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Criminal Anti-Corruption in the Era of Digital Technologies: The Russian Experience

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This study examines the problems of combating corruption in contemporary public relations in the Russian Federation. The relevance of the study lies in active development of modern digital technologies, and digitalizing public legal relations has brought positive experience to many countries in reducing corruption and state control over the work and activities of officials, where corrupt activities could have been possible earlier. It is important to note that the Russian Federation is on the path to positive changes in this area.

This is due to the "Digital Economy" programme and developments in the field of legislation that could introduce the use of smart contracts in public procurement, tenders, contracts, - the operational area of the legal entity of the state sector. It is important to note that the creation of interactive rooms is effective, and aids in precluding personal communication between an official and an individual, as well as offers other innovative schemes using digital technologies to increase the efficiency of anti-corruption activities.

Another optimal way that can reduce corruption is the availability and publicity of information regarding material resources, business and the family of officials. Today, officials of the Russian Federation may not indicate their income in cryptocurrencies in their declarations, which, in fact, can serve as a method to hide income.

Keywords: anti-corruption activities, corruption, smart contracts, digital personal accounts, cryptocurrency and corruption, corruption schemes, anti-corruption activities, anti-corruption legislation.

Contents

Introduction

The relevance of the study lies in the fact that corruption remains one of the key challenges of the modern globalized world. The level of corruption, inherent in the entire system of public administration, is one of the main factors, which represents a real threat to national security and concerns all the aspects of public life. The problem of corruption can only be addressed through the implementation of a package of anti-corruption measures, which should be implemented systematically in all the spheres of social relationships. This package of measures should be aimed not only at the eradication of corruption as a phenomenon, but also at the prevention of the conditions (elimination of the primitive cause of this phenomenon) that contribute to the incidence of corruption.

Notwithstanding the high rate of anti-corruption policy implementation in the Russian Federation, the results in addressing this universal problem to the present day remain to be achieved. However, the era of information technology, automation and digital society enables the world and the Russian Federation to apply, among other things, the latest methods for combating the corruptness of certain social groups of the population.

The article also considers the phenomenon of corruption in its close relationship with the digital economy; it proposes an assessment of the level of corruption in the state on the whole. Certain actual information on the results of digitalization is provided; an analysis of the process of combating corruption in the Russian Federation has also been conducted.

Scientific works of researchers in the field of law of the Russian Federation, who investigate the issues of the practices in combating corruption with the application of Internet technologies and other digital methods for combating corruption, constitute the theoretical basis for the study of this problem.

In the process of working on this scientific article, the authors applied a wide range of methods aimed at establishing a reliable, verifiable, objective truth. First of all, the formal-legal and historical-legal methods are employed. Furthermore, a comparison was made between the norms of Russian and foreign legislation. To do this, the authors of analyse the relevant provisions of normative legal acts and the practice of their application by judicial and other state bodies. The relevant legal norms are considered in the development.

1. Methods and Relevance of the Current Study

The theoretical basis for the study is provided by the acts of international organizations (for example, United Nations Convention against Corruption adopted in 2003[1], Criminal Law Convention on Corruption adopted by

[1] United Nations Convention against Corruption adopted on 31.10.2003. Available: https://mfc92.ru/upload/elora/korruptsiya/Konvenz_OON.pdf [last viewed 28.07.2020].

the Council of Europe in 1999[2]), as well as statutory provisions and delegated legislation of the Russian Federation, including the following: the Criminal Code of the Russian Federation (hereinafter referred to as the Criminal Code), federal legislation, edicts of the President of the Russian Federation, resolutions of the Government of the Russian Federation, departmental regulatory documentation, which also regulates the anti-corruption activities[3].

Comparative analysis is among the basic methods for studying and investigating corruption in this study. First of all, it enables critical examination of the techniques and approaches to combating corruption today. The use of analysis in the law and economics, in the social sphere, including the sphere of law enforcement makes it possible to pinpoint and examine the changes and results that have been achieved with respect to combating corruption.

The relevance of the study also lies in the fact that corruption is one of the most destructive processes in the Russian Federation to date. It has become a serious threat to legitimacy in general, to the supremacy of the law in particular; it imperils the implementation of democratic changes and rights of the individual. It has caused complex social problems, leading to degradation and negative changes in the sphere of political and social relationships, and it tarnishes the image of the Russian Federation throughout the world.

2. Technological Progress and Approaches to Curbing Corruption

It should be noted that in the context of technological progress and advancement and constant growth of the influence of digital technologies, it is important to use digital technologies as a resource in combating corruption.

In 2017, the Initiative of the President was implemented by the adoption of the programme "Digital Economy in the Russian Federation", intending to create certain conditions for development of digital economy in the Russian Federation through introduction of digital information into all the areas of work in social and economic environment, aimed at increasing competitiveness of the state, to improve quality of life of individuals, to ensure economic growth and national sovereignty[4].

Consequently, more attention was dedicated to addressing social and economic problems, including corruption. In accordance with the Law of the Russian Federation "On Combating Corruption," corruption is not only the acceptance or transfer of a bribe, but also the abuse of official position, commercial bribery, abuse of duties, etc. on the part of individuals and legal persons.

Notwithstanding the timely update of the legal provisions, which regulate the anti-corruption activities, the statutory provisions of the Russian Federation are still very far from the "ideal" legal environment – the legal provisions and legal norms, which are obsolete, form a number of difficulties

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[2] Criminal Law Convention on Corruption adopted by the Council of Europe on 27.01.1999. Available: https://www.coe.int/ru/web/conventions/full-list/-/conventions/rms/090000168007f58c [last viewed 28.07.2020].

[3] Civil Code of the Russian Federation. Part 2, 26.01.1996, No. 14-ФЗ. Available: http://www.consultant.ru/document/cons_doc_LAW_9027/ [last viewed 28.07.2020].

[4] National Programme "Digital Economy in the Russian Federation", approved by the Minutes of the Meeting of the Presidium of the Presidential Council for Strategic Development and National Projects of 4 June 2019.

in the implementation of economic processes. A complex approach seems to be necessary for the implementation of the Development Programme[5].

Application of digital technologies can contribute to combating corruption in the following directions:

- restriction of personal communication between officials and individuals;
- accessibility and transparency of information about officials on the Internet;
- application of "smart contracts" in cases where a legal person of the public sector of the economy is one of the parties of contractual relationships (also in tenders, auctions and public procurement).

The development practice of digital technologies suggests that they comprise a great opportunity for the effective anti-corruption measures not only in the financial sphere, but also in other areas of the individual's activities. Moreover, Blockchain technology goes beyond the finance and is of a great importance for the future development of economy in general and certain areas of production[6].

A certain part of corruption schemes is formed through personal contact of interested persons, therefore, the issues requiring personal contact between an official and individuals – citizens must be reduced to a minimum. Creation of an information portal and a common database of the Russian Federation citizens with a personal account, which could contain a certain function for the access to services provided by the country, and to the electronic document flow, will enable each user to implement online operations with the documentation via personal account and track them in future. This could reduce costs in the public administration sector and ease the pressure of the bureaucratic system on the whole; the solution will also ensure the transparency and "contactlessness" of state-provided service recipients with persons – officials, which could reduce the risks of corruption[7].

This approach is already practised in the Russian Federation. With the adoption of the digital programme, state agencies are at the forefront in terms of transfer to digital media, thereby replacing paper media. Websites and applications have been created for this purpose, including the well-known Government Services Portal, which operates since 2010 and has successfully been used by population. In 2017, the number of users registered with the Portal increased by 25 million and amounted to 65 million individuals. The share of individuals who use electronic services of the state has increased from 25 % in 2012 to 64 % in 2017.

According to the statistical information, anti-corruption activities are on the increase. This information means that it is either due to ineffective state-implemented anti-corruption policy, or caused by larger number of crimes in this sphere that are solved by the law enforcement authorities.

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[5] *Avdetsky, A. G., Goloborodko, A. Yu., Voloshin, R. P., Golubeva, M. O.* On foreign approaches to combating corruption. Science and education, economy and economics, entrepreneurship, law and management. 2018, p. 92.

[6] National Programme "Digital Economy in the Russian Federation", approved by the Minutes of the Meeting of the Presidium of the Presidential Council for Strategic Development and National Projects of 4 June 2019.

[7] *Vigna, P., Casey, M.* The age of cryptocurrencies. How bitcoin and blockchain are changing the global economic order. Moscow: Mann, Ivanov, and Ferber, 2017.

The classification of crimes with the corruption component testifies to the fact that these crimes are most frequently committed within the authorities of internal affairs, in the Ministry of Defence, as well as the authorities of the Federal Bailiff Service of the Russian Federation[8].

The tendency of corruption among the state employees has not yet been curbed. Nevertheless, it should be noted that information on the corruption-related criminal cases is made known to the public with an increasing frequency, which has a positive effect on this sphere of legal relations. Such criminal cases should include the high-profile criminal cases with respect to Roskosmos (Federal Space Agency of the Russian Federation) and Oboronservis JSC, criminal case against A. Ulyukayev, Ex-Minister of Economic Development of the Russian Federation, against A. Khoroshavin, former Governor of Sakhalin Oblast, etc.

3. International Examples of Countering Corruption

Foreign experience and positive results achieved by other countries can be a good example to have an impact on improving the situation in the area of combating corruption.

Subject to the United States legislation, US officials are prohibited from earning income other than coming from state institutions, or accepting gifts or presents. French legislation establishes criminal responsibility of officials, including imprisonment for participation in activities of legal persons they supervise[9].

In Canada, the officials who have retired from the state service do not have the right to as accept positions of senior managers in private sector entities, with which they had interacted one year before the termination of state service, use professional contacts and professional (confidential) information in the interests of private persons. Violation of provisions enshrined in the Code of Ethics may have consequences – from punishment of a disciplinary nature to discharge from service[10].

In Great Britain, there is a direct prohibition for officials to accept any gifts.

The statutory provisions of the Republic of Korea established by the Law "On Combating Corruption" represent a standard in combating corruption. In accordance with the statutory provisions, every adult citizen has the right to initiate an investigation of a criminal case on corruption, while the Board of Audit and Inspection must investigate such corruption charges, documented in the form of an application of an individual.

The provisions of anti-corruption legislation were introduced in China, where government employees involved in bribery are sentenced to severe penalties, including capital punishment. Since 2003, 10 000 officials whose guilt was established have been shot, and another 120 000 officials have received the sentence of 10 to 20 years of imprisonment. At the same time, it should be noted that China still retains a high level of corruption.

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[8] *Yegorov, V. A., Yakovlev, N. A.* Modern view of corruption and methods of combating its manifestation. Successes of Modern Science, 2016, pp. 119–123.

[9] *Mamitova, N. V.* Problems of countering corruption crimes in the Russian Federation. *Criminological Journal of the Baikal State University of Economics and Law*, Vol. 10, No. 2, 2016, pp. 261–270.

[10] *Kolpakova, L. A., Spasennov, B. A.* Problems of countering crime in the sphere of digital economy. *All-Russian Journal of Criminology. State and Law*. *Legal Science*, No. 2, 2017, pp. 258–267.

Today, the Russian Federation uses several methods for applying digital technologies in combating corruption. In a long term, accessibility of information on the Internet seems to be a major milestone in combating corruption by using a digital component[11].

Benefiting the government and citizens, open data enables everyone to have free access to information, stimulating greater public participation, comprehensive development and innovation.

Should a set of information pertaining the standard of living, material income, business and other information be open to the society and citizens, this would have its effect. For example, information about the state budget and federal expenditure, contracts and tenders, companies, personal voting of deputies, legal judgments, financing of political parties and property declarations should be available in the public domain, or at least conditions should be provided to make it possible to verify this information with respect to government employees more easily than with respect to an ordinary individual[12].

4. Perspectives of Cryptocurrency Technologies

Researchers contend that today there is a great prospect of effective combating corruption based on cryptocurrency technologies. Blockchain is a multi-level multifunctional technology that makes it possible to take into consideration the contradictions in different areas of public activities and activities of the country. Contradictions of an individual or social nature represent a basis for the growth of corruption spanning entire world. Blockchain is a technology, which helps to expose the negative phenomenon in the finance and economy, to make asset accounting parameters in legal entities of the country a basis, and is therefore of great importance in combating corruption.

Smart contracts provide an effective mechanism within the framework of digital economy. The smart contract concept was the focus of attention of legal and business contracts. Smart contracts, which are concluded and executed without the presence of the individual, will contribute to liberating the society of the Russian Federation from theft, court proceedings and corruption[13].

A smart contract is not a printed multipage documentation signed by the parties, but instead an algorithm, a program, which mitigates the mistrust between the parties, reduces the need for involvement of third parties and outflow of capital. This should be observed through the example of a standard sale and purchase transaction. Currently, notwithstanding the fact that smart contracts are not theoretically prohibited within the territory of the Russian Federation, there is a number of problems, which practically preclude the use of such contracts with respect to the state sphere (for example, in public procurement, tenders, in the conclusion of standard contracts with legal entities in the state sphere)[14].

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[11] *Yegorov, V. A., Yakovlev, N. A.* Modern view of corruption and methods of combating its manifestation. Successes of Modern Science, 2016, pp. 119–123.

[12] *Ponedelkov, A.V., Vorontsov, S. A.* Main directions of the state policy of the Russian Federation in the field of anti-corruption. Bulletin of the Povolzhsky Institute of Management, 2015, pp. 4–11.

[13] Minimizing the consequences of corruption as a problem of legislation in the field of national security. Russia: trends and prospects for development. Yearbook. OTV. *Gerasimov, V. I., Yefremenko, D. V.* (eds.). Vol. 11. Part 1. Moscow: Institute of Scientific Information on Social Sciences, RAS, 2016, pp. 386–388.

[14] *Mamitova, N. V.* Problems of countering corruption crimes in the Russian Federation. *Criminological Journal of the Baikal State University of Economics and Law*, Vol. 10, No. 2, 2016, pp. 261–270.

For example, payments under such contracts are also a problem. At the moment, settlements can only be made in Ethereum cryptocurrency. However, the Bank of Russia does not recommend the use of this cryptocurrency in settlements, therefore, state legal entities will most probably decline payments to be made under this system.

Currently, smart contracts in Russia are not regulated by the statutory provisions. They will become participants in the economic process before 2025 within the framework of the Digital Economy Project.

Article 434 of the Civil Code of the Russian Federation (hereinafter referred to as the Civil Code) provides for the conclusion (in certain cases) of a contract through the exchange of electronic documents, transferred over the communication channels, which make it possible to establish that the document originates from the party to the contract[15].

Speaking about corruption, it is worth to consider one of the particularly vulnerable spheres – the sphere of public procurement. For example, it is necessary to buy the desks for a school, but a front legal entity has been involved in the purchase, quoted a lower price and won the tender. Once the delivery has been agreed upon, corrupt government officials change the price of the contract upwards, for example, by setting additional commissions and payments. The register will make it impossible to carry out this fraud with the value after the conclusion of the contract in a manner that remains unnoticed by other participants. Furthermore, all the expenses and payments will be defined; it will not be possible to add additional surcharges afterwards, since the register users will detect the changes in the information.

