legality of CEC's decisions was reviewed by the Supreme Court (at the time – the Senate).

2.3. Course of Collecting Signatures and Legal Consequences Thereof

If CEC has concluded that the initiative group meets the requirements set in the law and that the draft law must be recognised as being fully elaborated, it must register the respective draft law or draft amendments to the *Satversme* for collection of signatures.⁷² Pursuant to Section 22 of the Law, voters may submit a draft law or draft amendments to the *Satversme* within 12 months from the day, when the draft law or draft amendments to the *Satversme* have been registered in the Central Election Commission. All citizens of Latvia, who have the right to elect the *Saeima*, have the right to initiate laws. If within 12 months provided for collection of signatures no less than one tenth of electors has signed in support of the draft law or draft amendments to the *Satversme*, then pursuant to Article 78 of the *Satversme* the draft submitted by voters is transferred to the President of the State for submitting to the *Saeima*. It must be noted that the term of 12 months for collecting signatures

⁶⁷ Satversmes tiesas likums: LR likums. 19.¹-pant [The Constitutional Court Law: Law of the Republic of Latvia. Section 19¹]. *Latvijas Vēstnesis*, 14.06.1996. Nr. 103(588).

⁶⁸ See Decision of 20.02.2013 by the Senate of the Supreme Court of the Republic of Latvia in case No. A420577912 SA-1/2013 9. pkt. Available at at.gov.lv/files/files/ [last viewed 20.07.2017]. By this decision the Supreme Court decided to amend the content of its decision of 11.02.2013 on submitting an application to the Supreme Court.

⁶⁹ Judgement of 18.12.2013 by the Constitutional Court in case No. 2013-06-01, para. 15.3 and 15.4.

⁷⁰ Par Centrālo vēlēšanu komisiju: LR likums [On the Central Election Commission: Law of the Republic of Latvia]. *Latvijas Vēstnesis*, 20.01.1994., Nr. 8(139).

⁷¹ Judgement of 18.12.2013 by the Constitutional Court in case No. 2013-06-01, para. 15.1.

⁷² See: Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu: LR likums [Law on National Referendums, Initiation of Laws and European Citizens' Initiative: Law of the Republic of Latvia]. *Latvijas Vēstnesis*, 20.04.1994. Nr. 47(178) 23. pantu [Section 23].

has been recognised as being reasonable and sufficient, allowing voters to express their will and the initiators of a draft law to collect signatures of at least one tenth of voters.⁷³

If within 12 months the initiative group has not gained the required support by 1/10 of voters, the law does not prohibit an identical initiative for repeated collection of signatures. In practice, for example, draft laws of identical nature have been registered repeatedly, three times, for collection of signatures – *Law on Revoking the Law of 8 November 2012 Amendments to Law on National Referendums, Legislative Initiatives and European Citizens' Initiative* (registered the first time for collection of signatures on 6 August 2014, the second time – on 18 September 2015, and the third time – on 16 September 2016).⁷⁴

Although the amendments of 2012 have made registration of initiatives more complicated, possibilities for collecting signatures have been expanded. Until 2012, signing was done only at notaries public or orphans' courts, however, now it is possible to sign also in local governments or sign using electronic signature on the site for collecting signatures.⁷⁵ The signed forms must be submitted to the initiative group.

In 2009, the Constitutional Court had to examine a case, in which the applicants – 20 members of the *Saeima* – requested examination of whether the section of the law, which provides that the signatures of persons submitting a draft law had to be certified by a notary public or orphans' court, complied with the principle of good governance following from Article 1 of the *Satversme*. The Constitutional Court in this case concluded that this procedure allowed ensuring that the expression of a person's will was genuine and useful, to decrease the possibility of influencing people's legislative process by counterfeit signatures and other unlawful proceedings and, thus, protected the democratic order of the state. Therefore, the Constitutional Court ruled that the contested norms were not incompatible with the principle of good governance.⁷⁶

In the meaning of Article 78 of the *Satversme*, the legislative process begins, when the President submits to the *Saeima* a draft law that has been fully elaborated by one tenth of electors, whereas implementation of voters' legislative initiative begins earlier – in accordance with the procedure set out in Law on National Referendums.⁷⁷ Examination of a draft law submitted by voters does not differ from examination of draft laws submitted by other subjects of legislation. In Latvia, draft laws are examined in 3 readings (in 2 readings, if members of the *Saeima* recognise

⁷³ Judgement of 12.02.2014 by the Constitutional Court in case No. 2013-05-01, para. 19.2. Available at http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-05-01_Spriedums.pdf [last viewed 20.07.2017].

⁷⁴ See 18.09.2015. CVK lēmumu Nr. 8 "Par biedrības "Atvērtās pārvaldības partnerība Latvijā" iesniegto likumprojektu "Likums par 2012. gada 8. novembra likuma "Grozījumi likumā "Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu" atcelšanu" [Decision by CEC of 18.09.2015 No. 8 "On the Draft Law Submitted by Association "Atvērtās pārvaldības partnerība Latvijā" "Law on Revoking the Law of 8 November 2012 "Amendments to Law on National Referendums, Legislative Initiatives and European Citizens' Initiative""]. Available at <https://www.cvk.lv/pub/public/31163.html> [last viewed 20.07.2017].

⁷⁵ Note: e-service www.latvija.lv

⁷⁶ See Judgement of 19.05.2009 by the Constitutional Court in case No. 2008-40-01. Available at <http://www.satv.tiesa.gov.lv/cases/?search%5Bnumber%5D=2008-40-01> [last viewed 20.07.2017].

⁷⁷ Judgement of 18.12.2013 by the Constitutional Court in case No. 2013-06-01, para 12.1. Available at http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-06-01_Spriedums.pdf 12.1 [last viewed 20.07.2017].

a draft law as being urgent). To prevent delaying a draft law submitted by voters, the law provides that the *Saeima* has to examine it in the session, during which it was submitted.

If the *Saeima* does not adopt a draft law submitted by voters (i.e., the *Saeima* rejects transferring it to commissions or rejects it as a whole)⁷⁸ or adopts it with amendments to its content, then, pursuant to Article 78 of the *Satversme*, a national referendum must be held on whether the draft law submitted by voters is acceptable. The regulation of Article 78 of the *Satversme*, providing that in case, if the parliament does not approve of the draft law submitted by voters, a national referendum must be held, is peculiar and seldom encountered in other countries. It is noted in legal science that Switzerland is the only other European state with a regulation like this.⁷⁹

Sometimes, the discussions in society and among lawyers have been caused by the question, which draft law should be submitted for a national referendum, i.e., – the version that was submitted by 1/10 of voters or the wording with amendments that would have been adopted by the *Saeima*. It must be noted that issue, whether voters support the draft law submitted by 1/10 of voters or the version with amendments by the *Satversme* must be put for a national referendum. This, *inter alia*, is confirmed by the practice of national referendums.⁸⁰ In fact, only in this stage, when the national referendum provided for in Section 78 of the *Satversme* takes place, the difference becomes apparent, whether the voters have proposed as a legislative initiative a draft law or draft amendments to the *Satversme*, because different requirements regarding quorum have been set for adopting the respective amendments. Namely, a draft amendment to the *Satversme* that has been put for a national referendum is adopted, if at least a half of those with the right to vote agree to it; a draft law, however, is adopted, if the voters constitute at least a half of electors who participated in the last election of the *Saeima* and if the majority has voted for adoption of the draft law (Article 79 of the *Satversme*).

Voters' right to legislative initiative is a mechanism that in Latvia has been applied in practice.⁸¹ As concluded above, after amendments to the Law of 2012 were adopted, a number of voters' initiatives have been registered with CEC for collection of signatures; however, none of them gained signatures of 1/10 of voters, so that the draft would be submitted to the President in the procedure defined in Article 78 of the *Satversme* for submitting it to the *Saeima*.

⁷⁸ See: Saeimas kārtības ruļļa 81. pantu. Saeimas kārtības rullis: LR likums [The Rules of Procedure of the *Saeima*: Law of the Republic of Latvia, Article 81]. *Latvijas Vēstnesis*, 18.08.1994. Nr. 96(227).

⁷⁹ See *Nikuļceva, I.* Velētāju likumdošanas iniciatīva Latvijā [Voters' Legislative Initiative in Latvia]. *Jurista Vārds*, 08.12.2009., Nr. 49.

⁸⁰ For example, in the national referendum held on 18 February 2012, the so-called language referendum case (which was held because the *Saeima* had not adopted the amendments to the a number of articles of the *Satversme* submitted by one tenth of voters, by which the official status of the Russian language would be entrenched), the formula of the referendum was "Are you for adoption of the draft law "Amendments to the *Satversme* of the Republic of Latvia that envisage granting to the Russian language the status of the second official language?" Possible answers were "For" and "Against". See: <https://www.cvk.lv/pub/public/30256.html> [last viewed 20.07.2017].

⁸¹ See also *Balodis, R., Kārklīņa, A., Danovskis E.* Latvijas konstitucionālo un administratīvo tiesību attīstība pēc neatkarības atjaunošanas [Development of Latvian Constitutional and Administrative Law after Restoration of Independence]. *Juridiskā zinātne*, 2012, Nr. 3, 69., 74.–77. lpp.

Summary

1. Latvia is one of the few countries in the world, where voters hold the right to legislative initiative. Pursuant to Article 78 of the *Satversme*, 1/10 of the voters have a right to submit to the *Saeima* a fully elaborated draft law (it may be an entirely new law or an amendment to an existing law), or draft amendments to the *Satversme*. However, to attain that the draft law is submitted to the *Saeima*, voters must comply with the requirements defined in the law “Law on National Referendums, Initiation of Laws and European Citizens’ Initiative”; i.e., they must establish an initiative group that is responsible for the draft law, and it must submit for registration to the Central Election Commission a fully elaborated draft law or draft amendments to the *Satversme*.
2. On 8 November 2012, the *Saeima* of the Republic of Latvia adopted amendments to the law “Law on National Referendums, Initiation of Laws and European Citizens’ Initiative: Law of the Republic of Latvia”, introducing a number of innovations to the procedure for exercising voters’ right to legislative initiative. The main innovation brought by these amendments is registration of an initiative group that is responsible for the particular draft law, clearly defined competence of CEC to assess draft laws submitted by voters and decide on registration thereof, as well as giving up the previously existing two stages of collecting signatures for initiating laws by voters, when the State assumed organisation and financing of collection of signatures after the voters had collected merely 10 000 signatures. It was found that at times some political forces had used this flexible regulation in bad faith, by proposing for national referendum initiatives that were incompatible with national values. These amendments, undoubtedly, make exercising of the legislative initiative more complicated. This is indirectly also proven by the fact that following adoption of the new regulation a number of voters’ initiatives have been submitted to CEC and registered for collection of signatures; however, none of these has succeeded in gaining support of 1/10 of voters within 12 months. The new regulation has been contested before the Constitutional Court, which recognised it as being constitutional.
3. Although sometimes the Constitutional Court decisions to terminate legal proceedings have been criticised in legal science, holding that they could cause doubt as to whether the Constitutional Court has sufficiently examined the application in the first stage, deciding on initiating the case, the decision of 19 December 2012 by the Constitutional Court on terminating legal proceedings in case No. 2012-03-01 has significantly contributed to the Latvian constitutional law. This decision defines the criteria for assessing whether voters’ initiatives are to be considered as being fully elaborated. The assessment criteria indicated in this particular decision are taken as the basis in the practice of CEC, as well as in case if a CEC’s decision is appealed against before the Supreme Court, the Court, in assessing the content of submitted draft laws, refers to the criteria defined in this decision by the Constitutional Court.
4. Amendments of 2012 provide that CEC refuses to register a draft law or draft amendments to the *Satversme*, if the draft law submitted by an initiative group is not fully elaborated in its form or content. Decisions by CEC reveal that often registration is refused exactly for the reason that a draft law is not fully elaborated as to its content. Judicature has become established in Latvia regarding the characteristics that a draft law must have to be regarded as being

fully elaborated. A draft law cannot be considered as being fully elaborated in its content, if: 1) it envisages deciding on such matter that are not to be regulated by law at all; 2) in case of being adopted, it would collide with norms, principles and values included in the *Satversme*; 3) in case of being adopted, it would collide with Latvia's international commitments.

5. The question, whether voters have the right to initiate a draft law that pertains to issues referred to in Article 73 of the *Satversme*, on which the people have no right to vote in a national referendum, has caused discussions in constitutional law for decades. The Constitutional Court has resolved this discussion in its decisions of 2013 by noting that voters have no right to submit draft laws with respect to issues referred to in Article 73. Likewise, voters have no right to submit draft laws that might be incompatible with national values and the core of the *Satversme*.

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 7. CVK 31.01.2013. lēmums Nr. 5. Par iniciatīvas grupas iesniegto likumprojektu "Par tautas līdzdalību eiro ieviešanas termiņa izlemšanā" [Decision by CEC of 31.01.2013. No. 5. "On the Draft Law Submitted by an Initiative Group "On People's Participation in Deciding on the Term for Introducing EURO""]. Available at https://www.cvk.lv/pub/upload_file/PV%202013/31012013_CVK_lēmums_Nr_5_izversts.pdf [last viewed 20.07.2017].
 8. CVK 18.03.2013. lēmums Nr. 14 Par iniciatīvas grupas iesniegto likumprojektu "Grozījumi likumā "Par Latvijas Banku" [Decision by CEC of 18.03.2013 No. 14 "On the Draft Law Submitted by an Initiative Group "Amendments to the Law "On the Bank of Latvia""]. Available at https://www.cvk.lv/pub/upload_file/14_pilnais.pdf [last viewed 20.07.2017].
 9. CVK 14.05.2013. lēmums Nr. 17 Par biedrības "Par latu, pret eiro" iesniegto likumprojektu "Grozījums Latvijas Republikas Satversmē" [Decision by CEC of 14.05.2013 No. 17 "On the Draft Law Submitted by the Association "Par latu, pret eiro" "Amendment to the Satversme of the Republic of Latvia""]. Available at https://www.cvk.lv/pub/upload_file/17_pilnais.pdf [last viewed 20.07.2017].
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 11. CVK 07.11.2013. lēmums Nr. 37 "Par biedrības "Sargāsim mūsu bērnus!" iesniegto likumprojektu "Grozījumi likumā "Bērnu tiesību aizsardzības likums" [Decision by CEC of 07.11.2013 No. 37 "On the Draft Law Submitted by the Association "Sargāsim mūsu bērnus!" "Amendments to "Protection of the Rights of the Child Law""]. Available at <https://www.cvk.lv/pub/public/30672.html> [last viewed 20.07.2017].
 12. CVK 31.07.2014. lēmums Nr. 71. "Par biedrības "Atvērtās pārvaldības partnerība Latvijā" iesniegto likumprojektu "Par 2012. gada 8. novembra likuma "Grozījumi likumā "Likums par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu" atcelšanu" [Decision of 31.07.2014 by CEC No. 71 "On the Draft Law Submitted by Association "Atvērtās pārvaldības partnerība Latvijā" "Law on Revoking the Law of 8 November 2012 "Amendments to Law on National Referendums, Legislative Initiatives and European Citizens' Initiative""]. Available at https://www.cvk.lv/pub/upload_file/2014/71.pdf [last viewed 20.07.2017].
 13. CVK 19.05.2015. lēmums Nr. 4. un 02.04.2015. lēmums Nr. 3. Par biedrības "Atvērtās pārvaldības partnerība Latvijā" iesniegto likumprojektu "Likums "Par Saeimas deputātu, ministru un valsts sekretāru personisko materiālo atbildību" [Decisions by CEC of 19.05.2015 No. 4 and Decision of 02.04.2015 No. 3 "On the Draft Law Submitted by the Association "Atvērtās pārvaldības partnerība Latvijā" "On the Personal Liability of Members of the Saeima, Ministers and Secretaries of the State""]. Available at <https://www.cvk.lv/pub/public/31136.html>; <https://www.cvk.lv/pub/public/31107.html> [last viewed 20.07.2017].
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Idea of Strict Liability in Private Law

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The article contains analysis of several aspects of strict liability and the criteria of its application, providing an insight into this complex concept of liability. The article contains analysis and opinion about the meaning and the role of strict liability and its differences with other models of liability. The author also explores the role of fault in the strict liability doctrine, as well as causation as a fundamental question of strict liability. The examined issues are analysed from the standpoint of theoretical sciences, thus allowing other legal scholars to use the conclusions outlined in the article in their scientific work.

Keywords: strict liability, fault, direct liability, objective liability, non-fault liability, liability for risk, presumption of fault, absolute liability, civil liability, exclusions of civil liability, source of increased danger, abnormally dangerous activity, fortuitous event (*cas fortuit*), causation, foreseeability, negligence.

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Introduction

The view that strict liability is understood as non-fault liability has become enshrined in legal science and doctrine. In the model of general (fault-based) liability manifestation of fault is closely linked, even identified with negligence and intent. Whereas strict liability is liability, which sets in irrespectively of the existence or non-existence of a person's negligence, i.e., liability sets in even if the slightest negligence cannot be discerned in a person's conduct. However, numerous examples from practice have led to the question set forth by legal science – can the model of strict liability be, indeed, differentiated from the model of general liability or fault-based liability with scientific precision? This question arises, in particular, considering the fact that regulation on strict liability occasionally even directly and immediately operates with the concept of fault. For example, the concept “fault” is found in the second part of Article 2347 of the Civil Law¹ (CL), which regulates liability for source of increased danger and, thus, strict liability.

1. Systems of Liability Models

The analysis of the idea of strict liability is impossible without examining different models of civil law liability. Examination of each of these models and identification of different principles leads to a better understanding of the strict liability idea.

a) Model of General (Fault-based) Liability

The model of general civil law liability or the model that envisages fault-based liability is included in CL Article 1635 in interconnection with CL Article 1640, which defines the degrees of fault. The content of the aforementioned articles envisages that civil law liability may set in only as a consequence of an act for which a person may be held at fault, whereas negligence or the minimum degree of fault applies, if lack of an honest manager's care can be identified in actions that have led to unlawful infringement upon other person's rights² (theory of the outcome of wrongdoing³). Since the idea of general civil law liability, which includes the principle of fault, is based upon the standard of an honest and careful manager (a reasonable person), accordingly, the model of liability inevitably comprises the idea that liability may set in only for such tort that an honest and careful manager would preclude. This, in turn, means that liability may not set in for unforeseeable tort, since the requirement to foresee and, thus, also to prevent it may not be imposed upon anyone (even an honest and careful manager), and consequently, this person also cannot be held at fault for negligence (fault is absent), which is a mandatory pre-requisite for applying civil law liability. Thus, upon establishing that the tort could not have been foreseen (even if it is causally related), it cannot be concluded that a person's acts did not comply with the standard of an honest and careful manager. This idea, for example, is clearly reflected in the regulation of CL Articles 1773 and 1775, which provide that loss that has occurred due to *force majeure* or

¹ Civillikums. *Valdības Vēstnesis*, 41, 20.02.1937.

² See in more detail about the model of general liability (fault-based liability): *Kārklīņš, J. Vainas, prettiesiskas rīcības un atbildības ideja privāttiesībās. LU žurnāls Juridiskā Zinātne*, No. 8, Rīga, 2015, pp. 169–173.

³ See in more detail about interaction between culpability and wrongdoings and the theory of outcome in *Kārklīņš, J. Vainas, prettiesiskas rīcības un atbildības ideja privāttiesībās. LU žurnāls Juridiskā Zinātne*, No. 8, Rīga, 2015, pp. 169–173.

cas fortuit must not be compensated for. However, these two institutions of law are not the only ones that comprise the idea that “inability to foresee a tort” does not cause liability, as situations that do not qualify as *force majeure* or *cas fortuit* may be possible, and yet the tort was equally unforeseeable and therefore liability does not set in.⁴ “Inability to foresee” and “honest and careful manager” are two inseparable concepts. At this point any reader might have a question – why does unforeseeing of a tort exclude liability? Is it not fair to compensate for any damage caused by a person’s act, which is in causal relationship with the consequences thereof? Why does the legal system protect the one who is unable to foresee rather than the one who has suffered harm? The idea of liability mentioned above is understandable, if the thesis that liability sets in only for an action that is incompatible with the standard of an honest and careful manager is accepted as a dogma. However, there is a deeper question – why is the borderline in applying liability exactly the standard of an honest and careful manager, which simultaneously includes also the seemingly confusing quality “ability to foresee a tort”? Numerous publications dedicated to the concept of an honest and careful manager (reasonable person) are found in legal literature,⁵ and yet almost none can be found that would explain the idea, why the quality of “ability to foresee” is included in this concept.

The idea that “ability to foresee” is a classical prerequisite in applying general civil law liability, can be found also in the commentaries on Principles of European Tort Law: “a person cannot be held liable for a consequence of her behaviour if, notwithstanding all due caution, she was not able to foresee it”.⁶ Likewise, this principle existed in the Roman law – if the damage has occurred and the person has shown the care of *bonus pater familia*, then liability does not set in even if it is established that a particularly shrewd master with good forecasting abilities would have been able to avoid causing the damage.⁷ This approach, sparing of the tortfeasor, as it were, is found in the fundamental theses of philosophy (order of things), which could be characterised, as follows – “any damage that a person suffers from during his life-time, he also assumes himself; no one has the obligation to compensate for anything to anyone else, the nature has not created life without harm and hardship. And only in exceptional cases a person may impose the consequences of damage upon another person”. That is to say, imposing the consequences of damage upon another person is an extraordinary exception to the order of things. This thesis also includes Aristotle’s statement that injustice is understood as voluntary offence, for which liability sets in not only as the consequence of objective activities, but as the consequence of the tortfeasor’s will, allowing that these consequences set in.⁸ Here, the word “allowing” is significant, as it is to be linked with the ability to prevent the consequences; thus, something that could be foreseen and prevented. On the basis of this fundamental thesis, for example, a uniform opinion exists that no one has the obligation to compensate

⁴ See in greater detail: Kārklīņš, J. Vainas, prettiesiskas rīcības un atbildības ideja privāttiesībās. LU žurnāls *Juridiskā Zinātne*, No. 8, Rīga, 2015.

⁵ Miller, A. D., Perry, R. The Reasonable Person. *Law Review*, Vol. 87, No. 2, New York University, 2012, pp. 323–392. Lucas, R. J. The Philosophy of the Reasonable Man. *Philosophical Quarterly*, No. 13(51), 1963, pp. 97–106. Ripstein, A. Reasonableness and Law. Vol. 86. Springer. 2009, pp. 255–281. Grueber, E. The Roman Law of Damage to Property. The Clarendon Press, Oxford, 1886.

⁶ European Group on Tort Law, Principles of European Tort Law, Text and Commentary. Springer, Vienna/New York, 2005, p. 78.

⁷ Grueber, E. The Roman Law of Damage to Property. The Clarendon Press, Oxford, 1886, p. 154.

⁸ Aristotle. *Nicomachean Ethics*. New York: the Bobbs-Merrill Company, Inc., 1962, pp.133–140.

for the damage that has been caused by *force majeure* or *cas fortuit* (unless a person has assumed this risk voluntarily or otherwise). Therefore, the victim himself must suffer the damage caused by a coincidence, *cas fortuit*, for which no person can be blamed, because in the concrete circumstances it has not been objectively foreseeable and preventable. The aforementioned leads to the conclusion that civil law liability is an exception to the natural order of things, and not to the contrary – any person has civil law liability, unless he can prove a justification referred to in the law for not applying liability. On the basis of this particular approach, the idea of legal theory becomes understandable – liability sets in only for a person, who by his *careless actions* or failure to act disrupts the natural order of things. The natural order of things does not comprise the dogma that an average person (which reflects the standard of an honest and careful manager) should be able to foresee unforeseeable torts. Therefore tort, which was objectively unforeseeable, does not create liability, since it was impossible to prevent it. The standard of an honest and careful manager comprises the idea that this person is knowledgeable and experienced, knows all laws and the aim of the legal system – to protect the material and immaterial benefits of persons. Thus, if it is established that a person of this standard, knowing all the laws, was unable to foresee and infringement upon benefits protected by this system, then such unforeseeing is not contrary to the aim of the legal system and therefore does not bring about liability. Undoubtedly, violation of the standard of an honest and careful manager is manifest, as a minimum, in the fact of negligence; however, to establish negligence, it must be determined that a person could have acted with greater care, and, in turn, it is possible to act with greater care only if the consequences of one's actions can be foreseen. It is important to note here that the concept of an honest and careful manager also comprises the idea that one must foresee within a reasonable scope – i.e., not whether theoretically it was possible to foresee a tort, but whether an average reasonable person could foresee and should have foreseen that his action would cause the particular tort. It is impossible to avoid something that a person cannot objectively foresee. If an event is unforeseeable, then a person cannot be accused of negligence, as it is not even known, what from and in what way one should beware. Therefore, in such situations it is impossible to accuse one of negligence (fault), even in the slightest degree. Because of this, *inter alia*, the theory of law does not provide for liability also for a damage that has been caused due to an *cas fortuit*, since an honest and careful manager can neither foresee, nor prevent it, thus, to beware of such consequences.

The foreseeability of tort as a mandatory criterion for applying liability has been consolidated, for example, in the provisions of criminal law. The fourth part of Article 10 of the Criminal Law,⁹ which defines committing a criminal offence due to negligence, provides that “an offence shall not be criminally punishable if the person did not foresee and should not and could not have foreseen the possibility that harmful consequences of his or her act or failure to act would result in”. Although this provision is not applicable in civil law, it should be taken into consideration that relationships of tort law in the Roman law, the concepts of extra-contractual tort and crime initially were not separated and were subject to united commitment – tort

⁹ Kriminālikums. *Latvijas Vēstnesis*, 199/200 (1260/1261), 08.07.1998.

(*delictum*).¹⁰ Consequently, the prerequisites for identifying negligence, consolidated in criminal law, may not be ignored in assessing application of the civil law liability also in the case of tort. Article 4:102 of the Principles of European Tort Law, *inter alia*, points to this, by characterising the standard of a person's behaviour, the foreseeability of the tort (damage) is mentioned as one of the criteria. In this regard, the systems of criminal law and civil law are concerted.

The aforementioned causes, thus, explain the idea that unforeseeable tort does not create liability. Moreover, pursuant to the aim of the civil law regulation it would not be right to establish that liability, nevertheless, sets in for unforeseeable torts, since that would decrease civil turnover. Law has the aim to promote and alleviate interactions between persons, not to set it against the natural order of things. Essentially, the legal concept "honest and careful manager" ensures a perfect balance between persons' freedom and safety. Abiding by this balance, in turn, ensures fairness.

At this point the reader might ask, how to assess precisely, whether a person could and should have foreseen the particular tort? In assessing the setting in of liability in the general model of liability according to the feature of foreseeability, a two-stage test must be performed. First of all, an answer must be found to the question, whether the person could have subjectively foreseen the tort. If the answer is negative, then the second step in the test is conducted, establishing, whether tort had been objectively foreseeable. Subjective inability to foresee tort does not release from liability. If the answer to the first or the second question is positive, then the person has allowed, at least, negligence.

However, even an objective possibility to foresee tort does not always create liability. Instances can be found in case law when liability for the tortfeasor does not set in, even if tort could have been reasonably foreseen. Thus, for example, in the English court case *Bolton v. Stone*, a ball struck by the defendant during a cricket match flew outside the field and hit a passer-by, causing damages to his health. The court rejected the victim's claim for damages, noting that during the last 30 years a cricket ball had flown outside the field only 6 times, thus, although tort was theoretically foreseeable, a probability as low as that precluded from describing this action as negligence.¹¹ This court case is not the only one, where liability does not set in, if the court establishes that the case, as the result of which someone has suffered, is an extraordinary exception from the natural order of things.¹²

Unforeseeing as an element excluding liability is also known in contractual law. Since 2009,¹³ it has even been enshrined in CL Article 1779¹. This Article confirms the idea expressed in this article that the legal system takes into account unforeseeability in determining the possible liability of the tortfeasor. However, foreseeability in contractual law, defined in CL Article 1779¹, should not be mistaken for foreseeability in tort law. Contractual law comprises the idea that in the presence of an infringement, the infringer cannot be required to compensate for the damage that he could not have envisaged at the moment of infringing upon the contract. Thus, in contractual law foreseeability restricts the maximum amount

¹⁰ *Janecek V. Exemplary Damages: A Genuine Concept?* *European Journal of Legal Studies*, Vol. 6, No. 2 (Autumn/Winter 2013/14), pp. 189–206. Available at <http://ssrn.com/abstract=2401622> [last viewed 09.06.2016].

¹¹ *Van Dam*, C. *European Tort Law*, 2nd edition. Oxford: Oxford University Press, 2013, pp. 236–237.

¹² *Ibid.*, p. 237.

¹³ *Grozījumi Civillikumā. Latvijas Vēstnesis*, 94(4080), 17.06.2009.

of damage (liability) that can be demanded from the infringer, whereas in tort law any amount of damage, which is causally related to tort must be compensated for, even if the amount was unforeseeable. Foreseeability in tort law does not apply to foreseeing the amount of damage, but to foreseeing tort. Thus, in contractual law, the unforeseeing only decreases the scope of liability, because the breach of contract and, thus, the fault is already identifiable, but in tort law the unforeseeability of the tort excludes liability as such, because the fault cannot be identified.

The model of the presumption of fault is similar to the model of liability for fault and, in terms of strictness, is located somewhere between the model of general liability and the model of strict liability. This model of liability should be perceived as a separate system of liability and may not be equalled to the model of general liability.

b) Model of Presumption of Fault

Pursuant to this approach, fault is presumed, i.e., it is presumed that a person has acted contrary to the standard of an honest and careful manager, unless he is able to refute this assumption. The plaintiff has to prove only that damage has occurred and that the defendant has a legal connection to this tort. The legislator usually establishes the presumption of fault in those relationships, where information about the infringement and facts related to it are with the infringer or are unclear, and therefore he has been imposed the task of refuting. For example, the presumption of fault is found in CL Article 2363, which provides that “the keeper of a domestic or wild animal shall be liable for losses caused by such animal, unless the keeper can prove that he took all safety measures required by the circumstances, or that the damages would have occurred notwithstanding all of the safety measures [...]” Thus, the law presumes that the keeper is liable, but at the same time grants the keeper the right to refute this presumption by proving absence of fault. Likewise, the presumption of fault is found in CL Article 2352¹⁴: “each person has the right to bring court action for the retraction of information that injures his or her reputation and dignity, if the disseminator of the information does not prove that such information is true.” If the information is true, but the disseminator cannot prove it, the court will presume that the information was incorrect and can grant also a moral damage in favour of person according to the Article 1635 of CL, whereas in the Commercial Law¹⁴ the presumption of fault is found in the third part of Article 169 – a member of the board and the council is not liable for losses, if he proves that he has acted as an honest and careful manager. CL Article 1998 and 2233 are to be mentioned as unclear as to their wording, and regarding their structure they comply with the model of strict liability, because they do not envisage assessment of fault (negligence of the subject himself) as an exception from liability. From the systemic perspective, the regulation included in these articles should, however, be included into the model of the presumption of fault,¹⁵ but the unclear wording of these articles should be explained from the historical aspect,¹⁶ when, indeed, in such cases liability was envisaged without taking into account the aspect of fault.

The model of presumption of fault is a stricter model of liability vis-à-vis the tortfeasor compared to the model of general liability, since the law imposes an obligation upon him to refute this presumption. In fact, the idea of justifying

¹⁴ Komerclikums. *Latvijas Vēstnesis*, 158/160(2069/2071), 04.05.2000.

¹⁵ *Sinaiškis, V.* Latvijas civiltiesību apskats. Lietu tiesības. Saistību tiesības. Rīga. 1996, 150. lpp.

¹⁶ *Čakste, K.* Nejaušība un nepārvarama vara Latvijas Civillikumos. Jurists. 1937, 14.–16. lpp.

oneself (presenting justification) starts functioning in the model of presumption of fault, when a person, who is accused of being liable for consequences, has to refute this accusation. If the person does not refute this assumption, then liability sets in, if other pre-requisites for applying civil law liability are present. Thus, in the case of the model of presumption of fault, the court does not have to establish, whether a fault can be discerned in the actions by the person, but rather, whether the defendant has submitted sufficient evidence proving that no fault can be identified in his actions. This model of liability can cause a situation, where liability is applied to a person, who cannot be held at fault for the tort, but the reason for applying liability is the fact that he is unable to refute the presumption due to lack of evidence. Due to this reason some sources of legal doctrine designate this model of liability as “quasi-strict liability”.¹⁷ Since this model of liability is an exception to the model of general liability, it may be applied only in those private law relationships, where the legislator has directly envisaged it. An arbitrary extension of the model of presumption of fault with respect to various legal relationships would decrease legal certainty¹⁸ and therefore is not allowed.

In the model of presumption of fault, similar to the model of general liability, objective unforeseeing of tort excludes civil law liability. It means, both in the fault-based model of liability and the model of presumption of fault that the tortfeasor has an access to all exceptions from applying liability, *inter alia*, acting in compliance with the standard of an honest and careful manager.

The question, whether presumption of fault does not exist in contractual law, should be examined separately. An opinion has been heard that in the case of breach of contract a fault should be presumed, because the victim cannot prove that the breach of contract has occurred due to negligence or intent. However, the opinion that presumption of fault exists in contractual law is not correct. The breach of contract can be manifested in two ways – as the failure to act, for example, by not repaying the loan, or as an action, for example, by selling a commodity with hidden defects, which has caused damage to the victim. In the first case, indeed, a situation characteristic of the presumption of fault occurs, where the plaintiff must only claim at the court that the loan has not been repaid, which, at the same time, imposes the burden of proof upon the defendant as the debtor. However, in this case, the reversed burden of proof is not linked to the existence of the presumption of fault in contractual law, but to the fact that the plaintiff reproaches the defendant for not performing certain activities. Thus, the plaintiff cannot at all prove a negative fact, which then reverses the burden of proof just as in the case of presumption of fault. If the defendant is unable to prove that he has repaid the loan, the court will satisfy the claim, even if the loan has been repaid, but the defendant is just unable to prove it. However, in the case, when the breach of contract has been manifest as an action, the plaintiff will have to prove the defendant’s fault. In the example of sale of defective goods, the plaintiff will have to prove that such a defect exists, and he will not be able to make do with a bare statement that the goods are defective and therefore the defendant should prove that it is not the case. If the presumption of fault operated in contractual law, then the plaintiff would always have to prove the breach of contract or of law. Finally, the presumption of fault in contractual law cannot be substantiated with any legal provision, since general regulation

¹⁷ European Group on Tort Law, *Principles of European Tort Law, Text and Commentary*. Springer, Vienna/New York, 2005, p. 67.

¹⁸ Compare: *Looschenders, D. Schuldrecht Besonderer Teil*. 11. auflage, München, 2016, S. 541.

establishing the existence of the presumption of fault in contractual or tort law cannot be found in CL.

The opinion that general presumption of fault exists in civil law is rooted in the Soviet law,¹⁹ where such a presumption was established in the first part of Article 229 of the Civil Code of the Latvian SSR (with respect to contractual law) and in Article 465 (with respect to torts). Later, after CL was reinstated, other authors assumed this position uncritically,²⁰ although as to the content, no articles similar to Article 229 or 465 of the Civil Code of the Latvian SSR can be found in CL. Moreover, the assumption of fault as a general provision in civil law does not exist in any country of the Romano-Germanic system of law, including Latvia. Likewise, nothing can be found about the presumption of fault as peculiarity of the civil law liability in the pre-war legal literature or case law. Quite to the contrary, for example, K. Čakste has noted that in accordance with general principles – “*onus probacionis incumbit actori*, and therefore pursuant to our Civil Law the plaintiff must prove the grounds of the claim and, consequently, also the fault”.²¹ Thus, the statements that general presumption of fault is enshrined in CL are unfounded.

c) Strict Liability Model

In contrast to the models of fault and the presumption thereof, unforeseeing a tort cannot be an exception to liability within the idea of strict liability. This, undoubtedly, is linked to the fact that within this model, the fault is assessed as a legal category and, consequently, the aim of this model is to expand the possibility of applying civil law liability to persons, who in accordance with the model of general liability would not be considered being at fault.

The approach of strict liability is based upon the idea that a person is liable for tort, irrespectively of whether the person has allowed any lack of care, thus – negligence or intent. This means that pursuant to the idea of strict liability, the person will be responsible for consequences also if he in his actions have ensured appropriate care and his actions fully comply with the standard of an honest and careful manager. To put it differently, this liability arises irrespectively of the person's conduct, since it is not analysed (it is not the required pre-requisite for applying liability). The fault is rarely designated by synonyms “lack of care”, “negligence”, “intent”, and since these legal institutions are not analysed in the context of strict liability (contrary to the model of general liability), this is the reason why this model of liability is called non-fault liability or strict liability. In legal literature, this model of liability is frequently also called objective liability or liability for risk.

Historically, the idea of strict liability appeared relatively recently, only in the 19th century. Its origins are linked to industrialisation of society, which demanded searching for new models of liability for effective protection of civil rights. Professor V. Sinaiskis, examining this peculiar model of liability, wrote that this approach was similar to “a system of grammar, in which over time more and more exceptions from the general rules appear, i.e., the language has developed in two directions – grammar and syntax – and therefore grammatical exceptions are nothing else

¹⁹ Vēbers, J. (red.). Latvijas PSR Civilt kodeksa komentāri. P. Stučkas Latvijas Valsts Universitātes profesora juridisko zinātņu doktora J. Vēbera vispārīgā redakcijā. Liesma, Rīga, 1979, 306. un 597. lpp.; Vēbers, J., Torgāns, K., Šulcs, V. Padomu tiesības. II. daļa. Saistību tiesības. Zvaigzne, Rīga, 1986, 71. lpp.

²⁰ Bitāns, A. Civiltiesiskā atbildība un tās veidi. Izdevniecība AGB. Rīga, 1998, 72. lpp.

²¹ Čakste, K. Motorizēto satiksmes līdzekļu īpašnieka atbildības problēma Latvijā un ārzemju civiltiesībās. 1939. gads. Čakste, K. Civiltiesības. Lekcijas. Raksti. Zvaigzne ABC, Rīga, 2011, 336. lpp.

than crystallisation of the language, which reflects the traces of many-sided development”.²² Similarly, one might say that strict liability as an exception to the general liability model is crystallisation of the legal system, characterising its many-sided development.

Examination of the pre-war period in Latvia reveals that strict liability did not exist in the general civil law, although it was discussed, for instance, in publications by Professors K. Čakste and V. Sinaiskis.²³ For a short period, this liability was established for drivers of vehicles²⁴ (1923–1931). Admittedly, to a certain extent approximation to application of strict liability occurred, envisaging presumption of fault in some specific laws,²⁵ however, strict liability was not introduced systematically. It is well-known that strict liability was introduced into the Civil Law in 1993, when the Civil Law was reinstated.²⁶

The term “strict” is found in the model of strict liability because this liability model is very strict towards the tortfeasor and rather favourable towards the victim, since the tortfeasor’s fault is not the criterion to be analysed, and, thus, to be proven.

The aim behind the idea of strict liability is to ensure a fair balancing of interests. On the one hand, a person is interested in gaining benefit by acting under conditions of increased risk, and, on the other hand, impossibility of total control over this risk increases the possibility of inflicting damage upon someone. A preference is given to compensating for the damage, although from the tortfeasor’s perspective, he sometimes may not be accused of negligence.

Due to the fair balancing of interests unforeseeing of tort does not release a person from the liability in the model of strict liability, since the fields, where this liability model is applied, *per se* disrupt the natural order of things, as noted in the article above. In this field, the risks have been created and, moreover, are managed by a person with the aim of benefitting, and therefore he should be also liable for those consequences that are not foreseeable. In other words, a person may justify himself with a statement that he was unable to foresee tort, if the very field, where the strict liability is applied, is of the kind where tort as such is a foreseeable phenomenon. This person, of course, often is unable to foresee the particular tort, which has occurred; however, tort as such is foreseeable as a phenomenon with a sufficiently high probability.

Each system uses the idea of strict liability with different intensity, for example, in England this liability model is narrowly applied, whereas in France the model is quite extensively used, *inter alia*, court rulings can be found to state that parents carry a strict liability for tort committed by their children,²⁷ although such approach

²² *Sinaiskis, V.* Tiesību pārkāpuma ideja senatnes un tagadnes civiltiesiskā sabiedrībā. *Jurists*, 1928., 144.–150. lpp. Note: V. Sinaiskis in his article, though, does not uphold the idea that strict liability is crystallisation of the model of liability, because he considers this model to be essentially wrong.

²³ *Čakste, K.* Motorizēto satiksmes līdzekļu īpašnieka atbildības problēma Latvijas un ārzemju civiltiesībā. 1939. gads. *Čakste K. Civiltiesības. Lekcijas. Raksti. Zvaigzne ABC, Rīga, 2011, 334.–335. lpp.*; *Sinaiskis, V.* Tiesību pārkāpuma ideja senatnes un tagadnes civiltiesiskā sabiedrībā. *Jurists*, 1928., 144.–150. lpp.

²⁴ *Čakste, K.* Motorizēto satiksmes līdzekļu īpašnieka atbildības problēma Latvijas un ārzemju civiltiesībā. 1939. gads. *Čakste, K. Civiltiesības. Lekcijas. Raksti. Zvaigzne ABC, Rīga, 2011, 334.–335. lpp.*

²⁵ See, for example, Article 97 of Railway Law of 1 September 1927.

²⁶ Likums “Par atjaunotā Latvijas Republikas 1937. gada Civillikuma saistību tiesību daļas spēkā stāšanās laiku un piemērošanas kārtību”. *Ziņotājs*, 1, 14.01.1993.

²⁷ European Group on Tort Law, *Principles of European Tort Law, Text and Commentary*. Springer, Vienna/New York, 2005, pp.103–104.

is criticised.²⁸ Considering that the model of strict liability is an exception from the concept of general liability, in some countries, the maximum limits of liability have been defined, up to which liability can be applied on the basis of the strict liability model. If the victim wishes to claim a larger compensation, he has a right to receive it only from the person who is genuinely at fault, i.e., by proving the tortfeasor's fault.²⁹ In any case, it is a matter of legislator's discretion to choose the field, where it wishes to apply this model of strict liability, or to limit the liability.

d) Model of Absolute Liability

The fourth model of liability, apart from the models of liability referred to above, exists in theory – the absolute liability. Pursuant to this approach, a person is liable for tort and has no right to use any justification, *inter alia*, *force majeure*. This model of liability as an independent basis of legal relationships does not exist in any legal system; however, theory allows it. In practice, the field of nuclear energy has been approximated to the model of absolute liability to a maximum extent. The first paragraph of Article IV of the 1963 Vienna Convention on Civil Liability for Nuclear Damage³⁰ provides that “the liability of the operator for nuclear damage under this Convention shall be absolute”. And yet, the remaining part of the Article lists those cases, when the liability of the operator of a nuclear facility is excluded. The following are noted as exceptions to liability – an act of armed conflict, hostilities, civil war or insurrection. Thus, there are no grounds to include the field of nuclear energy into the model of absolute liability. However, this model should be regarded as a specific model of strict liability. Para 2 of Article IV of the Convention also points to this, by providing that

“if the operator proves that the nuclear damage resulted wholly or partly either from the gross negligence of the person suffering the damage or from an act or omission of such person done with intent to cause damage, the competent court may, if its law so provides, relieve the operator wholly or partly from his obligation to pay compensation in respect of the damage suffered by such person”.

Obviously, those exceptions that serve as justification in the model of strict liability in the case of a source of increased danger may be applied also in the field of nuclear energy; however, the court is not obliged to do so, whereas *force majeure* as an exception from liability is not recognised. Thus, the operator's liability in the field of nuclear energy complies with the model of “quasi-absolute” liability, but cannot be recognised as being a pure model of absolute liability.

A similar regulation of “quasi-absolute” liability is found in the Principles of European Tort Law (PETL³¹), Article 7:102, providing that a strict liability may be excluded or reduced, if the injury was caused by *force majeure*. Thus, PETL regulation on strict liability approximates the regulation of absolute liability, if it does not automatically define *force majeure* as a justification for excluding liability.

²⁸ Principles, Definitions and Model Rules of European Private Law. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, p. 3303.

²⁹ Van Dam, C. European Tort Law, 2nd edition. Oxford: Oxford University Press. 2013, p. 90.

³⁰ Vienna Convention on Civil Liability for Nuclear Damage. Available at <https://www.iaea.org/sites/default/files/infirc500.pdf> [last viewed 03.11.2016].

³¹ Principles of European Tort Law. Available at <http://www.egtl.org/> [last viewed 26.02.2016].

In Latvian civil law, the model of absolute liability may be discerned in Article 1349 of the Civil Law, which provides that “if, during such use as is not in accordance with an agreement, a pledged property becomes damaged or destroyed, the pledgee is also liable for the losses caused in cases, where they are caused by *cas fortuit* or as a result of force majeure.” V. Sinaiskis has also pointed out that this Article provides for absolute liability.³² Although this provision does not give the right to refer to an unforeseeable event, which habitually in an exception to liability, this provision does not exclude the right to refer to cases mentioned in CL Article 1636, for example, a justified self-defence against the pledgee, as the result of which the pledged property is damaged. Thus, the liability model established by the aforementioned legal provision should be included in the model of “quasi-absolute” liability rather than that of absolute liability.

e) Differences Between Models of Liability

The comparison of all four models of liability leads to the conclusion that absence of negligence (thus, including inability to foresee tort) is a condition that prohibits applying civil law liability in the model of fault and presumption of fault, whereas the absence of negligence is not an obstacle to applying liability in the models of strict and absolute liability.

By summing up the findings of this section, in legal theory civil law liability on the basis of *fault* is to be reflected in 4 models:

- 1) **Model of fault** – CL Article 1635, a pre-requisite for satisfying the claim is the defendant’s negligence or intent that has been proven by the plaintiff. In some cases referred to in law, gross negligence must be established;
- 2) **Model of presumption of fault** – a pre-requisite for refusing the claim is the proof of absence of defendant’s fault (intent or negligence);
- 3) **Model of strict liability** – a pre-requisite for rejecting the claim is the presence of justifications proven by the defendant and precisely indicated in law;
- 4) **Model of absolute liability** – no pre-requisites justifying rejection of the claim exist, the defendant’s legal connection to the damage must be established.

In addition, the plaintiff must prove all the other pre-requisites for applying liability under civil law.

The legislator establishes the aforementioned models of liability depending upon the degree of the potential risk to cause damage. The greater the risk of causing damage, the stricter the model of liability that is applied (the fewer justifications a person may use). Application of the four models of liability referred to above depending upon the degree of risk to cause damage, is reflected in the following table:

Degree of risk of causing damage	Model of liability
Low degree of risk	Model of fault
Average degree of risk	Model of presumption of fault
High degree of risk	Model of strict liability
Extremely high degree of risk	Model of absolute liability

³² Sinaiskis, V. Latvijas civiltiesību apskats. Lietu tiesības. Saistību tiesības, Rīga, 1996, 95. lpp.

2. Identifying Regulation on Strict Liability

Usually, legal systems do not have a special law enumerating all those fields, where civil law liability should be applied in accordance with the model of strict liability. However, following certain criteria, it is possible to identify those fields of life, where the legislator has wished to establish stricter regulation upon the liability in private law relationships.

To establish, when the model of strict liability should be applied to a person, the two following features must be cumulatively identified:

- 1) special subject of law is indicated in the legal provision, for example, *possessor* of a source of increased danger, *producer* or *seller* of goods to consumers, *carrier* in the field of environmental law, etc., as well as
- 2) legal provision imperatively finds that this special subject of law is liable, unless concrete exceptions can be established, which have been precisely defined in law.

With respect to the first feature, it should be taken into account that the fact that the special subject has been indicated in the legal provision *per se* does not give grounds for concluding that the legislator has established the model of strict liability in the particular legal relationship. CL comprises a number of articles that regulate civil law liability and refer to the circle of special subjects; however, there are no grounds for stating that these articles also comprise the idea of strict liability. Such are, for example, Article 1639 (parents' liability for damage caused by their children), Article 1782 (employers' liability for damage caused by their employees, which is sometimes denoted by the concept "vicarious liability"), etc. These articles cannot be included in the regulation on strict liability, since the absence of negligence as one of the conditions excluding liability does not follow from them, or, to put it differently, fault is a criterion to be analysed for applying liability.

Apart from the aforementioned articles, other articles can be found in CL that might create a misleading impression that CL establishes a strict liability. An example of this is CL Article 2158, which provides that "a lessee shall maintain the leased farm in a condition suitable for use [...]", or CL Article 1084, which provides that "every owner of a structure shall maintain their structure in such condition that no harm can result from it". The two aspects point to the fact that these articles do not comprise a strict liability regulation. Firstly, although the articles comprise a specific subject of law, they do not refer to specific circumstances that exclude liability, which means that all arguments for excluding fault can be used, including *cas fortuit*, absence of negligence, etc. Secondly, a provision on strict liability must always grant to the victim the subjective right of claim against the special subject or should envisage obligation to compensate for the damage. Therefore, provisions of strict liability will always indicate, which special subject of law "is liable", or who "has the obligation to compensate for the damage". CL Article 2347 serves as example here, as it establishes an obligation to compensate for the damage addressed at a concrete subject.

With respect to the second feature, it must be noted that these concrete exceptions, referred to in law, are always exhaustively listed (the enumeration principle), and they never comprise such justification for not applying liability as the absence of fault (absence of negligence). At the same time, it must be admitted that a uniform catalogue of justifications that exclude strict liability does not exist. The legislator may envisage different justifications in each kind of legal relationships.

3. Exceptions to Applying Strict Liability

A case of *force majeure* is to be mentioned as a typical circumstance that excludes strict liability. This justification is encountered in all types of legal relationships, where the legislator has envisaged the model of strict liability and is typical of all legal systems. However, it cannot be excluded that the legislator has envisaged this circumstance as optional, leaving it in the discretion of the court, similarly to PETL.

Other circumstances that exclude liability in the case of strict liability model depend upon the field of legal relationship. Examination of various legal acts in Latvia that comprise the model of strict liability, allow identifying in addition to *force majeure* other circumstances that exclude liability. For example, in case of source of increased danger, gross negligence or intent of the victim will be an exception, as well as the object leaving possession due to illegal activities of a third person. In the field of environmental law – armed conflict, hostilities, civil war, insurrections., while in the sphere of maritime traffic – actions by a third person, if conducted with the aim of inflicting losses; the fault of the institution that is responsible for the maintenance of technical means of navigation. On the other hand, in the field of *consumers' rights* – a person has not put goods in circulation; the defect of goods has arisen after they have been put into circulation; goods were not produced with the aim to be put in circulation, or another type of distribution to gain profit, and were not produced or distributed in the framework of commercial activities, the level of scientific and technical development at the time, when goods were put in circulation, was not sufficiently high to allow detecting its defect or deficiency; the deficiency of goods arose because the producer abided by the requirements set by the state or municipality.

As these exceptions show, a part of them can be attributed also to *cas fortuit* (CL Article 1774) or an event that has occurred as an outcome of unforeseeable and unavoidable events, for example, “armed conflict” in the field of environmental law or “actions by a third person” in the sphere of maritime traffic. However, in the area of consumers' rights, for example, in case of liability for deficiencies in goods or service, “actions by a third person” is not an exemption from strict liability – “a manufacturer or a provider of services shall be held liable also for the loss that has resulted [...] from some action of a third person”³³ (this, however, does not mean that the seller of goods would be responsible for a wallet stolen from the customer at the store, because the seller's strict liability applies only to deficiencies of goods or services provided). As shown by the regulations of legal provisions on strict liability examined above, *cas fortuit* as an exception from strict liability is not an absolute exception, i.e., the legal system may recognise a regulation that envisages strict liability, irrespective of the fact that the damage has been caused by a fortuitous event (*cas fortuit*). However, at the same time, the legal system may comprise a regulation, pursuant to which a fortuitous event is to be considered as an exception to strict liability. Defining *cas fortuit* as an exception to strict liability is the legislator's free choice.

In assessing CL regulation on strict liability that is included in the second part of CL Article 2347, a fortuitous event as an exception to liability cannot be found there, because the article includes the concept of “*force majeure*”, which is

³³ Likuma “Par atbildību par precēs un pakalpojuma trūkumiem” 8. panta pirmā daļa. *Latvijas Vēstnesis*, 250/251(2161/2162), 05.07.2000.

a narrower concept compared to a fortuitous event. However, it should be noted that using the concept “*force majeure*” in the text of the article does not mean that the concept does not comprise also *cas fortuit*. A number of articles in the Civil Law indicate that the concept “*force majeure*” in the Civil Law should sometimes be read more broadly, covering also *cas fortuit*, these articles grammatically comprise the narrower term “*force majeure*”, but in the legal doctrine and practice this term has been construed more extensively, i.e., including also *cas fortuit* as an exception to civil law liability. Thus, for example, the situation described CL Article 2220, where a thing provided to the contractor is destroyed, lost, or damaged due to *force majeure*, should be designated as “the risk of accidental perishing of a thing”, thus including the concept of “*cas fortuit*” or “a fortuitous event” in the concept of “*force majeure*”.³⁴ The same conclusion has been made by K. Erdman:³⁵ “an entrepreneur is released from liability not only by force majeure, but also by any fortuitous event” and V. Bukovskis: “a fire as an exception to an entrepreneur’s liability exists, if the fire could have been neither foreseen, nor prevented, by making reasonable human effort.”³⁶ The author of this article and Prof. K. Torgāns have already noted previously, – “the issue whether also *cas fortuit*, a chance obstacle, a fortuitous event may serve as a justification in strict liability similarly to force majeure remains to be disputed” (CL Article 1774).³⁷ To provide an answer to this question, it should be noted that looking at it from the perspective of historical origins of CL Article 2347, there are no grounds to assert that the article contains regulation providing that also a fortuitous event is an exception to strict liability. However, on the other hand, it cannot be maintained that over time the case law is not going to attribute the concept of *force majeure* also to a *cas fortuit*. Two aspects prove that move towards such an understanding could happen. Firstly, in many legal systems a fortuitous event is an exception to strict liability, this exception is recognised also by the Draft Common Frame of Reference³⁸ (VI – Article. 5:302) and the Principles of European Tort Law (Article 7:102). Secondly, already now Latvian case law anticipates the approach taken by the Supreme Court, i.e., for example, that unlawful actions by third persons (thus – a fortuitous event) could exclude strict liability. The Department of Civil Cases of the Supreme Court ruled in case No. SKC-250/2015 that the owner of a passenger bus (a vehicle) was not responsible for the damage inflicted upon passengers, which occurred because the driver had to brake rapidly due to a unlawful manoeuvre of an unidentified third person – another driver, as a result of which a passenger fell in the bus and was injured.

And yet, notwithstanding these erroneous conclusions, the general understanding that only *force majeure* or the actions by the victim himself are exceptions to strict liability is, possibly, changing and approximates the understanding observed in other countries. Thus, it cannot be excluded that over time through case

³⁴ Latvijas Republikas Civillikuma Komentāri: Ceturtā daļa. Saistību tiesības. Autoru kolektīvs prof. Torgāna vispārējā zinātniskā redakcijā. Rīga: Mans īpašums, 2000, 529. lpp.

³⁵ Jerdman, K. Objazatel'stvennoe Pravo Gubernij Pribaltijskih". [B.v]: Izdanie pochetnogo mirovogo sud'i F. Je. Kamkina, 1908, c. 473.

³⁶ Bukovskij V. (Sost.) Svod' grazhdanskih" uzakonenij gubernij Pribaltijskih" (s" prodolzheniem" 1912-1914 g.g. i s" raz"jasnenijami) v" 2 tomah". T. II., soderzhashhij Pravo trebovanij. Rīga: G. Gempel' i Ko, 1914.

³⁷ Torgāns, K., Kārklīšs, J. Civiltiesiskās atbildības modeļi pēc vainojamības pazīmes. Rīga, *Jurista Vārds*, Nr. 35(887), 2015.

³⁸ Draft Common Frame of Reference. Available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf [last viewed 26.02.2016].

law the concept included in the second part of CL Article 2347 *force majeure* will be interpreted more broadly, including in it also *cas fortuit*. This path was chosen by Germany, which in its case law developed the approach that the exception to strict liability included in the law – *force majeure* (in German, *höhere Gewalt*) – should be understood in a broader sense, including also *cas fortuit*,³⁹ including actions by third parties.⁴⁰

And yet, if *cas fortuit* is envisaged as an exception to strict liability, this might lead to a question – what is the difference between the model of general liability, where *cas fortuit* is a circumstance that excludes liability, and strict liability? Are these models of liability not made as radically equal that separation thereof is no longer substantiated? The answer is negative. In the model of general liability, the exception from liability is granted by the absence of negligence, which never is and could not be justified in a model of strict liability. However, it must be taken into account that separation of both models might cause certain difficulties, as the exception to strict liability is a *cas fortuit*, which manifested itself as a third person's action, but which, possibly, could have been prevented by paying more attention to it. Thus, in assessing *cas fortuit*, it may be necessary to consider a person's conduct, which is seemingly contradictory to the understanding of the model of strict liability. However, the opinion that within the model of strict liability the actions (conduct) of a person are never assessed, but it is sufficient to establish a causally inflicted damage and the liable person defined by law is wrong. Although the second part of CL Article 2347 envisages only certain cases as exceptions to strict liability, the case law of other countries also establishes the absence of general delictual capacity as an exception to applying liability. These are the cases, where tort has been committed by a person with the capacity to act, and who has committed it while unconscious or being unable to understand the meaning of his actions, or being unable to control his actions (second part of CL Article 1637). In the English court, the case *Waugh v. James K. Allan* was heard, where a driver experienced a heart attack, due to which he was unable to drive the vehicle and inflicted damage upon third persons. The court did not recognise the driver's liability.⁴¹ Here it must be noted that the Anglo-Saxon legal system is rather dismissive towards applying the model of strict liability, thus, this finding cannot be automatically attributed to the Romano-German legal system. However, it cannot be ignored that also in Latvia, in addition to the exceptions referred to in the second part of CL Article 2347, there are general cases of delictual incapacity – a child below the age of 7, persons with mental or other health disorders, due to which they have been unable to understand the meaning of their actions and to control them (CL Article 1637), etc. Therefore, it would be premature to maintain that the findings made in the English court case *Waugh v. James K. Allan* are incompatible with the Latvian legal system.

As regards *cas fortuit* as an exception to liability, it must also be noted that from the perspective of the party applying a legal provision it is sometimes difficult to differentiate between *cas fortuit* as a justification for applying strong liability and *cas fortuit* that creates no causation (at all) and, thus, cannot be even examined

³⁹ Hentschel, P., König, P., Dauer, P. *Straßenverkehrsrecht*. 42., neu bearbeitete Auflage, C.H.Beck, 2013, S. 32

⁴⁰ BGHZ 62, 351, 354, 109, 8 14 f, NJW 86, 2319.

⁴¹ *Van Dam*, C. *European Tort Law*, 2nd edition. Oxford: Oxford University Press. 2013, p. 276.

as justification. Legal literature⁴² notes that absence of causation cannot be called “justification” that would exclude liability. The absence of it simultaneously is an absence of pre-requisite for liability, but not a justification for excluding liability. Justification should also be presented in cases, where adequate causal consequences have set in, but liability is excluded by justifications for the action presented by the tortfeasor. Looking for justifications is a part of pre-requisites for an unlawful action and cannot move outside it. This will be examined in greater detail in Section 5, which is dedicated to issues of causation in the model of strict liability.

4. Role of Fault in Model of Strict Liability

The opinion that strict liability is a non-fault liability is widespread, i.e., the fault is not analysed, it has no significance in applying strict liability. This opinion is only partially founded, since there are, nevertheless, cases, when a person’s conduct is analysed and, thus, – whether a person could not have acted differently, with greater care and prevented damage (aspect of fault). One of such instances is the case of *force majeure*, referred to in the second part of CL Article 2347. According to the theory of law, a person may refer to *force majeure* only if he was unable to foresee, prevent or overcome it. In evaluating, whether the particular person has a right to refer to *force majeure* as an exception to strict liability, a formal assessment of the subjective side of this person is needed, comparing it to the standard of an honest and careful manager, i.e., whether a person could have foreseen, prevented or overcome this obstacle. This analysis is based upon examination of this person’s conduct and is closely linked to the concept of negligence. If the person could be held at fault for not foreseeing *force majeure* because of the negligence he has allowed, then the person will not have a right to refer to *force majeure* as a justification against strict liability. Thus, it is obvious that sometimes application of strict liability is firmly linked to the concept of fault.

Likewise, the concept of fault is of decisive importance in connection with the second sentence in the second part of CL Article 2347, which provides – “*if a source of increased risk has gone out of the possession of an owner, holder or user, through no fault of theirs, but as a result of unlawful actions of another person, such other person shall be liable for the losses caused*”. This provision comprises the possibility to free oneself from strict liability by proving that the source of increased danger has gone out of the possession without the holder’s fault. In assessing fault in this case, such concepts as “an honest and careful manager”, “showing reasonable care”, “negligence” should be used, which are classical concepts that fall within the concept of “liability for fault”. The court would always assess, whether the holder’s carelessness (negligence) plays no part in losing possession. For example, in case of leaving the car with its door open and engine running, as a result of which a third person steals it and causes damage to other persons, the owner of the car, probably, would not free himself from strict liability solely by stating that his fault in losing the possession cannot be discerned. In such a situation, the court, inevitably, would have to assess the holder’s fault and depending upon its presence or absence strict liability would be or would not be applied. If the absence of fault for losing control over a source of increased danger is proven, then strict liability will not set in.

⁴² Torgāns, K., Kārklīņš, J. Civiltiesiskās atbildības modeļi pēc vainojamības pazīmes. Rīga, *Jurista Vārds*, Nr. 35(887), 2015.

The justification of a producer against applying strict liability included in Article 13 of the law “On Liability for Defective Goods and Deficient Services” – “*the producer has not put the goods in circulation*” – is closely linked to analysis of the producer’s behaviour. The producer will not be held liable, if goods were put into circulation by a third person, which had unlawfully stolen goods from the producer’s warehouse. However, to apply this justification, it should be assessed, whether the producer took all the necessary safety measures to prevent goods from entering the market. In certain circumstances, it could be concluded that the producer did not comply with the criterion of an honest and careful manager (for example, did not lock the warehouse), and therefore it should be recognised that goods entered the market due to the producer’s fault. Thus, application of strict liability will be based upon the finding that blameworthy actions (lack of care, negligence) can be discerned in the producer’s activities, not granting the producer the right to refer to an exception to liability that he had not put the goods in circulation. Likewise, the exception “*the producer has not put the goods into circulation*” may be subject to an assessment of the producer’s fault, if goods had been put into circulation by the producer’s employee without the employer’s permission, because goods were still in development stage. Pursuant to CL Article 1782 the producer will not be liable for the employee’s actions, if he is able to prove that his fault in selecting the employee cannot be found (*culpa in eligendo*). By proving an absence of fault in selecting the employee, strict liability cannot be applied, as it cannot be concluded that goods had been put into circulation by the producer.