The World Economic Forum Report predicts that the share of GDP in the world, which operates on the basis of the Blockchain, will reach 10% by 2027. Registration of rights through the Blockchain has a great potential. For example, shifting of *droit de suite*, which ties a part of income to the change of the price of its activities to the Blockchain platform, will provide an opportunity to reduce the legal uncertainty in the context of the method for acquisition of information about the facts of sale, buyers and value. Blockchain licensing opens up certain possibilities. This is an excellent instrument to record information on licensing and sublicensing[16].

The Ministry of Finance of the Russian Federation has prepared a draft law "On Digital Financial Assets", which proposes to fix the term of the contract as an electronic contract using the statutory provisions. The rights and obligations thereunder are exercised and enforced through the automatic implementation of digital transactions in the registry of digital transactions in a certain sequence and upon the occurrence of specific circumstances.

Some risks have been clearly defined. They may include laundering of capital received abroad; tax evasion; distribution of fraudulent schemes; capitalization of terrorist schemes. The use of smart contracts and cryptocurrencies has not yet been prohibited in the Russian Federation; thus, the government authorities of the country are very careful about these new spheres that have been created in the 21st century.

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[15] *Ponedelkov, A. V., Vorontsov,* S. A. Main directions of the state policy of the Russian Federation in the field of anti-corruption. Bulletin of the Povolzhsky Institute of Management, 2015, pp. 4–11.

[16] Ibid.

Corruption-related crimes severely destabilize the activities of the society and country on the whole. They have a negative effect on the governance of the country and legal relations therein. Corruption reduces the economic growth, deteriorates the level of citizens' confidence in the government and gives rise to some negative trends in public life: frank pledge is formed among the government employees at the municipal and regional level; organized crime becomes an important part of the society and grows together with the government authorities; impoverishment of the population persists, giving rise to felony, etc.[17]

The legislator made attempts to formulate a legislative idea of the concept of corruption and to determine the normative contours of combating corruption. In the statutory provisions, the notion of corruption encompasses the abuse of official position, transfer of a bribe, acceptance of money through bribery, abusive exercise of official competence, commercial bribery or unlawful use of an official position by the individual contrary to the interests of the social sphere and country for reaping the benefits in the form of capital, things of value, other property or property-related services, other proprietary rights for the individuals or for the third parties, or giving the benefits to a particular person by other individuals, or implementation of the abovementioned actions on behalf or in the interests of a company.

Given the economic and social conditions prevailing in the country, civil law methods can be considered the most effective measures to combat corruption. This situation is reflected in the recent scientific studies. N. M. Korkunov drew attention to the fact that criminal punishment does not restore the right that had been violated earlier, and does not compensate for the harm caused by the perpetrator of the crime. Researchers believe that implementation of the norms of the criminal law is a complex process, which does not guarantee results due to the lack of financial resources and personnel, or ineffectiveness of law-enforcement authorities. It is this system, which is prone to corruption above all others[18].

Summary

Drawing some conclusions based on the foregoing, one should note that measures aimed at combating corruption today should include the following:

- provision of openness and publicity in the activities of the country's authorities and officials, through the introduction of digitalization into their activities, strengthening the personal responsibility of each employee;
- improvement of the control system in the country and society with respect to the government employees, for example, by switching to the electronic decision-making system, which will make it possible to simplify the document flow and reduce the costs in the management sphere and provide for transparency of the previously made decisions;
- implementation of anti-corruption, educational measures in public relations in a timely manner, involvement of social masses in combating

[17] *Mamitova, N. V.* Problems of countering corruption crimes in the Russian Federation. *Criminological Journal of the Baikal State University of Economics and Law*, Vol. 10, No. 2, 2016, pp. 261–270.

[18] *Solovyov, S. G.* Concept of the subject of legal regulation and its relationship with other legal categories. Bulletin of the Perm University. Legal Science, No. 1 (15), 2012, pp. 47–52.

corruption through the popularization of public sphere portals, which enable contacting government authorities and informing them of incidents;
- involvement of mass media to cover the facts of corruption schemes, as well as building the citizens' awareness and perception of these phenomena.

A detailed approach should be implemented in the development and formation of the statutory provisions, which would be objective and consistent with the reality. It should be aimed at combating corruption in all of its aspects. This will ensure the principles of legality and individualize punishments for the offences in this sphere.

An amendment could be introduced into the applicable criminal legislation (Article 104.1 of the Criminal Code – "Confiscation of Property"): instead of confiscation of the corrupt official's property, which has been proved for by the investigation of the criminal case to be a *corpus delicti* in accordance with the Criminal Code, an amendment should be introduced, containing a condition of confiscation of the property, which is in corrupt official's ownership. Amendments of this kind must be included among important measures to address the problem of punishment for corrupt activities.

In the implementation of such measures, certain risks should be taken into consideration, which may arise with the increase in the rate of digitalization. One of them is the escape of the official's personality into a virtual space. Logins, passwords, nicknames and codes will only be displayed in the system. As a result, the corrupt official will be able to use financial resources anonymously, without revealing his (her) identity. It will be extremely difficult to identify and punish such an official.

Implementation of corruption schemes in cryptocurrency poses additional risks. Today, officials may not specify cryptocurrencies in their income documentation. Thus, the probability of corruption offenses will increase.

The digitalization process will not fully address the corruption problem and may even have the opposite effect during the first stage of the project implementation. In order to reap all the advantages of such technologies, they should be developed in a balanced manner. Moreover, this process will facilitate combating corruption activities in line with the strengthening of the measures, which have been effectively implemented earlier in the Russian Federation and other countries.

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6. *Kuptsova, A. A., Ryutov, D. Yu.* Foreign experience in countering corruption. Interactive Science, 2017, p. 82.
7. *Gerasimov, V. I., Yefremenko, D. V.* Minimizing the consequences of corruption as a problem of legislation in the field of national security. Russia: trends and prospects for development. Yearbook. // Vol. 11, part 1, Moscow, Institute of Scientific Information on Social Sciences, RAS, 2016, pp. 386–388.
8. *Mamitova N. V.* Problems of countering corruption crimes in the Russian Federation. *Criminological Journal of the Baikal State University of Economics and Law*, Vol. 10, No. 2, 2016, pp. 261–270.
9. *Ponedelkov, A.V., Vorontsov, S. A.* Main directions of the state policy of the Russian Federation in the field of anti-corruption. Bulletin of the Povolzhsky Institute of Management, 2015, pp. 4–11.
10. *Swan, M*. Blockchain: A Diagram of the New Economy. Moscow, Olympus Business, 2017.

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Abraham Lincoln, Nativism, and Citizenship

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Nativist movements in the United States in the 1840s and 1850s aimed to restrict the rights of recent immigrants because of their religion or ethnicity. During Abraham Lincoln's pre-presidential political career, he twice confronted such movements in his home state of Illinois. He opposed nativism, believing that adherence to the values expressed in the Declaration of Independence would unify native-born and naturalized Americans.

Keywords: Abraham Lincoln, immigration, nativism, xenophobia, citizenship.

Contents

Introduction

The purpose of this article is to examine Abraham Lincoln's reaction to nativist movements in the 1840s and 1850s. The article concludes Lincoln consistently opposed such movements.

American nativists, according to historian Tyler Anbinder, fear and resent immigrants and their impact in the United States and want to take some action against them, by violence, immigration restriction, or limiting the rights of

recent arrivals to the United States.[1] Lincoln always opposed nativism. Because Lincoln saw American citizenship as founded on the principles expressed in the Declaration of Independence, he believed that all white men who accepted that creed had equal claims to American citizenship. Both native-born and naturalized citizens should be members of the political community.

Nativist organizations in the 1840s and 1850s pressed for restrictions on the voting rights of immigrants, advocating changes in state voting laws that would lengthen the time needed for even naturalized citizens to vote. The federal naturalization statute in effect at the time permitted "any alien, being a free white person" to become a citizen after a five-year residence in the US, establishing good moral character, and taking an oath supporting the US Constitution and renouncing all allegiance to everywhere he previously had been a citizen or subject. Aliens did not have to speak English or be able to read to become a citizen.[2] Nativists called for 14- or 21-year periods after naturalization before a foreign-born citizen would even be eligible to vote. They also called for bans on office-holding by the foreign-born and for literacy tests for voting by immigrants.[3]

In his pre-presidential political career, Lincoln was a member of the Whig Party until 1856 when he became a member of the newly formed Republican Party. While the Democratic Party was reliably pro-immigrant, both the Whig and Republican parties were more divided over immigration, a division that was largely geographic. While many Whigs were nativists, nativism was more prevalent among Whigs in the Northeast than with Whigs in the Midwest (then known as the Northwest).[4] Midwestern Whigs – and then Republicans – were more likely to see immigrants as a key driver of economic development since a growing economy needed immigrants.[5]

1. Lincoln, Nativism, and the Whig Party

Democrats in Illinois regularly charged Whigs with anti-immigrant and anti-Catholic bias. Whig newspapers and politicians spent considerable time rebutting charges of nativism and wasted a lot of time accusing Democrats of being the real nativists. In 1844, after nativist riots erupted in Philadelphia, Pennsylvania between Protestants and Catholics, Lincoln and his fellow Springfield Whigs met to answer Democratic charges that Whigs were responsible for the riots because of their "supposed hostility" to "foreigners and Catholics." The assembled Whigs passed several resolutions denying they were anti-immigrant or anti-Catholic. They stated their opposition to any changes in the naturalization laws that would "render admission under them, less convenient, less cheap, or less expeditious."[6]

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1 *Anbinder, T.* Nativism and Prejudice Against Foreigners. In: A Companion to American Immigration, *Ueda, R.* (ed.). Oxford, UK: Blackwell Publishing, 2006, p. 179.

2 An Act to establish an uniform rule of Naturalization and to repeal the acts heretofore passed on that subject. April 14, 1802, Ch. 28, U.S. Statutes at Large 2, 1845, pp. 153–155.

3 *Lee, E.* America for Americans: A History of Xenophobia in the United States. New York: Basic Books, 2019, pp. 39–73.

4 *Keyssar, A.* The Right to Vote: The Contested History of Democracy in the United States. Rev. ed., New York: Basic Books, 2009, p. 53.

5 Boritt, G. S. Lincoln and the Economics of the American Dream. Memphis: Memphis State University Press, 1978, pp. 27, 98.

6 Abraham Lincoln ("AL"), "Speech and Resolutions Concerning Philadelphia Riots," June 12, 1844. *Basler, R.* (ed.). The Collected Works of Abraham Lincoln, 8 vols., New Brunswick, NJ: Rutgers University Press, 1953 ("CW"), AL, CW, 1:337–338.

Significantly, these resolutions rejected nativist proposals to increase the residency period for citizenship (the nativist American Republican party in June 1843 had proposed lengthening the five-year residency to 21 years).[7] A writer for the *Illinois State Register*, the Democratic newspaper in Springfield, noted how "Mr. Lincoln expressed the kindest, and most benevolent feelings towards foreigners; they were, I doubt not, the sincere and honest sentiments of *his heart*; but they were not those of *his party*."[8] Lincoln, in fact, was responsible for the Illinois Whig party adopting these resolutions at the state convention later that summer. As a member of the resolutions committee, Lincoln ensured that the Springfield resolutions were reported to the convention, which then "concurred with the sentiments" of the Springfield Whigs on " the rights of *foreigners* and *Catholics*."[9]

Despite Lincoln's best efforts, most immigrants in Springfield in the 1840s associated Whigs with nativism. Whigs paid dearly for this perception as immigrants aligned heavily with Democrats. In 1848, about 70 percent of foreign-born voters in Springfield voted Democratic. One-quarter of all Democratic voters were foreign-born while only one-tenth of Whig voters were immigrants. Irish and German voters favored Democrats by a three-to-one margin.[10]

2. The End of Alien Voting

While the federal government was given authority over naturalization in the US Constitution, states decided who could vote; some states – like Lincoln's Illinois – allowed immigrants to vote before they naturalized.[11] The Illinois Constitution of 1818 stated that "inhabitants" – not citizens – were eligible to vote, and non-citizens regularly voted in elections. Although there were solid reasons why this practice of allowing non-citizens to vote might be problematic, Whigs only began fretting about alien voting when they started losing elections because alien voters voted heavily Democratic. Whigs blamed the 1838 loss of their candidate for governor and the razor-thin victory of Whig John T. Stuart over Democrat Stephen Douglas for congress on bloc voting by Irish canal workers.[12] When Lincoln wrote to John T. Stuart about the possibility of holding the congressional elections for the 27th Congress in the summer of 1840, he advised that the Whigs thought that the canal and other public works would be stopped by the summer "and consequently, we shall then be clear of the foreign votes, whereas by another year they may be brought in again."[13]

The *Sangamo Journal*, the Whig-affiliated newspaper in the capital city of Springfield, published several articles on "foreign voters" after the August 1838 elections. One article warned that immigrants from the different kingdoms of Europe had poured into the United States and that, in Illinois, these immigrants were working as laborers on public works like the Illinois and Michigan Canal.

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7 *Anbinder, T.* Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850s. New York: Oxford University Press, 1994, p. 11.

8 AL, "Speech and Resolutions Concerning Philadelphia Riots," June 12, 1844, CW 1:338.

9 "Illinois Mass Convention at Vandalia, July 17, 1844," *Sangamo Journal*, August 8, 1844, p. 3.

10 *Winkle, K. J.* The Second Party System in Lincoln's Springfield. *Civil War History* 44 (1998), pp. 281–282.

11 U.S. Constitution, Art. 1, sec. 8; Keyssar, The Right to Vote, pp. 27–28.

12 *Johannsen, R. W.* Stephen A. Douglas. Urbana: University of Illinois Press, 1997, pp. 67–69; *Thompson, C. M.* The Illinois Whigs Before 1846. University of Illinois Studies in the Social Sciences, Vol. 4, Urbana: University of Illinois, 1915, pp. 79–80.

13 AL to John T. Stuart, January 1, 1840, CW 1:181.

These canal workers were predominately Irish and "instead of becoming *Americans*, they have brought Ireland with them." While Whigs criticized Irish immigrants, they extolled German immigrants as a "laborious, enterprising, moral and quiet people," a pattern Lincoln and other Illinois Republicans repeated in the 1850s.[14]

Stuart won his seat in Congress by only 130 votes out of over 36,000 votes cast. Lincoln and other Illinois Whigs worried about Douglas contesting the outcome. Lincoln and four other Whigs consequently prepared a form letter that was sent to Whig editors, stressing the importance of being ready for such a contest. The letter asked the editors to collect the proof necessary to challenge votes for Douglas. It inquired whether any errors had been made in tallying votes from the poll books, whether anyone who voted for Douglas was a minor or had not established residency, and whether "any unnaturalized foreigners voted for Mr. Douglas in your County." The third inquiry makes it clear that Lincoln and his colleagues had accepted the dubious Whig argument advanced earlier in the year in a lawsuit filed in Jo Daviess County that the Illinois Constitution didn't establish voting by non-citizens.[15]

The outcome in the race between Stuart and Douglas wasn't known for several weeks and the *Journal* erroneously concluded that Douglas had won by 130 votes. It lamented that Douglas would owe his seat "not to the citizens of this District, but to workmen on our public improvements, not American citizens – who have no fixed place of abode." The article also complained of illegal votes from Irish workers, which would be a common complaint of Illinois Whigs – and, later, Republicans.[16] Whigs complained about Irish canal workers; Republicans – including Lincoln – would later complain about Irish railroad workers, who allegedly either voted multiple times or had failed to establish residence.