Likewise, it would be wrong to state that fault does not play any role in a case of strict liability. In a case of strict liability, it might be possible that identification of fault is required and it carries legal “weight” within the issue of establishing liability. A case like this is, for example, when a person uses a source of increased danger, being aware that it comprises an abnormally increased risk of inflicting damage, for example, using a car with defective brakes or inappropriate tyres, etc. The role of fault here appears in case, if the source of increased danger has caused damage due to the victim’s own gross negligence. On the one hand, the victim’s gross negligence excludes strict liability, but, on the other hand, in using the source of increased danger the user also would have been grossly negligent. In such a case, there would be grounds to assess liability in accordance with the model of general liability, because strict liability could not be applied due to the victim’s own gross negligence. In certain cases, when damage has been caused to another person, there are grounds to analyse where solidary or several liability sets in *vis-à-vis* another victim. The European principles of tort law in such a case envisage a solidary liability of both persons who are at fault.⁴³

In those legal systems, where *cas fortuit* is an exception to strict liability, it is not sufficient to establish the fact that the cause of damage is a third person’s action in order for liability not to set in. It is always also examined, whether this action by a third person is an essential (self-sufficient) cause of the damage, compared to the risk caused by a source of increased danger. In this case, establishment of liability will be based upon analysis of causation, therefore, causation as a pre-requisite for applying strict liability is no less important aspect within the idea of strict liability.

⁴³ European Group on Tort Law, Principles of European Tort Law, Text and Commentary. Springer, Vienna/New York, 2005, p. 129.

5. Role of Causation in Model of Strict Liability

Causation is an important pre-requisite, which may be an exception to strict liability because causation as a mandatory pre-requisite for applying strict liability is absent. In the model of general liability, causation between the subject's action to be held at fault (unlawful) and the damage is assessed, whereas in the model of strict liability – between the field of responsibility of the special subject and the damage inflicted. Thus, in the model of strict liability establishment of unlawful action by the special subject of law from the perspective of culpability is not necessary. For example, selling goods to a consumer *per se* is a legal activity, whereas liability of the seller will set in, if it is discovered that goods have a production defect, which the seller did not know about and objectively could not have known (fault is absent) and that has caused damage to the consumer.

It is not always easy to establish causation, since quite often in the model of strict liability (but not solely) the cause of the damage can arise as a result of a number of events, among which it is difficult to discern the real cause.

Distancing of causation is one of the exceptions to application of liability both in the case of strict and of general liability. Undoubtedly, in all the models of liability, the theory of *conditio sine qua non* is applicable, in the framework of which “theory of adequate causation” has evolved. This theory envisages that a circumstance or an act is a cause of the damage only if it objectively is able to cause the resulting damage itself and only when the action in connection with the damages caused can be characterised as “normal subsequent consequences” (adequate consequences). This view is supported also by the pre-war and contemporary legal science.⁴⁴ The fact that causation includes only adequate, habitually expected and foreseeable consequences is determined also by PETL Article 3:201. PETL commentaries to this article refer to a case, where a person with his car crashes into a taxi carrying 3 best industry managers of the world, each of them earning 25 million dollars annually. Because of the accident, these persons lose their capacity to work. As the authors of the commentaries have noted, these consequences do not comply with the habitually expected consequences of a car accident.⁴⁵ Hence, although the actual causation can be established, the legal causation is absent. A similar case is mentioned as an example in the summary of European Tort Law in the book “Digest of European Tort Law” – a person, driving a car on the road, exceeds the allowed speed limit, after a while a drunken person appears in the middle of the road and stumbles, a collision occurs and damage is inflicted upon the pedestrian. Investigation establishes that even if the driver had been complying with the speed limit, he would have been unable to avoid the collision.⁴⁶ It can also be concluded that, had the driver moved at a slower speed, the collision would not have occurred, because the pedestrian would have stumbled before the car had reached him. Scholars of law note that in this particular case it can be established that the actual cause of the damage is exceeding the speed limit; however, exceeding of the speed limit cannot be considered as being the legal cause of the damage, since in these particular circumstances it was impossible to avoid the collision, and the main cause

⁴⁴ Čakste, K. Civiltiesības. Lekcijas. Raksti. Rīga: Zvaigzne ABC, 2011, 196. lpp.; Torgāns, K., Kārklīšs, J. Civiltiesiskās atbildības modeļi pēc vainojamības pazīmes. Rīga, *Jurista Vārds*, Nr. 35(887), 2015.

⁴⁵ European Group on Tort Law, Principles of European Tort Law, Text and Commentary. Springer, Vienna/New York, 2005, p. 62.

⁴⁶ Winiger, B., Koziol, H., Koch, B. A., Zimmermann, R. (eds.). Digest of European Tort Law. Vol. I. Essential Cases on Natural Causation. EST/ELT. Springer, Wien, New York, 2007, pp. 96–97.

of the damage had been the victim's presence on the road and stumbling in front of a car in motion. Thus, adequate consequences to exceeding the legal speed limit while driving do not include a drunken man suddenly stumbling in front of the car. Therefore, the legal causation and, hence, liability, are absent. These examples, where a person linked to the damage has committed an unlawful activity, are most difficult to assess from the perspective of causation, since it seems clear to everyone that unlawful actions create liability and that causation can be identified automatically. Precise identification of legal causation is an intellectually complex process and, occasionally, parties applying legal provisions mistake it for actual causation, without separating legal causation.

The criteria consolidated in the theory of causation must be applied in all models of liability, where a person's liability for the inflicted damage is assessed. In the model of general liability a person will not be liable for damage that was in adequate causal connection with the tort, but this tort could not be foreseen and he was not required to foresee it. However, in the case of strict liability, liability for the special subject of law will set in for all causally *adequate* consequences, irrespectively of the fact, whether he could or could not foresee these consequences as an honest and careful manager. For example, an operator of children's merry-go-round has just received from the factory a new merry-go-round, which as to its operations is classified as a source of increased danger, since it is run by internal combustion engine. However, already on the first day of its operation the engine explodes due to an internal defect, injuring clients. Although the operator could not have foreseen a defect like this, nevertheless, in view of the idea of strict liability, operator's liability will set it. Moreover, the consequences that set in are adequate, i.e., when an engine of a merry-go-round explodes, usually injuries are caused. The next example, in turn, characterises a case, where liability does not set in due to inadequacy of consequences. The seller sells unsafe goods, as a result of which a consumer suffers hand injury. While he is on his way to an out-patient clinic to have the injury treated, unknown persons inflict bodily harm upon the victim and rob him. On the one hand, it could be asserted that the seller should be liable for these consequences, because from the perspective of actual causation –had he not sold the defective goods, further consequences, i.e., robbery, would not have arisen, since the victim would not have needed to go to the out-patient clinic. However, in this case, strict liability is not applied to the seller, since causation is missing. The robbery is not an adequate consequence of selling unsafe goods. Here chronological sequence of events, but not legal causation, can be identified.

Likewise, with respect to a source of increased danger it is not enough only to identify an actual link between the source of increased danger and damage to establish the existence of causation. To apply strict liability for the damage caused by such a source, it must be established that it was exactly the use of this source that led to the respective tort and that control over this source fell within the person's "sphere of responsibility". For example, car B crashes from behind into car A, which has stopped at the pedestrian crossing, and car A, in turn, is pushed upon a pedestrian. Although the damage has been caused by the impact of a source of increased danger⁴⁷ (car A), A's liability will not set in, since the cause, why car A

⁴⁷ In the current article, the author does not deliberate as to whether cars still are to be considered as sources of increased danger, because, regardless of the conclusion, the use of a car is subject to strict liability regulation.

ran over the pedestrian were B's actions.⁴⁸ Stopping before a pedestrian crossing was not the cause of the damage, and it is not sufficient to establish that car A was involved in an accident to apply liability to its driver. In this case, the reason for not applying strict liability to A would not be exceptions defined in the second part of CL Article 2347 (since such do not exist), but the absence of causation. In cases like that, strict liability sets in only if there is a causal link between using the source and the tort caused. In other words, strict liability will set in only if the source of increased danger causes damage in connection with the risk that it creates in habitual circumstances. If a third person lifts by a crane a car owned by another person and throws it upon another, then the strict liability of the car owner will not set it, since such unusual risk of damage occurring does not fall within the habitual use of the car. An example that characterizes this understanding can be found in the common model – an explosive placed by a terrorist in a bus will not create strict liability of the bus owner, since this accident does not pertain to the risk, for which law envisage strict liability in connection with having in possession a source of increased danger.⁴⁹

The same approach is found also in PETL regulation (Art. 5: 101), which points out that strict liability sets in only if the damage characteristic to the risk presented by the activity of the object of increased danger occurs, not for the setting in of any possible risks that are typical of all objects. For example, if a box with dynamite falls upon a person and causes head injuries, then strict liability will not set in, since the cause of this damage is not a source of increased risk, typical of a box with dynamite (explosion),⁵⁰ but the risk of an object falling, which is general and typical of all moveable objects. This case of a falling box with dynamite should be assessed in accordance with the general regulation on civil law liability (CL Article 1635), not the regulation on strict liability (CL Article 2347).

The above analysis allows a critical assessment of an opinion once expressed by Prof. J. Vēbers,⁵¹ that in case if someone pushes a man in front of a driving car and he, consequently, perishes, then the owner of the car would be liable for the death as the possessor of a source of increased danger. This opinion is difficult to uphold, as in this case legal causation between possessing a source of increased danger (the typical sphere of risk) and the tort that was caused cannot be established, since the cause of death is not the risk caused by the source of increased danger, but unlawful actions by a third person, which totally disrupts the chain of causation between the use of the car and the consequences that have set it. In examining whether an external circumstance excludes strict liability, it must be established that this cause is adequate/ habitual/ necessary in connection with the use of increased source of danger. Thus, strict liability will set in for a biker, who causes a road traffic accident because a fly suddenly got into his eye, as a situation

⁴⁸ A similar example is indicated in the comments to the Model: Principles, Definitions and Model Rules of European Private Law. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, pp. 3384–3385.

⁴⁹ Principles, Definitions and Model Rules of European Private Law. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, p. 3539.

⁵⁰ European Group on Tort Law, Principles of European Tort Law, Text and Commentary. Springer, Vienna/New York, 2005, p. 128.

⁵¹ *Gilmanis, J., Grebņickis, P., Krauze, R., Narkevičs, G., Naumovs, V., Rozenfelds, J., Strautmanis, J., Šulcs, V., Torgāns, K.* Latvijas PSR Civiltkodeksa komentāri; Vēbers, J. (red.). Rīga. Liesma, 1979. 602. lpp.

like this falls within the expected risk connected with the use of such source of increased danger, whereas it can be expected that the typical risk in using a car would not be another person suddenly pushing a pedestrian in front of the vehicle.

It is difficult to accept the examples mentioned above, in which it is noted that strict liability will not set in, as excluding strict liability, because, from the victim's perspective, he is not to be blamed for anything and therefore it would be fair to receive compensation. The idea about receiving a compensation is, indeed, well-founded; however, the right to receive compensation does not always mean that the law allows claiming it from the person, in whose activities legal connection with the occurrence of the situation cannot be found. The fact that liability does not set in for a special subject of strict liability, in the examples examined above, is easier to understand, if we keep in mind the aims, for which strict liability was created. The idea of the liability was not to establish that in all cases the possessor of the source of increased danger would be liable only because he had some actual link to the event, which caused damage to a person, or only because he possessed a source of increased danger. Likewise, the idea of this liability is not weakening the criteria for applying causation. Pursuant to theory of law, liability is always assumed by the person at fault, whereas strict liability is an anomaly within the legal system,⁵² which should be applied with great caution. Incorrect application of strict liability may cause a violation of the principle of justice. Application of strict liability to the possessor of a source of increased danger is substantiated if: (a) damage has been caused by the risk that is characteristic of the source of increased danger, and (b) causation between the characteristic risk and the damage has an adequate connection.

The analysis provided above proves that correct application of causation is of fundamental importance within the framework of the strict liability concept for identifying correctly the person at fault for tort. Although strict liability is aimed at decreasing the tortfeasor's right to be released from liability due to applicable justifications, with respect to causation, however, the concept of strict liability does not envisage a different (stricter) approach compared to the model of general liability, which is based upon establishment of fault.

6. Differentiating Model of Strict Liability

The findings of this article lead to an obvious conclusion that it is not even possible to strictly differentiate between the models of general liability and strict liability. To rephrase it, pure liability independently of fault does not exist, and *vice versa*. Likewise, sometimes it is impossible to separate the model of general liability from the model of presumption of fault, or strict liability from quasi-absolute liability.

As noted in this article, strict liability comprises justifications that sometimes require assessing the issue of holding at fault, i.e., a person's actions in compliance with the clause of an honest and careful manager in a case of tort.

All the aforementioned examples characterise the fragile line that separates all the models of (approaches to) liability and, at the same time, allow to conclude that all the models of liability are not different systems existing in isolation one

⁵² Principles, Definitions and Model Rules of European Private Law. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, p. 2992.

from another, but are interacting and overlapping. All approaches to liability, irrespectively of the model, are based upon the same idea, i.e., liability does not set in, if exceptions (justifications) referred to in the law can be established. In the general model and the model of presumption of fault, absence of negligence is allowed as an exception to applying liability, whereas in the case of strict and absolute liability this justification is excluded. Likewise, differences between the models with respect to allocation of the burden of proof can be identified. Whichever model of liability we find in the law, we should keep in mind that none of them is an alternative type of civil law liability. In theory of law, the entire idea of civil law liability is based upon one fundamental assumption – to restore to the extent possible the victim's legal and material status, as it was before the tort, whereas models of liability only instruct, how to reach this aim.

Summary

1. In the model of general liability, which is based upon the principle of fault, liability cannot set in for unforeseen tort, since nobody (even an honest and careful manager) can be set the requirement to foresee such and, thus, also prevent, and, thus, neither can this person be held at fault for negligence (fault is absent), which is a mandatory pre-requisite for applying civil law liability.
2. Foreseeability in tort law should not be mistaken for foreseeability in contractual law, established in CL Article 17791. Contractual law comprises the idea that in the presence of an infringement, the infringer cannot be required to compensate for the damage that he could not have envisaged at the moment of infringing upon the contract. Thus, in contractual law foreseeability restricts the maximum amount of damage (liability) that can be demanded from the infringer, whereas in tort law any amount of damage, which is causally related to the tort, must be compensated for, even if it (the amount) was unforeseeable. Foreseeability in tort law does not apply to foreseeing the amount of damage, but foreseeing the tort.
3. Latvian Civil Law does not envisage a general principle of presumption of fault. Presumption of fault exists only in cases, where the legislator has directly established it. The model of presumption of fault is a stricter model of liability *vis-à-vis* the tortfeasor compared to the model of general liability, since the law imposes an obligation upon him to refute this presumption
4. The aim of the idea of strict liability is to ensure fair balancing of interests. On the one hand, a person is interested in gaining benefit, by acting in conditions of increased risk, and, on the other hand, impossibility of total control over this risk increases the possibility of inflicting damage upon someone. Preference is given to compensating for the damage, although from the tortfeasor's perspective, he sometimes may not be accused of negligence. In the model of general liability, an exception to liability is the absence of negligence, which never is and cannot be justification in the model of strict liability.
5. In the model of strict liability, unforeseeing of tort does not release from liability, because the fields, where this model of liability is applied, *per se* carry a high risk of inflicting damage. A person may not use as justification a statement that he was unable to foresee tort, if the very field, where strict liability is applied, is such, where tort as such is a foreseeable phenomenon.
6. Pursuant to the model of absolute liability a person is liable for tort and he does not have the right to use any justification, including *force majeure*. This model of

liability as an independent basis of legal relationships does not exist in any legal system; however, theory allows it. The model of “quasi-absolute” liability is found in legal systems, *inter alia*, in Latvia.

7. To establish, when the model of strict liability should be applied to a person, the two following features must be cumulatively identified:
 - 1) special subject of law is indicated in the legal provision, for example, possessor of a source of increased danger, producer or seller of goods to consumers, carrier in the field of environmental law, etc., as well as
 - 2) legal provision imperatively finds that this special subject of law is liable, unless concrete exceptions can be established, which have been precisely defined in law.
8. It would be wrong to assess that fault does not play any role in a case of strict liability. In a case of strict liability it might be possible that identification of fault is required and it carries legal “weight” within the issue of establishing liability.
9. In those legal systems, where *cas fortuit* is an exception to strict liability, it is not enough to establish the fact that the cause of damage is a third person’s action, in order for liability not to set in. It is always also examined, whether this action by a third person is an essential (self-sufficient) cause of the damage, comparing to the risk caused by a source of increased danger.
10. In addition to exceptions referred to in the second part of CL Article 2347 exceptions to strict liability are also cases of general delictual incapacity – a child below the age of 7, persons with mental or other health disorders, due to which they have been unable to understand the meaning of their actions or had been unable to control their actions, etc. (CL Article 1637. pants).
11. Causation is an important pre-requisite, which may be an exception to strict liability because causation as a mandatory pre-requisite for applying strict liability is absent. In the model of general liability causation between the subject’s action to be held at fault (unlawful) and the damage is assessed, whereas in the model of strict liability – between the actions of special subject and the damage inflicted.
12. Distancing of causation is one of the exceptions to application of liability both in the case of strict and of general liability. This theory envisages that a circumstance or an act is a cause of the damage only if it objectively is able to cause the resulting damage itself and only when the action in connection with the damages caused can be characterised as “normal subsequent consequences” (adequate consequences).
13. It is not sufficient only to identify an actual link between the source of increased danger and damage to establish the existence of causation. To apply strict liability for the damage caused by such a source, it must be established that it was exactly the use of this source that led to the respective tort and that control over this source fell within the person’s “sphere of responsibility”.
14. Liability is always assumed by the person at fault, whereas strict liability in an anomaly within the legal system,⁵³ which should be applied with great caution. Incorrect application of strict liability may cause a violation of the principle of justice. Application of strict liability to the possessor of a source of increased danger is substantiated if: (a) damage has been caused by the risk that is

⁵³ Principles, Definitions and Model Rules of European Private Law. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). New York: Oxford University Press, 2010, p. 2992.

characteristic of the source of increased danger, and (b) causation between the characteristic risk and the damage has an adequate connection.

15. In the model of general liability and of presumption of fault, the absence of negligence is allowed as an exception to applying liability, whereas in the case of strict and absolute liability this exception is excluded.

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Significance of Principles of Penal Law in Administrative Law

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The article examines legal regulation of sanctions imposed by public administration, and argues that all the sanctions imposed by institutions of public administration, at least in legal doctrine, should be considered as being a discrete sub-branch of administrative law, in the legal regulation of which and in application of sanctions the principles of substantial and procedural law that are common with penal law should be complied with. A separate section of the article is dedicated to one of these principles – institution of limitation.

Keywords: administrative sanction, administrative violations, limitation period, administrative liability, penal law.

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Introduction

Coercive measures applied by institutions of public administration – administrative sanctions – is a special form of operation implemented by the public administration.¹ Already since restoration of independence in Latvia, the concept that administrative sanctioning should be regulated separately from the procedure

¹ *Briede, J., Danovskis, E., Kovaļevska, A. Administratīvās tiesības. Mācību grāmata [Administrative Law. Textbook]. Rīga: Tiesu namu aģentūra, 2016, ISBN 978-9934-508-39-4, 204. lpp.*

of regulating adoption of administrative existed,² because administrative sanctioning is kindred to penal law. However, when the Administrative Procedure Law entered into force, decisions by institutions on applying administrative sanctions complied with the definition of an administrative act included in the Law and, as such, were appealed against in administrative courts. Since July 2012, decisions in cases of administrative violations are appealed against in courts of general jurisdiction, and since 2013 these are no longer considered as administrative acts. However, a number of laws still provide for the sanctions that institutions of public administration apply by issuing administrative acts. The causes of this dualism are difficult to understand not only to the students beginning to master administrative law, but sometimes also to the lawyers, whose daily work is not related to administrative law. Therefore, this article explains the genesis of administrative sanctioning in Latvia and highlights the need to comply with the principles typical of penal law in regulating and applying these sanctions.

The article consists of three sections. The first section outlines the causes of dualism in regulation of administrative sanctions. In the second section, by using an institution typical of penal law – limitation, the need to be aware of importance of penal law principles in regulation on administrative sanctions is proved. The third section, in turn, comprises some theoretical reflections on whether the entire regulation on sanctions applied by institutions of public administration can be examined as a united sub-branch of administrative law.

1. Development of Administrative Penal Law in Latvia

The current regulation on administrative sanctions both in its substantial and procedural aspects is comparatively clearer than ever before. A codified regulation of administrative sanctions did not exist during the inter-war period (1918–1940). Institutions had a right to apply sanctions both for some offences referred to in the Penal Law of 1933 (prior to that – the Penal Law of 1903), and violations referred to in a number of other laws. In 1936, Nikolajs Ripke (1892–?), Vice-prosecutor of the Chamber of Prosecution at Riga Regional Court, listed 63 laws and regulations, which granted to institutions of public administration the right to apply sanctions for various violations.³ Diverse opinions are found in the periodicals of the first period of independence, deliberating as to whether in all cases, when a law granted an institution the right to apply administrative sanctions, the provisions of the Criminal Procedure Law of 1864 were applicable. N. Ripke concluded that “the lack of procedural norms in cases to be resolved in administrative procedure is an obstacle to correct application of administrative sanctions. The fact that administrative sanctions here, in Latvia, have not been regulated by procedural norms, in no respect should be considered as something typical of procedure for applying administrative sanctions. Other states have a detailed regulation on administrative procedure.”⁴ The Chief Prosecutor of the Senate Fricis Zilbers (1875–1942), in his turn, pointed out the need to apply the procedure established in the Criminal Procedure Law for examining similar cases in all those instances, where

² Sk. Danovskis, E. Procesuālais duālisms administratīvo pārkāpumu lietu izskatīšanā [Procedural Dualism in Reviewing Cases of Administrative Violations]. *Augstākās Tiesas Biļetens*, ISSN 1691-810X, 2011, Nr. 3, 42. lpp.

³ Ripke, N. Tiesa un administratīvā sodīšana [Court and Administrative Sanctioning]. *Tieslietu Ministrijas Vēstnesis*, 1936., Nr. 4, 692.–697. lpp.

⁴ *Ibid.*, p. 705.

institutions applied administrative sanctions.⁵ He criticised the fact that appeal in these cases took place in accordance with the Law on Administrative Courts of 1921 (decisions of Ministries were appealed in the Administrative Department of the Senate),⁶ and admitted “that one law on criminal-administrative procedure should be adopted, it would be applicable to all cases of administrative sanctioning and would establish a clear procedure of prosecuting for, investigating and sanctioning for criminal offences, entering into effect of a decision and enforcements thereof.”⁷ In Annex of the Article 1130 of the Criminal Procedure Law of 1939, 23 instances were indicated, when institutions in cases under their jurisdiction had to abide by the simplified procedure for examining cases in an institution, established in the Criminal Procedure Law.⁸

In the initial period of Soviet occupation, there were no concepts like “administrative liability” and “administrative violation” in the Soviet law. In the 1950s, these terms were relatively new.⁹ Until the very beginning of the 1960s, neither substantial, nor procedural legal norms had been drafted that would systemically regulate institutions’ rights to apply sanctions. However, many sanctions of this kind were not envisaged in the Criminal Code, but instead were established in regulatory enactments of different levels, moreover, codified procedural norms that would regulate application of such sanctions were non-existent. The first significant attempt to harmonise legal regulation of one administrative sanction – a fine, and application thereof, was a decree by the Supreme Soviet of the USSR, adopted on 21 June 1961, “On Further Restricting Application of Fines to be Applied in Administrative Procedure”. On 23 December 1961, on the basis of this decree, the Presidium of the Supreme Soviet of the Latvian SSR adopted a similar decree,¹⁰ as well as Regulation of procedure for examining cases of administrative violations, as a consequence of which fines must be applied in administrative procedure.¹¹ This regulatory enactment was the first important attempt to establish a united regulation on applying an administrative sanction (a fine). Almost 20 years later, the Supreme Soviet of the USSR adopted “The Basis for Legislation on Administrative Violations of the USSR and the Republics of the

⁵ *Zilbers, F. Pie jautājuma par administratīvo sodīšanu un administratīvām tiesām [On the Question of Administrative Sanctioning and Administrative Courts]. Tieslietu Ministrijas Vēstnesis, Nr. 1, 1937., 145. lpp.*

⁶ *Ibid.*, pp. 150–152.

⁷ *Ibid.*, pp. 152–153.

⁸ *Kriminālprocesa likums [Criminal Procedure Law]. Rīga: Valsts tipogrāfija, 1939, 182.–183. lpp.*

⁹ See *Bel'skij, K. S. Administratīvā atbildība: genezis, osnovnye priznaki, struktura. Gosudarstvo i Pravo. 1999, No. 12, c. 12.*

¹⁰ *Par administratīvā kārtā uzliedzamo naudas sodu piemērošanas tālāku ierobežošanu: Latvijas PSR Augstākās padomes prezidija 1961. gada 23. decembra dekrēts [On Further Restricting Application of Fines to be Applied in Administrative Procedure: Decree of 23 December 1961 by the Presidium of the Supreme Soviet of the Latvian SSR]. Grām.: Latvijas PSR spēkā esošo likumdošanas aktu sistematiskais krājums. XXVI sadaļa. Likumdošanas akti par administratīvo atbildību [Systemic Collection of Legal Acts in Force in the Latvian SSR. Section XXVI. Legal Acts on Administrative Liability]. 1. burtnīca, 1.–7. lpp. Rīga: Latvijas PSR Tieslietu ministrija, 1977.*

¹¹ *Nolikums par kārtību, kādā izskatāmas lietas par administratīviem pārkāpumiem, par kuriem uzliedzami naudas sodi administratīvā kārtā: Apstiprināts ar Latvijas PSR Augstākās padomes prezidija 1961. gada 23. decembra dekrētu [Regulation on procedure for examining cases of administrative violations, for which fines must be applied in administrative procedure: Approved by the Decree of 23 December 1961 of the Presidium of the Supreme Soviet of the Latvian SSR]. Grām.: Latvijas PSR spēkā esošo likumdošanas aktu sistematiskais krājums. [Systemic Collection of Legal Acts in Force in the Latvian SSR] ..., 8.–12. lpp.*

Union”.¹² This Basis of Legislation comprised the most important general rules on pre-conditions of administrative liability, administrative sanctions and application thereof, as well as on procedure in administrative cases. The provisions included in the Basis of Legislation were transferred to the administrative violations codes adopted by republics of the Union, including the Administrative Violations Code of the Latvian SSR, adopted on 7 December 1984¹³ (hereinafter – the Code). The Code was noteworthy due to the fact that it for the first time codified all administrative violations to be regulated by law.¹⁴

Upon restoring Latvia's independence, the Code was retained,¹⁵ and the tradition of codification continued; i.e., those violations, for which institutions of public administration had the right to impose an administrative sanction, were defined in the special part of the Code. However, gradually the rights of institutions of public administration to apply sanctions were established also in other regulatory enactments. For example, Chapter XIII of the Cabinet Regulation “On State Monopoly of Alcohol and Alcoholic Beverages”¹⁶ envisaged the right of officials of the State Revenue Service and the State Committee for Trade Supervision to apply fines to companies for violations of this Regulation in the amount up to 1000 lats. In January 1995, the Cabinet adopted, in the procedure established by Article 81 of the *Satversme* [Constitution], a regulation with the force of law “On Securities”¹⁷, which granted to the Security Markets Commission a right to apply a fine for violation of this regulation in the amount up to 5000 lats. A similar right was established also in the law adopted in 1995 “On Securities”,¹⁸ and in the Credit Institutions Law.¹⁹ Currently, apart from the right of the State Revenue Service to apply fines for violations in tax payments, the right to apply “penalty payments” have been granted in 20 laws to eight institutions of public administration:

¹² Osnovy zakonodatel'stva Sojuza SSR i sojuznyh respublik ob administrativnyh pravonarushenijah. Vedomosti Verhovnovo Soveta SSSR, 1980, No. 44.

¹³ Latvijas PSR Administratīvo pārkāpumu kodekss [Administrative Violations Code of the Latvian SSR]. *Latvijas PSR Augstākās Padomes un Valdības Ziņotājs*, 1984. gada 20. decembris, Nr.51.

¹⁴ Pursuant to Section 5 of the Administrative Violations Code of the Latvian SSR, the local councils of people's deputies and executive committees also were authorised to adopt decisions, for the violation of which administrative liability was envisaged.

¹⁵ Par Latvijas PSR likumdošanas aktu piemērošanu Latvijas Republikas teritorijā: Latvijas Republikas Augstākās padomes 1991. gada 29. augusta lēmums [On Application of Legal Acts of the Soviet SSR within the Territory of the Republic of Latvia: Decision of 29 August 1991 by the Supreme Council of the Republic of Latvia]. Available at <http://m.likumi.lv/doc.php?id=68772> [last viewed 01.07.2017]; Par Latvijas PSR normatīvo aktu piemērošanas izbeigšanu [On Ceasing to Apply Regulatory Enactments of the Latvian SSR]. *Latvijas Vēstnesis*, 1998. gada 28. oktobris, Nr. 317/320(1378/1381).

¹⁶ Par spirta un alkoholisko dzērienu valsts monopolu: Ministru kabineta 25.01.1994. noteikumi Nr. 37 [On State Monopoly of Alcohol and Alcoholic Beverages. Cabinet Regulation No. 37 of 25.01.1994]. *Latvijas Vēstnesis*, 1994. gada 2. februāris, Nr. 14(145).

¹⁷ Par vērtspapīriem: Ministru kabineta 07.01.1995. noteikumi Nr.10 [On Securities. Cabinet Regulation No. 10 of 07.01.1995]. *Latvijas Vēstnesis*, 1995. gada 14. janvāris, Nr. 6(289).

¹⁸ Par vērtspapīriem [On Securities]. *Latvijas Vēstnesis*, 1995. gada 12. septembris, Nr. 138(421).

¹⁹ Kredītiestāžu likums [Credit Institutions Law]. *Latvijas Vēstnesis*, 1995. gada 24. oktobris, Nr. 136(446).

the Financial and Capital Market Commission,²⁰ the Bank of Latvia,²¹ the Public Utilities Commission,²² the Competition Council,²³ the Consumer Rights Protection Centre,²⁴ the National Electronic Mass Media Council,²⁵ the Health Inspectorate,²⁶ and the Food and Veterinary Service.²⁷ The origins of the term “penalty payment” (as opposed to “a fine”) used in these laws is linked to two main considerations. Firstly, the term “penalty payment” is used to differentiate it from the term “fine” used in the Code. This differentiation was necessary to prevent misunderstandings of whether norms of the Code should be applied in imposing this sanction. Secondly, the term “penalty payment” is used also because it was envisaged to apply these sanctions to legal persons; however, the possibility to envisage legal persons as subjects of administrative liability (and fine) appeared only in 1998.²⁸ There are no other reasons for this terminological differentiation, and it has gradually become meaningless. For example, the coercive measure that is established in the Competition Law has been called a fine (not a penalty payment as in other laws), whereas para. 5 of Section 15(8) of Unfair Commercial Practice Prohibition Law defines the right of the respective supervisory authority to “apply a fine in the procedure established in Section 15² of this Law”, however, in Section 15² the coercive measure that is regulated has been called a penalty payment. Thus, at present there is neither a theoretical nor practical significance in giving different names to the same institution – an obligation imposed by an institution of public

²⁰ Kredītiestāžu likums [Credit Institutions Law] ...; Ieguldījumu pārvaldes sabiedrību likums [Law on Investment Companies]. *Latvijas Vēstnesis*, 1997. gada 30. decembris, Nr. 342/345(1054/1057); Valsts fondēto pensiju likums [Law on State Funded Pensions]. *Latvijas Vēstnesis*, 2000. gada 8. marts, Nr.78/87(1989/1998); Finanšu un kapitāla tirgus komisijas likums [Law on the Financial and Capital Market Commission]. *Latvijas Vēstnesis*, 2000. gada 20. jūnijs, Nr. 230/232(2141/2142); Krājizdevu sabiedrības likums [Law on Savings and Loan Associations]. *Latvijas Vēstnesis*, 2001. gada 18. aprīlis, Nr. 60(2447); Ieguldītāju aizsardzības likums [Investor Protection Law]. *Latvijas Vēstnesis*, 2001. gada 23. novembris, Nr. 170(2557); Finanšu instrumentu tirgus likums [Financial Instrument Market Law]. *Latvijas Vēstnesis*, 2003. gada 11. decembris, Nr. 175(2940); Apdrošināšanas un pārāpdrošināšanas starpnieku darbības likums [Activities of Insurance and Reinsurance Intermediaries Law]. *Latvijas Vēstnesis*, 2005. gada 1. aprīlis, Nr. 52(3210); Maksājumu pakalpojumu un elektroniskās naudas likums [Law on Payment Services and Electronic Money]. *Latvijas Vēstnesis*, 2010. gada 17. marts, Nr.43(4235); Alternatīvo ieguldījumu fondu un to pārvaldnieku likums [Law on Alternative Investment Funds and their Managers]. *Latvijas Vēstnesis*, 2013. gada 24. jūlijs, Nr. 142(4948); Apdrošināšanas un pārāpdrošināšanas likums [Law on Insurance and Reinsurance]. *Latvijas Vēstnesis*, 2015. gada 30. jūnijs, Nr. 124(5442); Kredītiestāžu un ieguldījumu brokeru sabiedrību darbības atjaunošanas un noregulējuma likums [Law on Restoring and Regulating Activities of Credit Institutions and Investment Brokerage Companies]. *Latvijas Vēstnesis*, 2015. gada 2. jūlijs, Nr. 127(5445).