The *Sangamo Journal* continued this campaign against alien voting throughout the fall. In December, the *Journal* claimed that it didn't object to votes from "Foreigners where they have made themselves citizens of the state." But the Irish canal workers "come in the spring – work during the summer – and leave the state in the fall – many never return. They are transient persons, and neither *citizens* or *inhabitants*."[17]

In 1839, Whigs filed a collusive lawsuit in Jo Daviess County to stop alien voting, hoping to obtain a favorable decision from the Illinois Supreme Court before the 1840 election. To get the issue before the court, the plaintiff Horace Houghton complained that Thomas Spraggins, the Whig election judge, knowingly allowed Jeremiah Kyle, a "native of Ireland" and not a naturalized citizen, to vote in the previous election. Dan Stone, the judge who heard the case, was a former Whig representative to the Illinois General Assembly. Stone held that the election judge violated the law because the defendant wasn't legally qualified to vote because he wasn't yet a citizen of the United States.[18]

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[14] *Sangamo Journal*, August 18, 1838, p. 2.

[15] "To the Editor of the Chicago *American*," June 24, 1839, CW 1:151.

[16] "Illinois Election," *Sangamo Journal*, August 25, 1838, p. 2; see also "The Belleville Representative," *Sangamo Journal*, February 23, 1839, p. 2.

[17] "Stuart and Douglass," *Sangamo Journal*, December 15, 1838, p. 2.

[18] "Important Decision," *Sangamo Journal*, November 29, 1839, p. 2; "The 'Alien Case,'" *Sangamo Journal*, December 17, 1839, p. 2; "The Alien Case – No. II," *Sangamo Journal*, December 27, 1839, p. 2.

The case then headed to the Illinois Supreme Court where it would be heard by a court consisting of three Whigs and one Democrat. Facing what they believed to be certain defeat, the Democrats sought to delay the case at least until after the 1840 elections and also introduced a "court-packing" bill that would increase the size of the court from four to nine. The case was continued from the December 1839 term to the June 1840 term and, after Stephen Douglas found an error in the circuit court record, the case was continued again to the following December. That ensured the alien vote still would be allowed in the state and national elections that year.[19]

When the supreme court finally reached the case in the December 1840 term, Theophilus W. Smith, the Democratic judge on the court, wrote a long, discursive opinion that held the challenged alien voter was legally qualified to vote under the Illinois Constitution because "inhabitant" meant resident. Consequently, voting was not limited to citizens.[20] Apparently hoping to stave off the pending court-packing bill, the three Whig judges surprisingly concurred in the result reached by Smith.[21]

After a long and contentious battle, the court-packing bill passed, largely due to Douglas's efforts.[22] Douglas, who was so closely identified with the court bill that it became known as the "Douglas bill," was selected by the legislature as one of the five new judges on the court. Lincoln's over 700 references to "Judge Douglas" in his speeches in the 1850s were meant pejoratively; Lincoln was reminding his audiences about Douglas's prominent role in the court-packing scheme and his subsequent selection to the court, which foes of Douglas considered a payoff.[23]

While the alien voter case was pending in the supreme court, Springfield had moved to incorporate as a city. Democrats believed that the city's charter was a Whig plot spearheaded by Lincoln and Edward D. Baker.[24] The charter necessarily had to address who could vote in municipal elections. Other cities had not mentioned citizenship as a requirement for voting in their city charters.[25] Springfield was a Whig stronghold, and its charter pointedly stated that voters consisted of "all free white male inhabitants, citizens of the United States."[26] The charter's language on voting codified the Whig argument against alien suffrage, but also reflected the fact that alien voters in Springfield had

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19 *Ford, T.* A History of Illinois. Urbana: University of Illinois Press, 1995, 1854, pp. 14–153; *Johannsen, R. W.* Stephen A. Douglas, pp. 82–87.

20 *Spragins v. Houghton*, 3 Illinois Reports 377, 414, 1840 (opinion by Justice Smith).

21 Miller, R. L. Lincoln and his World: Prairie Politician, 1834-1842. Mechanicsburg: Stackpole Books, 2008, pp. 419–420.

22 Ibid., pp. 420–425.

23 I ran a search for "Judge Douglas" in the online version of Lincoln's *Collected Works*, which resulted in 738 matches. The Collected Works of Abraham Lincoln. Available: https://quod.lib.umich.edu/l/lincoln/ [last viewed 01.08.2020].

24 *Miller, R. L.* Lincoln and his World, p. 380.

25 An Act to Incorporate the City of Alton, July 21, 1837, Laws of the State of Illinois, Passed by the Tenth General Assembly, at their Special Session. Vandalia: William Walters, 1837, p. 19; see also An Act to Incorporate the City of Chicago, March 4, 1837, Laws of the State of Illinois, Passed by the Tenth General Assembly. Vandalia: William Walters, 1837, p. 52.

26 *Winkle, K. J.* The Second Party System in Lincoln's Springfield, pp. 267, 272–273; An Act to Incorporate the City of Springfield, February 3, 1840, Laws of the State of Illinois, Passed by the Eleventh General Assembly, Springfield: William Walters, 1840, pp. 8–9.

unanimously voted Democratic in the 1838 election.[27] The limitation on suffrage in the charter was met some resistance in the legislature, but still passed handily. The Sangamon County delegation split its vote, 4 to 2, with Lincoln voting in favor of the charter.[28] Voters ratified the charter in the subsequent election in Springfield.[29] The Whig victory on limiting suffrage was short-lived. In the wake of the supreme court's ruling on alien voters, the Democratic-controlled legislature amended Springfield's charter in the following session, repealing the citizenship provision and substituting language allowing "every inhabitant" of Springfield "who is entitled to vote for state officers" to vote in city elections.[30]

The 1847 constitutional convention addressed the rights of both non-citizens and naturalized citizens to hold office and to vote.[31] Democratic delegates were quick to label any proposed changes affecting suffrage or elective office as "Native American." They used the term as shorthand for being anti-immigrant and anti-Catholic, associating those delegates who advocated changes in suffrage with a party widely seen as condoning violence and destruction in wake of the Philadelphia riots of 1844.[32] The "Native Americans" first had appeared in New York in 1835, running candidates who were anti-Catholic and opposing the foreign-born holding political offices. That group soon disappeared. In 1843, nativists in New York created the American Republican party, calling for extending the required period of residence for naturalization from five years to twenty-one years and supporting only native-born citizens for public office. Having won elections in Pennsylvania, Massachusetts, and New York, the American Republicans held a national convention in 1845 in Philadelphia, where they rechristened themselves as the Native American party.[33]

Proponents of the change to the suffrage provision argued that the right to vote was linked inextricably to citizenship. Whig farmer Gilbert Turnbull argued for the "common-sense" principle that "in any society whatever, members alone have a right in a voice in the management of the affairs of that society." Turnbull proclaimed, "Sir, in my opinion, citizen-ship, alone, can entitle a person to vote."[34] Nativism provided an additional argument for the new provision on suffrage. Henry Greene, a Whig farmer from Tazewell County, claimed a majority of foreigners who came to Illinois were either ignorant or "criminals and paupers."[35]

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[27] *Pratt, H.* Lincoln – Trustee of the Town of Springfield. *Bulletin of the Abraham Lincoln Association*, No. 48, June 1937, p. 6.

[28] Ibid.

[29] City of Springfield. *Sangamo Journal*, April 10, 1840, p. 2

[30] An Act to Amend "An Act to Incorporate the City of Springfield," February 27, 1841, Laws of the State of Illinois, Passed by the Twelfth General Assembly, Springfield: Wm. Walters, 1841, pp. 61–62.

[31] *Cicero, Jr., F.* Creating the Land of Lincoln: The History and Constitutions of Illinois, 1778-1870. Urbana: University of Illinois Press, 2018, pp. 115–118, 121–124.

[32] On Native American justifications for the Philadelphia riots, see Important Testimony Connected with Native American Principles, Philadelphia: First District Native American Association, 1845; Hancock Lee, J. The Origin and Progress of the American Party in Politics. Philadelphia: Elliott and Gihon, 1855.

[33] *Anbinder, T.* Nativism and Slavery, pp. 9–14; *Holt, M. F.* The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War. New York: Oxford University Press, 1999, pp. 190–191.

[34] *Cole, A. Ch.* (ed.). The Constitutional Debates of 1847. Springfield: Illinois State Historical Library, 1919, p. 527.

[35] Ibid., p. 534.

The opponents of the suffrage provision gave two general arguments against it. First, it abandoned the "policy of our fathers to encourage immigration from the east, and from foreign lands."[36] Democratic delegate Thompson Campbell stated that Illinois needed immigrants and should continue to hold out " the greatest inducement for men" to come to the state.[37] Opponents also associated the proposed suffrage provision with nativism and, in particular, the policies of the "Native American" party.[38]

The proposed suffrage provision eventually passed. The "foreign voter" provision in the 1818 Constitution, which allowed "all white male inhabitants above the age of 21" to vote, was supplanted by the 1848 Constitution, which limited suffrage to "every white male citizen above the age of 21" and "every white male inhabitant" who was residing in the state at the time of the adoption of the constitution. The 1848 Constitution also lengthened the residence requirement from six months to one year.[39]

3. Lincoln and the Know Nothing Party

The nativist parties of the 1840s had been short-lived. The nativist Know-Nothing party experienced a more spectacular rise and fall that began after the 1852 presidential election when nativists lost their faith in the Whig Party as a reliable bulwark against immigration and Catholicism. In 1852, the Whig Party actively had sought the support of German and Irish immigrants, with its presidential candidate, Winfield Scott, making clumsy and ineffective overtures to foreign-born voters.[40] Nativists felt betrayed by these Whig overtures to immigrants. The Know-Nothing Party was to be steadfastly anti-slavery, anti-Catholic, and anti-immigrant.

The rise of the Know Nothings, as members of the party were called, also was fueled by a dramatic increase in immigration. Three million immigrants came to the United States between 1845 and 1854. By 1850, forty percent of foreign settlers in the United States were Catholics from Ireland.[41]

The Know-Nothing movement reached Illinois in time for the 1854 elections. The party's platform in Illinois called for modifying naturalization laws by extending the residency requirement and repealing any state law that permitted resident aliens to vote, resisting " the corrupting influences and aggressive policy of the Roman Church," and restoring the Missouri Compromise to keep slavery out of the territories.[42] The Know-Nothing Party operated as a secret fraternal organization; its members used "handgrips, signs, and manner of speech" to

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[36] *Cole, A. Ch.* (ed.). The Constitutional Debates of 1847. p. 526 (statement of William C. Kinney).

[37] Ibid., p. 517–518.

[38] See, for example, ibid., p. 541 (statement of William R. Archer), p. 552 (statement of Thompson Campbell).

[39] Illinois Constitution of 1848, Art. VI, sec. 1.

[40] *Holt, M. F.* The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War. New York: Oxford University Press, 1999, pp. 691–697; *Wilentz, S.* The Rise of American Democracy: Jefferson to Lincoln. New York: W. W. Norton, 2005, pp. 679–685; AL, "Speech to the Springfield Scott Club," August 14, 1852, CW 2: 143.

[41] *Maizlish, S. E.* The Meaning of Nativism and the Crisis of the Union: The Know-Nothing Movement in the Antebellum North. In: Essays on Antebellum Politics 1840–1860, *Maizlish, S. E. and Kushma, J. J.* (eds.). College Station: Texas A & M University Press, 1982, p. 170.

[42] *Senning, J. P.* The Know Nothing Movement in Illinois, 1854–1856. *Journal of the Illinois State Historical Society*, 7, April 1914, pp. 9, 27–29.

guard their identity.[43] The secrets apparently weren't very well kept. David Davis, Lincoln's friend and political ally, wrote Lincoln after the election about one Watson, "the secret nominee of the Know Nothings."[44]

After Lincoln had returned to Illinois in 1849 from serving his one-term in Congress, he "practiced law more assiduously than ever before." He later said he "was losing interest in politics, when the repeal of the Missouri Compromise aroused me again."[45] In May 1854, Congress passed the Kansas-Nebraska Act, which repealed the Missouri Compromise's prohibition of slavery in territories north of latitude 36º 30'. Many Northerners were appalled by the possibility of slavery's extension in the territories.[46] That year, Lincoln re-entered the political arena as a candidate for office, running for a seat in the General Assembly. Lincoln and Stephen T. Logan, who was also running for state representative as a Whig, each met with an American Party committee in Sangamon County. The committee told both Whig politicians that they had been endorsed by the American Party. The committee first met with Logan and after a "pleasant interview," he "cheerfully accepted" the nomination. Logan subsequently became a leader of the American Party in Illinois.[47] The committee then went to Lincoln's law office to discuss his secret nomination. Lincoln told the group that he still "belonged to the Old Whig party" and would continue to do so "until a better one arose to take its place." He said he would not become identified with the American Party. They could vote for him if they wanted, as could the Democrats, but "he was not in sentiment with this new party."[48]

Lincoln needled the delegation about nativists using "Native American" as a label for their beliefs. He rhetorically asked them who the Native Americans were. "Do they not," he said, "wear the breech-clout and carry the tomahawk? We pushed them from their homes and now turn upon others not fortunate enough to come over as early as we or our forefathers. Gentlemen of the committee, your party is wrong on principle." Lincoln was making fun of the use of the term "Native Americans" by a group decidedly not composed of Native Americans. The self-styled "Native Americans" who were critical of European immigrants were themselves descendants of European immigrants. Lincoln then used a story to make his point.

> *When the Know-nothing party first came up, I had an Irishman, Patrick by name, hoeing in my garden. One morning I was there with him, and he said, 'Mr. Lincoln, what about the Know-nothings?' I explained that they would possibly carry a few elections and disappear, and I asked Pat why he was not born in this country. 'Faith, Mr. Lincoln,' he replied, 'I wanted to be, but my mother wouldn't let me.'*

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[43] *Senning, J. P.* The Know Nothing Movement in Illinois, 1854-1856. *Journal of the Illinois State Historical Society*, 7, April 1914, p. 17.

[44] David Davis to AL, December 26, 1854, Abraham Lincoln Papers, Library of Congress.

[45] AL to Jesse W. Fell, December 20, 1859, CW 3:511.

[46] *McPherson, J. M.* The Battle Cry of Freedom: The Civil War Era. New York: Oxford University Press, 1988, pp. 121–129.

[47] *Senning, J. P.* The Know-Nothing Movement, p. 19.

[48] *Levering, N.* Recollections of Abraham Lincoln. *Iowa Historical Record*, 12, July 1896, pp. 495–497; *Fehrenbacher, D. E.* and *Fehrenbacher, V.* (eds.). Recollected Words of Abraham Lincoln, Stanford: Stanford University Press, 1996, lii–liii, pp. 20–21.

Lincoln's anecdote captured his tolerant attitude toward European immigrants: Lincoln accepted immigrants because their coming to the United States meant they wished they had been born here.[49] Lincoln's skepticism of all organized religion meant he wouldn't have been receptive to attacking Catholics for not being Protestants.[50] Rejecting the intolerance of the nativists, Lincoln refused the nomination. Not being the secret nominee of the nativists didn't hurt Lincoln – both Lincoln and Logan were elected to the legislature.[51]

While Lincoln privately criticized the Know Nothings in letters, he avoided antagonizing them publicly, believing their support was crucial for the anti-Nebraska, anti-Douglas forces. Lincoln also was sometimes disingenuous in public about the Know Nothings. The Democratic *Illinois State Register* reported Lincoln as saying in a Springfield speech that he "knew nothing of the secret institution."[52] In a speech in Bloomington two weeks later, Lincoln continued in this vein, saying that "he *knew nothing* in regard to the Know-Nothings, and that he had serious doubts whether such an organization existed." But, he said "in all seriousness," if such an organization really existed and wanted to interfere "with the rights of foreigners," then he was against it as much as Douglas. Still, Lincoln equivocated: "If there was an order styled the Know-Nothings, and there was any thing bad in it, he was unqualified against it; and if there was any thing good in it, why, he said, God speed it!"[53]

Lincoln may have been too clever by half. After winning his race for the Illinois legislature, Lincoln resigned to run for the Senate because the election results favored an Anti-Nebraska candidate.[54] Lincoln lost his bid for Senate, possibly because he was seen as having Know-Nothing support.[55] One paper announced, "Mr. Lincoln is a Know Nothing and expects the full vote" of the Know Nothings. Lincoln lost support because of this perceived association, and he refused to denounce the Know Nothings for fear of losing even more support.[56] Ironically, some Know Nothings also refused to back Lincoln because he was seen as an old-line Whig.

Lincoln continued to criticize the Know Nothings privately. In a letter to Owen Lovejoy, an abolitionist member of the Illinois legislature, Lincoln discussed the necessity of bringing the Know Nothings into the opponents of slavery extension camp without bringing "Know-nothingism." Lincoln said he was willing to "fuse" with anyone "provided I can fuse on grounds which I think is right," and he was clear that he was only willing to fuse with Know Nothings without the "K.N.ism." He confided to Lovejoy that "of their principles

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49 *Silverman, J. H.* Lincoln and the Immigrant. Carbondale: Southern Illinois University Press, 2015.

50 *Wilson, D. L.* Honor's Voice: The Transformation of Abraham Lincoln. New York: Alfred A. Knopf, 1998, pp. 7, 81–83, 187; *Current, R. N.* The Lincoln Nobody Knows. New York: Hill and Wang, 1958, pp. 51–65.

51 *Pinsker, M.* Not Always Such a Whig: Abraham Lincoln's Partisan Realignment in the 1850s. *Journal of the Abraham Lincoln Association*, 29, Summer 2008, pp. 34–38.

52 AL, "Speech at Springfield," September 9, 1854, CW 2:229.

53 AL, "Speech at Bloomington," September 26, 1854, CW 2:234.

54 *Cole, A. Ch.* The Era of the Civil War 1848-1870. Centennial History of Illinois, Vol. 3, Springfield: Illinois Centennial Commission, 1919, pp. 133–134.

55 *Pinsker, M.* Senator Abraham Lincoln. *Journal of the Abraham Lincoln Association*, 14, Summer 1993, pp. 1–21.

56 *Donald, D.* Lincoln. New York: Simon & Schuster, 1995, pp. 181–185; *Holt, M. F.* The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War. New York: Oxford University Press, 1999, pp. 870–871.

I think little better than I do of those of the slavery extensionists. Indeed I do not perceive how any one professing to be sensitive to the wrongs of the negroes, can join in a league to degrade a class of white men." In Illinois, Lincoln had wanted the Know Nothings to "die out" without him having to take an open stand against individuals who were "mostly my old political and personal friends."[57]

Lincoln's most famous denunciation of nativism is found in his 1855 letter to his friend Joshua Speed, which was written in the same month as the letter to Lovejoy. Lincoln was responding to Speed's question of where Lincoln now stood politically. Lincoln said he thought he was a Whig "but others say there are no whigs, and that I am an abolitionist." Lincoln did not accept the abolitionist designation because he did "no more than oppose the *extension* of slavery." But Lincoln was sure about one thing: "I am not a Know-Nothing." He explained:

> *How could I be? How can anyone who abhors the oppression of negroes, be in favor of degrading classes of white people? Our progress in degeneracy appears to me to be pretty rapid. As a nation, we began by declaring that "all men are created equal." We now practically read it "all men are created equal, except negroes." When the Know-Nothings get control, it will read "all men are created equal, except negroes, and foreigners, and catholics." When it comes to this I should emigrating to some country where they make no pretense of loving liberty – to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocracy.*[58]

Lincoln was not yet ready to publicly criticize nativists because he wanted them to join the anti-Nebraska forces.

4. The Election of 1856

Other Republicans in Illinois began publicly criticizing Know Nothings before Lincoln did. The Republicans in Chicago adopted a platform of principles in November 1855 that held the "only true rule" for office was "merit, not birth place" and that naturalization laws should not be changed because "we should welcome the exiles and emigrants from the Old World, to homes of enterprise and of freedom in the new."[59]

In the early months of 1856, Lincoln was ready both to join the Republican Party and to criticize the nativists. Lincoln helped draft an anti-nativist plank at an 1856 meeting of antislavery newspaper editors in Decatur, which he attended as an informal guest. When the anti-nativist plank introduced by German immigrant George Schneider met with opposition, Theodore Canisius recalled Lincoln saying that "we must state our position honestly and openly, and only through an unqualified proclamation can we count on support. The citizens who have adopted this country as their own have a right to demand this from us."[60] Lincoln said the anti-nativist plank was "nothing new. It is already contained in the Declaration of Independence." The plank borrowed

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[57] AL to Owen Lovejoy, August 11, 1855, CW 2:316–317.

[58] AL to Joshua F. Speed, August 24, 1855, CW 2:323.

[59] "Platform of Principles," *Chicago Daily Tribune*, February 9, 1856, p. 1.

[60] *Canisius, T.* Abraham Lincoln: Historisches Charakterbild. Vienna: Reisser, 1867, quoted and translated in *Baron, F.* Abraham Lincoln and the German Immigrants: Turners and Forty-Eighters. *Yearbook of German-American Studies, Supplemental Issue*, 4, 2012, p. 85.

the pro-immigrant language from the Chicago Republicans' platform of principles.[61] At the Republican Convention in Bloomington in May, the newly formed party adopted a platform that held " the spirit of our institutions as well as the Constitution of our country, guarantees the liberty of conscience as well as political freedom, and that we will proscribe no one by legislation or otherwise on account of religious opinions, or in consequence of place of birth."[62] The Republicans, like Lincoln, were ready to fuse with former members of the Know Nothing Party so long as they didn't bring "Know-Nothing-ism."

The 1856 presidential election pitted James Buchanan, the Democratic Party nominee, against John C. Frémont, the Republican Party candidate, and Millard Fillmore, the Know-Nothing nominee. Lincoln accurately foresaw that the anti-Nebraska vote in Illinois would be split by Frémont and Fillmore, which would assure Buchanan winning the state's electoral votes. Lincoln sent a lithographed form letter to "good, steady Fillmore men" that tried to convince Fillmore supporters that they should tactically support Frémont in Illinois if they wanted to help their candidate nationally. Lincoln cautioned them if Buchanan won Illinois, he would win the election and "*he will get Illinois*, if men persist in throwing away votes upon Mr. Fillmore." Lincoln's plea fell on deaf ears. Buchanan won Illinois with 44% of the vote, Frémont received 40%, and Fillmore, 16%.[63]

Illinois had ended alien voting for immigrants who arrived in Illinois after the adoption of the new constitution; however, the suffrage provision retained the previous "inhabitant" language for residents who were living in Illinois at the time of the adoption of the constitution. Lincoln, in an unsigned 1856 editorial published in a Galena newspaper, took the time to explain this unusual compromise after a Democratic newspaper had asserted that non-citizens couldn't legally vote. "This is a grave error," Lincoln wrote. "Our Legislature has directed, that unnaturalized foreigners, who were here before the adoption of our late State Constitution, shall in common with others, vote for and appoint Presidential Electors." Lincoln was on the side of these "unnaturalized foreigners," correctly stating "[l]et not this class of foreigners be alarmed. Our Legislature has directed that they may vote for Electors; and the U.S. Constitution has expressly authorized the Legislature to make that direction."[64]

5. Nativism and the Senate Race of 1858

The Republicans in Illinois succeeded in absorbing former members of the Know-Nothing movement without absorbing what Lincoln called "Know-Nothingism."[65] Democrats rarely attacked Lincoln, the Republican standard-bearer for Senate in 1858, or the Republicans for supporting nativism. Stephen Douglas never tried to paint Lincoln as a nativist in their debates, probably

[61] *Burlingame, M.* Abraham Lincoln: A Life. 2 vols., Baltimore: Johns Hopkins University Press, 2008, 1: 412–413.

[62] *Raum, G. B.* History of Illinois Republicanism. Chicago: Rollins Publishing, 1900, p. 28.

[63] Schwartz, T.s F. Lincoln, Form Letters, and Fillmore Men. *Illinois Historical Journal*, 78, Spring 1985, pp. 65–70.

[64] AL, "Editorial on the Right of Foreigners to Vote," July 23, 1856, CW 2:335–336.

[65] *Foner, E.* Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War. 1970; repr., New York: Oxford University Press, 1995, pp. 250–260; *Levine, B.* 'The Vital Element of the Republican Party': Antislavery, Nativism, and Abraham Lincoln. *Journal of the Civil War Era*, 1, December 2011, pp. 481–505.

because Douglas had decided to win over nativists by portraying a battle between "Fremont abolitionism on the one side and constitutional-law-abiding-Union-loving men under the Democratic banner on the other side."[66]

Lincoln gave his fullest expression of his vision of a white republic that included both native-born and naturalized citizens during the Senate campaign. Unlike those white Anglo-Saxon Protestants who believed that the foundation of American greatness was white Anglo-Saxon Protestants, Lincoln believed American greatness grew from the principles of the Declaration of Independence. Any European immigrant who came to the United States because of the promise of the Declaration already was sufficiently "Americanized." Lincoln never worried about immigrants assimilating because believing in the principles of the Declaration would unify all Americans, native and foreign-born. The Declaration was the "electric cord" that links "the hearts of all patriotic and liberty-loving men together." Lincoln explained in a campaign speech in July that it did not matter if these men "descended by blood from our ancestors" or were recent arrivals from Europe. As long as the Declaration of Independence was "the father of moral principle in them," then they had a right to claim it "as though they were blood of the blood, and flesh of the flesh of the men who wrote it."[67]

Lincoln believed that Europeans would be attracted to America's promise of an "equal chance" given to all. He welcomed all immigrants from Europe, making no distinctions between those who were of Anglo-Saxon stock and those who weren't. In this respect, he differed from many in the Whig Party, some in the Republican Party, and everyone in the Know-Nothing Party. Lincoln presented his vision of "free soil, free labor, free men" in the territories in his last debate with Douglas. The territories would be "an outlet for free white people everywhere," not just those "born amongst us." Lincoln welcomed "Hans and Baptiste and Patrick and all other men from all the world" to "find new homes and better their conditions in life."[68]

The Declaration of Independence had different meanings for blacks and whites. For blacks, the Declaration posited that all men were created equal and had the same natural rights. For whites, the Declaration became an "electric cord" that linked " the hearts of patriotic and liberty-loving men together" whether they were descendants of the "iron men" who fought for Independence or whether they men who had come from Europe after the revolutionary war had been won. Celebrating the Fourth of July allowed all these men to feel more attached to one another "more firmly bound to the country we inhabit." Adhering to the principles allowed all white men – native born or not – to be part of this "mighty nation." Even though members in Lincoln's imagined community were linked together only by belief in the principles of the Declaration, Lincoln was talking only about immigrants from Europe ("they are men who have come from Europe – German, Irish, French and Scandinavian – men that have come from Europe themselves"). Lincoln didn't recognize black men as "patriotic and liberty-loving" until the Civil War. It was only then Lincoln would consider at least some

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[66] Stephen A. Douglas to John A. McClernand, December 23, 1856, quoted in *Hansen, S. and Nygard, P.* Stephen A. Douglas, the Know-Nothings, and the Democratic Party in Illinois, 1854-1858. *Illinois Historical Journal*, 87, Summer 1994, pp. 121–122.

[67] AL, "Speech at Chicago," July 10, 1858, CW 2:499–500.

[68] *Davis, R. O. and Wilson, D. L.* (eds.). The Lincoln-Douglas Debates. Urbana: University of Illinois Press, 2008, p. 282.

blacks should be part of this "mighty nation" and hold full rights of citizenship, including suffrage.[69]

Lincoln was particularly solicitous toward German immigrants.[70] After 1851, Germans had replaced the Irish as the largest incoming group. The German-born population in the United States grew from 584,720 to 1,301,136 in 1860. By 1850, there were 38,451 German immigrants in Illinois, a sizable number in a state with a total population of 851,470 (4.5%). The German-born population in Illinois reached 130,804 in 1860 when Illinois had a total population of 1,711,951 (7.6%).[71] Germans were the largest immigrant group in the Republican Party. Gustave Koerner, a German immigrant and Illinois politician, recalled Lincoln speaking in Belleville during the 1856 campaign. Lincoln told the Belleville crowd that everywhere he had spoken "he had found the Germans more enthusiastic for the cause of freedom than all other nationalities." Nearly in tears, Lincoln exclaimed, "God bless the Dutch!"[72]

One of the reasons Republican politicians in the Midwest disavowed anti-immigrant policies was to garner votes from Germans.[73] During the 1858 senate campaign, Lincoln called for German speakers to be sent across the state and helped arrange the publication of his speeches in German. He warned Gustave Koerner that the party was "in great danger" in Madison County and asked if Koerner, the newspaper editor Theodore Canisius, "and some other influential Germans set a plan on foot that shall gain us accession from the Germans, and see that, at the election, none are cheated in their ballots."[74]

While Lincoln publicly welcomed "Hans and Baptiste and Patrick," he harbored some suspicion about "Patrick." Irish voters generally supported the Democratic Party; Lincoln once alluded to Irish immigrants as "those adopted citizens, whose votes have given Judge Douglas all his consequence."[75] While Lincoln worked hard to get votes from German immigrants, he expressed concern over fraudulent voting by Irish laborers, echoing Whig concerns about illegal voting by Irish canal workers in 1838. In September, Lincoln wrote Norman B. Judd that he was cautiously optimistic about his race with Douglas "unless they overcome us by fraudulent voting." Lincoln said that the Republicans had to be "especially prepared for this," the prospect of fraudulent voting "must be taken into anxious consideration at once." Lincoln thought they could defeat voting fraud if it was "men imported from other states and men not naturalized."