²¹ Kredītiestāžu likums [Credit Institutions Law], ...; Kredītu reģistra likums.[Law on Credit Register]. *Latvijas Vēstnesis*, 2012. gada 13. jūnijs, Nr. 92(4695).

²² Enerģētikaslikums [Energy Law]. *Latvijas Vēstnesis*, 1998. gada 22. septembris, Nr. 273/275(1334/1336); Elektronenerģijas tirgus likums [Electricity Market Law]. *Latvijas Vēstnesis*, 2005. gada 25. maijs, Nr. 82(3240).

²³ Reklāmas likums [Advertising Law]. *Latvijas Vēstnesis*, 2000. gada 10. janvāris, Nr. 7(1918); Konkurences likums [Competititon Law]. *Latvijas Vēstnesis*, 2001. gada 23. oktobris, Nr. 151(2538); Negodīgas mazumtirzniecības prakses aizlieguma likums [Unfair Retail Trade Practice Prohibition Law]. *Latvijas Vēstnesis*, 2015. gada 3. jūnijs, Nr.107(5425).

²⁴ Reklāmas likums [Advertising Law], ...; Negodīgas komercprakses aizlieguma likums [Unfair Commercial Practice Prohibition Law]. *Latvijas Vēstnesis*, 2007. gada 12. decembris, Nr. 199(3775).

²⁵ Reklāmas likums [Advertising Law],...

²⁶ Reklāmas likums [Advertising Law],...

²⁷ Reklāmas likums[Advertising Law],...

²⁸ Grozījumi Latvijas Administratīvo pārkāpumu kodeksā [Amendments to the Latvian Administrative Violations Code]. *Latvijas Vēstnesis*, 1998. gada 8. jūlijs, Nr. 199/200(1260/1261).

administration to pay money for violating a legal provision. Essentially, this sanction is a penalty.

Penalties applied by these institutions differ from the fine envisaged in the Code only in some, however, important aspects. First, in imposing these penalties the Code is not applicable. Institutions adopt the respective decisions in accordance with the Administrative Procedure Law and the special norms envisaged in the respective law. A decision on applying these sanctions is an administrative act, whereas decisions on sanctions envisaged in the Code are not administrative acts.²⁹ Sometimes a court underscores it in particular, if an applicant in a case regarding application of a sanction outside the Code refers to terms set in the Code: “The procedure, in which the Financial and Capital Market Commission issues administrative acts is defined by regulatory enactments that regulate procedure for issuing administrative acts. [The Code] is not a regulatory enactment that regulates the procedure for issuing administrative acts, therefore Section 37 thereof, which defines limitation period in a case of administrative violation, was not and is not applicable in issuing an act of sanctioning a person for [...] a violation of the Financial Instrument Market Law. Therefore [...] the Commission was not obliged to comply with the terms defined in Section 37 [of the Code].”³⁰ Secondly, disputes regarding applying of sanctions are to be heard by an administrative court, whereas decisions in cases of administrative violations since July 2012 are to be appealed in a court of general jurisdiction.³¹ Thirdly, the majority of these sanctions significantly exceed the fines established in the Code.³² Fourthly, large part of these sanctions follow from obligations of the Member States established in directives of the European Union to envisage “effective, proportionate and dissuasive” sanctions³³ for respective violations.

The right vested in institutions of public administration to apply sanctions is part of penal law as a broader field of law, which covers both criminal law and sanctions applied by public administration. These sanctions, similarly to the fine envisaged in the Criminal Law (recovery of money for legal persons) and the fine envisaged in the Code are coercive measures of economic nature applied by

²⁹ Ar 2012. gada 1. novembra grozījumiem Administratīvā procesa likumā [By amendments of 1 November 2012 to the Administrative Procedure Law]. *Latvijas Vēstnesis*, 2012. gada 21. novembris] Nr. 183(4786) ir noteikts, ka lēmumi administratīvo pārkāpumu lietās nav administratīvi akti [it is established that decisions in cases of administrative violations are not administrative acts].

³⁰ Administratīvās apgabaltiesas 2014. gada 26. marta spriedums lietā Nr. A43013712, 12.1. punkts [Decision of 26 March 2014 by the Administrative Regional Court in case No. A43013712, para. 12.1]. Available at <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/152371.pdf> [last viewed 12.02.2017].

³¹ Grozījumi Latvijas Administratīvo pārkāpumu kodeksā [Amendments to the Latvian Administrative Violations Code]. *Latvijas Vēstnesis*, 2011. gada 22. decembris, Nr. 201(4599).

³² Section 26(1) of the Code provides that the maximum fine for legal person shall not exceed 14 000 euro. To compare: Pursuant to Section 198¹(1) of the Credit Institutions Law, the Financial and Capital Market Commission has the right to impose a penalty payment up to five million euros, but in some cases – even more.

³³ See, for example, Directive (EU) 2015/849 of the European Parliament and of the Council 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC; Directive (EU) 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, *Official Journal of the European Union*, 11 June 2005, L 149/22, Art. 13.

institutions of state power for violations of legal norms. Therefore the majority of them should be recognised as sanctions of criminal law nature in the context of Article 6 and Article 7³⁴ of the Convention for the Protection of Human Rights and Fundamental Freedoms.³⁵ For example, the Supreme Court has recognised that “the nature, essence, severity of the violation of competition law demand examining the actions by the Competition Council in investigating the case and determining liability in the light of criminal law nature in the meaning of Article 6 and 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In view of the severity of sanction applied to the applicant, [...] the fine by the Competition Council and the procedure for determining thereof has criminal law nature. Therefore, the activities of the Competition Council and the fine that was applied is to be examined from the perspective of respective general principles of law, *inter alia*, principles of legal security, *ne bis in idem*, and proportionality.”³⁶

Sanctions applied by institutions of public administration have not only the procedural dimension referred to above, but also the dimension of substantive law. I.e., in creating legal norms that envisage application of a sanction a number of requirements derived from the principle of legal certainty must be met. For example, a norm that establishes or intensifies a sanction cannot have a retroactive force;³⁷ if the legal norm envisages adverse consequences to the sanctioned person (the institution of penal record), then such consequences should be limited in time. Within the Latvian legal system, the issue of limitation period of those sanctions applied by institutions of public administration that are regulated outside the Code has been of particular relevance.

2. Limitation Period as an Institution Typical of Penal Law

In 2016, the *Saeima* reviewed draft amendments to “Law on the Financial and Capital Market Commission” (Nr. 523/Lp12), a proposal concerning these was submitted in the second reading to envisage a limitation period for sanctions

³⁴ See more on the case law of the European Court of Human Rights Guide on Article 6 of the European Convention of Human Rights. Right to a fair trial (criminal limb), 2014, pp. 9–10. Available at http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf [last viewed 03.02.2017]; *Litvins, G., Aperāne, K.* Administratīvā pārkāpuma lietvedība ceļu satiksmē [Administrative Violations Record Keeping in Road Traffic] Rīga: Sabiedriskās politikas centrs PROVIDUS, 2011, ISBN 978-9984-854-21-2, 12. lpp.

³⁵ Cilvēka tiesību un pamatbrīvību aizsardzības konvencija [Convention for the Protection of Human Rights and Fundamental Freedoms]. *Latvijas Vēstnesis*, 1997. gada 3. jūnijs, Nr. 143/144(858/859).

³⁶ Augstākās tiesas Administratīvo lietu departamenta 2016. gada 14. septembra spriedums lietā Nr. 461/2016, 11. punkts, nav publicēts [Judgement of 14 September 2016 by the Department of Administrative Cases of the Supreme Court in case No. 461/2016, para. 11, unpublished].

³⁷ The failure to abide by this principle was the grounds for the Supreme Court to set aside the judgement by the Administrative Regional Court in case regarding application of disciplinary punishment to a person employed in public service relations. The Supreme Court recognised that also in disciplinary cases “the principle for applying sanctions that a sanction that intensifies a sanction applied to a person cannot have retroactive force” must be abided by. See Augstākās tiesas Administratīvo lietu departamenta 2015. gada 19. marta spriedumu lietā Nr. SKA-27/2015, 5. punktu. [Judgement of 19 March 2015 by the Department of Administrative Cases of the Supreme Court in case No. SKA-27/2015, para. 5]. Available at <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/207794.pdf> [last viewed 02.02.2017].

applied by the Financial and Capital Market Commission.³⁸ Although this proposal was not supported, it initiated a discussion on whether and what kind of limitation period would be necessary for sanctions applied by the Financial and Capital Market Commission. This minor episode from the legislative process proves the need to be aware of the significance of limitation period as an institution typical of penal law both in legislation and in application of laws. It should be taken into account that in this sense the absence of limitation period and the wish to establish such is not unique. In 1974 the Council of the European Communities adopted a regulation, which was intended especially for establishing a limitation period to the European Commission's right to apply sanctions for violations in the fields of transport and competition.³⁹

The institute of limitation period follows from the principle of legal certainty. The need to establish a limitation period for sanctions applied by institutions of public administration was particularly emphasized by the Committee of Ministers of the Council of Europe by adopting on 13 February 1991 recommendation on administrative sanctions.⁴⁰ The 4th principle of this recommendation provides that any action taken by authorities with respect to a violation must be taken within reasonable time. The meaning of the institution of limitation period has been already explained also in a judgement by the Supreme Court, referring to the book by professor Pauls Mincs (1868–1941) "Course of Criminal Law. General Part":⁴¹ "The State usually restricts the right to apply sanctions by setting a definite term. At least two noteworthy reasons for establishing a limitation period have been mentioned in legal literature: 1) absurdity of the procedure – after a longer period of time the circumstances of the case no longer can be accurately established, therefore "it is better to waive the claim to a sanction than demonstrate one's helplessness"; 2) "the necessity to release from a sanction due to a limitation period follows from the internal striving of law for certainty [...]." The fact that limitation period makes officials of the respective institutions better disciplined and facilitates making the culpable persons legally liable in a timely manner⁴² can be mentioned as an important feature of limitation.

Although the main objective of the institution of limitation is to promote legal certainty, lack of institution of limitation *per se* cannot be regarded as a situation

³⁸ Latvijas Tirdzniecības un rūpniecības kameras 2016. gada 6. aprīļa vēstule Nr. 2016/190 Saeimas Budžeta un finanšu komisijai [Letter of 6 April 2016 by the Latvian Chamber of Commerce and Industry No. 2016/190 to the Budget and Finance Committee of the Saeima]. Available at <http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/0/468C0E7009F3F68BC2257F8E001FCA5A?OpenDocument> [last viewed 03.02.2017].

³⁹ Regulation (EEC) No. 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition. *Official Journal of the European Union*, 29 November 1974, L 319.

⁴⁰ Recommendation No. R (91) 1 of the Committee of Ministers to Member States on Administrative Sanctions. Available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2011123&SecMode=1&DocId=392992&Usage=2> [last viewed 03.02.2017].

⁴¹ *Mincs, P. Krimināltiesību kurss. Vispārīgā daļa. Ar U. Krastiņa komentāriem* [Course of Criminal Law. General Part. With Comments by U. Krastiņš]. Rīga: Tiesu namu aģentūra, 2005, ISBN 9984-671-91-7, 322.–323. lpp.

⁴² Augstākās tiesas Senāta Administratīvo lietu departamenta 2009. gada 2. marta spriedums lietā Nr. SKA-6/2009, 12. punkts [Judgement of 2 March 2009 by the Department of Administrative Cases of the Supreme Court in case No. SKA-6/2009, para. 12]. Available at <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/13099.pdf> [last viewed 03.02.2017].

contrary to legal certainty or human rights. For example, the Court of Justice of the European Union has recognised: “The failure to set a limitation period for the exercise of the Commission’s powers to find infringements of Community law is not therefore in itself unlawful from the point of view of the principle of legal certainty.”⁴³ The Court has made this conclusion with respect to the European Commission’s right to establish an infringement upon requirements of a European Union regulation after the term for applying the respective sanction defined in the regulation has expired. The Court arrived at a similar conclusion already in 1970, when the legal norms of the European Union did not yet set a limitation period to the right of the European Commission to apply sanctions for violations of competition law.⁴⁴ However, the fact that the limitation period has not been defined in regulation does not mean that the term for applying a sanction is everlasting. The Court of Justice of the European Union, in summarising the judicature on issues of applying the European Union law to limitation period, has recognised that “where the EU legislature has not laid down any limitation period, the fundamental requirement of legal certainty precludes the administration from indefinitely delaying the exercise of its powers.”⁴⁵ Thus, in circumstances, where the limitation period has not been set in legal norms, an institution, in deciding on the need to apply a sanction, must examine, whether application of sanction, compared to the time when the violation was committed or ceased and the nature and consequences of the offence, causes greater benefit for protecting interests established by legal norms, compared to the infringement of the offender’s right to legal certainty.

The fact that in the majority of laws, referred to in footnotes 20–27 of this article, a limitation period has not been set can be explained also with the fact that at the time, when these laws were drafted, the link of these sanctions to the general principles of penal law was not considered, in particular, to the principle of legal certainty. In this respect, Latvia differs from other EU Member States. An overview of foreign regulatory enactments that envisage the right of the respective financial supervisory authority to apply sanctions reveals that rules on limitation are found comparatively frequently. For example, the Dutch Act on financial supervision, Section 1:87, defines a three year limitation period for applying a sanction for a violation of this law.⁴⁶ The Czech Act on Banks, Part 6 of Section 36.i provides that proceedings for a violation may be initiated no later than within a year after this violation was detected, but no later than within five years after the date when the violation was committed.⁴⁷ The Austrian Act on Banks (Section 99.b) sets

⁴³ Eiropas Savienības tiesas Pirmās instances tiesas 2005. gada 6. oktobra spriedums apvienotajās lietās Nr. T-22/02 un T-23/02, 83. punkts [Judgement of 6 October 2005 by the First Instance Court of the Court of Justice of the European Union in joined cases No. T-22/02 and T-23/02, para. 83]. Available at www.curia.europa.eu [last viewed 01.07.2017].

⁴⁴ Sk. Eiropas Kopienas tiesas 1970. gada 15. jūlija sprieduma lietā Nr. 41/69, 17.–21. punktu [Judgement of 15 July 1970 by the Court of Justice of the European Communities in case No. 41/69, para. 17–21]. Available at www.curia.europa.eu [last viewed 01.07.2017].

⁴⁵ Eiropas Savienības Civildienesta tiesas 2014. gada 12. marta spriedums lietā Nr. F-128/12, 50. punkts. [Judgement of 12 March 2014 by the European Union Civil Service Tribunal in case No. F-128/12, para. 50]. Available at www.curia.europa.eu [last viewed 01.07.2017].

⁴⁶ Act of 28 September 2006, on rules regarding the financial markets and their supervision. Available at <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brieven/2009/11/16/engelse-vertaling-van-de-wft/act-on-financial-supervision.pdf> [last viewed 11.02.2017].

⁴⁷ Act of 20 December 1991 on Banks. Available at http://www.cnb.cz/en/legislation/acts/download/act_on_banks.pdf [last viewed 11.02.2017].

the limitation period as 18 months.⁴⁸ The Finnish Act on Financial Supervisory Authority, Section 42.a, differentiates the limitation period, depending upon the severity of offence, – for administrative sanctions (to legal persons – up to the amount of 100 000 euro) – 5 years, but for penalty payment (may reach the amount of several millions) – 10 years.⁴⁹ In one of the regulations of the European Central Bank the limitation period to applying sanctions to credit institutions is set as 5 years.⁵⁰ This comparison shows that limitation periods differ and depend upon peculiarities of Member States' legal systems, *inter alia*, whether Member States have common rules on administrative sanctions, and, if they have, whether these rules do or do not apply to sanctions imposed by financial supervisory authorities. However, even this brief insight proves that in the national law of Member States limitation period is included in the regulation on sanctions by public administration as a principle characteristic of penal law.

Although absence of the institution of limitation *per se* does not exclude the possibility to apply a sanction, in the interests of legal certainty (in particular, from the perspective of economic actors) it is important to establish it in those cases, where institutions of public administration are granted the right to apply sanctions outside the system of administrative sanctions established in the Code. However, limitation period is not the only institution shared with penal law, the significance of which should be considered either in legislation or in application of law. In creating legal norms: 1) possibility to envisage for the same unlawful action both the possibility for an institution of public administration to apply a sanction and to apply coercive measures defined in the Criminal Law should be avoided (*ne bis in idem*);⁵¹ 2) to envisage a term for extinguishing penal record, if the fact of sanctioning leads to other adverse consequences (for example, is taken into consideration as an aggravating circumstance, when a sanction for other violations is applied); to ensure that the ruling may be appealed against on its merits in at least two court instances,⁵² whereas in applying sanctions it must be taken into consideration that legal norms that aggravate legal situation for the sanctioned person, do not have retroactive force,⁵³ presumption of innocence must be abided by,⁵⁴ and other procedural safeguards that must be met in other cases of criminal law nature must be ensured.⁵⁵

⁴⁸ Federal Banking Act. Available at http://ec.europa.eu/internal_market/bank/docs/windingup/200908/annex1_finalcountryreport_at-3-austrian%20banking%20act_en.pdf [last viewed 11.02.2017].

⁴⁹ Act of the Financial Supervisory Authority. Available at http://www.fin-fsa.fi/en/Regulation/Legislation/Finnish/Documents/FIVA_Act.pdf [last viewed 11.02.2017].

⁵⁰ Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities. *Official Journal of the European Union*. 14 May 2014, L 141/1.

⁵¹ Cilvēka tiesību un pamatbrīvību aizsardzības konvencijas 7. protokola 4. pants [Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4 of Protocol No. 7].

⁵² Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2 of Protocol No. 7.

⁵³ Cilvēka Convention for the Protection of Human Rights and Fundamental Freedoms, the first part of Article 7.

⁵⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, the second part of Article 6.

⁵⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, the third part of Article 6.

3. Administrative Penal Law as a Sub-branch of Law

It was already noted in the Section 1 of this article that since the mid-1990s there are two types of sanctions that have been applied by institutions of public administration in Latvia: sanctions that are applied in accordance with the Code, and sanctions that are applied in other cases established by law in accordance with the general procedure established in these laws and in the Administrative Procedure Law.⁵⁶ Legal regulation and application of these sanctions must ensure the substantial and procedural legal principles that are typical of penal law. With respect to violations and sanctions envisaged in the Code such terms as “administrative violation”, “administrative sanction”, “administrative liability” have been used already for many decades, however, the sanctions used in other laws (“penalty payments”) have gone almost unnoticed by doctrine. A textbook on administrative law states the following about these sanctions: “A number of laws establish coercive measures similar to administrative liability. These are not to be considered as administrative violations, because they have not been envisaged in the Latvian Administrative Violations Code.”⁵⁷ At present there is no other more exhaustive assessment of these violations and sanctions, as well as their place in the Latvian legal system. In certain respects, the issue of whether these violations and sanctions that are regulated outside the Code should be equalled to violations and sanctions envisaged by Code is theoretical; however, in the framework of the currently proposed reform to the Code (more about it below) it might acquire also practical significance.

Violations and fines for them envisaged in the Code and in other laws differ only in two aspects: amount and procedure of application. However, these sanctions do not differ substantially. Therefore, attempts to find different names for two substantially similar phenomena seem to be redundant. The term “administrative violation”, borrowed from the Soviet law, has become organically integrated into the Latvian legal system and successfully denotes those violations, the sanctions for which are applied by an institution of public administration (“administrative”). Today, the term “administrative violation” denotes only those administrative violations that are envisaged in the Code and in binding regulations of local governments. This follows from the second part of Section 1 (“the Code shall determine, which action or inaction shall be acknowledged as an administrative violation”) and Section 5 (on the right of local government councils to provide for administrative liability) of the Code. Currently, this term is necessary to underscore that the rules included in the Code are applicable only to violations and sanctions that are envisaged in the Code and binding regulations of local governments. Therefore, from the perspective of legal terminology, at least at present it is not correct to also designate other violations anticipated for in other laws, for which the sanctions may be applied by institutions of public administration, administrative violations. At the same time, it must be admitted, that at least for now the Latvian legal system does not have any other, semantically more appropriate term to denote these violations.

⁵⁶ Administratīvā procesa likums [Administrative Procedure law]. *Latvijas Vēstnesis*, 2001. gada 14. novembris, Nr. 164(2551).

⁵⁷ *Briede, J., Danovskis, E., Kovaļevska, A.* Administratīvās tiesības. Mācību grāmata [Administrative Law. Textbook] ..., 209. lpp.

Similar considerations apply to the use of the term “administrative sanction” and “administrative liability”. Although in regulatory enactments these terms are used exactly in the context of the Code, substantially, at least on the level of legal doctrine, these could be attributed also to the sanctions established in other laws that are applied by institutions of public administration. At least in legal doctrine, the administrative penal law should be defined as a totality of legal norms that define violations and sanctions thereof, which institutions of public administration may apply to private persons. According to the current legal regulation, it can be considered that administrative penal law consists of two parts: 1) violations and sanctions applicable thereof that are envisaged in the Code and in binding regulations of local governments; 2) sanctions of financial nature (fines) stipulated by other laws, which institutions of public administration are entitled to apply for violations of these laws. Hence, there are also two types of administrative violations: 1) administrative violations referred to in the Code and binding regulations by local governments, with respect to which procedure is conducted in accordance with the Code; 2) administrative violations envisaged in other laws, where decision on applying a sanction is adopted in procedure established by the Administrative Procedure Law and in other legal norms.

At the time of writing this article, the Administrative Violations Procedure Law was being prepared for the third reading by the *Saeima*.⁵⁸ It is intended that this Law will replace the Code. One of the most significant changes that this draft law proposes is the so-called “de-codification of administrative violations”. I.e., elements of administrative violations that until now were envisaged in the special part of the Code will be “transferred” to sectoral laws. A question may arise in the context of this reform, whether violations that are currently envisaged in other laws should not be included in a new system of law, similarly to Germany, where also sanctions for financial market⁵⁹ and competition violations⁶⁰ are examined in the procedure⁶¹ established by the Administrative Violations Law (*Ordnungswidrigkeitengesetz*).⁶² At the moment, the draft law does not envisage including these violations in the system of administrative violations. This approach comprises some considerations worth reflecting upon. Firstly, with respect to some sanctions that may be applied

⁵⁸ Administratīvo pārkāpumu procesa likums. 12. Saeimas likumprojekts [Administrative Violations Procedure Law. Draft law of the 12th convocation of the *Saeima*]. Available at <http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/WEBRespDocumByNum?OpenView&restricttocategory=16/Lp12|2521> [last viewed 12.02.2017].

⁵⁹ See, for example, Securities Trading Act (Gesetz über den Wertpapierhandel) Article 39 ff. Available at <https://www.gesetze-im-internet.de/wphg/BJNR174910994.html#BJNR174910994BJNG000604377> [last viewed 12.02.2017]. See also Guidelines on the Imposition of Fines in Administrative Offence Proceedings for Breaches of the Provisions of the Securities Trading Act. Available at https://www.bafin.de/SharedDocs/Downloads/EN/Leitfaden/WA/dl_lf_bussgeldleitlinien_2013_en.pdf?__blob=publicationFile [last viewed 12.02.2017].

⁶⁰ See Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) Article 81. Available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=3 [last viewed 12.02.2017].

⁶¹ In Germany, the system of regulation on administrative violations is similar to the one that is intended to be created by the Administrative Violations Procedure Law. I.e., the majority of elements of administrative violations are included in other laws, not in the German Administrative Violations Law. See, for example, *Bohnert, J. Ordnungswidrigkeitenrecht*. 4. Auflage. München: Verlag C. H. Beck, 2010, ISBN 978-3-406-60556-7, S.1-3; *Kleszczewski, D. Ordnungswidrigkeitenrecht*. München: Verlag Franz Vahlen, 2010, ISBN 978-3-8006-4066-9, S. 3-4.

⁶² *Ordnungswidrigkeitengesetz*. Available at https://www.gesetze-im-internet.de/owig_1968/ [last viewed 12.02.2017].

by the Competition Council and the Finance and Capital Market Commission and the respective violations, over time a rather stable case law of administrative courts has been established. The cases regarding violations of the Competition Law often require delving deep into very specific issues typical of this group of violations. In these cases, certain specialisation of judges has evolved. Thus, there is a considerable risk that by transferring these cases for reviewing to courts of general jurisdiction, the stability of judicature and quality of hearing of these cases might be jeopardised. Secondly, some of these laws (for example, the Competition Law) provide for special norms on performing procedural actions (for example, obtaining and securing evidence). Thirdly, in the view of the complexity of hearing of these cases, the need not to apply a number of provisions included in the Administrative Violations Procedure Law (for example, comparatively short period of limitation and other procedural terms) should be considered.

However, there are also some considerations on why these cases (at least in the institution) could be examined in the procedure established in the Administrative Violations Procedure Law. Firstly, from the perspective of procedural regulation, the regulation established in the Administrative Violations Procedure Law is more appropriate (more detailed) than the regulation of the Administrative Procedure Law on issuing administrative acts. For example, it is doubtful, whether a reasonable explanation exists as to why with respect to the sanctions currently applied by the institutions of public administration outside the framework of the Code rules on the presumption of innocence, the obligation to prove and the legal presumption of a fact should not be applied in the framework of the Administrative Violations Procedure Law. Secondly, from the perspective of clarity and transparency of the legal system, it is rational to develop a system of administrative sanctions that is based upon common principles, taking into account that all administrative sanctions are applied by institutions of public administration and that the principles of substantial and procedural law, typical of cases with a nature of criminal law, must be implemented accordingly.

Summary

1. For more than 20 years, two types of sanctions that are imposed by institutions of public administration have existed in the Latvian legal system: 1) sanctions that are imposed in compliance with the Code for administrative violations stipulated by the Code and binding regulations of local governments; 2) other sanctions envisaged in 20 laws, which, in accordance with the procedure established by the Administrative Procedure Law, are applied by institutions of public administration for violations of these laws by issuing an administrative act. Although the majority of these sanctions ("penalty payments") are terminologically differentiated from the fines envisaged in the Code, substantially, these sanctions do not differ.
2. In legal regulation and application of administrative sanctions, the requirements that follow from the Convention for the Protection of Human Rights and Fundamental Freedoms with respect to hearing cases of criminal law nature, as well as other principles of substantial and procedural law typical of penal law must be abided by. The institution of limitation period is one of the institutions that should be included in all cases, where public administration is granted the right to apply sanctions.

3. Respecting the current, different procedure for applying these sanctions, at least in legal doctrine all sanctions imposed by administrative institutions and legal regulation thereof should be elaborated as belonging to the administrative penal law in the form of a discrete sub-branch of administrative law, which, in turn, constitutes a part of the so-called penal law.

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Multilevel Shared Management for Policy Design and Problem Solving. Case of an Idle Group – Released from Estonian Prisons

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The focus of the paper is on the application of the subordinates involving governance (SIG) model and its design in a certain context through problem identification method. The proposed social involvement model is combining shared governance with independent actors and traditionally subjected (subordinate) parties as counterparts. As an example of the policy design mechanics, the case of socialization of returners from prison is chosen to build a model: an opportunity and preparedness in finding legal engagement for the (re)entry into society are the key components that may tackle high recidivism rate in the region. Seemingly, the current system already has a shared governance model in use, government working with NGOs and with the Estonian Unemployment Insurance Fund. This cooperation however has resulted with no substantial results from the perspective of rehabilitation and (re)socialization – Estonia remains one of the high incarceration and recidivism areas in Europe. The paper argues that current target in data collection (knowledge formation) and in preparation for (re)integration is set following institutional interests instead of systemic logic with a focus on results. The search for better solutions must therefore continue.

Keywords: multilevel governance, shared policy design, involvement, sustainable communal development, security, SIG model, data collection, action research, knowledge formation.

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Abbreviations

EU – European Union

EUIF – Estonian Unemployment Insurance Fund

ExQ1 – focus group interviews with the Estonian Unemployment Insurance Fund (EUIF) specialist

ExQ2– the questionnaire results for the Estonian Unemployment Insurance Fund (EUIF) specialists

MinJust – the Ministry of Justice, Estonia

MinSoc – the Ministry of Social Affairs

PICS – the post-incarceration syndrome

PrQ – the questionnaire for male inmates and its results (570 valid respondents from all three Estonian male prisons)

SIG model – the subordinates involving governance model

Introduction

*All that is valuable in human society
depends upon the opportunity for
development accorded the individual.*

Albert Einstein

The paper is not discussing prison or any penal matters as such. The focus of the paper lies on a model, where a subject or subordinate idle group in a society (its members) are brought into the decision-making process as counterparts in the public policy design through shared management.¹ The reasons for this approach are explained by the rationality in knowledge formation and top-down vs. bottom-up relationships in the community. Prisoners as temporarily idle group but expected entrants to the society with different power relation and even culture are used as a sample. The overall objective of the underlying study was to define the problem and to propose a solution to socialization of idle group(s) in the frame of existing circumstances. Principles in any different case should be adjusted to realities in order to offer practical advice.² Recidivism is one of the problems that affects society on multiple levels. The paper introduces a model that was created to ease departure from a recidivistic circle for these offenders who have a potential for a legal adjustment after imprisonment. Similar models could be moderated for different idle (minority) groups, including immigrants, idle youth, long-term unemployed,

¹ See: Charron, N. Government Quality and Vertical Power-Sharing in Fractionalized States. *Publius* 39, No. 4, 2009, pp. 585–605; Charron, N. Power Sharing, Ethnolinguistic Fractionalization and Government Quality. *QoG Working Paper Series*, No. 8, 2007, pp. 1–44.

² See: Akers, R. L., Sellers, C. S., Jennings, W. G. *Criminological Theories: Introduction, Evaluation, and Application*, 7th ed. Oxford University Press, 2016.

persons with improving or partial disabilities or those discouraged in their adjustment to labor market or occupational activity.

For a few decades, public service systems are transforming into market-like organizations of service delivery.³ The prison system is not exception in attempts to make the “service” more efficient at the same time meeting changing requirements (offenders’ human rights e.g.). The core principle in public spending is that a “service” should be available for as few as possible but to as many as needed, considering the overall functioning of the society. Most social aid (if to consider prison to be one of those) systems are closed by their functioning to the public.

The use of NGO services in prisons to the system of private prisons⁴ have been considered but rejected, social contacts and public involvement in the punitive system are minimal or nonexistent – prisoners are idle until they are released and reenter society with obligations and expectations ahead. The (in)efficiency of the current governing is seen in its “product” that is released in the public or evaluated in time. Even though, an outsider has almost no say in the operation of prisons as an example, the debate about the outcome of a punishment and expected rehabilitation should be more of the interest of executives and scholars. The 1960s penal reforms in Finland were designed and executed by a small group of scholars and executives, the involvement of the public was not considered necessary. In Estonia, a similar has happened but the grounds and reasons for that have been different.