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69 AL, "Speech at Chicago," July 10, 1858, CW 2: 499–500.

70 *Silverman, J. H.* Lincoln and the Immigrant, pp. 36–40.

71 *Bergquist, J. M.* People and Politics in Transition: The Illinois Germans, 1850-1860. In: Ethnic Voters and the Election of Lincoln, *Luebke, F. C.* (ed.). Lincoln: University of Nebraska Press, 1971, pp. 196–197; *Pease, T. C.* The Frontier State 1818-1848. The Sesquicentennial History of Illinois, Vol. 2, Urbana: University of Illinois Press, 1987, p. 393.

72 *McCormack, T. J.* (ed.). Memoirs of Gustave Koerner 1809-1896. 2 vols., Cedar Rapids: Torch Press, 1909, 2: 32–33. Americans had referred to Germans as Dutch, from *Deutsch*, since the 1740s. *Flexner, S. B.* I Hear America Talking: An Illustrated History of American Words and Phrases. New York: Simon & Schuster, 1979, pp. 130–131.

73 *Efford, A. C.* German Immigrants, Race, and Citizenship in the Civil War Era. New York: Cambridge University Press, 2013, pp. 2, 69.

74 AL to Gustave P. Koerner, July 15, 1858, CW 2:502; AL to Gustave P. Koerner, August 6, 1858, CW 2:537–538; AL to Norman P. Judd, Sept. 23, 1858; AL to Gustave P. Koerner, July 25 6, 1858, CW 2:524.

75 AL, "Speech to the Springfield Scott Club," August 14, 1852, CW 2: 143.

He was more worried about another type of fraud: otherwise "qualified Irish voters of Chicago" being deployed into a "doubtful district, having them to swear to an actual residence when they offer to vote." Lincoln warned that voter fraud was "a great danger, and we must all attend to it."[76]

Lincoln sometimes stated his concerns about illegal voting by Irish workers out loud. A Democratic paper reported that Lincoln grumbled in a speech about seeing "a dozen Irishmen at the levee, and it occurred to him that those Irishmen had been imported expressly to vote him down." The paper was outraged by Lincoln's suggestion: "Doubtless Mr. Lincoln entertains a holy horror of all Irishmen and other adopted citizens who have sufficient self-respect to believe themselves superior to the negro." The paper charged that Lincoln's expressed fear was a cue to his followers to keep "adopted citizens" from the polls.[77]

6. Nativism and Massachusetts, 1859

The state of Massachusetts was a stronghold of the Know-Nothing Party, which swept state elections in 1854. The Know-Nothing governor, Henry J. Gardner, proposed a 21-year waiting period *after naturalization* before immigrants could vote. This proposal, along with a literacy test for voting, passed the legislature in 1855. Under the Massachusetts constitution, it had to pass two successive legislatures before it would be put before the electorate. In 1856, the legislature instead substituted a fourteen-year period. In the 1857 legislature, now dominated by Republicans, the fourteen-year period was defeated and a two-year period substituted. The two-year period passed again in 1858. The measure was then placed before the voters for approval. Lincoln was one of many western Republicans who opposed the two-year period, worried that the provision would hinder their ability to appeal to immigrant voters, particularly Germans.[78]

Lincoln prepared a resolution for the Illinois Republican Party condemning the Massachusetts legislature for approving the two-year period. Lyman Trumbull, the Republican senator from Illinois, instead suggested that "it would be better to select some act of our adversaries, rather than of our own friends, upon which to base a protest against any distinction between native and naturalized citizens, as to the right of suffrage."[79] After the provision in Massachusetts passed, Theodore Canisius asked Lincoln if he supported it. Lincoln conceded that Massachusetts had the perfect right to pass such a provision: "Massachusetts is a sovereign and independent state; and it is no privilege of mine to scold her for what she does." But Lincoln was more than willing to state his opposition to such a provision in Illinois "or in any other place, where I have a right to oppose it." Lincoln explained: "Understanding the spirit of our institutions to aim at the elevation of men, I am opposed to whatever tends to degrade them. I have some little notoriety for commiserating the oppressed condition of the negro; and I should be strangely inconsistent if I could favor any project for curtailing the existing rights of white men, even

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[76] AL to Norman B. Judd, September 23, 1858, CW 3:202; see also AL to Norman B. Judd, October 24, 1858, CW 3:332.

[77] "Speech at Meredosia, Illinois," October 18, 1858, CW 3:328–329.

[78] *Anbinder, T.* Nativism and Slavery, pp. 247–253; *Foner, E.* Free Soil, Free Labor, Free Men, pp. 250–252.

[79] AL to Gustave P. Koerner, April 11, 1859, CW 3:376.

though born in different lands, and speaking different languages from myself."[80] Canisius published the letter in the German-language *Illinois Staats-Anzeiger* and in the *Illinois State Journal*.[81]

Lincoln understood that such nativist appeals were politically damaging in the Midwest. In an 1859 letter, he decried Republicans' tendency to include issues that were popular in that state but a "firebrand" elsewhere. He included the "movement against foreigners" in Massachusetts as an example. He lamented that "Massachusetts republicans should have looked beyond their noses; and then they could not have failed to see that tilting against foreigners would ruin us in the whole North-West."[82]

7. The Campaign of 1860

Before the 1860 presidential campaign, Lincoln bought a printing press for Canisius to start a German paper in Springfield that "in political sentiment" was to adhere to the "Philadelphia and Illinois Republican platforms."[83]

The Republican Party platform in 1860 included a pro-immigration plank that repudiated the Massachusetts residency provision. Koerner and Carl Schurz were on the platform committee and fought hard for the language.[84] It stated that the Republican Party was "opposed to any change in our naturalization laws, or any state legislation by which the rights of citizenship hitherto accorded by emigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the rights of all classes of citizens, whether native or naturalized, both at home and abroad."[85]

When the Pennsylvania and Indiana delegations met at the Republican national convention to discuss which candidate to support, supporters of Edward Bates showed up in force. Bates, a former Whig and Know Nothing from Missouri, was one of the main contenders for the Republican nomination (Bates would later serve as Lincoln's Attorney General). The Lincoln-supporting Illinois delegation sent Koerner, a former Democrat, and Orville H. Browning, a former Whig, to counteract the Bates movement. Koerner told the delegations that Bates had supported Know Nothings in municipal elections in Missouri and that German Republicans would never vote for Bates. Browning observed that "on the other hand Lincoln had always opposed Native Americanism. This would secure him the foreign Republican vote all over the country."[86]

After Lincoln secured the nomination, campaign literature highlighted Lincoln's pro-immigration views. The Chicago *Rail Splitter* reprinted Lincoln's letter to Canisius in its first edition with the headline "Mr. Lincoln on Naturalization."[87] The Freeport *Wide Awake* on the eve of the election proclaimed that Lincoln was gaining thousands of votes from Germans in New York because

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80 AL to Theodore Canisius, May 17, 1859, CW 3:380.

81 Ibid.; Mr. Lincoln on the Massachusetts Amendment. *Illinois State Journal*, May 25, 1859, p. 1.

82 AL to Schuyler Colfax, July 6, 1859, CW 3:390–391.

83 Contract with Theodore Canisius, May 30, 1859, CW 3: 383. Philadelphia was the site of the Republican national convention in 1856.

84 Memoirs of Gustave Koerner 1809-1896, 2: 32–33.

85 A Political Text-Book for 1860. New York: Tribune Association 1860, pp. 26–27.

86 *McCormack, T. J.* (ed.). Memoirs of Gustave Koerner 1809-1896. 2 vols., Cedar Rapids: Torch Press, 1909, 2: 89–90.

87 The Rail Splitter (Chicago), June 23, 1860, p. 1.

"they can't stand the Douglas fusion with the Know Nothings" and that the Irish in Illinois would also be voting for Lincoln.[88] Republican newspapers throughout the North also published the Canisius letter.[89]

Lincoln associated America with freedom and Europe with despotism. European immigrants were fleeing from "tyranny" and to "freedom." In an 1861 address to Germans in Cincinnati, Lincoln said,

> *In regard to the Germans and foreigners, I esteem them no better than other people, nor any worse. It is not my nature, when I see a people borne down by the weight of their shackles – the oppression of tyranny – to make their life more bitter by heaping upon them greater burdens; but rather would I do all in my power to raise the yoke, than to add anything that would tend to crush them.*
> *Inasmuch as our country is extensive and new, and the countries of Europe are densely populated, if there are any abroad who desire to make this the land of their adoption, it is not in my heart to throw aught in their way, to prevent them from coming to the United States.*[90]

Summary

Lincoln consistently rejected nativist proposals to make it more difficult for immigrants to naturalize or to vote. Lincoln was outspoken in 1844 after anti-Catholic riots in Philadelphia. Lincoln was more circumspect in criticizing nativists in Illinois because he wanted them to join the Republican Party. Lincoln wanted this "fusion" on his terms: he wanted nativists without nativism.

He initially waited for Know-Nothings to join the Republican ranks based upon a common opposition to slavery extension in the territories. By 1856, Lincoln was ready to publicly criticize nativism. Lincoln again attacked nativism in 1859 when Massachusetts nativists proposed lengthening the time to vote after an alien was naturalized.

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[88] Coming by Thousands," "The Irish Vote," *Freeport Wide Awake*, November 3, 1860, p. 1.
[89] See, e.g., "Mr. Lincoln on Naturalization and Fusion," *Chicago Tribune*, May 26, 1860, p. 1; "Mr. Lincoln on Naturalization and Fusion," (Madison) *Wisconsin State Journal*, May 28, 1860, p. 2.
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Withdrawal from the Consent to Process Personal Data Provided as Counter-Performance: Contractual Consequences

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This article deals with the Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. The Directive says that Member States are free regarding the question of the legal nature of contracts for the supply of digital content or digital services. The Directive must be transposed into national law by 1 July 2021 and the date of entry into force of the transposition rules shall be 1 January 2022. As contracts for the supply of digital content and digital services were not previously regulated, the major challenges for Member States are the contractual meaning of personal data and categorisation of these contracts. The article explores the link between consumer consent to process personal data and the contractual consequences of withdrawal from such consent, specifically the trader's right to terminate the contract. The author supports the need to grant traders the right to terminate the contract in order to provide balance between the rights and obligations of the parties in accordance with the existing national law.

Keywords: digital content and services, contract law, DCDS Directive, personal data as counter-performance.

Contents

Introduction

Technological developments have made it possible to develop different business models based on the supply of digital content and digital services. Business models where digital content or digital services are supplied not for payment but for the personal data of the consumer are used in a considerable part of the market. In order to harmonise the rules governing the supply of digital content and digital services, DCDS Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (hereinafter DCDS Directive)[1] was extended to cover 'free contracts'. The processing of personal data must comply with the General Data Protection Regulation (EU) 2016/679 [GDPR][2] and Directive 2002/58/EC[3] on privacy and electronic communications, which, in turn, raises the question of whether compliance with data protection requirements affects the contractual rights and obligations of the parties.

The same set of rules, provided for in the DCDS Directive, apply to both gratuitous and remunerated digital content and services. The purpose of this article is to examine the conditions under which the consumer may withdraw from the consent to process personal data, and the provider in turn use contractual remedies based on processing personal data. In order to answer the question, the article examines the use of personal data as a form of counter-performance in different business models, the consent to process the data under Directive (EU) 2019/770 and GDPR, requirements applying to the submission of personal data and finally the consumer's right to withdraw from the consent and the provider's right to terminate the contract and claim damages under Estonian law. As the DCDS Directive does not regulate the consequences of the consumer's withdrawal from the consent, the consequences of such a withdrawal should remain a matter for national law (Estonian law is analysed as an applicable national legal system).

[1] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Text with EEA relevance). 22/5/2019, OJ L 136, 22/5/2019, pp. 1–27.

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance). OJ L 119, 4/5/2016, pp. 1–88.

[3] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). OJ L 201, 31/7/2002, pp. 37–47.

1. Personal Data as a Form of Consideration

1.1. Free Digital Content and Services as a Business Model

According to Article 3 (1) of DCDS Directive (EU) 2019/770, the DCDS Directive applies to remunerated contracts and contracts where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader instead of paying. Sharing digital content or services against personal data, i.e. contracting 'free of charge' is a widely used business model.[4] There are several ways to use personal data provided by consumers, such as transmitting the data to advertising companies or data collection platforms[5], or indirectly generating revenue from advertising aimed at using data sets or providing co-financing services.[6] Social media platforms and software hosting providers also use the supply of services against personal data. For example, almost 30 % of antivirus, search software and cloud services, 77 % of download services (for example, *Spotify*) and 50 % of e-games, e-books and television is transmitted free of charge.[7] The supply of digital content or digital services free of charge may mean savings for the consumer (provision of personal data allows some services to be supplied free of charge, for example, in case of *Spotify*) or the raising of funds (for example, *Handshake*[8]). In freemium business models an initially free service or digital content may become chargeable after a certain period of use, after a certain level is reached (for example, *Dropbox*) or when

[4] Commission staff working document impact assessment accompanying the document Proposals for Directives of the European Parliament and of the Council (1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules and (2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC. SWD/2018/096 final – 2018/089 (COD).

[5] See more at *Staudenmayer, D*. Verträge über digitalen Inhalt. *New Juristische Wochenschrift*, No. 37, Vol. 69, 2016, p. 2722. See also Handbook on European Data Protection Law. 2018 edition. Luxembourg: Publications Office of the European Union, 2018, p. 143. Available: https://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf [last viewed 18.05.2020]. This does not mean, however, that consent can never be valid in circumstances where not consenting would have some negative consequences. For instance, if refusing a supermarket's customer card only results in not receiving a small reduction in the price of certain goods, consent could be a valid legal basis for processing the personal data of those customers who consented to having such a card. There is no subordination between company and customer and the consequences of not consenting are not serious enough to prevent the data subject's free choice (provided that the price reduction is small enough not to affect their free choice). However, where goods or services can only be obtained if certain personal data are disclosed to the controller or further on to third parties, the data subject's consent to disclose his or her data, which is not necessary for the contract, cannot be considered a free decision and is, therefore, not valid under data protection law. See GDPR, Art. 7(4).

[6] See more at *Lambrecht, A., Goldfarb, A., Bonatti, A., Ghose, A., Goldstein, D., Lewis, R. A., Rao, A., Sahni, N. S., Yao, S*. How Do Firms Make Money Selling Digital Goods Online? *Rotman School of Management Working Paper* No. 2363658, 2018. Available: https://ssrn.com/abstract=2363658 [last viewed 18.05.2020].

[7] Commission staff working document, Annex 11.

[8] *Handshake* is a platform created in 2011 that aims to disclose the monetary value of personal data, offering platform users the opportunity to actively transfer their data with their consent to process it, trade in price and decide to whom to sell the data. Homepage: https://www.joinhandshake.com [last viewed 18.05.2020]. See more about the platform at *Lambrecht, A., Goldfarb, A., Bonatti, A., Ghose, A., Goldstein, D., Lewis, R. A., Rao, A., Sahni, N. S., Yao, S*. How Do Firms Make Money Selling Digital Goods Online? *Rotman School of Management Working Paper*, No. 2363658, 2018.

a better service is desired (for example, *Amazon*, *Duolingo*, *Viber*). Differences in the level of consumer protection based on the nature of the consideration would discriminate between different business models, stimulate the supply of digital content for data and ultimately affect consumers' economic interests, as they would not be protected on an equal footing with consumers who pay a price for digital content or digital services.

1.2. Personal Data as a Commodity?

The extension of the scope of the DCDS Directive to contracts in which the consumer does not pay a price but provides his or her personal data has generally received a positive response.[9] However, the term 'consideration' used in the proposal for the directive was criticised and afterwards deleted from the text of the DCDS Directive. The most influential critic was the European Data Protection Supervisor (EDPS), whose opinion published in 2017 stated, *inter alia*, that "fundamental rights such as the right to the protection of personal data cannot be reduced to simple consumer interests, and personal data cannot be considered as a mere commodity".[10] In addition, the EDPS considered that that the term 'data as a counter-performance' should be avoided and the DCDS Directive shall be applied irrespective of whether a payment is required.[11] The treatment of personal data in return, i.e. the trade in personal data, has been seen as contrary to Article 8 of the Charter of Fundamental Rights of the European Union.[12] On the other hand the GDPR, which is adopted on the basis of Article 8 of the Charter of Fundamental Rights of the European Union and Article 16 of the Treaty on the Functioning of the European Union, is sufficiently appropriate to regulate the processing of personal data[13], and denial of the economic value of personal data is generally considered a disregard of common practice.[14] The legal literature also refers to the case law of the European Court of Justice on the protection of personal data and the protection of economic interests. The ECJ have considered it appropriate to draw an analogy with the author's personal

[9] Statement on the proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015)634 (Digital Content Directive). Research Group 4 ("Data as a means of payment") at the Weizenbaum Institute for the Networked Society. The German Internet Institute, March 2018. Available: https://weizenbaum-institut.de/media/News/Statement/Statement_Weizenbaum-RG4-Statement-on-DCD-March2018.pdf [last viewed 18.05.2020].

[10] European Data Protection Supervisor (EDPS). Summary of the Opinion on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content. 2017/C 200/07. OJ EU C 200/10, p. 10.

[11] Ibid., p. 13.

[12] Charter of Fundamental Rights of the European Union. 2000/C 364/01. OJ EU C 326, 26.10.2012.

[13] In particular, the legal literature refers to Purtova's views. See more in *Purtova, N*. Property Rights in Personal Data: A European Perspective. The Hague: Kluwer Law International, 2011. See also study by Versaci, who analyses Purtova's point of view on the relationship between contract law and the protection of personal data. *Versaci, G.* Personal Data and Contract Law. *European Review of Contract Law*, Vol. 14, No. 4, 2018, pp. 382–383.

[14] *Staudenmayer, D*. Auf dem Weg zum digitalen Privatrecht – Verträge über digitale Inhalte. *Neue Juristische Wochenschrift*, No. 35, 2019, p. 2499; A. Metzger. Verträge über digitale Inhalte und digitale Dienstleistungen: Neuer BGB-Vertragstypus oder punktuelle Reform? *Juristenzeitung*, No. 12, 2019, pp. 577–586.

rights, as EU copyright law does not prohibit contractual agreements on the use of the author's personal rights for economic purposes.[15]

Would the use of personal data as contractual counter-performance be contrary to the basic principles of the GDPR? The answer to this question can be found in Article 13(2)(e) of the GDPR, which provides that the data subject has to be informed whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data. However, it must be borne in mind that the DCDS Directive does not limit or exclude the protection of personal data guaranteed by the GDPR, as the trader must comply with requirements, including processing of personal data and conditions for consent (Articles 5 and 7 GDPR).[16] The provisions of the GDPR must be complied with regardless of whether the provision of personal data has a contractual meaning or whether the supply of digital content or digital services is subject to the provisions of the DCDS Directive.[17]

In conclusion, it should be emphasised that personal data may have an economic value and that the supply of digital content and digital services provided for free as a business model should not affect the protection of consumer rights relating to personal data. According to recital 24 of the preamble to the DCDS Directive, the DCDS Directive should ensure that consumers are entitled to contractual remedies even if the consumer does not pay a price but provides personal data to the trader, recognising at the same time that the protection of personal data is a fundamental right and personal data cannot be considered a commodity. Finally, the DCDS Directive does not regulate the type of contract under which the digital content is supplied or the digital service is provided, i.e. the DCDS Directive should apply only to those parts of the contract that concern the supply of digital content or digital services; other elements of the contract are governed by the relevant rules of national law.[18] The question of whether such contracts constitute a contract of sale, a service, a lease or a *sui generis* contract should be left to the discretion of the Member State. Therefore, the rules of the type of contract governing payment of the price or the general rules if specific rules cannot be applied must apply to the provision or obligation to provide personal data. For example, in the case of a sales contract, the rules governing the payment of remuneration must apply to the provision or obligation to provide personal data.

1.3. The Scope of DCDS Directive

According to Article 2 (8) of the DCDS Directive, personal data means personal data as defined in Article 4(1) of the GDPR, i.e. any information relating to an identified or identifiable natural person (data subject). According to Article 4(1) of the GDPR an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to name, personal

[15] More on the use of the author's personal rights for economic purposes in *Versaci, G.* Personal Data and Contract Law. *European Review of Contract Law*, Vol. 14, No. 4, 2018, pp. 386–388.

[16] Ibid., p. 388.

[17] See also Manko's and Monteleone's comments on the proposal for the Directive in *Manko, R., Monteleone, S.* Briefing: Contracts for the supply of digital content and personal data protection. European Parliamentary Research Service, 2017, p. 6.

[18] See DCDS Directive, recital 33.

identification number, location information, network identifier or one or more physical, physiological, genetic, mental, economic, cultural or social characteristics of that natural person. The DCDS Directive should not apply to situations where personal data is exclusively processed by the trader to supply digital content or a digital service, or to allow the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose.[19] Such situations can include, for instance, cases where the registration of the consumer is required by applicable laws for security and identification purposes, where the trader only collects metadata (except where this situation is considered to be a contract under national law) or where the consumer, without having concluded a contract with the trader, is exposed to advertisements exclusively in order to gain access to digital content or a digital service.[20] Member States are free to extend the application of the DCDS Directive to all kinds of supply of digital content and services or provide their own special measures to protect the consumers.

Contracts offering software under a free and open-source licence are also excluded from the scope of the DCDS Directive, provided that the consumer does not pay a price and the trader processes personal data provided by the consumer only to improve the security, compatibility or interoperability of specific software (Art. 3(5)(f) DCDS Directive).

Member States are free to decide whether the requirements for the conclusion, existence and validity of a contract concluded under national law are met (Art. 3(10) DCDS Directive). It is left to the Member States to decide whether the consumer is comprehensively protected against the provision of personal data in the supply of digital content or digital services. As the DCDS Directive does not regulate the distribution of the burden of proof between the parties for the purposes of the processing of personal data[21], it must be shared in accordance with the GDPR. According to Article 5 (2) of the GDPR, the controller must prove the lawfulness of the processing of personal data, i.e. compliance with the requirements set out in Article 5 (1) of the GDPR. This means, *inter alia*, that the controller must demonstrate that personal data are collected for specified, explicit and legitimate purposes and processed in a way compatible with those purposes (Article 5 (1) (b) GDPR) and that there are no other purposes for processing the personal data.

[19] Art. 3(1) of the DCDS Directive.

[20] DCDS Directive, recital 24. See also comments in *Sein, K., Spindler, G.* The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1. *European Review of Contract Law*, Vol. 15, No. 3, 2019, p. 264.

[21] For example, Spindler considers that although the burden of proof is not regulated in the proposed directive, it should not be imposed on the consumer, for whom it would be unreasonably burdensome. See *Spindler, G.* Contracts for the Supply of Digital Content – Scope of application and basic approach – Proposal of the Commission for a Directive on contracts for the supply of digital content. *European Review of Contract Law*, Vol. 12, No. 3, 2016, p. 193.

2. Supply of Personal Data in the Process of Formation of Contract

2.1. DCDS Directive

Article 3, para. 10 leaves to Member States the freedom to regulate aspects of general contract law, such as rules on the formation, validity and nullity.[22] According to the wording of Article 3(1) of the DCDS Directive, the supply of personal data may take place either at the time or after the conclusion of the contract if the consumer undertakes to provide personal data to the trader. The text of the DCDS Directive does not specify what is meant by the supply of personal data and what requirements must be met if the consumer undertakes only to supply personal data.[23]

The term "has provided" used in Article 3(1) of the DCDS Directive does not refer to the consumer's activity in submission of personal data,[24] unlike the wording used in the proposal for a DCDS Directive[25]. The solution is reasonable, because personal data is not collected only through active submission, but also indirectly, for example through social networks or cookies. Otherwise, widely used open access platforms, free software, etc., would be excluded from the scope of the DCDS Directive.[26] The waiver of the requirement for the consumer to actively communicate data has also been criticised, as in this case each website visit has to be treated as a contractual relationship,[27] ultimately leading to the regulation of the whole internet.[28] In particular, it is questionable

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[22] For more on the relationship between consent to process personal data and the requirements for concluding a contract, see *Clifford, D., Graef, I., Valcke, P.* Pre-formulated Declarations of Data Subject Consent – Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections. *German Law Journal*, Vol. 20, No. 5, 2019, p. 707.

[23] *Clifford, D., Graef, I., Valcke, P.* Pre-formulated Declarations of Data Subject Consent – Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections. *German Law Journal*, Vol. 20, No. 5, 2019, p. 704.

[24] See Sein, K., Spindler, G. The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1. *European Review of Contract Law*, Vol. 15, No. 3, 2019, p. 263.

[25] The proposal of the Directive, Art. 3 (1): "... and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data." See Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content. COM/2015/0634 final – 2015/0287 (COD). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015PC0634 [last viewed 18.05.2020]. The position published by the European Law Institute has found that the restriction in the proposed directive to apply the Directive only if the consumer provides personal data through an active activity leads to legal uncertainty. See Statement of the European Law Institute on the European Commission's proposed directive on the supply of digital content to consumers. COM (2015) 634 final. European Law Institute, 2016, p. 3. Available: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Statement_on_DCD.pdf [last viewed 18.05.2020].

[26] See for example *Loos, M., Luzak, J. A.* Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers. *Journal of Consumer Policy*, No. 1, 2016, pp. 63–90; *Langhanke, C., Schmidt-Kessel, M.* Consumer Data as Consideration. *Journal of European Consumer and Market Law*, 2015, Vol. 4, No. 6, pp. 219–223.

[27] *Staudenmayer, D.* Verträge über digitalen Inhalt. *New Juristische Wochenschrift*, No. 37, Vol. 69, 2016, p. 2719.

[28] It would be unjustified to subject any use of the Internet related to data collection to contract law rules, as the protection of consumers' personal data should be sufficiently guaranteed by the GDPR. See *Sein, K., Spindler, G.* The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1. *European Review of Contract Law*, Vol. 15, No. 3, 2019, pp. 263–264 and *Spindler, G.* Contracts for the Supply of Digital

whether the consumer would need protection guaranteed by the DCDS Directive in each such case, in addition to which submission of personal data by the consumer and the consent to their processing should not automatically constitute a contractual relationship.

2.2. Estonian Law

Under Estonian law, a contract is entered into by an offer being made and accepted or by the mutual exchange of declarations of intent in any other manner if it is sufficiently clear that the parties have reached an agreement (§ 9(1) LOA[29]). In typical contracts for the supply of digital content or services, it will be the service provider who makes an invitation to make offers if not otherwise indicated by the trader, and the offer is made by the consumer.[30] This conclusion is based on the § 16(3) of the LOA: "A proposal which is addressed to a previously unspecified set of persons and is made by sending advertisements, price lists, rates, samples, catalogues or the like or by displaying goods or by offering goods or services to a previously unspecified set of persons on a public computer network is deemed to be an invitation to make offers, unless the person making the proposal clearly indicates that it is an offer." Whether the invitation to make an offer or offers includes a proposal to enter into a contract with personal data as counter-performance has to be clarified by interpretation. Under Estonian law, the interpretation of unilateral declarations of intention is based on the objective standard, which means that a declaration of intention that is directed to the public shall be interpreted according to the understanding of a reasonable person (§ 75(2) GPCCA[31]).

While contracts concluded online are usually standard terms contracts, there might be a need to interpret standard terms as used by the trader. The question arises as to whether the average consumer understands, when concluding a contract, that the trader does not provide digital content or digital services free, but for personal data.[32] The processing of personal data requires the consent of the consumer (Art. 7(2) GDPR), in addition to which according to recital 42 of the GDPR, the data subject must be aware of at least who the controller is and for whom the processing is intended. If the condition that digital content or services will be supplied for personal data as counter-performance is a standard term (§ 35(1) LOA), the objective standard of interpretation applies, for example 'standard term' shall be interpreted according to the meaning that

Content – Scope of application and basic approach – Proposal of the Commission for a Directive on contracts for the supply of digital content. *European Review of Contract Law*, Vol. 12, No. 3, 2016, p. 194.

[29] Law of Obligations Act (LOA), in force from 1/07/2002. Available in English at https://www.riigiteataja.ee/en/eli/508082018001/consolide [last viewed 18/05/2020].

[30] There are no special rules concerning contracts providing digital content or services. See *Kull, I.* § 16. Võlaõigusseadus I. Üldosa (§ 1-207). Kommenteeritud väljaanne [Law of Obligations Act. Annotated edition]. *Varul, P., Kull, I., Kõve, V., Käerdi, M., Sein, K.* (eds.). Tallinn: Juura, 2016.

[31] General Part of the Civil Code Act (GPCCA), in force from 1/07/2002. Available in English: https://www.riigiteataja.ee/en/eli/509012018002/consolide [last viewed 18.05.2020].

[32] For example, a survey conducted in Germany in 2014 found that 67 % of internet users understood that providing personal data is a charge for services provided over the internet. See more in DIVSI Studie. Daten – Wahre und Währung. Hamburg, November 2014, p. 16. Available: https://www.divsi.de/wp-content/uploads/2014/11/DIVSI-Studie-Daten-Ware-Waehrung.pdf [last viewed 18.05.2020]. See also *Metzger, A*. Data as Counter-Performance: What Rights and Duties do Parties Have? *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 8(1), 2017, p. 3.

reasonable persons of the same kind as the other party would give to them in the same circumstances. If there is doubt, standard terms shall be interpreted to the detriment of the party supplying the standard terms (§ 39(1) LOA).

The extension of the scope of the DCDS Directive to free contracts has been considered important precisely because of the possibility of fairness control of the rules for the use of digital content providers and other standard terms.[33] In particular, in the case of consent given for the processing of personal data, the question may arise as to whether the validity of the consent must be verified on the basis of Article 7(2) of the DGPR and § 37(3) of the LOA.[34] Although Article 3(8) of the DCDS Directive requires personal data to be subject to the GDPR, this does not pose any problems under contract law, as § 37(3) of the LOA is similar in substance to Article 7(2) of the GDPR.