Why prisoners? Why Estonia? From its establishment in 1918 the country has had (one of) the highest imprisonment rates in comparison with other states – Scandinavia, USSR, the immediate neighbors. At the same time, the rate of criminality was the lowest during the Soviet era. This draws interest to the rehabilitation system operational efficiency. From the philosophical side, an understanding of the relations between a person and state, the allowed and prohibited, accepted measures of protection and adjustment are continuously acute in Europe. From the practical side, it affects every member of the society through multiple effects like:

- public safety and security;
- social cost, demographics, emigration;
- labor market, social practice;
- personal gain or loss (applied to family members, children);
- public (and personal) spending on imprisonment and rehabilitation.⁵

It is difficult to estimate the total of any national spending on crime or recidivism. The average annual cost per inmate in the United States is estimated from \$31 282⁶ to a mean salary in USA of \$40 000⁷. In Estonia, the direct incarceration cost per inmate exceeds this more than twofold.⁸ At the same time, Estonian prison investments are two times less than those of Finland.⁹ Some traits that are believed to be characteristic to small states (Estonia’s inhabitants slightly exceed 1M people), like informality of structures and procedures,

³ See: *Pierre, J.* New Governance, New Democracy? *The QOG Institute* 4, 2009, pp. 4–25.

⁴ See: *Cheung, A.* Prison Privatization and the Use of Incarceration. The Sentencing Project, 2009.

⁵ Very difficult to calculate, as it consists of parts that are interrelated and divided between different ministries of the state.

⁶ *Henrichson, C., Delaney, R.* The Price of Prisons What Incarceration Costs Taxpayers. 2012.

⁷ *Darity, W., Hamilton, D.* Bold Policies for Economic Justice. The Review of Black Political Economy, 2012.

⁸ *Vanglad [Prisons]. Aruanded ja Palgad [Reports and Salaries]. Annual Reports, 2015.*

⁹ *Mäe, I.* Estonian Prison Investments Twice Smaller than in Finland. Postimees, July 17, 2015.

multifunctionalism of civil servants and organizations oppose “personalism” of roles and functions.¹⁰ Reducing the number of inmates by diminishing recidivism seems like an opportunity for direct saving and a positive influence on the social cost. Recidivism in Estonia has received targeted attention on the state level but still is high compared to European averages.¹¹ Exact reconviction rates in Europe and worldwide are calculated by different methods, which makes them difficult to compare. The methodology differs even within Estonia.¹² Another problem with the comparative statistics is that newer EU member states are often not included in the international statistics.¹³ Crime rate in Estonia has been evaluated as medium or even safe,¹⁴ the problem for the small state is the number of inmates per capita and high rate of recidivism.¹⁵ The latter could be treated as an inefficiency of current measures – convicted once means that the person gets trapped. This leads to the understanding that punishment is not for the crime but punished person gets cut off from the active part of society. Solution is seen in improvement of the efficiency of the current system in leading subjects out of the cycle of recidivism through a legal occupation and meaningful skill-advancing activity.¹⁶ The author is not naïve – no model is going to eliminate criminality from society. To offer a feasible opportunity and to facilitate the return into society, however, should be the goal.

Another target of the research was unexpected but became as important as the original set goal – the lack of proper methodology in gathering the statistical and comparable data asked for a bottom up action research method and the approach brought up discrepancies that haven't been described by other researchers. The method of critical thinking was not originally scheduled but was tailored to this study and became a necessary and inseparable part of it. This involved analysis and evaluation of theories that have formed the basis of traditional studies. It appeared that theoretical perspective may change rapidly in transformation societies and affect both, the setup and outcome of the studies.

¹⁰ See: *OECD. Estonia: Towards a Single Government Approach*. 2011.

¹¹ See: *Ahven, A., Salla, J., Vahtrus, S. Retsidiivsus Eestis [Recidivism in Estonia]*. 2010; *Ahven, A. Vanglast Vabanenute Retsidiivsus*. 2010.

¹² See *Ahven, A. et al. Kuritegevus Eestis [Crime in Estonia]*. 2015, 2016. *Hilborn, J. Ülevaade Kuriteoennetuse Planeerimisest [Review of Crime Prevention]*. 2007; *KESA-Mauritius. Retsidiivsus [Recidivism]*. 2007.

¹³ See *Council of Europe. Annual Penal Statistics. Recidivism Studies*. 2017; *Fazel, S., Wolf, A. A Systematic Review of Criminal Recidivism Rates Worldwide: Current Difficulties and Recommendations for Best Practice*. *Plos One*, Vol. 10, 2015.

¹⁴ *OSAC. Estonia 2015 Crime and Safety Report*. 2015.

¹⁵ See: *University of London ICPR. Estonia | World Prison Brief. WPB*, 2017.

¹⁶ See: *Altmäe, E. Retsidiivsusust mõjutavad tegurid valitud kuriteoliikide näitel [Factors that Influence Recidivism. Based on Selection of Crime Types]*. Thesis, MA, 2015; *Meier, R. F., Miethe, D. T. Understanding Theories of Criminal Victimization. Crime and Justice* 17, 1993, pp. 459–99; *Harper, L. The Four Theories of Victimization*. Soapboxie, 2014; *Hilborn, J. Ülevaade Kuriteoennetuse Planeerimisest [Review of Crime Prevention]*. 2007; *Pease, K. Repeat Victimization: Taking Stock. Crime Detection and Prevention Series*, 1998.

1. Defining the problem of current policing

Defining the problem for policy design, e.g., in policing,¹⁷ important distinction is that problem-oriented policing describes comprehensive framework for improving (e.g. the police's) systemic capacity to perform the mission. Problem-oriented policing impacts everything the system does (the police do) operationally as well as managerially.¹⁸ The term "problem solving", used from the 1980s, more specifically describes the mental process of the problem-oriented policing.¹⁹ The same basics apply to the problems in resocialization through the penal system. The basis for the application is true and appropriate information of the situation so the methodology of knowledge formation stands out. The history of the components of today's multilevel governance in rehabilitation and shared management applied onto inmates, dates back a long time: once the world's largest prison Australia, the old Central Prison of Raleigh, Bastøy, Delancey Street, Papa Giovanni project,²⁰ etc. These examples did not lead to the devolvement of power from the state. The key to resocialization was purposely executed through occupational involvement and encouragement of one's abilities.

Defining the case in hand, we are playing with two interrelated aspects:

- expectations towards the state (institutional system) in terms of "rehabilitation" of (delinquent) male,
- value vs. bearing of the subjects (prisoners after release) expected towards the state and to the community.

Ability to place oneself onto the labor market has been and still is the pivot of it. Social security models taken from Sweden, Germany, Britain etc. are based on demarcation between the deserving and the undeserving. Characteristic to most undeserving is a believed position of self-inflicted poverty, a choice of not working to the best of one's ability. The choice, however, could only be made in a situation where the subject has a position of a real applicable choice and importantly, a new (case-adjusted) choice could be added to the proposed set. Instead of "how do we bear with them?" or "how do we care about them?", the question could rather be "what can we do in order to help them to help themselves?" Different reforms launched in the EU welfare ringleaders during the past decade (German Hartz-reform, British Welfare to Work programs, Swedish efforts to create efficient work-focused rehabilitation) all target the role of the state in the "work first welfare state".²¹ The leader of mass incarceration, U.S., has also been pressured to find solutions in leading idle persons incl. released to the legal labor market and provide

¹⁷ See: *Braga, A. A. Problem-Oriented Policing and Crime Prevention. 2008; Goldstein, H. Improving Policing: a Problem-Oriented Approach. Crime & Delinquency, 1979; Goldstein, H. Problem-Oriented Policing. McGraw-Hill, 1990; National Research Council. The Growth of Incarceration in the United States. National Academies Press, April 24, 2014.*

¹⁸ See: *Boba, R. Problem Analysis in Policing. COPS Publication, 2003.*

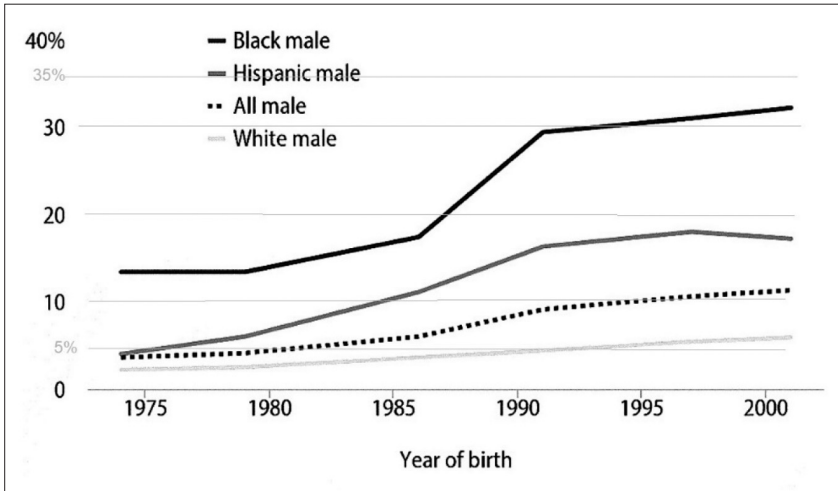
¹⁹ See: *Scott, M. S. Problem-Oriented Policing: Reflections on the First 20 Years. COPS Publication, 2000.*

²⁰ See: *Associazione Comunità Papa Giovanni XXIII; Bastøy fengsel. The Raleigh prison was designed and built by prisoners; in Bastøy prison-island in Norway even the transportation to the prison island from the mainland is done jointly with captives. Bastøy is not the only system believing that attitude and philosophy that is supported by action will change not only prisoners but also the institutions and systems. Based on: Sæheim, E. Private Correspondence 2012-2017 (The founder and long-term director of Bastøy prison). Norway.*

²¹ See: *Stendahl, S. Employment Support – a Normative Step Backward, Forward or Nowhere in a European Work-First Welfare State. Centre for European Research, University of Gothenburg, 2008.*

explanations on why more severe penal system is not giving promised results.²² Explanations given heretofore have not been fully supported by the respective statistics.²³ Another aspect is that those analyses²⁴ do not apply well to other societies or cultures, including the case of Estonia.

Figure 1. **Effect of the change of the policy.** Plot of the lifetime likelihood of a first incarceration at a state or federal prison for individuals born in U.S. between 1974 and 2001 disaggregated by race and ethnicity for men (see: Cox, 2015)



Estonia is not a mass incarceration state but compared to the European average, the situation stays disturbing. Noticeable in Estonia is a trend from rehabilitative approach to punitive²⁵ as it has also been discussed in other cases.²⁶ While in the U.S. the problem of criminality has been viewed from the perspective of minority suppression (Figure 1), in the Eastern European countries persons with criminal penalty become themselves a growing but hidden minority group. Rights and obligations of citizens, as well as the state, in this new setting are asking for tailored solutions, new viewpoints, and perhaps even a change of paradigms. Academic debate in that matter should collaborate with legislative and executive power. International experts have cautioned that Estonia keeps writing strategies that are enjoyed on paper – there are too many of those but practical application is rather weak. Another weakness is perceived in the loosening link between science

²² See: *Schrager, A.* In America, Mass Incarceration Has Caused More Crime than It's Prevented. Quartz, 2015.

²³ See: *Neyfakh, L.* Mass Incarceration: a Provocative New Theory for Why so Many Americans are in Prison. Slate.com, 2015.

²⁴ See: *Goodman, N.* The Weekly Abolitionist: Exploring the Causes of Mass Incarceration. Center for a Stateless Society, 2014.; *Cox, R. J. A.* Where Do We Go from Here? Mass Incarceration and the Struggle for Civil Rights. Economic Policy Institute, 2015, pp. 1–20.

²⁵ See: *Riigikohus* [Supreme Court of Estonia]. Karistuse Kohaldamise Etapid Eesti Kohtupraktikas. Oigusteabe Osakond, 2012; *Riigikohus* [Supreme Court of Estonia]. Ülekriminaliseerimine [Overcriminalization]. 2010.

²⁶ See: *Lerman, A. E.* The Modern Prison Paradox: Politics, Punishment, and Social Community. Cambridge University Press, 2013.

and practice.²⁷ The paper suggests a model that tailors existing knowledge and experience in involvement of subject groups to the decision-making process in a real case situation, using the frame of these strategies.

2. Rationality in Policy Design

Prison as a unique system with specific power relations gives room for lab modeling that could be applicable more widely. It could serve as an example in the design of more efficient community (or state) management.²⁸ However, theories that have been used in the governance design in e.g. Estonia originate from circumstances that differ from the existing ones. Therefore, illuminating the overall context, while leaving room for specific developments could help. The capability of the knowledge-based growth model to deliver its expected benefits to these areas crucially depends on tackling the specific set of socio-institutional factors, which prevents innovation from being effectively transformed into economic growth.²⁹

Rational choice theory has been used to explain criminal or delinquent behavior.³⁰ Conversely, a real crime most frequently is not a rational act.³¹ In the case of Estonia, alcohol and narcotics play significant role in criminality, as Estonians stand out with the largest alcohol consumption in OECD and has the highest number of drug deaths in Europe.³² The goal of rehabilitation should form and perpetuate rational choices for a released in the future life. Among other factors, this aspiration is based on adequate and sufficient information that is added to a forced situation of choice and possibilities. This applies to all involved parties from individual level to institutional one (Figure 2). To make an adequate decision, the situational evaluations should be viewed with their possible opposites.³³ This, again, applies equally not only to the subjects but also to the officers/civil servants, workers of the institutions and to public attitude. The punctuated equilibrium and Tuckman model³⁴ in the combination with the understanding of logics in social

²⁷ See: *Kaevats, Ü. Säaestev Eesti 21 – Teadmistepõhise Eesti Tuumideestik. RiTo, 2004; Proos, I. et al. Demokraatia ja rahvuslikud huvid. Eesti Ühiskond. 2006; Ruttas-Küttim, R., Stamenov, B. RIO Country Reports. RIO Country Report, 2015.*

²⁸ See: *UNEP. Finance Initiative. Integrated Governance: a New Model of Governance for Sustainability. June, 2014).*

²⁹ See: *Crescenzi, R., Rodríguez-Pose, A. Innovation and Regional Growth in the European Union, Advances in Spatial Science. Springer Berlin Heidelberg, 2011.*

³⁰ See: *Cornish, D., Clarke, R. The Reasoning Criminal: Rational Choice Perspectives on Offending. Transaction Publishers, 2014; Clarke, R. V., Cornish, D. B. Modeling Offenders' Decisions: a Framework for Research and Policy on JSTOR. Crime and Justice 6, 1985, pp. 147–85; Akers, R. L. Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken. Journal of Criminal Law and Criminology 81, no. 3, 1990, pp. 653–76.*

³¹ See: *MinJust. Kuritegevus Eestis [Criminality on Estonia] 2006-2015. Yearbooks, 2017; Piquero, A. R. Rational Choice and Criminal Behavior: Recent Research and Future Challenge. Routledge, 2012.*

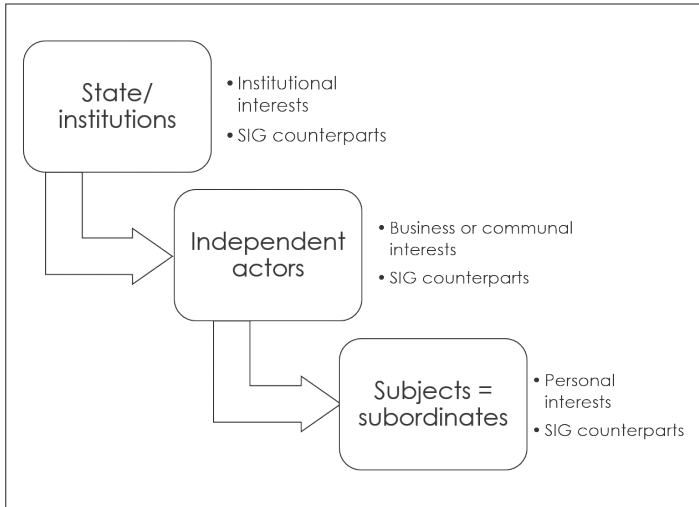
³² See: *WHO. Alcohol Consumption: Levels and Patterns. 2014, 1; EMCDDA. Estonia Country Overview. European Drug Report, 2016; News.err.ee. Report: Estonians Stand out for Largest Alcohol Consumption in OECD. 2015; Finn, C. Estonia Has the Highest Number of Drug Deaths in Europe. But Why?. The Journal, 2014.*

³³ See: *Leps, A. Modern Dialectical Criminology: A New Perspective on Study of Criminology. Ortwil, 2016.*

³⁴ *Hurt, A. C., Trombley, S. M. The Punctuated-Tuckman: Towards a New Group Development Model Towards a Case for Integration. 2007.*

theory³⁵ lead to the practical experimenting of appropriate strategic models of change.

Figure 2. Counterparts groups in a SIG model



The influence of the EU governance on Eastern European national governments is often treated as a top-down power relation. The process moves from government to governance and rescaling politics has been described as the process of Europeanization. Little has been learnt about how the so-called extended parallel process model might be applied to societies and governments of new member states.³⁶ From the first ideas on consociational sharing of power in 1980s³⁷ the trends in the understandings about the power transition and its directions have moved up and down.³⁸

In any case, the “quality of governance” has its primary effect on the economic growth and transition to democracy.³⁹ These processes require proper information and communication, which in cases of corruption, autocracy, authoritarianism,

³⁵ Ford, J. D., Ford, L. W. Logics of Identity, Contradiction, and Attraction in Change. *Academy of Management Review* 19, No. 4, 1994, pp. 756–85.

³⁶ See: Witte, K. Fear Control and Danger Control: a Test of the Extended Parallel Process Model. *Communication Monographs* 61, No. 2, 1994, pp. 113–35; Maloney, E. K., Lapinski, M. K., Witte, K. Fear Appeals and Persuasion: a Review and Update of the Extended Parallel Process Model. *Social and Personality Psychology Compass* 5, No. 4, April 2011, pp. 206–19; Hullett, C. R., Witte, K. Predicting Intercultural Adaptation and Isolation: Using the Extended Parallel Process Model to Test Anxiety/uncertainty Management Theory. *International Journal of Intercultural Relations* 25, No. 2, March 2001, pp. 125–39.

³⁷ Lijphart, A. *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*. Routledge, 2008; Reynolds, A. *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*. Oxford University Press, 2002.

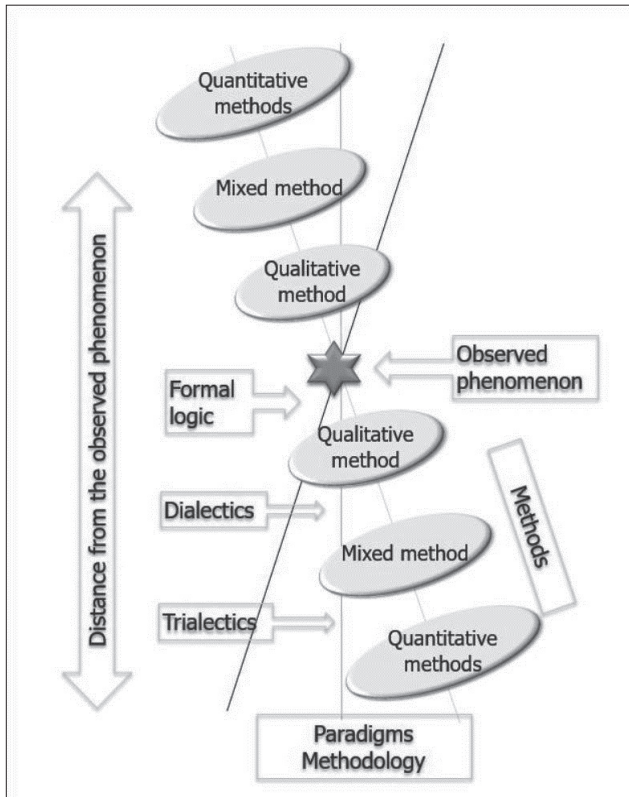
³⁸ See: Travers, T. *Sub-National and Local Government in Context - 1*. London School of Economics and Political Science, 2013; Etzioni, A. *The Need for a New Paradigm*. *Commentary*, 1994, pp. 994–95.

³⁹ See: Kanchanavipul, K. *An Integrated Model for SOA Governance*. Report/IT University of Göteborg, 2008.; See about the influence of the governance on operation type and on the (business) environment: Delsing, M. *City Networking in Europe*. 2013; See about the effect on economy: Charron, N. *Government Quality and Vertical Power-Sharing in Fractionalized States*. 2009. Charron, N. *Power Sharing, Ethnolinguistic Fractionalization and Government Quality*. 2007.

prohibited access to involvement, high barriers to entry or political manipulations are not working.⁴⁰ Experts, as in the Delphi method, under these circumstances do not have access to policy forming; the knowledge-based development is hindered.

Multilevel governance means change. The theory of change in social structures has often been considered naïve. Nevertheless, it has its place and logic. It is important to recognize that change is not a linear movement, as promised and expected e.g. about economic growth or overall improvement of the quality of life. It has its cycles and stages. Motivation for change could be suppressed or inhibited by the lack of prerequisites, choice, and opportunity to add a new or missing particle to the existing set. The lack of choice or impossibility to influence the processes, which affect a subject, may cause apathy or rage, depending on the situation and the character, or appear in a combination. The set methodological lens may either help to see clearly or make the picture blurry (Figure 3).

Figure 3. **Lens of view.** It is adjusted by our views and choice of methodology, following methods, analysis, interpretation and presentation of gathered information. This information may help to form knowledge about the phenomenon and its causes/ effects (T. Stewart)



⁴⁰ See: Levitsky, S. Competitive Authoritarianism. Cambridge University Press, 2010; Levitsky, S., Way, L. A. The Rise of Competitive Authoritarianism. Journal of Democracy 13, No. 2, 2002, pp. 51–65; OECD. Estonia: Towards a Single Government Approach.

For building a model suitable for the context of the current time and location, the primary and essential task is to map at least these aspects:

- current situation and its trends (statics and its dynamics);
- the reasons for the choice of the method;
- understanding of the problem as a complex of interrelated aspects and factors;
- any given problem is a cause and a result at the same time;
- the content and meaning of the data at hand;
- interpret the correspondence between reality and the model;
- the level of simplification should not distort truth;
- interpretation itself depends largely on objectivity⁴¹ or subjectivity⁴² of the situation.

3. Findings: Obstacles vs. Possibilities in (Re)socialization

Findings of this paper are based on a) the questionnaire for male inmates PrQ; b) interviews and discussion groups in the EUIF, with prisoners, released and their family members ExQ1; c) questionnaire for the EUIF experts ExQ2; d) statistics from the EUIF about the released from prisons in the system of employment agency and consultation with the experts of MinJust.

PrQ: N=570 from all three Estonian male prisons compiles a valid group (approx. ¼ of all male inmates at the time). PrQ average respondent has been sentenced to prison penalty 2.8 times; harmonic mean HM=1.8; the average current time of sentenced imprisonment is 6.0 years, HM=2.3; average time spent in prison during respondent's life was 7.1 years, while 35.4% fell into the category of 1 to 5 years, but 27.5% have been imprisoned for more than 10 years. Approx. 3000 men are in prison today in Estonia (combining the sentenced and pre-trial detention), all of them (except 40 lifers) are returning to the society sooner or later.

According to PrQ:

- majority of inmates are not working and never have a chance to practice real work during their captive time even if they expressed willingness;
- there is no division in the institution between the ones who are able to acquire job after release, need temporary support to conform with the labor market demands (and the information as to what are these requirements) or who might fall into permanent social support category;
- work, if ever offered, is not offered considering actual skills; the ones who had the experience of working before, soon lose the respective skills;
- during the incarceration time, developing of social skills, abilities for re-entry into the community and labor market is marginal;
- easiest choice after release is either to return to illegal means or to become a social benefit receiver. A certain part just falls out of society, become homeless, discouraged (Table 1).

⁴¹ The system of stereotypes, in which a person finds himself.

⁴² Personal, first-hand, direct, experienced.

Table 1. **Sources of obstacles in socialization** (Stewart, 2016). The table shows example of the groups of needs at the release. Most of those problems should be addressed during the incarceration time. Especially young offenders, says Ministry of Justice, commit a crime right after release. Interviews showed that it is explained by anger and helplessness – nobody notices, no one cares.

Obstacles to socialization (according to the PrQ)				
<i>Obstacle</i>	<i>Affected by personal or social factors</i>	<i>Influences by prison</i>	<i>Social service (after release)</i>	<i>Respondents with this obstacle</i>
<i>Addictions</i>	Q81⁴³	Appr. 30 pers/year =1%/ get treated⁴⁴	29% admitted an addiction	33% (yes + blank)
<i>Age (>55 years)</i>	19% said that age is a problem			<2% over 55y⁴⁵
<i>Health (physical)</i>	Lack of information, knowledge, courage, money	See the budget (Figure 4)	Not aware of the symptoms of post release syndrome	interviewed, not in the PrQ,⁴⁶
<i>Health (contagious disease)</i>		HIV, TB – not treated⁴⁷	Records not accurate Us Department of State, “Human Rights Report Executive Summary 2013. Estonia,” 2013.	Not asked
<i>Health (mental) (Chancellor of Justice, 2011)</i>	Not aware of the rights	Access to treatment and medications limited (Chancellor of Justice, 2011)		Not asked, observed, and interviewed
<i>Education (<9 years)</i>	Q4	Obligation to educate up to the 9th year		112/20% of total
<i>Computer</i>	Q14		CV, job adds in internet	131/23% of total (has not used ever or ≥ 5 years)
<i>Social skills</i>	Data from Questionnaires, to be analyzed in the next step	The course of lifestyle	Interviews with the Unemployment Fund, family members	

⁴³ Q... – the main question that measured that index. There might be other questions and in most cases, it is the combination that gives the picture.

⁴⁴ *MinJust*. Arengukava tegevuste ja kulude tabel 2015-2018 [Improvement Plan, Activities and Expenses].

⁴⁵ Even though the limit by the research was set at 55 years of age (the regular age of retirement in Estonia is 63 years), 109 respondents said that age is a limitation for them.

⁴⁶ Only 33,7% of young Estonian males are eligible for the service in national armed forces (2013). The rest are exempt due to poor health. There is no reason to assume that the health of prisoners is better. It is probably worse due to their age categories, lifestyle, previous habits, and access to health services.

⁴⁷ The testing and cure of the hepatitis C is expensive and is not possible with existing state budget (currently, the problem is solved thanks to the foreign supports, which end in 2015). Norwegian project “Public health” in prisons: in a year, against HIV were tested 3000 inmates, against Hepatitis C – 400 inmates. Treatment course was completed by 29 inmates *MinJust*, 2015.

Continued Table 1

Professional certificate	Q5	Courses – welders, general, AA etc.	Some have 5 professions, but cannot find job in prison or after	301/53% of total (no profession or not marked)
Education (≥ 9), no profession	No other obstacles	The full range of professions Q18 enlisted		110/19% of total
Language (Rus <2 languages)	Q11 – 102 Q12 ⁴⁸ – 88 Q13 – 87		Total Rus = 232	Excluded Russians with 1 language
No work experience and habit	Q18	State statistics (the meaning of “working” in prison statistics)		118 (incl. the ones who did not answer)
Finding a job	Q62			160/30% of respondents
Length of isolation this time ⁴⁹ q78	555 respondents	≥ 5 years		240/43% of respondents
Length of isolation in life q79	523 respondents	≥ 10 years		156/30% of respondents
Adaptation	Q62			172/33% of respondents
Recidivism	543 respondents	318 respondents in prison 1 st (129) or 2 nd (189) time	225 respondents ≥ 3 times, 77 respondents 5 times or more, 14 respondents 10 times or more	41% ≥ 3 times 24%=2 nd time 35%=1 st time
Debts and liabilities	Q			Respondents who declared that money is the main problem and they see no solution
Homeless	Q62		Respondent for whom family was the main problem and see no solution	115/22% of respondents
Summary = group, eligible for work	Number of men needing special treatment	X+y+... = ... 48 persons/ 8% of total / 36 Est, 12 Rus	Number of men left from the general group	572 - ... =
Security		“Anger management” and other courses for coping (MinJust, 2016b)	See Q82 – of the target – crimes	Additional penalties + black hole + health + ... = 3-5% ⁵⁰

⁴⁸ One person answered Q12=0; Q13=0 in writing. The questionnaire was completed.

⁴⁹ Many respondents said that the time, when a man brakes is about 4.5 years. After that starts the phase of apathy and hopelessness. Special and targeted rehabilitation is needed even for young men. Especially noticeable is it in cases of repeated imprisonment and lengthy solitude or punishment in black hole (the longest time in the black hole reported by the respondents was 353 days).

⁵⁰ This is a remarkable number as it matches with the number of respondents who reported that they actually work during their prison time.

The growing body of idle persons in society has forced social security systems to elaborate more regulations, aid, and support measures.⁵¹ The problem in this case is that those measures reach neither prisons nor the released,⁵² the majority of inmates have not heard of those measures. The average planned social support at the release on 2017 is 15.5€ per person: budget 23 000€/1 482 released (data of 2016).

Preparation in the penal facilities is not adjusted to the reality on the labor market:

- very few inmates have access to the courses. It is explained by the security norms, even though all male prisons in Estonia are high security facilities;
- the courses do not involve practical training;
- the equipment is outdated and limited;
- courses on practical labor are not adjusted to the reality outside – e.g. welders are one of the major groups of unemployed but this is often the only practical course in prison;
- after release, the criminal record is published in public registry – competing on the open labor market is almost impossible.

The interviews showed that even though the EUIF does treat released persons equally with other people, potential employers are not keen to hire “a criminal”. Carrying out a penalty does not mean rehabilitation in the eyes of public. Current imprisonment policy combined with the lack of possibility to choose one’s involvement in rehabilitative activity (incl. work) breaks the required elements of successful return.⁵³ Thereof, the study showed that the released find themselves in the position where to start over after release is even more complicated than before the sentence time.⁵⁴

The budget of the prison service in Estonia, judging by its expense categories (Figure 4) is primarily focused on strengthening the institutional structure. Similar strategy is adhered to in other Baltic states.⁵⁵ In this budget, no expenses are earmarked to organize work for prisoners (it is done by a privately-owned organization, so the budget is not publicly available data), schooling or development programs. Neither does the budget indicate any income from the prisoners’ work. About 20% of the prisoner’s wage stays in his personal account. The rest, depending on the case, is divided by liabilities for the state and victims, personal obligations, such as alimonies, release fund etc. This makes the wage approx. 0.2€/h. From 2015, the education service in one of the three major prisons in Estonia is no longer offered due to the insufficient funding. The reason for the year-by-year increase of the cost of prisons in Estonia is reportedly caused by the modernization of the prison system.

⁵¹ See: *MinSoc*. 2015 and *Riigikogu* [Estonian Parliament], 2001 and 2005; *EUIF*, 2015.

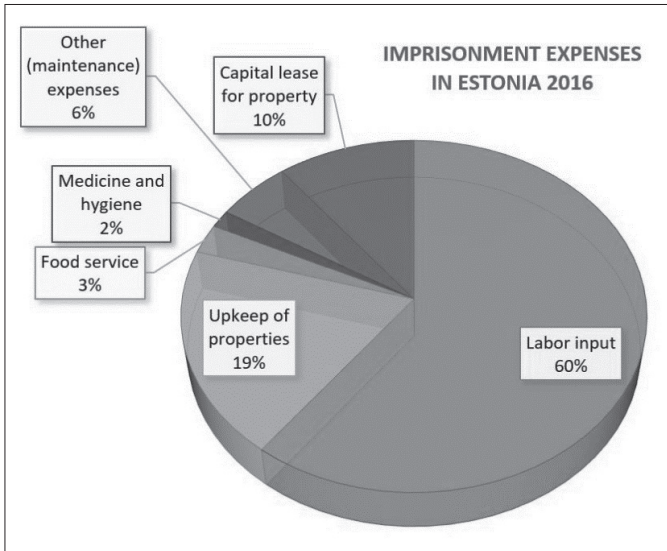
⁵² See: *Stewart, T.* 2014; *EUIF*, 2016; *Eesti statistika* [Statistics Estonia], 2015.

⁵³ See: *Devetzi, S., Stendahl, S.* Too Sick to Work? Reforms in European Social Security Systems for Persons with Reduced Earnings Capacity. 2011; *Hearn, J. et al.* Studying Men’s Violences in Europe. 2013; *Liiv, M., Hanni, E.* Vangide tööhõive vabaduses: vanglas töötanud ja mittetöötanud kinnipeetavate võrdlus [Employment of prisoners at release. The comparison of the ones that worked/ did not in prison]. 2006; *Musgrove, K. et al.* A Program for Offenders Transitioning into the World of Work. ProQuest Criminal Justice, 2012; *The Leadership Conference Education Fund*, 2013; *Western, B.* From Prison to Work: a Proposal for a National Prisoner Reentry Program. 2008.

⁵⁴ See: *MinSoc* and *MinJust*. Tugiteenus Vanglast Vabanejatele [Support service to the released from prisons]. 2014.

⁵⁵ *Kamenska, A., Pūce, I., Laganovska, K.* Prison Conditions in Latvia. 2013.

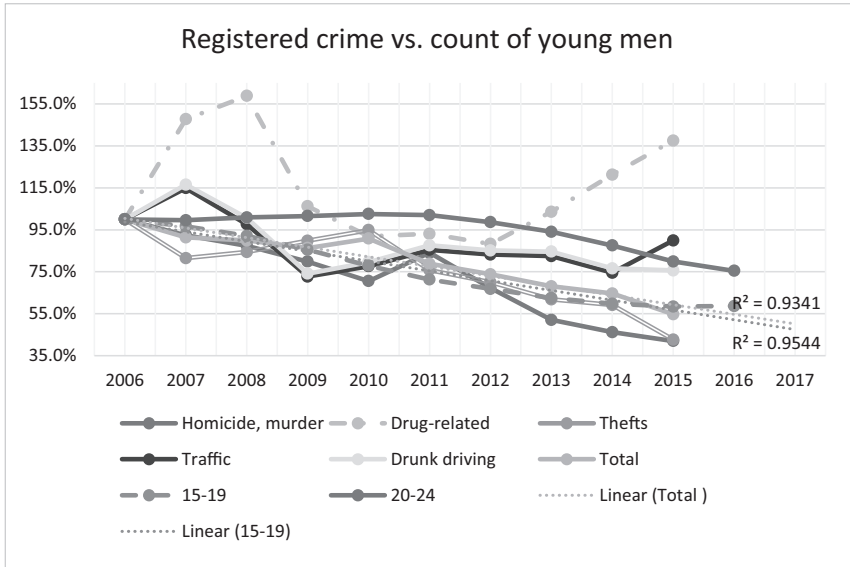
Figure 4. **Estonian prison service expenses by categories.** (MinJust, 2016) The upkeep expense per prisoner in 2016 per month was 1482€ and it is rising; total cost of food per prisoner is 1.2 € per day vs. 1669 € salary per prison worker per month (incl. labor).



Confusing statistics. Yearbooks of criminal statistics and research (from the masters' thesis) about Estonia underline the importance of demographics related to crime. At the same time, this influence is not discussed at all.⁵⁶ In 10 years (2006–2015), the number of criminal acts has been reduced by 33.7% (Figure 5). The count of criminal acts is a better statistical comparison than e.g. count of prisoners as the latter depends more on the fast-changing criminal law in the region. At the same time, the count of young men in Estonia at the age group that is supplying the main part of criminality has declined by 32.9% (Figure 5). This means that criminality in Estonia has not dropped in the last decade considering that the loss on people also means less contacts, interaction, and possibility to form (delinquent) groups. Another aspect is that more and more Estonians (young men) are detained elsewhere. This number is estimated in some sources, but not known with certainty. These factors have not been discussed while explaining the criminal statistics.

⁵⁶ See: *MinJust*. Kuritegevus Eestis 2006-2015; *Altmäe, E.* Retsidiivsust mõjutavad tegurid valitud kuriteoliikide näitel [Factors that influence recidivism. Based on selection of crime types]; *Saarpoll*. Kinnipeetavate väärtushinnangute uuring [Study on Values of Inmates]. 2009. See: *Saar, J., Markina, A.* Vangide arv Eestis 1991-2005 ja selle vähendamise karistusõiguslikud ja kriminoloogilised alused. 2007.

Figure 5. **Registered crime in Estonia, 2005–2015.** The reported decline of crime was 33,66%. Estonian Police, “Registreeritud kuriteod 2005-2015,” 2016



Applied practice depends more on the culture of the society, not so much on legal acts. The monopoly in the treatment of the imprisonment-punished offenders and their rehabilitation in Estonia are held by the state, as in most European countries. The trends of (male) prisoners working shows great reduction compared to the preceding times. The principle used to be that the cost of the penal system should be covered by the convicts (plus open prison) as society has already paid the social cost and suffered the damage of crime.⁵⁷ In addition, it was (at least unofficially) acknowledged that prisons hold lots of skillful people.

4. Released Persons as a Weakened Group in the Society

The study was interested in factors of prerequisites and possibilities for (re) socialization of idle group – released from prison. This relates to the reasons for recidivism. Opinion of observers and institutions on this has been expressed periodically.⁵⁸ The study asked who these men are and what are considered as reasons for their return to the criminal cycle.

The study showed that all surveyed groups see the released as a weakened group in the society. The attitude nevertheless, varied across the surveyed groups:

- Prisons were seen by all as a limiting factor for work-ability (health, habit, skills, social competencies). The same was revealed by the ExQ1 discussions. ExQ1 showed that even though there are measures to support enterprises

⁵⁷ In Soviet times, even imprisoned handicapped worked having adjusted work places and tasks (see: Sillaots, O. Tööhõive Eesti vanglates [Occupation in Estonian prisons]. 2003. Today, only up to 5% of prisoners work daily (MinJust, 2015), the industry is producing substantial loss. See: AS Vanglatööstus [Prison Industry Ltd.], 2015. The penal system entirely subsists on taxpayers and EU funds.

⁵⁸ See: KESA-Mauritius. Retsidiivsus [Recidivism]. 2007; Altmäe, E. 2015; Ahven, A. Vanglast Vabanenute Retsidiivsus [Recidivism of the released]. 2010; Saarpoll, 2009.

in employing long-term unemployed persons, ex-prisoners are not accepted unless they are employed by relatives or close friends.

- ExQ2 – the specialists of the EUIF see prison-released as suitable for simple labor, characterized clients of this category as polite and willing to work. Respondents from the EUIF have not heard of the Prison Industry Ltd. or had neither details nor contacts with the representatives of this industry.
- ExQ1, ExQ2 and PrQ revealed that released are normally paid less than average or standard wage on the market.
- ExQ2 and PrQ revealed that released accept unregistered labor.⁵⁹ As salary is often not paid at all or is paid only partly, this leaves workers in a situation of no legal protection. Frequently follows an offer to pick up an illegal “job”.
- The most negative attitude against prison-released as a potential work-force was expressed by those employers who had no experience with this category.
- Statistics, documents, and interviews show that the actual potential to find legal job after release is not strengthened during imprisonment – courses of small-scale entrepreneurship is offered just for few (without practice), and welding (the most common skill offered by prison) is not needed on the market (unemployment statistics).
- The attitude in PrQ differed a) about the person himself or b) prisoners as a general body. Most respondents were very critical about the abilities of prisoners to take active part on the labor market after release. The main reasons for the failure seen by the prisoners are shown in Table 2, Table 3. Compared to the professional skills and semi-professional hobbies that PrQ respondents reported (Table 4, Table 5), the activity offered during the captive time is not correlating.
- The main expected personal obstacles at the release are shown in Figure 6.

Table 2. **Main obstacles in finding legal job after release (PrQ).**

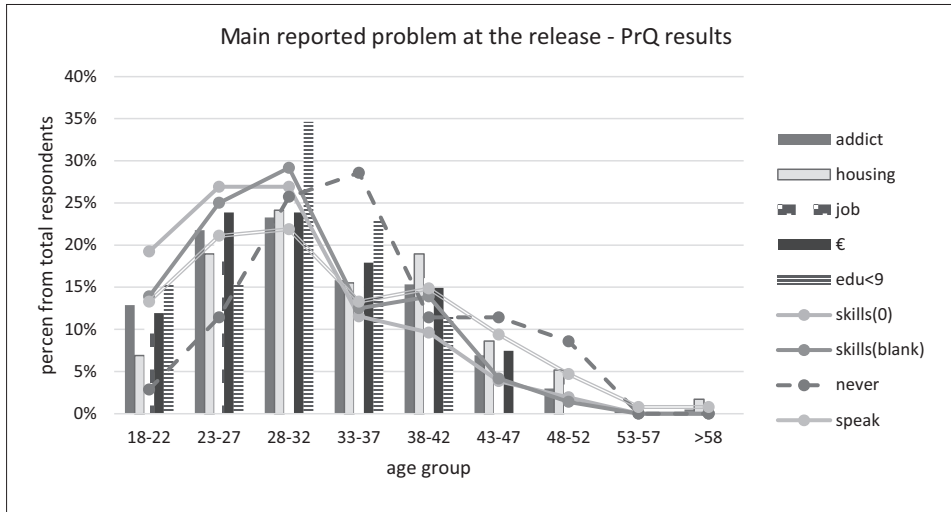
Obstacle	<i>educa- tion</i>	<i>skills</i>	<i>criminal record</i>	<i>lack of help</i>	<i>lack of support (state)</i>	<i>general attitude</i>	<i>personal problems*</i>	<i>something else</i>
Response	66,1%	54,4%	38,1%	39,1%	47,4%	53,3%	77,7%	26,7%

Table 3. **Perceived hindrance in life (PrQ)**

Hindrance	<i>money</i>	<i>education</i>	<i>skills</i>	<i>age</i>	<i>family</i>	<i>criminal record</i>	<i>something else</i>
Response	58,9%	32,1%	23,5%	19,1%	10,7%	57,7%	16,0%

⁵⁹ This means that no state taxes are paid on this work, the worker has neither social guarantees, nor a contract.

Figure 6. **Expected personal problems at the release.** € – income, financial resources; edu – lack of sufficient education; skills (0) – no proper work skills; skills (blank) – not answered, considered (by the researcher) poor; never – never used a computer; speak



Could we see this group as a *minority or a weakened group* in the society? The use of term “minority” regarding persons with criminal record has been argued. Traditionally, minority as a term has been used to designate women, ethnic or cultural groups or, in the 21st century, a person with disabilities or distinct sexual orientation.⁶⁰ Considering the limiting characteristics pertaining to the released from prisons,⁶¹ the term applies prior to their conviction and often strengthens after release, the connection between belonging to the minority and potential criminality is there. This logical thread is supported by the conflict theory.⁶²

Regionally, other agendas besides security have been seen behind captive punishment policies, e.g. ideas that imprisonment is used to regulate excess unemployment or that the problem is still related to the leftover of slavery and racism and political populist interests.⁶³ In Estonia, no explanation has been given regarding the interest of the state or any of the political forces on the existing policy that keeps prisoners, esp. male prisoners (95%) out of work or meaningful

⁶⁰ See: Hartsock, N. Rethinking Modernism: Minority vs. Majority Theories. *Cultural Critique* 7, 1987, pp. 187–206; Nemeth, C. J. Minority Influence Theory. *Handbook of Theories of Social Psychology*, No. 218, 2010; Lewin, K. Action Research and Minority Problems. *Journal of Social Issues* 2, 1946, pp. 34–46.

⁶¹ McNamara, A. The ‘Special Needs’ of Prison, Probation, and Parole. 2007.

⁶² See: Goar, H. Conflict Theory and Deviance: Discovery Service for Academic Library of Tallinn University. *Research Starters: Sociology*, 2015, 7; Furman, N., Ackerman, R. et al. The Criminalization of Immigration: Value Conflicts for the Social Work Profession. *Journal of Sociology & Social Welfare* 39, No. 1(2012): 169–86.

⁶³ See: Myers, S. L., Sabol, W. J. Unemployment and Racial Differences in Imprisonment. *The Review of Black Political Economy* 16, No. 1–2, June 1987, pp. 189–209; Sutton, J. R. Symbol and Substance: Effects of California’s Three Strikes Law on Felony Sentencing. *Law & Society Review* 47, No. 1, 2013, pp. 37–72; Goodman, N. Exploring the Causes of Mass Incarceration. Cox, Where Do We Go from Here? Mass Incarceration and the Struggle for Civil Rights. *National Research Council. The Growth of Incarceration in the United States*. 2015.

activity.⁶⁴ Additional limitations and obstacles after release leave little alternatives for legal income.⁶⁵ Europe is looking for new forms of engagement and occupational networking.⁶⁶ This is one of the groups not involved in these reforms. This sector of public service in Estonia seeks fresh solutions as the official communal interest fails to match the results or resources spent. Private prisons have been discussed but rejected. The experience with third-party project-managed rehabilitation services (which is the wave) is not giving results.

5. In Search for Solutions – SIG Model

The suggested program focuses on work placement and executable activity for the released. Activation policies of the EU are expanding obligation to work to new social groups. The process of redefinition has begun. It has been well established that unemployed citizens have a duty to actively seek jobs. The new development here is who is included into the definition of “the unemployed”.⁶⁷

All respondents confirmed that social skills diminish in prison, the released have a distorted sense of reality, and that imprisonment is a life-changing experience. Interviews revealed that health problems will usually deepen in prison; however, temporary detachment from addictions is possible. Employers prefer people who can be trained at the site – suitability and targeted skills are proven fast. This explains the popularity of test-job and job-practice. Work-habit is weaker among younger offenders. Statistics shows that former offenders use EUIF services after release more in recent years. This has not shown effect on recidivism rate. Decentralization is a multidimensional phenomenon, involving not only the assignment of expenditure and revenue responsibilities among various levels of governing but also the extent of subnational policymaking autonomy.⁶⁸ High territorial imbalances of a state tend to increase inequalities and corruption while the effect of decentralization in the developed world may be either neutral or even contribute to the reduction of regional disparities.⁶⁹ In Estonia, the trend is towards increasing territorial contrast and it intensifies.

In the search of solution, the integration program for idle groups SIG was created. The graph of the model is provided in Figure 7, see the description under the section “**Novelty of the model**”. The proposed model is to balance centralized governing, which has failed to solve certain problems. Based on the principle of subsidiarity, the goal of decentralization is to bring governing closer to subjects. This could increase efficiency, accountability, and transparency. Power belongs to the actors. Actors create complexity. Tackling the critical issues involved, the integrated SIG model of governance (Figure 7) has been developed and presented to be applied to the sample circumstances. It helps to clarify **the relationship between governance, service-based business environment and subject’s interests** (Figure 2) as well as brings improvements to the overall shared governance model. The best

⁶⁴ See: AS *Vanglatööstus* [Prison Industry Ltd.], 2015.

⁶⁵ See: *Riigikontroll* [The National Audit Office], 2002.

⁶⁶ See: *Devetzi & Stendahl*, 2011.

⁶⁷ See: *Stendahl*, 2008.

⁶⁸ See: *Rodríguez-Pose, A., Krøijer, A.* Fiscal decentralization and economic growth in Central and Eastern Europe. *Growth and Change*, 2009.

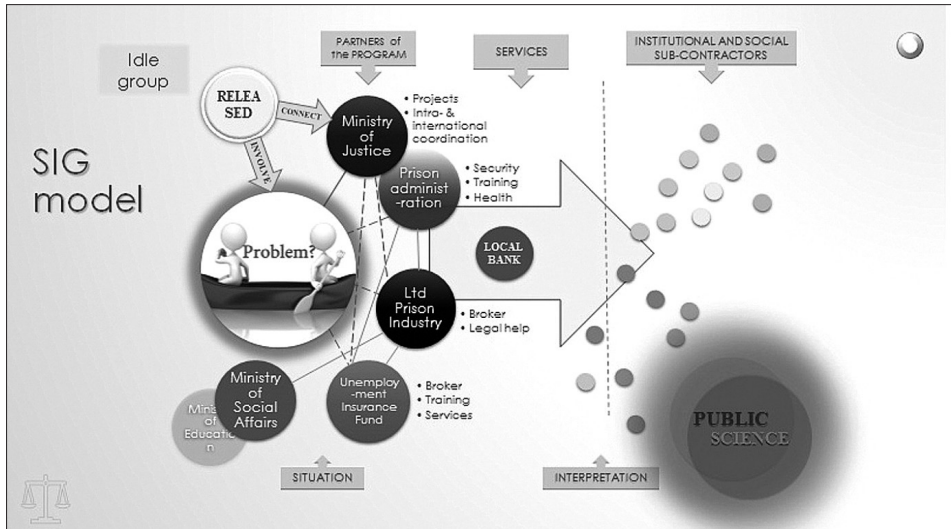
⁶⁹ See: *Rodríguez-Pose & Krøijer*, 2009.

way for testing the idea was conducting action research by its latest definitions.⁷⁰ The effect of the SIG model is appraised from these main viewpoints:

- efficiency – business interest;⁷¹
- social development;
- tension reducer – political interest.⁷²

As a derivative, additional interests could evolve: bottom-up and mixed-scanning strategy in community development, stability and dispersal of real information through new actors as counterparts in the process. This may lead to new innovative solutions. The goal of integrated governance is to maximize value for the society generally and shareholders in particular. True, as a possible downside, decentralization has been seen as a possibility for corruption. In addition, it has been argued that multiple layers of governing in decentralization may reduce accountability by blurring the divisions between different tiers and making it difficult for the public to direct their concerns or credit about delivered services.⁷³

Figure 7. **SIG model.** Subordinates-involved governance model with the participation of a subject group (developed and presented by T. Stewart).



⁷⁰ See: Williamson, T. Work-based learning: a leadership development example from an action research study of shared governance implementation. 2005; Wicks, P. G., Reason, P. Initiating action research: Challenges and paradoxes of opening communicative space. 2015; Reason, P. Journal of Management Inquiry, Vol. 15 No. 2, June 2006, pp. 187-203; Reason & Bradbury. The SAGE handbook of action research: participative inquiry and practice. 2008; Coghlan & Brannick. Action Research and Organizational Development. 2014.

⁷¹ See: MinJust, 2015; AS Vanglatööstus [Prison Industry Ltd.], 2015.

⁷² See: News Portal, 2014; Riigikontroll [The National Audit Office], 2002.

⁷³ See: Varraich, A. Decentralisation, the road to better Quality of Government? 2011; UNEP. Integrated Governance: A new model of governance for sustainability. 2014.

Proper methodology here is of an utmost importance. Criminal behavior is not one-dimensional phenomenon; it is always related to the specific society that fosters it.⁷⁴ The proposed SIG model is (in moderation) applicable to diverse idle groups. The underlying beliefs for the proposed model are:

- the term “criminal (act)” by its origin defines that it will never be tolerated in a society therefore the problematic opposition with the group always remains;
- crime was born with the first men on Earth but crime is not dull, consequently, the measures against it should accordingly be stable, persistent and, at the same time, continuously developing. The same applies to rehabilitation measures;
- the meaning of the modern Western penal system is that a human, who walks out of the prison gate, is capable and ready to join the society on an equal or better footing than the one who started the penal turn;
- the ones in need often do not know what they need, especially in cases where they have not experienced variety of options. This applies also to the participating experts and specialists. Trust about the so far opposing parties should be learnt;
- under the circumstances, there is no access to the prison or penal system from outside. Therefore, the model is designed for the after-release time knowing that this work should be applied to the sentenced person from the very beginning of detention;
- when dealing with humans, averages often do not lead to the truth;
- alternatives to the current low efficient models exist.

The key or pivot of the modified shared governance model SIG proposed in this paper is:

- dynamic and adjusting to the focus group, participatory counterparts, and contracted partners;
- involved are the groups and individuals that in traditional models have been treated as subjects or top-down subordinates;
- it would force the state power to lean closer to civic society and initiate changes both from top-down and bottom-up directions – one would correct and balance the other and foster subsidiarity, possibly leading to mixed-scanning strategy;
- involvement of neutral counterparts would balance the influence of political and strict business interest, helping to retain the model more systematic and sustainably adequate;
- the model is not limited by the number of participants;
- it does not require immediate changes in existing policies or legislation;
- while properly applied, all the involved parties have an opportunity to be heard and to act as experts on the problem in hand.

The model would give motivation to reduce the cost and social effect of related foregoing problem. Employment or occupational development factor described in this model is an essential aspect of what has been called the active welfare state

⁷⁴ See: *Piquero, A. R. Rational Choice and Criminal Behavior: Recent Research and Future Challenges. 2012; Steinberg, L., Morris, A. S. Adolescent Development. Annual Review of Psychology, 52, 2001, pp. 83–110.*

or the work first welfare state⁷⁵. Without truly realizing the circumstances and consequences of change (also in the past), no reform would bring an essential change or expected effect⁷⁶.

Novelty of the model in the Estonian rehabilitation system is the combination and cooperation between different governance levels plus involving all these counterparts into the policy design (Figure 2 and Figure 7):

- state government level – ministries (social, education, health, interior affairs, justice);
- local government level – city government, regional authorities (best connected to the location, local resources, and contractors);
- independent/state office(s) – in this case, e.g. Estonian Unemployment Insurance Fund (EUIF);
- nongovernmental level – the organizing and coordinating body (for the program or project) – currently, the programs and projects are mediated and controlled by the state;
- entrepreneurs – might be employers or experts who could be involved on contractual basis; the level could consist from sole entrepreneurs (the most common type of entrepreneurship in Estonia);
- communal savings and loan associations – local credit associations,⁷⁷ which indirectly stand for all stockholders and the public;
- mixed/integrated level – institutional and social sub-contractors could be from any of abovementioned structural levels of economy and society;
- media, other contractors (not mentioned above), international networks.

The reasons, why government cannot lead this another “project” of rehabilitation is answered above. In 2003,⁷⁸ the government of Estonia formed the Crime Prevention Council⁷⁹ that involved experts, members of the government, scientists, police and even church. In 2013, the council was declared having no legislative or executive power and was called back.⁸⁰ The experts of crime prevention and rehabilitation are now sought based on short-time projects, which are evaluated by the Ministry of Justice.⁸¹ Partly, the current inefficiency originates from the system’s power relations that cause elimination of important counterparts from the communication and leads to the lack of information in statics and dynamics of the process. The outcome is a situation where the system works to sustain itself (Figure 4) but much less to benefit its target group and the society as a whole.

⁷⁵ The concept of “work first” has been used in the North American context (U.S., Canada) to label welfare reforms, which focus on transiting welfare recipients from benefits to private-sector jobs. In 1995, the Work First welfare reform bill was introduced for debate in the U.S. Senate by Democrats and the following programs have been subsequently institutionalized in different states. The American way of activation through work has been associated with “workfare”: government schemes where unemployed and disabled people must work in return for their benefits. The running of workfare schemes is **outsourced to a range of public, private, and voluntary sector providers**, who sub-contract parts of their schemes to charities and community groups.

⁷⁶ The investigation of the causes and effects has proven that longer sentences and mass incarceration do not work. What works, might be having more policemen on duty. See: *Schrager, A.* 2015.

⁷⁷ *Riigikogu* [Estonian Parliament], 1999.

⁷⁸ According to *Ilvest, J.* 2013; *MinJust*, 2014; *MinJust*, 2015.

⁷⁹ *Riigikogu* [Estonian Parliament], 2003.

⁸⁰ *Riigikogu* [Estonian Parliament], 2015.

⁸¹ *MinJust*, 2014; *MinJust*, 2015.

6. Group Description

The research that underlies the present paper proves that the paradigm of shared governance is also applicable to penal systems. It is essential that there would be an opportunity not only willingness to take part. Therefore, the program accepts persons from the target group (Table 1) who:

- have been in prison not more than two times (non-recidivistic), preferably not longer than five years in total;
- are free of addictions;
- of working age (20–55⁸²), able to adjust existing skills and knowledge;
- have completed at least 9 classes of education (the basic required level) and meaningful work experience;
- have certified profession or extensive traceable experience on professional field, if the profession is rare or individually taught;
- agree to the terms of the program;
- are willing to work legally, starting from an entry level, if needed and based on his personal adjustment pace.⁸³

The program offers temporary residency for the released; it is a starting point and a springboard for those who need it. Advisable stay in the program would be one year with the prospect of extension according to the reasonability. Some may be hired for the program itself. A former convict is a part of the problem; at the same time, the former convict is a part of the solution.

The extremely negative and judgmental attitude towards the released was underlined by most respondents in the research. The basic argument, when talking to the top administration of justice executives or public was that prisoners are drug users who have no education and poor, if any, skills. Besides, they cannot be trusted. Even “official” reports perceive all the released as an identical body and often describe them as nonhumans.⁸⁴ Statistics about the prisoners disagree with this preconception. Unbreakable traps are believed to be characteristic for minorities in general.⁸⁵ The influence of the prison time is obviously grave, affecting more than some other forms of idleness in a society. **The goal of the SIG model is to start separating from the “average” the clusters that need the least help in their change of criminal patterns and would be able to receive help from the model’s program** (see below). The rest should be separated according to their need for aid.

The capability of released felons to work is often questioned. There are problems that ask for involvement but there lies also exciting potential (Table 4, Table 5):

- approx. ¼ of respondents reported an addiction;⁸⁶

⁸² According to the Statistics Estonia, 2017, the average age of Estonian men lived without (functional health) limitations is 53,7 years.

⁸³ See: *Gorski, T. Articles*, 2014.

⁸⁴ See: *Mauritiuse Instituut; Sisekaitseakadeemia* [Estonian Academy of Security Sciences], 2007 and 2000–2015.

⁸⁵ See: *Steinberg & Morris*, 2001; *Davis*, 1998; *Gould*, 1996; *Wacquant*, 2002; *Cox*, 2015; *Harper*, 2014. What appears from the angle of prisoners is not necessarily the same print.

⁸⁶ Question 81: “Do you have any addictions that you have been told require treatment?” Addictions recognized in this research included drugs, alcohol, and certain types of compulsive behavior (sexual offenders, chronic thieves, and uncontrollable driving). The answer was not directed, the figure corresponds with statistical data.

The fact that Estonia is leading among the EU states concerning drug problems adds another nuance to the set of problems and deserves close attention since this is an example of a specific cluster that requires different measures.

- average education of prisoners was 10+ years; 66.7% had 9–12 years; 2.3% are reaching for the higher education (have applied or are taking correspondents courses). There are persons with an academic degree (MA or corresponding). Prison system in Estonia supports educational development up to the ninth grade (the basic education). For the employers this level is not attractive;⁸⁷
- the average knowledge of languages was 2.3 languages; many respondents reported more than three languages spoken and read; this average among Estonians (of the respondents) - 2.6 languages was significantly higher than of Russians – 1.7;
- computer skills depend heavily on the time spent in prison where the use of computers and digital technology is not allowed;
- 51% of respondents had a certified profession prior to their imprisonment, almost none had an opportunity to practice while in prison (prison work is low-skilled maintenance in the block);
- to the question “what are you good at?” most respondents replied that it was their job, many had specific hobbies, younger respondents were (semi) professionally involved in sports (not practiced in prison). Many said that there is nothing they can do or have practiced (12 questions covered various aspects of work experience);
- 35% of the respondents had worked with their last employer for more than two years and their average working period with their last employer was 4.9 years;
- mental disorders⁸⁸ and overall health⁸⁹ – all family members underlined the hardships of the transition period after release. For prisoners, the PICS syndrome came as a surprise. Work is a basis for healing and reconnecting with the family. Dignity is the key, not only a right.

Table 4. **Evaluation of skills.** Q: What instruments/ tools do you handle well? High self-esteem = persons who responded that they are good at all or most (PrQ)

	<i>blank</i>	<i>self-esteem</i>	<i>welding</i>	<i>mechanic</i>	<i>construction</i>	<i>computer</i>
<i>Responses</i>	23,2%	16,5%	6,8%	31,4%	43,3%	10,2%

⁸⁷ See: Oras, K. Tööle värbamisel arvesse võetavad kriteeriumid tööandjate ja vilistlaste pilgu läbi (the Criteria on Recruitment through the View of Employers and alumnus). Tallinn University, 2014.: Since prisoners do not work, they lose practical skills and habit to work. Obtained new vocational certificates (mostly welding) are considered formal.

⁸⁸ If the figures are correct (see: Andersen, 2004; WHO, 2015) these people should not be in prison but receive a proper treatment in suitable institutions. It is not determined whether they were ill when sentenced or has their health deteriorated during the penal time.

⁸⁹ One of the symptoms is heavy decline of mood and optimism about the future. The bandwagon effect was noticeable – in the questionnaire Tuuli Stewart, Interviews and Questionnaire 2013–2015, issued 2016. people underline the overall negative attitude even after the punishment has been undergone.

Table 5. Skills and serious hobbies. Reported by PrQ

Q: What tools are you skillful with?	(blank)	self-esteem	welding	mechanic	construction	computer
Results: % of positive answers	23,2	16,5	6,8	31,4	43,3	10,2
		self-esteem		no work	incl. business	
Q: What are you really good at?	blank	nothing	everything	sports	work	smth else ⁹⁰
results: % from those who answered	20.9	15.3	4.4	5.8	47.0	33.5
Number of the question in PrQ	64 ⁹¹	65	66	67* (sports)	67* (work)	no hobbies (marked)
Results: % of positive answers	59.3	62.8	85.2	44.6	7.7	13.7

7. Impact: How Does It Work

The proposed model relays on **creative** not on normative **methodology**, it is flexible and dynamic. The model in this context is concerned with the penal time and release in the case of prisoners but it could be referred to a preparation time for immigrants, gradual partial recovery time for handicapped or vocational training for young. Adjustments are expected while applying the model to these other cases based on the possible input of the minority or subject group, existing governing model(s), the definition of the problem and other circumstances.

The program, based on the presented SIG model is designed to promote motivation of the excluded or idle social groups by changing patterns through responsibility. The model acknowledges the stages of change and treats all participatory groups as learners and subjects of change. The model offers practical help through shared information; it uses motivational interviewing of the subject group members and pro-social modeling as a way of learning.

The program combines methods for reducing exclusion, building trust and inclusion for all participating parties. Proposed platform, ideally, is a safe place for rehearsal and practice of governing for all counterparts with the help of the other counterparts. It receives support from professionals of the associated fields (preferably, not representing the involved institutions), cooperation creates better understanding between the otherwise opposing or dominating parties. The model of subject or minority involvement is not limited by its volume but it should be kept local in its communication forms. The model and its executive program are not governed by state institutions, it is neither a classical bottom-up approach nor an independent initiative.⁹² Practical implementation relays on political course. What it needs is will and courage of all the involved parties to attempt the change.

⁹⁰ E.g.: language, cooking, communication, thinking, creative activity, music, learning, sales, with women.

⁹¹ 64: Are you able to continue at the job that you had before imprisonment? / 65: Do you think this profession really suits you? / 66: Why? (confidence, esteem) / 67: What else do you like to do (as a profession or a hobby)?

⁹² See: Etzioni, A. 2009, 1999/ 2000, Etzioni, A. 2009; Aresti, et al., 2012 and Delancey Street, 2015.

True, the program is not guaranteed to work for all. However, programs that have involved suppressed or groups with limited power as meaningful counterparts have been successful in positive participation of this group in society and shown more efficient policy involvement than most government-initiated top-down tactics.⁹³ This relates to the theory of standpoint and strong objectivity described by feminist theorist S. Harding⁹⁴ – the notion that the perspectives of marginalized and/or oppressed individuals can help to create more adequate understanding of the world.