Pursuant to § 68(1) of the GPCCA, a declaration of intent may be made in any manner, unless otherwise provided by law. Acceptance of such an offer may be declared explicitly by ticking boxes or implicitly by use of the service or by registering as a user of the platform. Pursuant to § 62^1(3) of the LOA, the trader must always confirm receipt of the order electronically[35] to provide the consumer with certainty that the order has been received. This confirmation may also have contractual meaning as an acceptance of the offer made by the consumer.[36] However, the contractual declaration of intent cannot be equated with consent to process personal data in all cases.[37]

The consent that was given in breach of requirements provided for in the GDPR, should be considered non-binding (Art. 7(2) GDPR). The validity of the contract on the other hand is not affected by the violation of the requirements for the processing of personal data (Art. 8(3) GDPR).

When concluding a contract via a computer network, the undertaking must ensure, in accordance with § 62^2(3) of the LOA, that the consumer clearly confirms by submitting the order that the order means an obligation to pay. If the trader does not comply with this requirement, the consumer is not bound by the contract or the order. If personal data is considered to be a consideration, then § 62^2(3) of the LOA should also extend to the submission or obligation to submit personal data.

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[33] Although the DCDS Directive only applies to contracts where personal data are used for purposes other than the sole and narrow performance of the contract, this may not significantly affect the level of consumer protection, as the use of personal data for non-restricted purposes is likely to increase. See more in *Spindler, G., Sein, K.* Die endgültige Richtlinie über Verträge über digitale Inhalte und Dienstleistungen. Anwendungsbereich und grundsätzliche Ansätze. *Multimedia und Recht*, No. 7, 2019, p. 419.

[34] According to § 37(3) LOA, standard terms, the contents, wording or presentation of which are so uncommon or unintelligible that the other party cannot, based on the principle of reasonableness, have expected them to be included in the contract, or which the party cannot understand without considerable effort, are not deemed to be part of the contract.

[35] According to § 62^1(8) the provisions of this section do not preclude or restrict any obligations of a trader to provide the other contracting party with any other information prescribed by law.

[36] *Sein, K.* § 62^1. Võlaõigusseadus I. Kommenteeritud väljaanne. P. Varul jt (Law of Obligations Act I. Commented edition). Tallinn: Juura 2017, 4.3.

[37] Will it be an offer or an acceptance? See also *Langhanke, C., Schmidt-Kessel, M.* Consumer Data as Consideration. *Journal of European Consumer and Market Law*, Vol. 4, No. 6, 2015, p. 220.

2.3. Consumer Consent to Processing of Personal Data

According to the wording of Article 7(4) of the GDPR, the trader may refuse to conclude the contract if the consumer refuses to provide the personal data necessary for the performance of the contract. Under Article 3(1) of the DCDS Directive, the trader should have the same right if the consumer refuses to provide the trader with the personal data necessary to comply with legal requirements. When a trader offers digital content or a digital service against personal data, the processing of which brings benefits to the trader, these are inherently reciprocal obligations (*do, ut des*)[38] that should lead to corresponding legal consequences. This means that the trader should also have the right to refuse to enter into a contract if the consumer does not agree to provide the personal data that will be used for purposes other than those necessary to comply with the contract or the law.[39]

In order to process personal data that is not related to the performance of the contract, the consumer shall consent to process personal data. Consent to process consumer personal data must comply with the requirements of the GDPR, regardless of whether the personal data are submitted at the time of the conclusion of the contract, or later. For example, a consumer may provide personal information when registering on a web platform or uploading photos, videos or other material when using a digital service. According to Article 4 (1) of the GDPR, consent must be a voluntary, specific, informed and unambiguous declaration of intent by which the data subject consents to the processing of personal data concerning him or her, either in the form of a statement or by express consent.

Pursuant to Article 7(1) of the GDPR, the controller must be able to prove in the event of a dispute that the data subject has consented to the processing of his or her personal data. The GDPR does not exclude the possibility that consent to process personal data is given as a standard term with the order or order confirmation, but in such a case the consent must be clearly distinguishable, comprehensible and easily accessible in clear and simple language (Art. 7 (2) of the GDPR).[40] This could include ticking the appropriate box on the website, selecting technical equipment for information society services, or any other statement or behaviour that specifically indicates in this context the data subject's consent to the intended processing his or her personal data. Silence, pre-ticked boxes or omissions should therefore not be considered consent.

2.4. Consent to Processing of Personal Data Conditional to Performance of the Contract

As mentioned, the conclusion of a contract does not depend on the submission of personal data or valid consent for processing. However, the question of voluntary consent to process personal data (Art. 7 (4) of the GDPR) could arise if the transfer of digital content or the provision of a digital service is also conditional on the provision of personal data that is not necessary to

[38] For more on this opinion see *Bach, I.* Neue Richtlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte. *Neue Juristische Wochenschrift*, 72, 2019, 24, p. 1706.

[39] The text of the DCDS Directive refers to equating the provision of personal data with consideration, albeit only in limited functions. On the regulation of the provision of personal data in return for a DCDS Directive, see ibid., p. 1707.

[40] According to recital 32 of the GDPR, consent should be given in the form of a clear statement, such as written confirmation, including by electronic means, or an oral statement.

comply with the contract or law.[41] As explained in recital 43 of the GDPR, consent cannot be considered voluntary if the performance of the contract is conditional on such consent, even though it is not necessary for the performance of the contract. Linking the performance of the contract to consent does not preclude voluntary consent (Art. 7 (4) of the GDPR). The GDPR clarifies that the fact that the performance of a contract, including the provision of a service, is conditional, inter alia, on consent to the processing of non-contractual personal data must be taken into account as far as possible.[42] The burden of proving consent on a voluntary basis lies with the controller in accordance with Article 7 of the GDPR.[43] If the processing of personal data has taken place in breach of the provisions of the GDPR the consumer may use contractual remedies provided for in the DCDS Directive.[44]

In conclusion, it can be considered that consent to process personal data is not linked to the conclusion or validity of the contract, unless the parties themselves have given such meaning to the consent. However, consent to process personal data given in breach of the GDPR is not binding on the consumer. If consent to process personal data is given as a standard term, the regulation of standard terms applies.[45]

3. Contractual Consequences of the Right to Withdraw from Consent to Processing of Personal Data

3.1. Linking the Right to Withdrawal of the Consent to Processing of Data and Contractual Consequences

The processing of personal data for purposes other than ensuring the conformity of the performance of contractual obligations or the performance of requirements arising from law must be based on the consent of the data subject.[46] Since Article 3 (10) of the DCDS Directive requires all personal data to be subject to the provisions of the GDPR in addition to the requirements of the DCDS Directive, the consumer's right to withdraw consent to process

[41] *Malgieri, G., Janeček, V.* Data Extra Commercium. Data as Counter-Performance – Contract Law 2.0? In: *Lohsse, S., Schulze, R., Staudenmayer, D.* (eds.). Hart Publishing/Nomos, 2019.

[42] For more details on the links between personal data voluntariness and contract law, see *Clifford, D., Graef, I., Valcke, P.* Pre-formulated Declarations of Data Subject Consent – Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections. *German Law Journal*, Vol. 20, No. 5, 2019, pp. 713–717. See also *A. Metzger*. Data as Counter-Performance: What Rights and Duties do Parties Have? *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 8(1), 2017, p. 5.

[43] Recitals 32, 42, 43 in the preamble to the GDPR; Summary of the EDPS Opinion (Ref. 22), p. 16. Consent that does not comply with the requirements of the GDPR is not binding on the consumer (Article 7(2) of DGPR).

[44] *Drechsler, L.* Data as Counter-Performance: A New Way Forward or a Step Back for the Fundamental Right of Data Protection? Datenschutz & LegalTech/Data Protection & LegalTech: Digitale Ausgabe zum Tagungsband des 21. Internationalen Rechtsinformatik Symposions IRIS 2018, pp. 35–43.

[45] About the application of the unfairness assessment of standard terms to the price of data as counter-performance see *Hacker, P.* Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive. In: *Lohsse, S., Schulze, R., Staudenmayer, D.* (eds.). Data as Counter-Performance – Contract Law 2.0? Hart Publishing/ Nomos, 2019.

[46] GDPR Art 6(1)(a) and (b).

personal data to the extent covered by the GDPR should be guaranteed.[47] However, the right to regulate the consequences of the withdrawal of consent is left to the Member States.[48]

The right of a Member State to regulate the consequences[49] of withdrawal does not answer the question of the relationship between the trader's obligation to supply digital content or digital services and the consumer's right to withdraw consent to process personal data. For example, if a consumer downloads a free mobile application and also consents to process personal data for purposes other than complying with the contract or legal requirements and withdraws consent during the performance of the contract, can the trader terminate the service or limit its scope?

Since the DCDS Directive requires traders to comply with the requirements of the GDPR when providing digital services, it is necessary to ask whether linking the right to withdraw consent to process personal data to the contractual consequences is compatible with the GDPR. To the extent that the consumer's right to withdraw consent has to be guaranteed, agreements which exclude or restrict the consumer's right of withdrawal do not apply and the consumer's exercise of the right of withdrawal cannot be considered non-performance. Pursuant to Article 7(4) of the GDPR, the assessment of the voluntary nature of consent must take into account to a large extent whether the performance of the contract, including the provision of a service, is conditional, *inter alia*, on consent to the processing of personal data. One possibility is to interpret the provisions of the GDPR and the DCDS Directive so that Article 7(4) of the GDPR only regulates voluntary consent and, although the GDPR takes precedence over the DCDS Directive (Art. 3(8)), it does not prohibit consent on supply of personal data as economic equivalent to monetary price.[50] Another possibility is to take the view that personal data is not a consideration that can be claimed and the refusal or withdrawal of consent given by the consumer to process personal data should not lead to the right to use remedies[51]. In this case withdrawal of consent should not lead to contractual consequences.[52]

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[47] Recital 39 in the preamble to the Directive. Malgieri and Custers have argued, for example, that it would have been legally clearer not to link consent to the processing of personal data to a restriction on active submission, but rather to give consumers the right to know the economic value of their data. It would also have avoided ambiguity as to what the trader's rights would be in the event of withdrawal. For more details, see *Malgieri, G., Janeček, V.* Data Extra Commercium. Data as Counter-Performance – Contract Law 2.0? In: *Lohsse, S., Schulze, R., Staudenmayer, D.* (eds.). Hart Publishing/Nomos, 2019.

[48] GDPR, Art. 3(10).

[49] Ibid.

[50] For more details on the position, see *Metzger, A*. Data as Counter-Performance: What Rights and Duties do Parties Have? *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 8(1), 2017, p. 5.

[51] *Sein, K., Spindler, G.* The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1. European Review of Contract Law, Vol. 15, No. 3, 2019, p. 265.

[52] The legal literature also contains a proposal to give the trader the right to use legal remedies in case of withdrawal from the consent to the use of personal data, except for the claim for damages; for more details see *Metzger, A., Efroni, Z., Mischau, L., Metzger, J.* Data-Related Aspects of the Digital Content Directive. *Journal of Intellectual Property, Information Technology and E-Commerce Law*, Vol. 9, No. 1, 2018, p. 96. For the same view, see *Langhanke, C., Schmidt-Kessel, M.* Consumer Data as Consideration. *Journal of European Consumer and Market Law*, Vol. 4, No. 6, 2015, p. 222.

The provision or obligation to provide personal data allows the trader to process the submitted personal data for revenue. If the consumer withdraws consent to process personal data, the personal data provided will no longer have the economic value that the trader had taken into account when concluding the contract. Given the purpose of the DCDS Directive and the protection guaranteed by the GDPR, preference should be given to the interpretation that consumer redress in the event of withdrawal of consent to process personal data is not excluded. The trader may stipulate in the terms of the contract that the consumer will be able to use the services to a lesser extent upon receipt of the condition (in case of withdrawal of consent) or will lose the right to part of the originally authorised services.

As the consumer has the right to withdraw consent to process personal data at any time,[53] giving consent is not a counter-obligation that could be required from the consumer. However, the right to withdraw consent to process personal data does not mean that the contract is non-binding, i.e. the consumer has the right to demand that the trader fulfil his or her obligations at least until the withdrawal of consent[54] to process personal data.[55] Given the reciprocal nature of remunerated contracts, the trader's interests should be protected if the consumer uses his or her right to refuse to fulfil obligation with the right to terminate the contract.[56]

3.2. Contractual Consequences – the Trader's Right to Terminate the Contract and Claim Damages Under Estonian Law

Applying Estonian law to a situation in which the consumer withdraws consent to data processing could achieve the following results. Taking a sales contract as an example, the seller has an obligation to deliver the goods and transfer ownership, while the buyer has an obligation to pay the price and take delivery of the goods (§ 208 (1) LOA). If the buyer does not pay the agreed price, the seller (trader) may withdraw from the contract on the bases of § 116 of the LOA, which provides that withdrawal from the contract is permitted only if there is a fundamental non-performance (§ 116 (1) LOA). According to § 116 (2)(2) of the LOA[57], non-performance of such an obligation, the exact performance of which is a precondition for the other party's interest in the contract is fundamental non-performance. If the performance of the trader's obligations or the volume of performance is set dependent on the consent to process personal data, the predictability requirement provided for in § 116 (2)(2)

[53] GDPR, Art. 7(3).

[54] Directive, Art. 3(1).

[55] In principle, Estonian law also recognises binding obligations that can be withdrawn or cannot be demanded. For example, either party to a lease entered into for more than 30 years may cancel after 30 years, observing the term provided by law (§ 318 LOA), and the debtor may not be required to perform an incomplete obligation pursuant to § 4(1) of the LOA.

[56] For possible remedies under German law, see *Metzger, A*. Data as Counter-Performance: What Rights and Duties do Parties Have? *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 8(1), 2017, p. 6. For more details on the two-step control model for the control of unjustified commercial use of personal data, see *Malgieri, G., Janeček, V*. Data Extra Commercium. Data as Counter-Performance – Contract Law 2.0? In: *Lohsse, S., Schulze, R., Staudenmayer, D.* (eds.). Hart Publishing/Nomos, 2019.

[57] Estonian LOA: "§ 116. Termination and cancellation as legal remedies (2) A breach of contract is fundamental if: 2) pursuant to the contract, strict compliance with the obligation which has not been performed is the precondition for the other party's continued interest in the performance of the contract...".

of the LOA is met and the trader has the right to terminate the contract without giving an additional term (§ 116(4) LOA). If it is considered that the consent given to process personal data is not an obligation, the strict observance of which is a prerequisite for maintaining the interest in performance of the contract, the trader must give the consumer an additional term (§ 114(1) LOA). If the consumer fails to use the additional term to cure the non-performance, the trader can terminate the contract. The termination can also be automatic (§ 116(5) LOA).