8. Funding and Fiscal Scheme of (Re-)entry Model

Heated discussions about the wave of expected immigration in 2016 has resulted in solutions in just weeks: the state government of Estonia found a funding to be directed to the local government for residences. An immigrant would pay for the rent and utilities only when he (she) has found a job. In case the person is unable to find a job, government would cover the cost of living while the apartment belongs to the local government. The mediating body between the local government and the person who rents the apartment is a third partner. Similar principles were successfully used after the WWII.⁹⁵ SIG model program would apply similar principles.

Important points regarding the financing and the program:

- this is not another version of Scandinavian model where the entire responsibility lies on the state or on society (like Makarenko's Gorki Colony⁹⁶). This is not the current Estonian system where the entire responsibility is on the shoulders of the released and the state is mostly acting as a charging, assessing and punitive body. The responsibility is shared between all counterparts;
- the interest of the state (institutions), public (employers, taxpayers) and most of the released is *shared* – work, proper income, and a shelter for the start, which would give an *option* (not a guarantee) to choose between criminal and legal paths;
- the program is neither political, nor religious;
- *employers* already have a fiscal support system from the state.⁹⁷ Despite that, the employment for a released is mostly possible based on personal contacts. The program offers a bridge to society;
- *local stock savings bank* – local bank means regional savings and loan association or mutual loan association/society.⁹⁸ A local credit society is a better advocate for local interests, more interested in regional development, more flexible, more open for innovative or alternative solutions than a big

⁹³ See: New School of Convict Criminology, 2015; Journal of Prisoners on Prison, 2015; British Convict Criminology, 2014; Prison Fellowship, 2015; Associazione Comunità Papa Giovanni XXIII, 2016.

⁹⁴ Society for Social Studies of Science, 2013.

⁹⁵ See: *Tabasz, T. F. Toward an Economics of Prisons*. D.C. Heath, 1976.

⁹⁶ See: *Halvorsen, T.* 2014; *Filonov, G. N.* 1994.

⁹⁷ See: *EUIF Work ability reforms*. Estonia, 2015.

⁹⁸ There were two of those in Estonia in 2015 – Tartu Credit Cooperative (Tartu Hoiu-laenuühistu) and Tallinna Hoiu-Laenuühistu.

- international one with standardized mentality. In cooperation with the counterparts, the program oversees the interest and fiscal discipline of all;⁹⁹
- **conditional temporary housing** – housing for released is formally offered already but is not connected to development program or work attempts. In addition, it does not cover the actual needs;¹⁰⁰
 - **conditional temporary basic income** – the place for living, food (made at the place) and work are provided to the ones who comply with their contract regarding the program. Evaluation is carried out by the consensus of the Board of the program partners (Figure 7) considering all aspects of security and personal growth according to set goals (as it was done in prison by the officer, now is created by the person himself with the help of professionals);
 - the program presents **contract, obligation, responsibility** vs. opportunity and possibility;
 - **loan** – set up like a student loan – while a person is still busy with “growing stronger” he/ she does not have to pay. The relapse from the program brings discontinuation of the support. The loan is not to be used privately – it is backed up (for the bank) by the program and is evaluated by the program;
 - **credit** for the person’s own business – obligation to return only when the business succeeds.¹⁰¹ The payment schedule is to be discussed with the program (who supports and mediates the credit) and the development support (educational, consultation) should be available for 3–5 years;
 - **motivation** – a system of motives. By giving rights, responsibility is expected in return. Trust is the key for all partners but this trust does not have to be naïve, instead it is a form of supportive cooperation;
 - **criteria** for evaluation of success – evaluation is done by the range of experts (see Table 6).

Table 6. **Functions of the partners and counterparts.** SIG (T. Stewart)

	Gov Office 1	Gov Office 2	Office 3, 4, 5	Bank	Released / immigrants/ disabled
Previous function	Top-down governing	Directed	Not asked	Foreign international fiscal interest	Subject
Expected function	Horizontal partner	Partner	Expert	Advisor and mediator, developer	Consultant, participator, executor

Where does the money come from? From the state institutions, which have funds and measures already created - ministries (social affairs, justice, education), projects from specific foundations (incl. the EU), and donations. The cost of incarceration (Figure 4) exceeds the cost of the program in folds. Profit of the activity comes to the program and is shared for the purposes that the Board has approved (might be someone’s enterprise, startup for an apartment, child support, ticket, schooling etc.). The principle is not democratic but communitarian.¹⁰²

⁹⁹ See: Ahrend, et al. Passing the Buck? Central and Sub-national Governments in Times of Fiscal Stress. 2013; Power Sharing, Ethnolinguistic Fractionalization and Government Quality. 2007; Charron, N. Government quality and vertical power-sharing in fractionalized states. 2009.

¹⁰⁰ See: EUIF, 2015; MinSoc, 2014; MinJust, 2015.

¹⁰¹ Japan was one of the economies that used this kind of system for the recovery from the WWII.

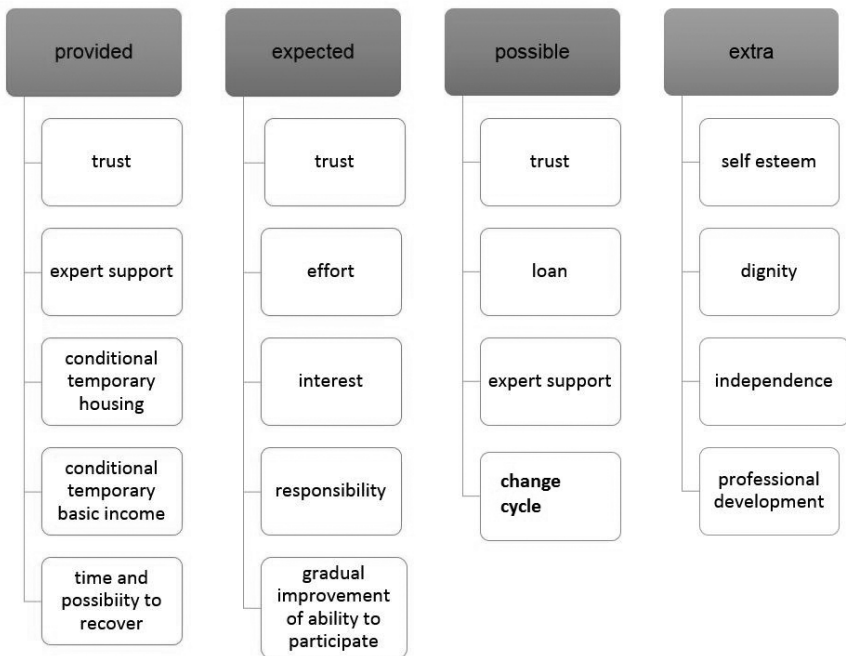
¹⁰² See: Etzioni, 2007; Etzioni, 1999.

What kind of work would they do? After the immigration news broke, many companies announced that they could offer jobs, as there was the state's support. Based on the PrQ, the activities that would be affordable for a released at once range from moving to renovation, welding, artist, chef (for a school), sports instructor, planting of greenery, carpentry, mechanics, community services etc. This belief is reinforced by other researches.¹⁰³ The work schedule and placement depend on committed crime, needed recovery and possible persisting (acquainted) problems.

Who is responsible when something goes wrong? The outcome is not set to be 100% success. This is a dynamic and real system offering an opportunity not a guarantee. The experience of other forms of long-term socialization programs prove that expected success is at least 60–70%. What exactly is recognized as a success is to be defined case by case in the cooperation with experts and considering personal goals. The difference from the privately ran enterprises is a strong involvement of experts and specialists, incl. correctional institutions (Figure 8).

Limitations. The questions often asked: Can the model and its application program improve an inmate's attitudes and behaviors? Does it increase the probability of lawful life and reduce the likelihood that another crime would not be committed after release? Could such a program reduce prison populations and costs? The author believes that the model is not a miracle cure for all but it could start the process and be a remarkable example that would encourage other forms of good governing in its adjusted forms. Expected limitations have been listed above. The main lubricant for the development of the model and its application would be sincere will and considerate monitoring.

Figure 8. The benefits of the SIG program of (re)entering the society (T. Stewart)



¹⁰³ See: SaarPoll, 2009.

Conclusions

Recidivism, as an example social phenomenon, is influenced by the preparedness for the lawful life of the released by the end of the incarceration period and circumstances he meets after release. The paper argues that the current prison system in Estonia should be repositioned in society. The proposed SIG model for suitable dynamic policy design is relying on multilevel governance and shared management concepts, following principles that are applied both horizontally and vertically in the architecture of the EU democracy. The scope of this paper is also to review methodology through the critical thinking lens.

Ideally, state governments should be promoters of the partnership with civil society organizations and with the private sector to maximize scarce resources in the face of increasing demand. Practice proves that there are sectors that should be governed by state for their efficiency. This does not mean that combinations on operational level and search for better and more efficient service brokers in the ever-changing world has to end where it is today.

The extent of sharing the power and the most effective combinations are creative sum of circumstances and possibilities at place and time. The paper proposes for further discussion an example model (SIG) and its executive program in the search of feasible forms for one of the sample groups. Labor market is in demand of new forms of engagement and involvement of persons who have lost the capability for traditional full-time work or can work with a decreased capacity. Traditional models of engaging prisoners and providing an opportunity that would alter the criminal path have ended with discouraging results in the Estonian context. In addition to the proposed use, an adjusted model could work for other minority groups incl. immigrants. Ability to be competitive on the labor market involves not just basic education, skills, and knowledge but involves necessary practice and habit to work, problem-solving and coping skills. In order to involve idle groups into existing social circumstances better communication from the involved parties is needed. This communication is hindered in the sample case and should be developed by a targeted mechanism. The proposed SIG model groups inmates according to their ability to cope with the circumstances and the help needed after release, targeting the resources and channeling effect.

The proposed model combines existing attempts and measures in tackling a social problem. Solution, proposed in this model relies on trust between the other involved levels in policymaking. The practical demonstration of the model is in the phase of fine-tuning development from several aspects. This could be the first practical effect of this paper – to gather experts on the field of governing system, legislation, labor market, science, education etc. with the involvement of subjected group(s) for a brainstorming and discussion on how the model could be implemented practically in actual situation as the nuances could differ even within the same state and change shape in time.

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Perception of Insurable Interest in European Insurance Law

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This article explores regulation of insurable interest in insurance law from the European perspective in general and the perspective of Latvian contract insurance law in particular. At the beginning, the present article provides overview of regulation of insurable interest at international law and national law from the perspective of European countries. Furthermore, the article analyses essential aspects of insurable interest such as understanding of the concept of insurable interest both at the doctrinal (academic) level and legislative level; the person who shall demonstrate insurable interest; and time when insurable interest by that person should be demonstrated. The analysis is based on discussion of various approaches employed by different European countries and comparison with the approach of Latvian insurance contract law. This article finishes with conclusions following the discussion contained therein.

Keywords: insurance law, insurance contract, essential element of a contract, insurable interest, lack of insurable interest, validity of a contract, European countries, Latvia.

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Introduction

Insurable interest has been considered one of peculiarities of insurance law as such concept is employed only in the field of insurance law concerning regulation of an insurance contract. Importance of insurable interest relates to the fact that requirement of insurable interest is one of basic principles in insurance contract law alongside with requirement of insurable risk, principle of indemnity and subrogation. Similarly, as these principles, insurable interest is based on an objective criterion, which exists irrespectively of the will of parties to an insurance contract.¹ Considering the importance of insurable interest for characterisation of nature of insurance contract law, insurable interest is identified as one of essential elements of an insurance contract. Topicality of the theme of insurable interest for legal research in studies like the one reflected in this article is connected not only with its inherent meaning to insurance (contract) law but also with limited studies on regulation of insurable interest in Europe on a comparative basis identifying similarities and differences of its regulation among different European countries.²

Historically, establishing insurable interest as a requirement for a valid insurance contract was introduced in English law in 18th century in conjunction with subsequent statutes and case law of English courts, and was overtaken (or possibly developing simultaneously) by continental European countries becoming generally recognised insurable interest as one of essential elements of an insurance contract. However, considerable differences among the continental European countries in respect of perception of insurable interest and its regulation arose (as well as in respect of other insurance contract aspects, even in such aspect as termination of an insurance contract³). These differences may lead (and in some occasions do lead) to differences in practice by application of insurance law of various European countries concerning establishing insurable interest in particular cases.⁴

At the same time, studies on insurable interest are available mostly in Anglo-American legal literature, either as chapters in insurance law monographs⁵ or

¹ This conclusion means that lack of insurable interest leads to invalidity of insurance contract (see discussion below in Chapter 4 concerning different approaches regarding the time when insurable interest should be demonstrated). However, this conclusion does not deprive persons entitled to claim payment of insurance redress to refer to other remedies, if such are available for them, for instance, in the case of misleading allegations of an insurer concerning existence of insurable interest or either ordinary or gross negligence for omission for non-reporting of the fact of lack of insurable interest). Yet, studies concerning those issues are limited (see, as one of such rare examples, *Duesenberg, R. W. Insurer's Tort Liability for Issuing Policy without Insurable Interest: A Comment. California Law Review*, 1959, pp. 64–73).

² Several examples for studies of insurable interest on a comparative basis from the European perspective could be mentioned, such as: *Clarke, M. Policies and Perceptions of Insurance: An Introduction to Insurance Law*. Oxford: Clarendon Press, 1997, pp. 20–32; Expert Group on European Insurance Contract Law. Final Report of the Commission Expert Group on European Insurance Contract Law, pp. 34–35. Available at http://ec.europa.eu/justice/contract/files/expert_groups/insurance/final_report.pdf [last viewed 20.07.2017].

³ Expert Group on European Insurance Contract Law. Final Report of the Commission Expert Group on European Insurance Contract Law, pp. 34–35.

⁴ The fact of differences of regulation of insurable interest among European countries is supported also by other studies, for instance, in the recent study prepared for the European Commission (Discussion Paper III. Differences in Insurance Contract Laws and Existing EU Legal Framework Insurance Contract Law – General Part 1, prepared by Yannis Samothrakis. Available at http://ec.europa.eu/justice/contract/files/expert_groups/report_on_section_3_final_en.pdf [last viewed 20.07.2017]).

⁵ For instance, those monographs of English or American law commentators referred to from time to time in this article.

influential articles in legal journals.⁶ Regrettably, continental European legal commentators address insurable interest in a limited amount despite the fact that it is one of essential elements of an insurance contract.⁷

The aim of this article is twofold. One aim relates to the discussion of regulation of insurable interest in European countries on the basis of a comparative legal method. Another aim relates to discussion of insurable interest from the perspective of Latvian insurance contract law in conjunction in comparison with other European countries by exploring specific approaches of the Latvian legislator and Latvian courts for treatment of insurable interest. Topicality of discussion of insurable interest from the perspective of Latvian insurance contract law relates to the fact that discussion of insurable interest was carried out in Latvian legal literature on a fragmentary and obviously insufficient basis⁸ despite the fact that it was assessed and tested in different disputes in Latvian court practice (mainly in property insurance and motor insurance, see the discussion of cases below).

The present article is structured, as follows. It consists of several important aspects of insurable interest, commencing with overview of regulation of insurable interest at international arena including EU law; further considering understanding of insurable interest; and exploring its essential elements like time when insurable interest must be demonstrated; by whom it must be demonstrated; and the consequences for lack of insurable interest both in relation to situations when insured risk (risks) have or have not taken place. The conclusions drawn from this analysis are provided at the end of the article.

1. International Law

1.1. General Overview

The so-called global international treaties address regulation of insurance law on a fragmentary basis, especially in relation to carriage of goods in such legal instruments as the Vienna Convention on Contracts for the International Sale of Goods,⁹ and the CMR Convention concerning international carriage of goods by road.¹⁰ Particularly, the CMR Convention provides that, “[w]here applicable, the consignment note shall also contain [...] [t]he sender’s instructions to the carrier

⁶ Taylor, H. L. The Law of Insurable Interest in North Carolina. *North Carolina Law Review*, 1946, Vol. 24, pp. 247–266; Swisher, P. N. The Insurable Interest Requirement For Life Insurance: A Critical Reassessment. *Drake Law Review*, 2004–2005, Vol. 53, pp. 477–543; Patterson, E. W. Insurable Interest in Life. *Columbia Law Review*, 1918, Vol. 18, pp. 381–421.

⁷ PEICL could be mentioned as one of such rare examples (Basedow, J., Birds, J., Clarke, M., Cousy, H., Heiss, H. (eds.). *Principles of European Insurance Contract Law (PEICL)*. Munich: Sellier. European Law Publishers, 2009, pp. 53–54).

⁸ Rone, D. Apdrošināšanas tiesību principu ietekme uz apdrošināšanas atlīdzības izmaksu [Influence of insurance law principles on payment of insurance redress]. Available at https://dukonference.lv/files/proceedings_of_conf/53konf/tiesibas/Rone.pdf [last viewed 20.07.2017]; Torgāns, K. Saistību tiesības: Mācību grāmata [Law of obligations: A textbook]. R.: Tiesu namu aģentūra, 2014, 445. lpp.

⁹ Article 32(3) Vienna Convention on Contracts for the International Sale of Goods (United Nations Convention on Contracts for the International Sale of Goods. Available at <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> [last viewed 20.07.2017]).

¹⁰ Convention on the Contract for the International Carriage of Goods by Road (CMR). Signed on 19 May 1956 in Geneva, entered into force on 2 July 1961 [CMR Convention]. Available at https://treaties.un.org/doc/Treaties/1961/07/19610702%2001-56%20AM/Ch_XI_B_11.pdf [last viewed 20.07.2017].

regarding insurance of the goods”.¹¹ However, neither this nor any other provision in the CMR Convention contains rules on insurable interest. At the same time, it should be noted that the CMR Convention provides that “a benefit of insurance in favour of the carrier or any other similar clause [...] shall be null and void”.¹² From this wording, however, it cannot be concluded that insurable interest is discussed, even in indirect way but with prohibition of limiting liability instead. Indeed, the essence of this provision lies in the fact that “if the cargo interest assigns his [or her] right to the insurance moneys to the carrier, the carrier is in effect relieved of all liability”,¹³ which falls within prohibition for a carrier to evade liability¹⁴. Furthermore, the green card system established in 1949 on the basis of the Recommendation on Insurance of Motorists Against Third Party Risks No. 5¹⁵ (adopted by the Working Party on Road Transport of the Inland Transport Committee of the United Nations Economic Commission for Europe), and mutual agreements between national insurers’ bureaux does not (and even cannot, due to the character of these agreements) address insurable interest requirement at all.

As regards regional treaties concerning Europe, except EU law discussed in the next sub-chapter, several treaties addressing insurance law regulation could be mentioned. One of these, is the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles,¹⁶ which was opened for signature to members of the Council of Europe in Strasbourg on 20 April 1959 and entered into force on 22 September 1969.¹⁷ As this Convention deals with motor insurance law, its regulation naturally addresses insurable interest indirectly¹⁸ similarly as in the case of EU motor insurance¹⁹. In addition, this Convention is not influential or is, as characterised by Advocate General Trstenjak, without “any great practical significance”²⁰ due to the limited number of accession countries, i.e. seven.²¹ Another treaty that should be mentioned is the Hague Convention on the Law Applicable to Traffic Accidents which was concluded on 4 May 1971 and entered into force on 03 June 1975.²² As this Convention states the law applicable to civil non-contractual liability arising from traffic accidents, it does not provide any regulation for insurable interest.

¹¹ Article 6(2) (e) CMR Convention.

¹² Article 41(2) CMR Convention.

¹³ *Messent, A., Glass, D. A. Hill & Messent CMR: contracts for the international carriage of goods by road.* 2nd ed. London a.o.: Lloyd’s of London Press, 1995, p. 311.

¹⁴ Article 41(1) CMR Convention.

¹⁵ Recommendation on Insurance of Motorists against Third Party Risks No 5. Available at <http://www.cobx.org/content/default.asp?PageID=58&DocID=40902> [last viewed 20.07.2017].

¹⁶ The text of this Convention is presented at the webpage of the Council of Europe. Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/029.htm> [last viewed 20.07.2017].

¹⁷ Summary. Available at <http://conventions.coe.int/Treaty/en/Summaries/Html/029.htm> [last viewed 20.07.2017].

¹⁸ Article 1(1) in conjunction with Article 3(1) Annex 1 of that Convention.

¹⁹ For a discussion of EU motor insurance law, see sub-chapter 1.2. below.

²⁰ Case No. C-484/09 *Manuel Carvalho Ferreira Santos v Companhia Europeia de Seguros SA* [2011] ECR I-01821, Opinion of AG Trstenjak, para. 45.

²¹ Status as of 18 July 2014. Available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=029&CM=4&DF=&CL=ENG> [last viewed 20.08.2014].

²² Convention of 4 May 1971 on the Law Applicable to Traffic Accidents. Available at http://www.hcch.net/index_en.php?act=conventions.status&cid=81 [last viewed 20.07.2017].

1.2. EU Law

Regulation of insurance in EU law, which is scattered among different EU legal acts (both in primary and secondary EU law) is mainly focused on supervision of insurance law subjects such as (re)insurers and (re)insurance intermediaries, rather than on contractual matters, except motor insurance and certain fragmentary aspects. Insurable interest is not among these aspects, and neither are other essential elements of an insurance contract. Consequently, the regulation of insurance contracts except those fragmentary aspects mentioned above, was never harmonised at the EU level. Therefore, essential elements of an insurance contract including insurable interest are not directly subject to any regulation of EU law neither in the Solvency II Directive²³ nor any other legal act, leaving these issues completely for national law. Therefore, one may agree with the opinion that “European [Union] law does not deal with this concept [i.e., insurable interest – author’s remark]”.²⁴

It should be noted that the European Commission submitted to the Council in 1979 a proposal for the coordination of laws, regulations and administrative provisions relating to insurance contracts 1979²⁵ and after revision, an amended version in 1980.²⁶ This proposal contained, yet rudimentary, regulation of insurance either in favour of the policyholder or in the favour of a third person, i.e. an insured,²⁷ though insurable interest was not directly proposed to regulate under that proposal. However, this proposal never was adopted and was finally withdrawn by the European Commission on 24 August 1993.²⁸

Despite the lack of direct regulation of insurable interest, as well as other essential elements of an insurance contract in EU law, indirect regulation of that concept in EU law could be identified. Particularly, EU motor insurance law, as well as national motor insurance law of EU Member States links the status of a person being insured within a motor insurance contract with a liable motor vehicle driver.²⁹ It means that insurable interest is demonstrated either by a motor vehicle driver himself or herself or a person who concludes motor insurance contract in the

²³ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). OJ, L 335, 17.12.2009, pp. 1–155.

²⁴ Expert Group on European Insurance Contract Law. Final Report of the Commission Expert Group on European Insurance Contract Law, p. 41.

²⁵ Commission, Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts, COM(79) 355 final; Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts [1979] OJ C190/2.

²⁶ Commission, “Amendment to the proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts’ COM(80) 854 final; Amendment to the proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts [1980] OJ C355/30.

²⁷ Article 11 of the proposal mentioned in the previous footnote.

²⁸ Withdrawal of certain proposals and drafts from the Commission to the Council [1993] OJ C228/4 (see specifically p. 14).

²⁹ Concerning EU motor insurance law, see Article 3(1) and (4) Codifying Motor Insurance Directive (Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 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. OJ, 07.10.2009., L 263, pp. 11–31) (ex Article 3(1) and (4) First Motor Insurance Directive (Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability. OJ, 02.05.1972., L 103, pp. 1–4. Special edition, Series I, Vol. 1972 (II), pp. 360–362)).

favour of that driver. At the same time, a deviation from that rule may take place in some EU Member States, for instance, in Latvia, whose Supreme Court perceives the motor vehicle owner (instead of the motor vehicle driver) as the insured (considering that a liable motor vehicle driver who concluded a motor insurance contract as a policyholder did it in the favour of that owner).³⁰

1.3. Influence on National Law of European Countries

The majority of European countries, including EU Member States provides a regulation of insurable interest within the regulation of an insurance contract, yet to a different extent. At least one similarity concerning regulation of insurable interest is common to all European countries, as all of them envisage insurable interest, as insurance law experts justly established it, as one of essential elements of an insurance contract.³¹

As it was discussed in the previous sub-chapters, global international treaties, as well as regional treaties covering Europe including EU law contain neither regulation of insurance contracts in general nor insurable interest particularly. Therefore, European countries including EU Member States were free to choose their own national approaches for treatment of insurable interest within the traditions of their civil law and its regulation. This freedom created various perceptions and regulatory approaches in respect of insurable interest among European countries, including EU Member States. As discussed below, understanding and, consequently, regulation of insurable interest among European countries depends on national approaches and, therefore, the concept of insurable interest should be discussed on the basis of insurance contract law of each respective country.

2. Understanding of the Concept of Insurable Interest in National Law

2.1. Emergence of Insurable Interest: Historical Traces

There is a consensus among legal commentators that insurable interest arose first in English law³² and gradually expanded all over the world including European countries.³³ At the same time, it could be allowed that the understanding of necessity of insurable interest developed in continental European countries simultaneously with English law. So, already in the 18th century learned French jurist *Emerigon* wrote about distinction between insurance contracts properly so called and insurance by form of wager.³⁴ The first two legal acts adopted in England concerning insurance, i.e. an act adopted in 1746 concerning marine insurance and

³⁰ Judgment of the Supreme Court of the Republic of Latvia dated 17.12.2015 in case No. SKC-0246/2015 (C30744812).

³¹ Expert Group on European Insurance Contract Law. Final Report of the Commission Expert Group on European Insurance Contract Law, p. 40.

³² For a legislative history of regulation of insurable interest in English law (as well as Scots law), see generally Law Commission, Scottish Law Commission. Issues Paper 4: Insurable Interest, pp. 4–9; *Merkin*, R. Colinvaux's Law of Insurance. 8th ed. London: Sweet & Maxwell, 2006, pp. 73–76.

³³ *Jerry*, R. H., II, *Richmond*, D. R. Understanding insurance law. 4th ed. LexisNexis, 2007, pp. 273–277; *Mehr*, R. I., *Cammack*, E., *Rose*, T. Principles of Insurance. 8th ed. Homewood, Illinois: Richard D. Irwin, Inc., 1985, p. 101.

³⁴ *Emerigon* B. M. A Treatise of Insurances. Translated from the French; With An Introduction And Notes by S. Meredith, esq. London: Henry Butterworth, 1850, p. 3.

1774 in relation to life insurance, was related to combating such evils as gambling, wagering and intentional cause of insured risks.³⁵ In common law, it was and still is important to differentiate insurance contracts from other arrangements, such as gambling by using the criterion of insurable interest.³⁶ However, such a differentiation is not being of influential importance among continental European countries leading even to different perception of insurable interest than in English law.³⁷ Therefore, it is not a coincidence that European legal commentators usually link necessity of insurable interest with combating intentional cause of insured risks as it was pointed out in this regard in Latvian legal literature.³⁸

Similar grounds may be identified also today for substantiation of the requirement of insurable interest³⁹ in addition to economic explanation of existence of insurable interest,⁴⁰ yet it is argued that wagering and gambling does not play any crucial role in insurance law.⁴¹ Despite the fact that nowadays wagering and gambling have more suitable instruments than an insurance contract, such as gambling law, the requirement for necessity of insurable interest is retained as falling within public policy for prohibiting concluding insurance contracts without any economic or legal link between the insured and the insured object.

2.2. Academic Perception of Insurable Interest

Insurable interest allows to insure a particular insurance object, in whose preservation a policyholder has lawful interest either of economic or legal nature. This insurance object may be either a corporeal or incorporeal thing (in property insurance); material condition (in liability insurance); or life, health or physical integrity (in personal insurance). The requirement of insurable interest was introduced and still is perceived from the perspective of public policy. As Professor Malcolm Clarke pointed out, “[t]he insured must be acceptable as a risk – not only to the insurer but also to society, which must be satisfied that he is a person whose purpose in seeking insurance is a proper purpose”.⁴² The requirement of insurable interest is an objective one and, therefore, as it is correctly stated in legal literature, “[t]he insurer [and, surely, also the policyholder – author’s remark] cannot waive the insurable interest requirement”.⁴³

³⁵ For general overview of necessity to adopt these legal acts, see Law Commission, Scottish Law Commission Issues. Paper 4: Insurable Interest, pp. 4–6; *Merkin, R.* Gambling By Insurance – A Study of the Life Assurance Act 1774. *Anglo-American Law Review*, pp. 331–333; *Birds, J.* *Birds’ Modern Insurance Law*. 10th ed. London: Sweet and Maxwell, 2016, pp. 41–43.

³⁶ *Merkin, R., Steele, J.* *Insurance and the Law of obligations*. Oxford: Oxford University Press, 2013, pp. 39.

³⁷ For these different perceptions, see subchapter 2.4. below.

³⁸ *Torgāns, K.* *Saistību tiesības: Mācību grāmata* [Law of obligations: A textbook]. R.: Tiesu namu aģentūra, 2014, 445. lpp.

³⁹ *Mehr, R. I., Cammack, E., Rose, T.* *Principles of Insurance*. 8th ed. Homewood, Illinois: Richard D. Irwin, Inc., 1985, pp. 100–101.

⁴⁰ *Clarke, M.* *Policies and Perceptions of Insurance: An Introduction to Insurance Law*. Oxford: Clarendon Press, 1997, pp. 21–22.

⁴¹ *Clarke, M.* *Policies and Perceptions of Insurance: An Introduction to Insurance Law*. Oxford: Clarendon Press, 1997, p. 20.

⁴² *Clarke, M.* *Policies and Perceptions of Insurance: An Introduction to Insurance Law*. Oxford: Clarendon Press, 1997, p. 20.

⁴³ *Mehr, R. I., Cammack, E., Rose, T.* *Principles of Insurance*. 8th ed. Homewood, Illinois: Richard D. Irwin, Inc., 1985, p. 101.

It is a common opinion among legal commentators that insurable interest in property and civil liability insurance⁴⁴ must be viewed separately from life insurance.⁴⁵ Therefore, a different approach shall be used for testing insurable interest in indemnity insurance and insurance of fixed sums, which is frequently reflected in regulation of insurable interest in different European countries, as revealed further in this chapter.

2.3. Interrelationship Between Insurable Interest and Principle of Indemnity

Insurable interest has been traditionally (and justly!) linked with the principle of indemnity.⁴⁶ Operation of this link, however, is possible only within the field of indemnity insurance, as the principle of indemnity does not work in the case of personal insurance, with an exception of English law.⁴⁷ Due to different scope and legal consequences, both concepts shall be differentiated, as it was justly pointed out in legal literature.⁴⁸ Therefore, one can hardly agree with the opinion that insurable interest is not necessary today as the principle of indemnity could be sufficient.

As regards the differences concerning the scope between the principle of indemnity and insurable interest, two different motives could be indicated, both of which, on the one hand, emphasise necessity of insurable interest and, on the other, indicate necessity for its differentiation from the principle of indemnity.

The first motive relates to indemnity insurance, which is strictly linked with actual damage. Insurable interest, however, as it is understood in several European countries discussed below, could be perceived broader and may cover not only actual damage but also (and quite frequently) other economic interests. Another motive for differentiation of both concepts relates to personal insurance where insurable interest operates rather based on presumptions than on the strict application of the principle of indemnity.

As regards the consequences, both concepts produce different results. The principle of indemnity should not invalidate the validity of an insurance contract, as it leads just to refusal of the claim allowing for the right person who sustained the damage claim insurance redress. The lack of insurable interest, at the same time, leads to invalidity of an insurance contract as it is provided in insurance law of different European countries.⁴⁹

The importance of distinction between the principle of indemnity and insurable interest may be analysed on the basis of several Latvian court cases. As it will be

⁴⁴ Yet, different legal commentators discuss only separation of property insurance and life insurance, therefore, obviously covering civil liability insurance with the concept of property in this regard (see, for instance, *Mehr, R. I., Cammack, E., Rose, T. Principles of Insurance*. 8th ed. Homewood, Illinois: Richard D. Irwin, Inc., 1985, p. 100).

⁴⁵ *Mehr, R. I., Cammack, E., Rose, T. Principles of Insurance*. 8th ed. Homewood, Illinois: Richard D. Irwin, Inc., 1985, p. 100

⁴⁶ See, for instance, Jerry R. H., II, *Richmond D.R. Understanding insurance law*. Fourth ed. LexisNexis, 2007, pp. 277–278; *Merkin, R. Colinvaux's Law of Insurance*. 8th ed. London: Sweet & Maxwell, 2006, p. 77.

⁴⁷ For discussion of insurable interest in English law and its grounding on the principle of indemnity, see, for instance, *Birds, J. Birds' Modern Insurance Law*. 10th ed. London: Sweet and Maxwell, 2016, pp. 46–57.

⁴⁸ *Merkin, R. Colinvaux's Law of Insurance*. 8th ed. London: Sweet & Maxwell, 2006, p. 77.

⁴⁹ *Merkin, R. Colinvaux's Law of Insurance*. 8th ed. London: Sweet & Maxwell, 2006, p. 77. For consequences of lack of insurable interest, see sub-chapter 2.5. of this Article below.

clear from the discussion of these cases, Latvian courts does not always separate both concepts, which could lead to different outcomes in particular cases.

The situation of the first case was related to the fact that a living house as the insured object was insured against fire risk. A policyholder, who was simultaneously an insured, i.e. concluded an insurance contract in its own interest, insured the house in its full value despite the fact that this person owned 1/3 of that house. After occurrence of the insured risk, which fully destroyed the house, the insurer paid out insurance redress for 1/3 of the full value of the house. The insured brought a claim to the court for collection of insurance redress that would correspond to the full value of the insured object. All three instances of Latvian courts refused that claim. The Supreme Court, which heard the case at the last – cassation – instance, established that an insurance contract “relates only to the property owned by a particular person”, therefore the claimant “cannot receive insurance redress for destruction of property’s part owned by third parties”.⁵⁰

As it could be observed from the reasoning cited in the previous paragraph, the Supreme Court did not mention the requirement of insurable risk, but rather was guided by the principle of indemnity. It led to the situation that, if lack of the insurable interest was not established, the insurance contract in the remaining part, i.e., in respect of insurance of the 2/3 of the house, is still valid and other co-owners of that house may apply with a claim for payment of insurance redress for the part of damage corresponding to their parts in that house. Therefore, although Latvian courts correctly refused the claim brought by co-owner of 1/3 for collection of the insurance redress in the amount of full value of the insured object, the reasoning in this situation should be linked with the lack of insurable interest rather than the principle of indemnity.

In another case, Latvian courts faced the situation that the acquirer of a residential property (living house) insured it against fire risk. The insured risk took place during the validity period of the insurance contract, when the acquirer was the owner of that house. However, the previous owner re-gained ownership rights for that house in the time period between occurrence of the insured risk and the moment of adoption of the decision of the insurer for payment of insurance redress. As the insurer paid out insurance redress to the previous owner, the ex-acquirer brought claim to the court for collection of insurance redress. The Supreme Court was guided by the principle of indemnity and established that the crucial point for establishing a person who sustained damage is the moment when the insured risk took place. Consequently, the claim was satisfied in the favour of the person who was the owner at the moment of occurrence of the insured risk.⁵¹ In this case, Latvian courts correctly refused the claim and rightly applied the principle of indemnity as the crucial question did not concern a person who had an interest for conclusion of the insurance contract, but a person who sustained damage.

An approach similar to the latter case was also used by Latvian courts in another court case by correctly applying the principle of indemnity instead of the insurable interest test. This court case concerned the insurance contract, which was concluded by a carrier for insurance of international cargo carriage transported by roads, and provided payment of insurance redress to the consignor. The appeal

⁵⁰ Judgment of the Civil Case Department of the Senate for the Supreme Court dated 13.03.2013 in case No. SKC-145/2013.

⁵¹ Judgment of the Civil Case Department of the Senate for the Supreme Court dated 30.10.2002 in case No. SKC-469.

court satisfied the claim for payment of insurance redress, which was brought by the carrier for disappearance of cargo and necessity to pay the indemnity to the person who sustained loss, i.e. consignor. By revoking this judgment, the Supreme Court referred to the principle of indemnity and held that this principle precludes satisfying such a claim, considering the fact that the appeal instance court had not established losses sustained by the carrier.⁵² In this case, the Supreme Court correctly omitted to apply the insurable interest test, as the consignor had such an interest, and instead applied the principle of indemnity, precluding the payment of insurance redress to a person which has not sustained loss due to loss of cargo, in this case, the carrier.

2.4. Approaches Employed by European Countries

It is difficult to find any European country, whose law is not familiar with either legal definition or explanation of insurable interest. Yet, perceptions of insurable interest differs among different countries, as it was justly established by insurance law experts,⁵³ which might lead to different outcomes in particular cases in different European countries. Several perceptions may be identified among European countries for the understanding of insurable interest.

2.4.1. Strict Approach

English law (similarly as Scots law, yet with some differences) traditionally has employed a strict approach for establishing insurable interest by linking it with the principle of indemnity (even in personal insurance), and distinguishing different legal regimes of insurable interest in indemnity insurance and life insurance.

English law provides that insurable interest in indemnity insurance consists of two requirements: a person must demonstrate not only economic interest⁵⁴ in the insured object but also legal relation with it.⁵⁵ As regards the insurable interest in life insurance, four different narrow application schemes could be distinguished: “(1) interest arising out of natural affection; (2) interest arising out of a potential financial loss, which is recognised by law and can be shown at the time of the contract; (3) interest arising out of statutory provisions; and (4) interest recognised by the courts that does not fit into any of the above categories”.⁵⁶ At the same time, the very existence of necessity of insurable interest is questioned in English law due to adoption of new gambling regulation,⁵⁷ however, this opinion is not likely

⁵² Judgment of the Civil Case Department of the Senate for the Supreme Court dated 28.01.2004 in case No. SKC-27.

⁵³ Expert Group on European Insurance Contract Law. Final Report of the Commission Expert Group on European Insurance Contract Law, p. 41.

⁵⁴ See generally: *Clarke, M. A., Burling, J. M., Purves, R. L.* The Law of Insurance Contracts, 6th edition. London: Informa, 2009, p. 135 *et seq.* (including case law discussed).

⁵⁵ *Clarke, M.* Policies and Perceptions of Insurance: An Introduction to Insurance Law. Oxford: Clarendon Press, 1997, pp. 29–30; *Clarke, M. A., Burling, J. M., Purves, R. L.* The Law of Insurance Contracts, Sixth edition. London: Informa, 2009, pp. 142–146; *Birds, J.* Birds’ Modern Insurance Law. 10th ed. London: Sweet and Maxwell, 2016, pp. 62–63.

⁵⁶ See Law Commission, Scottish Law Commission. Insurance Contract Law Issues. Paper 4. Insurable interest. 14 January 2008, p. 10 *et seq.* See generally: *Clarke, M. A., Burling, J. M., Purves, R. L.* The Law of Insurance Contracts, 6th edition. London: Informa, 2009, p. 121 *et seq.* (including the discussed case law).

⁵⁷ Law Commission, Scottish Law Commission. Insurance Contract Law Issues. Paper 4. Insurable interest. 14 January 2008, p. 42.

to be true, as gambling and insurance contract are of different nature,⁵⁸ and yet no authority is available to support this opinion.

The discussed strict approach in respect of establishing insurable interest is unreasonably burdensome and, therefore, English legal commentators have criticised such approach, proposing to reform the regulation of insurable interest requirement.⁵⁹ By reacting to the shortcomings of existing regulation of insurance contracts including insurable interest, discussion of the necessary reform of this regulation in the UK also covering insurable interest was started in 2008⁶⁰ but so far it has not resulted in an adopted legal act.⁶¹

2.4.2. Economic Interest Approach

Another – more liberal – approach is shared by different European countries, as well as other world's countries such as Australia, Canada, the United States which, as Professor Malcolm Clarke elegantly characterised, drops off the legal relation and relies on economic interest alone.⁶²

Switzerland is one of the countries, which *expressis verbis* provide a link between economic interest and insurable interest in its law by envisaging that “[t]he subject-matter of property insurance can be any economic interest that someone has in the failure of a feared event”.⁶³ Although Swiss insurance contract law links the value of insured event with the moment when an insurance contract enters into force,⁶⁴ it is clear that this value may be revised if it does not correspond to the actual value of the insured object.⁶⁵

France shares a similar approach as Switzerland. Indeed, French insurance contract regulation in relation to non-marine insurance provides that “[a]ny person who has an interest in safeguarding a property may have it insured”.⁶⁶ This interest is defined broadly by stating that “[a]ny direct or indirect interest in the non-occurrence of a risk may be the subject of insurance”.⁶⁷

Also, the Dutch insurance law yet indirectly refers to the concept of interest. It provides that “[w]here the cover relates to interests of a third person, whose identity is known when the insurance is entered into”.⁶⁸ Although this provision relates to disclosure of facts before conclusion of a contract, it nonetheless could simultaneously serve for establishing perception of insurable interest. Also, concerning personal insurance, the Dutch legislator points out to the concept

⁵⁸ Merkin, R. Colinvaux's Law of Insurance. 8th ed. London: Sweet & Maxwell, 2006, pp. 80–83.

⁵⁹ Birds, J. Birds' Modern Insurance Law. 10th ed. London: Sweet and Maxwell, 2016, pp. 68–69.

⁶⁰ See, for instance, the joint statement of Law Commission and Scottish Law Commission on insurable interest (Law Commission, Scottish Law Commission. Insurance Contract Law Issues. Paper 4. Insurable interest. 14 January 2008).

⁶¹ See generally: Birds, J. Birds' Modern Insurance Law. 10th ed. London: Sweet and Maxwell, 2016, pp. 55–57, 68–69.

⁶² Clarke, M. Policies and Perceptions of Insurance: An Introduction to Insurance Law. Oxford: Clarendon Press, 1997, pp. 29–30.

⁶³ Article 48 Swiss Insurance Contract Act (Bundesgesetz über den Versicherungsvertrag). Available in German at <https://www.admin.ch/opc/de/classified-compilation/19080008/index.html> [last viewed 20.07.2017].

⁶⁴ Article 49(1) Swiss Insurance Contract Act.

⁶⁵ Articles 50–51 Swiss Insurance Contract Act.

⁶⁶ Article L121-6(1) French Insurance Code. Available in English at https://www.legifrance.gouv.fr/content/download/1961/13731/version/2/file/Code_38.pdf [last viewed 20.07.2017].

⁶⁷ Article L121-6(2), French Insurance Code.

⁶⁸ Article 928(2) Book 7 Dutch Civil Code; in: The Civil Code of the Netherlands. Warendorf, H., Thomas, R., Curry-Sumner, I. (transl.). Alphen aan den Rijn: Wolters Kluwer, 2009.

of “the risk of a third person”,⁶⁹ therefore employing more economic than strict approach for perception of insurable interest.

A similar perception of insurable interest exists also in Italy, understood in more economic meaning. Indeed, Article 1904 of the Italian Civil Code, which contains regulation on interest insurance, stipulates that a contract of insurance of property, and more generally, an indemnity contract is void if, at the time when of the beginning of insurance, the insured has no interest in the property for which he/she may be compensated in case of damage.⁷⁰ This provision links the insurable interest requirement with “any legally recognised insurance relationship, as a consequence of which the policyholder can suffer a prejudice for the loss of the property or a benefit by its safety”.⁷¹

The German Insurance Contract Act provides that insurable interest is linked with the value of insurance object⁷² to be established in the time when insured risk takes place^{73,74}. As it follows from these and other provisions of this Act, specifically concerning claims to be brought by mortgage creditors⁷⁵ as persons in whose favour a contract could be concluded,⁷⁶ German insurance contract law perceives this interest as an economic interest. German legal literature, therefore, describes legal relationship existing between a policyholder who concludes an insurance contract in the favour of a third person and this person as an insured as ‘internal relationship’ (*Innenverhältnis* in German) grounded on either contractual or legal relationship.⁷⁷ The German Federal Supreme Court (*Bundesgerichtshof* in German) established a similar approach (concerning similar regulation of insurable interest, yet included in the previously effective legal act) that insurable interest covers economic interest to be established in each individual insurance contract separately.⁷⁸ The German Federal Supreme Court later upheld this approach anew.⁷⁹

Similarly to the case of Germany, Estonian insurance contract law in relation to non-life insurance provides that “[i]nsurable interest is the interest of the policyholder in being insured against a certain insured risk”.⁸⁰

⁶⁹ Art. 928(3) Book 7 Dutch Civil Code

⁷⁰ Art. 1904 Italian Civil Code. Available at http://www.jus.unitn.it/cardozo/obiter_dictum/codciv/Codciv.htm [last viewed 20.07.2017].

⁷¹ Cerini D. Insurance Law in Italy. AH Alphen aan den Rijn: Kluwer Law International, 2012, p. 80.

⁷² Art. 74(1) German Insurance Contract Act (*Gesetz über den Versicherungsvertrag (Versicherungsvertragsgesetz – VVG)*). Available in German at http://www.gesetze-im-internet.de/vvg_2008/BjNR263110007.html [last viewed 20.07.2017].

⁷³ Art. 88 German Insurance Contract Act.

⁷⁴ For application of these legal norms, see generally, for instance, *Steinbeck, R., Terno, C. Materiellrechtliche Grundsätze. in Höra, K. (Hrsg.) Münchener Anwaltshandbuch Versicherungsrecht. 3., überarbeitet und erweiterte Auflage. München: Verlag C.H. Beck, 2013, S. 95–98, 116–117.*

⁷⁵ Art. 94 German Insurance Contract Act.

⁷⁶ Art. 43(1) German Insurance Contract Act; *Steinbeck, R., Terno, C. Materiellrechtliche Grundsätze. in Höra, K. (Hrsg.) Münchener Anwaltshandbuch Versicherungsrecht. 3., überarbeitet und erweiterte Auflage. München: Verlag C.H. Beck, 2013, S. 88.*

⁷⁷ *Steinbeck, R., Terno, C. Materiellrechtliche Grundsätze. in Höra, K. (Hrsg.) Münchener Anwaltshandbuch Versicherungsrecht. 3., überarbeitet und erweiterte Auflage. München: Verlag C.H. Beck, 2013, S. 90.*

⁷⁸ BGH, NJW-RR 1988, 727.

⁷⁹ BGH, IV ZR 100/99.

⁸⁰ Art. 478(1) Estonian Law of obligations. Available in English at <https://www.riigiteataja.ee/en/eli/506112013011/consolide> [last viewed 20.07.2017]).

2.4.3. Actual Loss Approach

The third perception of insurable interest links the insurable interest with actual loss (damages) and, therefore, excludes expectancy of damages in future or economic (financial) disadvantages by narrowing the perception of insurable interest.

Latvia is one of European countries employing this perception of insurable interest. According to Article 1, Point 2 of the Latvian Insurance Contract Act,⁸¹ insurable interest is defined as “interest not to suffer damages upon the occurrence of insurance risk”. Latvian law of obligations interprets the concept of damages as diminution of one’s property⁸² which, in turn, means that the legal definition of insurable interest is understood similarly to the principle of indemnity.

Two obvious weaknesses of such a perception of insurable interest and, to be more precise, of such a legal definition of insurable interest may be identified. The first one relates to the fact that the link between necessity to avoid suffering damages and occurrence of the insured risk is obscure; in other words, which damages and in relation to what occurrence shall not be suffered is not stated in the Latvian legal definition of the concept of insurable interest. Although Latvian courts have not interpreted the understanding of insurable risk⁸³ (at least, as far as the publicly known Latvian court practice is concerned), it follows from this wording that insurable interest must be interpreted strictly within the application field of the principle of indemnity. Such interpretation would correspond to the opinion expressed in pre-war literature, yet in relation to different legal regulation existing at that time. According to this opinion, “[i]nterest is in the basis of an insurance contract to avoid probability that i[n]sured] event (for inst[ance], fire) does not diminish or destroy i[n]surance] object. This interest is legal but not economic [saimniecisks in Latvian – author’s remark] concept, therefore, it is not possible to conclude this c[ontra]ct on the basis of economic [saimniecisks in Latvian – author’s remark] interest. For inst[ance], a merchant cannot insure a factory which supplies him [or her] with goods”.⁸⁴

Another weakness of the above legal definition of insurable interest employed by Latvian insurance contract law relates to artificial exclusion of personal insurance from the requirement for demonstration of insurable interest. Particularly in the case of life insurance, but also in the case of accident insurance no damages (loss) are suffered if damages are considered within the category of pecuniary damage (harm) in opposition to non-pecuniary damage (harm) relating to mental sufferings and pain covered by both the above types of personal insurance.

⁸¹ Law “On insurance contracts”. Its official translation in English is available at http://vvc.gov.lv/image/catalog/dokumenti/On_Insurance_Contracts.doc [last viewed 20.07.2017], Latvian Insurance Contract Act.

⁸² Article 1770 Civil Law of the Republic of Latvia of 1937. Its official translation in English is available at http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Civil_Law.doc [last viewed 20.07.2017].

⁸³ For the sake of truth, it should be noted that the Supreme court reviewed cassation appeals in two recourse claim cases arising from insurance contracts for insurance of apartments concluded in the favour of a bank (obviously being as a mortgagee). Yet, the Supreme Court did not consider these cases from the point of view of existence of insurable interest within these insurance contracts (Judgment of the Supreme court of the Republic of Latvia dated 17.12.2015 in case No. SKC-0244/2015 (C28449911); Judgment of the Supreme court of the Republic of Latvia dated 19.02.2016. in case No. SKC-0022/2016 (C28359512)).

⁸⁴ Apdrošināšanas līgums [Insurance contract]. In: Švābe, A., Būmanis, A., Dišlers, K. (red.). Latviešu konversācijas vārdnīca. Pirmais sējums. A-Bekons. R.: A. Gulbja apgāde, 1927–1928, 647. lpp.

Lithuanian insurance contract law resembles the Latvian perception. Indeed, the legal definition of insurable interest is provided by Article 2(14) of the Lithuanian Insurance Act⁸⁵ by defining it as “a loss that the policyholder, the insured person, or the beneficiary may incur upon occurrence of an insured event”. Although Lithuanian Civil Code provides that “[o]nly the interests protected by laws may be insured”,⁸⁶ the former act defines the concept of insurance object as “property interests related to a person’s life, health, property, or civil liability”⁸⁷ which, therefore, links the concept of insurable interest not so much with economic but proprietary interests, i.e. application of the principle of indemnity

Different perceptions characterised above may in practice provide different outcomes. For instance, in the case of mortgagees, there may be an economic interest in insurance of a particular property either as property or liability insurance. If the insurable interest is understood as economic interest, mortgagees would have insurable interest in respect of insurance of houses which are pledged to them. However, if the insurable interest is linked with actual loss, i.e. the application of the principle of indemnity, then it is not possible for mortgagees to demonstrate such loss. A similar situation relates to bailees: if the English law allows that bailees, for instance, warehouse keepers, may insure goods of their customers and receive the full value of the goods from the insurer in the form of insurance redress,⁸⁸ such situation cannot be used in Latvia due to the strict legal definition of the concept of insurable interest as discussed above.

2.5. Legal Consequences Brought by Lack of Insurable Interest

The consequences brought by the lack of insurable interest in European countries are rather similar. The lack of insurable interest leads to invalidity of insurance contract (either fully or partly), and, as a result, non-existence of obligation on the part of the insurer to provide insurance redress. Regulation of these consequences is frequently envisaged by European legislators in statutes. However, there are European countries who state that principle *expressis verbis* but other countries focus on the duty of payment of insurance premium only by presuming invalidity of the insurance contract. For instance, the UK (unless this contract falls within gambling regulation when it is unenforceable⁸⁹) and Latvia are among such countries that state this principle *expressis verbis* in their regulation.⁹⁰

Legal consequences caused by a lack of insurable interest may be not only of civil but also of criminal character. This is the position of the English law, providing that, if a marine insurance contract is concluded without interest, a policyholder shall be

⁸⁵ Law on Insurance of the Republic of Lithuania, adopted on 18 September 2003 No. IX-1737 [Lithuanian Insurance Act]. Available in English at <https://www.lb.lt/ix1737> [last viewed 20.07.2017].

⁸⁶ Article 6.988, Civil Code of the Republic of Lithuania. Available in English at https://e-seimas.lrs.lt/rs/legalact/TAD/TAIS.245495/format/MSO2003_DOC/ [last viewed 20.07.2017].

⁸⁷ Article 2(19) Lithuanian Insurance Act.

⁸⁸ Clarke, M. *Policies and Perceptions of Insurance: An Introduction to Insurance Law*. Oxford: Clarendon Press, 1997, p. 31.

⁸⁹ Law Commission, *Scottish Law Commission Issues*. Paper 4: Insurable Interest, p. 9.

⁹⁰ Art. 10(1) and (4) Latvian Insurance Contract Act; Section 1 Life Assurance Act 1774. Available at <http://www.legislation.gov.uk/apgb/Geo3/14/48/section/1> [last viewed 20.07.2017], for the effect of this article, see, for instance, Merkin, R. *Gambling By Insurance – A Study of the Life Assurance Act 1774*. *Anglo-American Law Review*, pp. 353–354, Law Commission, *Scottish Law Commission Issues*. Paper 4: Insurable Interest, p. 20; Section 4(1) Marine Insurance Act 1906. Available at <http://www.legislation.gov.uk/ukpga/Edw7/6/41/contents> [last viewed 20.07.2017].

guilty of an offence, and shall be liable either to imprisonment or fine.⁹¹ This rule is still valid, yet no one has been found liable for breach of this provision,⁹² and currently it is proposed to abandon this rule.⁹³

At the same time, the lack of insurable interest shall be distinguished from the lack of consent of a subject who should demonstrate insurable interest (to be discussed in the next chapter). This consent is required by some countries like France⁹⁴ or Lithuania⁹⁵ concerning life insurance but in other countries like Latvia this person in life insurance (i.e., a beneficiary) is entitled to refuse to be such a person.⁹⁶ Necessity for distinguishing both situations is obvious due to their different character which, however, produces the same results. In case of lack of insurable interest as objective criterion, public policy precludes validity of insurance contract irrespective of will of insurance contract parties or those who are entitled to have claims under that contract. However, in the latter case, the person subjectively refuses from insurance redress without necessarily invalidating the insurance contract but leaving it unenforceable.

3. Subject, Who Should Demonstrate Insurable Interest

Another essential aspect of regulation of insurable interest relates to a person who should demonstrate insurable interest. As a general principle, a policyholder, being one of two subjects to the insurance contract (the insurer is another), shall demonstrate insurable interest. This principle is directly provided by insurance law of some European countries, for instance, Estonian insurance law provides that “[i]nsurable interest is the interest of the policyholder in being insured against a certain insured risk”.⁹⁷

Another generally recognised principle is that a policyholder may conclude an insurance contract either in his or her own favour or in favour of a third party. As it is justly stated in legal literature, such distinction is provided in different European countries such as Austria, Belgium, Czech Republic, the Netherlands, France, Germany, Greece, Hungary, Italy Luxembourg, Poland, Portugal, Spain, Sweden, Switzerland, the United Kingdom.⁹⁸ Additionally, all three Baltic States can be mentioned in this regard.⁹⁹ Thus, the possibility for the policyholder to conclude an insurance for the account of another person, i.e. in favour of a third person, is widely accepted in European countries and beyond.

A policyholder insuring either his or her own property or its part, his or her own liability, or his or her own life, health or physical integrity, will always have an

⁹¹ Section 1(1) Marine Insurance (Gambling Policies) Act 1909. Available at <http://www.legislation.gov.uk/ukpga/Edw7/9/12/section/1> [last viewed 20.07.2017].

⁹² Law Commission, Scottish Law Commission. Issues Paper 4: Insurable Interest, pp. 8–9, 24, 41, 45–46.

⁹³ *Ibid.*, p. 65, 69.

⁹⁴ Article L132-2(1) French Insurance Code.

⁹⁵ Article 98(3) Lithuanian Insurance Act.

⁹⁶ Art 53(4) Latvian Insurance Contract Act.

⁹⁷ Art. 478(1) Estonian Law of Obligations. Available in English at <https://www.riigiteataja.ee/en/eli/506112013011/consolidate> [last viewed 20.07.2017].

⁹⁸ *Basedow, J., Birds, J., Clarke, M., Cousy, H., Heiss, H.* (eds.). *Principles of European Insurance Contract Law (PEICL)*. Munich: Sellier. European Law Publishers, 2009, p. 263.

⁹⁹ Latvia: Article 1(6) and 12 Latvian Insurance Contract Act; Lithuania: Articles 1(2), 86, 88, 90(1), 112(1) Lithuanian Insurance Act; Estonia: 424(1) Estonian Law of Obligations.

insurable interest over these insurable objects. Therefore, establishing of insurable interest in these situations may not cause any problems.

However, when the policyholder insures the insurable object for the account of another person, the existence of the requirement of insurable interest is more difficult to establish and it depends solely on a perception of insurable interest in a particular jurisdiction as characterised above.¹⁰⁰

Furthermore, the character of insurable interest to be demonstrated should be discussed, as an insurance object may be of either pecuniary (material) or non-pecuniary (non-material) nature. In such a way, insurable interest in relation to property and liability insurance, on the one hand, shall be differentiated from personal insurance, on the other.¹⁰¹ As regards personal insurance, insurable interest could be identified by blood relatives or those being in a partnership irrespective of whether it is registered or not. This opinion coincides with the opinion expressed by Professor Kalvis Torgāns concerning personal insurance. He stated that “parents in relation to [their] children are not strangers”.¹⁰²

At the same time, if an insurance contract is concluded in the favour of a third party, i.e. the insured, insurance law of particular European countries links the demonstration of insurable interest with that person, but not with the policyholder itself. Indeed, Latvian insurance contract law defines the concept of an insured as “a legal or natural person who has the insurable interest and for the benefit of whom the insurance contract has been entered into [...]” by a policyholder (defined as “a legal or natural person who enters into an insurance contract for the benefit of himself or herself or of another person”¹⁰³) in relation to a specific insurance object (property, civil liability or life, health of physical state).¹⁰⁴ Considering this regulation of Latvian insurance contract law, it is erroneous to state that this regulation does not stipulate, which person must demonstrate insurable interest,¹⁰⁵ because it shall be demonstrated by the insured.

By providing that insurable interest must be demonstrated by the insured, Latvian insurance law is identical to the PEICL, which also contains the same regulation. Indeed, Article 1:202 of the PEICL establishes that the insured “means the person whose interest is protected against loss under indemnity insurance”.¹⁰⁶ Therefore, the PEICL provides within indemnity insurance that “[t]he insured is the one entitled to the insurance money”.¹⁰⁷ As regards insurance of fixed sums, the PEICL employs the concept of beneficiary, which “may be compared to the insured, but his entitlement to the insurance money is not dependent on suffering loss”.¹⁰⁸

¹⁰⁰ See Section 3.4. of this article above.

¹⁰¹ See, for instance, *Clarke, M. A., Burling, J. M., Purves, R. L.* The Law of Insurance Contracts, Sixth edition. London: Informa, 2009, p. 114.

¹⁰² *Torgāns, K.* Saistību tiesības: Mācību grāmata [Law of obligations: A textbook]. R.: Tiesu namu aģentūra, 2014, 445. lpp.

¹⁰³ Article 1(6) Latvian Insurance Contract Act.

¹⁰⁴ Article 1(12) Latvian Insurance Contract Act.

¹⁰⁵ *Rone, D.* Apdrošināšanas tiesību principu ietekme uz apdrošināšanas atlīdzības izmaksu [Influence of insurance law principles on payment of insurance redress]. Available at https://dukonference.lv/files/proceedings_of_conf/53konf/tiesibas/Rone.pdf [last viewed 20.07.2017].

¹⁰⁶ *Basedow, J., Birds, J., Clarke, M., Cousy, H., Heiss, H.* (eds.). Principles of European Insurance Contract Law (PEICL). Munich: Sellier. European Law Publishers, 2009, p. 53; see also comments on this provision (Article 1:202 PEICL, C3, pp. 53–54).

¹⁰⁷ *Ibid.*, Article 1:202 PEICL, C3, p. 54.

¹⁰⁸ *Ibid.*, Article 1:202, C4, p. 54

Lithuania employs a similar approach by providing that an insured could be one of the persons that should demonstrate insurable interest. Article 2(14) of the Lithuanian Insurance Act gives the legal definition of the insurable interest as “a loss that the policyholder, the insured person, or the beneficiary may incur upon occurrence of an insured event”.

4. Time, When Insurable Interest Must Be Demonstrated

In addition to a person who should demonstrate insurable interest, a separate issue of regulation of insurable interest relates to the time when this person must demonstrate the insurable interest. This issue is also linked to the validity of insurance contract, since, if the insurable interest is not demonstrated at the right time, it makes the insurance contract null and void. In general, two approaches may be distinguished among the European countries: the approach of English law and that of the continental European law.

English law distinguishes life and property (non-life) insurance concerning the time when insurable interest must be demonstrated. If in case of property (non-life) insurance English law requires demonstrating insurable interest at the moment of occurrence of the insured risk,¹⁰⁹ then in the case of life insurance – at the moment, when insurance contract is concluded, i.e. effected.¹¹⁰

Another approach is shared by continental European countries, which demand demonstration of insurable interest throughout the whole period of validity of an insurance contract. Germany, as well as France and other European countries link the insurable interest with “proof of actual loss at the time of claim”, as characterised by Professor Malcolm Clarke.¹¹¹ Yet, this principle is *expressis verbis* provided in regulation of insurable interest only in separate European countries.¹¹² According to this approach, the insurable interest must be demonstrated from the moment of entry into force of an insurance contract to the very moment when the insurance risk occurs. Therefore, the fact that the insurable interest no longer exists at the very moment of payment of insurable redress may not lead to the conclusion that insurance contract is not valid and the claim for payment of insurance redress has no ground.

Conclusions

The discussion carried out within this article shows that insurable interest as a concept, as well as its essential elements, are perceived and, consequently, regulated differently across the European countries. This discussion reveals that it is not possible to discuss the insurable interest on the basis of common understanding or a general rule common to all European countries, rather its understanding and, consequently, regulation depends on national approaches and should be discussed on the basis of national insurance contract law of each respective country. Another conclusion brought by the review is that the differences among European countries regarding regulation of insurable interest cannot be explained as minor deviations

¹⁰⁹ *Birds, J.* *Birds' Modern Insurance Law*. 10th ed. London: Sweet and Maxwell, 2016, p. 60.

¹¹⁰ *Birds, J.* *Birds' Modern Insurance Law*. 10th ed. London: Sweet and Maxwell, 2016, p. 44.

¹¹¹ *Clarke, M.* *Policies and Perceptions of Insurance: An Introduction to Insurance Law*. Oxford: Clarendon Press, 1997, p. 30.

¹¹² For instance, in the case of Latvian insurance law (Article 10(1) and (4) Latvian Insurance Contract Act).

from some general rule, but rather as different and sometimes opposite perspectives of insurable interest in different European countries. A further initiative of the European Commission would be welcomed in this situation, as far as EU Member States are concerned, by reanimating its own proposal for regulation of insurance contracts. Otherwise, due to the differences in perception of insurable interest, as well as insurance contract regulation in general, it is not possible to establish a truly common European insurance market. At the same time, introducing shared regulation of insurable interest is not, however, easy to ensure, considering the fact that this regulation, as well as regulation of other insurance contract aspects is deeply rooted in national civil law traditions, regulatory approaches and peculiarities of existing insurance environment in each European country.

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