If the contract for the transfer of digital content or digital services corresponds to the features of a lease contract, the trader as a lessor could cancel the contract in the cases provided for in § 316 of the LOA. However, this provision is not directly applicable to personal data as counter-performance, therefore the cancellation of a contract on the basis of § 196(2) of the LOA, i.e. due to a fundamental non-performance, could be considered. Pursuant to § 196(2) of the LOA, the trader must in such a case give the consumer an additional term for performance, except in the cases provided for in § 116 (2)(2)-(4) of the LOA. The application of § 313 of the LOA could also be considered. Pursuant to § 313 of the LOA, the lessor has the right to cancel the lease contract if there is a good reason for doing so, in the event of which the party wishing to cancel cannot be expected to continue performing the contract. However, the application of this rule depends on how the mutual interests are weighed, i.e., the consumer's interest in the continuation of the contract and the trader's interest in obtaining an economic advantage from the processing of personal data. This is probably more of a legal policy issue that a Member State must address when transposing a DCDS Directive.

In principle, it could also be considered that the trader requires the consumer to compensate damage on the basis of § 115(1) of the LOA instead of performance.[58] This could be done by the trader without setting an additional term, if the withdrawal of consent to the processing of personal data is considered a case provided for in § 116(2) of the LOA and § 115(3) of the LOA. The precondition for a claim for compensation for damage is the liability of the consumer for the breach of the obligation, i.e. the consumer is released from liability if the breach was caused by force majeure (§ 103 LOA). It is difficult to imagine circumstances that could excuse the withdrawal of the consumer's consent. However, there are opinions that withdrawal of consent should not give rise to remedies or should be significantly restricted in the light of the objectives of the GDPR.[59] The legal consequences for the trader of the consumer's withdrawal from content are governed by Article 16 of the DCDS Directive. The consumer shall have the right to request the deletion of his or her personal data and the termination of their further processing upon termination of the contract or withdrawal of consent.[60] If the consumer does not withdraw from the contract, he or she may only request the deletion and termination of personal data that are not necessary for the further performance of the contract, or request the transfer

[58] However, in the case of a claim for damages, the question arises as to the determination of the economic value of personal data; for more details see *Malgieri, G., Custers, B.* Pricing Privacy – The Right to Know the Value of Your Personal Data. *Computer Law & Security Review*, Vol. 34, No. 2, 2018, pp. 289–303.

[59] *Langhanke, C., Schmidt-Kessel, M.* Consumer Data as Consideration. *Journal of European Consumer and Market Law*, Vol. 4, No. 6, 2015, p. 222.

[60] See GDPR, Art. 17.

of personal data to another controller, if technically possible.[61] Granting the trader the right of withdrawal would ensure the balance of the rights and obligations of the contracting parties and would not be in conflict with the basic principles of Estonian private law. When transposing the DCDS Directive, it must therefore be decided whether, in the event of withdrawal of consent to process personal data, it is intended to draft specific rules based on the type of contract concerned or to lay down general rules that will apply to all contracts.[62] General rules would be the most certain way to guarantee the right to consent to process personal data and traders' interest to use the processing of personal data in their business models.

Summary

The purpose of the article was to examine the contractual consequences of withdrawing consent to the processing of personal data in Estonian law taking into account the contractual significance of personal data. Extending the scope of the DCDS Directive to contracts for the supply of digital content or digital services against personal data or the obligation to provide personal data is a pragmatic solution in line with the business models used. There is no doubt that the right to process personal data has an economic value as counter-performance and this has been taken into account in both the GDPR and the DCDS Directive. The choice given to Member States to extend the scope of the contracts covered by the DCDS Directive and to ensure consumer protection provides the necessary flexibility to transpose the DCDS Directive and find appropriate solutions. Given the reciprocal nature of remunerated contracts, the trader's interests should be protected if the consumer uses his or her right to refuse to consent to process personal data and this can be done with the right to terminate the contract. If transposing the DCDS Directive into Estonian law, general rules concerning the contractual consequences of the withdrawal from the consent would be the most certain way to guarantee the interests of consumers and of traders who are interested in using right to process personal data in their business.

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[61] Directive, recital 68.

[62] *Metzger, A.* Data as Counter-Performance: What Rights and Duties do Parties Have? *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 8(1), 2017, p. 7.

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Abbreviations

Art.	Article
DGDS Directive	Directive (EU) 2019/770
GDPR	General Data Protection Regulation
GPCCA	General Part of Civil Code Act (Estonia)
EDPS	European Data Protection Supervisor
EU	European Union
LOA	Law of Obligations Act (Estonia)
No.	Number
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Sustainable Higher Education as a Challenge for Latvia: Impact of the Constitutional Court of the Republic of Latvia

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In view of the current relevance of the concept of sustainability, the article examines the application of this principle within the system of higher education in three essential areas, analysing the existing situation and outlining the necessary improvements in the context of sustainability. The article also reveals the impact of the rulings delivered by the Constitutional Court of the Republic of Latvia on the sustainable development of institutions of higher education, highlighting the rulings, which directly deal with issues important for institutions of higher education, *inter alia*, in the context of the development of the rule-of-law state. The author also expresses her opinions on the need for a dialogue between the legislator and the Constitutional Court on these matters, as well as urges to seek solutions to several essential issues regulating the life of institutions of higher education – both with respect to regulation on the employment legal relationship and the criteria set for the Latvian Science Council's expert in the legal science.

Keywords: sustainability, higher education, Constitutional Court, professor, normative regulation, labour agreement, expert.

Contents

Introduction

Higher education, as well as science, is an important part of all societies. Institutions of higher education, by fulfilling their mission, shape individuals who, respectively, participate in the life of the state and society and, after all, constitute the state itself. The better educated society is, the more democratic and better governed by the rule of law is the state. Institutions of higher education are also the centres of science and innovation. If states set ambitious goals for development in the most diverse fields, it is impossible to reach them without higher education. Likewise, it will be impossible to attain the aims of a sustainable state without reaching the sustainability of higher education itself.

Sustainability is a comparatively new concept, which, in particular, recently is gaining popularity among parties applying the law; it is employed in the most diverse areas and fields. Sustainability must be seen as being of great importance also in higher education. Application of this principle in the three most essential areas of the system of higher education is examined in the article by analysing the current situation and also outlining the necessary improvements in the context of sustainability.

In view of the importance and impact of the Constitutional Court, the article reveals the influence of the valid rulings by the Constitutional Court on higher education and also outlines the contribution of the cases to be examined in the future not only to higher education but to the Latvian legal system in general. Some issues in the system of higher education are delineated and analysed in the context of the Constitutional Court's rulings. This chosen methodology, however, does not mean that other matters in higher education would be well organised.

Possibly, the space of Latvian higher education will soon undergo changes. However, it is important that these changes are comprehensible, justified and that the envisaged mechanisms reach the ambitious aims.

The article, in establishing the ideas and the content of a sustainable university, uses the experience of other countries, research that until now had not been sufficiently examined in the context of Latvian higher education.

1. Sustainability and Higher Education: Concept, Application and Interconnection

In view of the new challenges to the global politics, economy, law, environmental protection and development of states, new concepts are allocated a special role and significance. The concept of sustainability is one of these, it is becoming increasingly relevant for every nation state, the European Union and the global community. Sustainability may be considered as one of the most recent concepts, which was recognised by the international community only in 1987, when the World Commission on Environmental and Development (known as Bruntland Commission) published the statement "Our common future".[1] Following that, "Agenda 21" was adopted in 1992 at Rio de Janeiro Earth

[1] Report of the World Commission on Environment and Development: Our Common Future. Available: https://www.are.admin.ch/are/en/home/sustainable-development/international-cooperation/2030agenda/un-_-milestones-in-sustainable-development/1987--brundtland-report.html [last viewed 24.03.2020].

Summit.[2] Naturally, the politics of nation states reflect the ideas of sustainability. It is significant that today the definition of sustainability provided by Bruntland Commission is applied not only in Latvia[3] but also in other countries. This definition comprises the most essential aspects of this concept. Namely, sustainability is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[4] To phrase it differently, sustainability merges the development interests of the present generation with those of the future generations, demanding long-term thinking and actions. The Constitutional Court of the Republic of Latvia (thereinafter – Constitutional Court) also uses this understanding of sustainability in its case law.[5] A similar definition of the term "sustainable development" is included also in the normative regulation, for example, Section 1 of the Environmental Protection Law.[6]

Although sustainability could be considered as being, foremost, a principle of politics[7], this principle is included in normative acts in specific areas[8],

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[2] United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 AGENDA 21. Available: https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf [last viewed 23.03.2020].

[3] See, for example, Judgement of the Constitutional Court of the Republic of Latvia of 24 February 2011 in case No. 2010-48-03, para. 6.1. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/07/2010-48-03_Spriedums_ENG.pdf#search=2010-48-03 [last viewed 23.03.2020]; Judgement of the Constitutional Court of the Republic of Latvia of 17 January 2008 in case No. 2007-11-03, para. 15. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/05/2007-11-03_Spriedums_ENG.pdf#search=2007-11-03 [last viewed 23.03.2020].

[4] Report of the World Commission on Environment and Development: Our Common Future. Available: https://www.are.admin.ch/are/en/home/sustainable-development/international-cooperation/2030agenda/un-_-milestones-in-sustainable-development/1987--brundtland-report.html [last viewed 24.03.2020].

[5] See, for example, Judgement of the Constitutional Court of the Republic of Latvia of 24 February 2011 in case No. 2010-48-03, para. 6.1. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/07/2010-48-03_Spriedums_ENG.pdf#search=2010-48-03 [last viewed 23.03.2020]; Judgement of the Constitutional Court of the Republic of Latvia of 17 January 2008 in case No. 2007-11-03, para. 15. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/05/2007-11-03_Spriedums_ENG.pdf#search=2007-11-03 [last viewed 23.03.2020].

[6] Law states that "principle of sustainable development should be regarded as the integrated and balanced development of public welfare, the environment and economy, which meets the present social and economic needs of inhabitants and ensures the compliance with environmental requirements, not endangering the possibility to meet the needs of the future generations, as well as ensures the preservation of biologic diversity." Vides aizsardzības likums [Environmental Protection Law] (02.11.2006). Available: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Environmental_Protection_Law.doc [last viewed 23.03.2020].

[7] Sustainable Development Strategy of Latvia until 2030 or "Latvia 2030" states that the aim of the country is to reach sustainable development that is an integrated and balanced development of the public welfare, the environment and economics, which satisfies present social and economic needs of inhabitants, ensures the observation of the environmental requirements without endangering the possibility to satisfy the needs of future generations, and ensuring the biological diversity. Sustainable Development Strategy of Latvia until 2030. Available: http://varam.gov.lv/lat/pol/ppd/?doc=13857, para. 8. [last viewed 23.03.2020].

[8] Principle of sustainability is one of the fundamental principles of land use planning. See, for example, Judgement of the Constitutional Court of the Republic of Latvia of 17 January 2008 in case No. 2007-11-03, para. 15. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/05/2007-11-03_Spriedums_ENG.pdf#search=2007-11-03 [last viewed 23.03.2020]; Judgement of the Constitutional Court of the Republic of Latvia of 24 September 2008 in case No. 2008-03-03, para. 17.2. *Latvijas Vēstnesis*, No. 151 (3935), 30.09.2008; Judgement

turning it into a principle of a particular area. Even more so, the principle of sustainability has become a constitutional principle, directed at the protection of the aims and values included in the Constitution of Latvia – the *Satversme*[9] – as well as implementation thereof.[10] The Preamble to the *Satversme* provides that "Latvia protects its national interests and promotes sustainable and democratic development of a united Europe and the world."[11] Alongside that, *Satversme* envisages an essential aspect of sustainability – responsibility towards future generations, since the Preamble to the *Satversme* states that "Each individual takes care of [..] future generations, the environment and nature." This means that the constitutional legislator expects responsible actions of each individual or, one might say, each member of society, in the name of the future generations, which is also an indispensable element of sustainability.

Institutions of higher education (hereafter – also higher educational establishment, university[12]) have played an important role in the development of society.[13] Today, the institutions of higher education are expected to yield manifold investments or contributions to society. Higher educational establishments are expected to be not only scientific research centres, but also sources of technological innovation, they have to be dedicated to civil rights, social justice and reforms.[14] Undeniably, at present higher education has an essential role in the national development, based on knowledge, innovation, effectiveness and competitiveness. Likewise, higher education is an instrument for developing and safeguarding culture and values. The European Court of Human Rights has reiterated in its judgement[15] that higher education is "instrumental in the pursuit

of the Constitutional Court of the Republic of Latvia of 30 January 2004 in case No. 2003-20-01, para 8.2. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2003/09/2003-20-01_Spriedums_ENG.pdf#search=2003-20-01 [last viewed 23.03.2020]; Judgement of the Constitutional Court of the Republic of Latvia of 3 May 2011 in case No. 2010-54-03, para. 12.1.1. *Latvijas Vēstnesis*, No. 70 (4468), 06.05.2011. Judgement of the Constitutional Court of the Republic of Latvia of 9 October 2014 in case No. Nr.2013-19-03, para. 15.1. Latvijas Vēstnesis, No. 201 (5261), 10.10.2014.; Judgement of the Constitutional Court of the Republic of Latvia of 19 November 2009 in case No. 2009-09-03, para. 14. *Latvijas Vēstnesis*, No. 184 (4170), 24.11.2009.

9 Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: http://saeima.lv/en/about-saeima/work-of-the-saeima/constitution/ [last viewed 23.03.2020]

10 Judgement of the Constitutional Court of the Republic of Latvia of 6 October 2016 in case No. 2016-24-03, para. 11. Latvijas Vēstnesis, No. 201, 10.10.2017.

11 Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: http://saeima.lv/en/about-saeima/work-of-the-saeima/constitution/ [last viewed 23.03.2020]

12 Pursuant to Section 3 (1) of the Law on Higher Education Institutions, higher education institutions are higher education and science institutions, in which academic and vocational study programmes are implemented, as well as which are engaged in science, research and artistic creation. A university is a higher education institution, which complies with specific criteria included in Section 3 (3) of the Law on Higher Education Institutions. Augstskolu likums [Law on Higher Education Institutions]. (02.11.1995). Available: https://likumi.lv/doc.php?id=37967 [last viewed 24.03.2020].

13 *Hrubos, I.* The Changing Role of Universities in Our Society. Society and Economy, Vol. 33, No. 2, pp. 347–360; Available: https://www.jstor.org/stable/41472162 [last viewed 23.03.2020].

14 See more in *Raulea, A. S., Oprean C., Titu, M. A.* The Role of Universities in the Knowledge based Society. International conference KNOWLEDGE-BASED ORGANIZATION, Vol. 22, issue 1, 2016, p. 229.

15 Judgement of 10 November 2005 of the European Court of Human Rights in case *Leyla Şahin v. Turkey*, No. 44774/98, para. 136. Available: http://hudoc.echr.coe.int/eng?i=001-70956 [last viewed 23.03.2020].

and advancement of knowledge, constitutes an exceptionally rich cultural and scientific asset for both individuals and society."[16]

If higher education is an integral part of society and, thus, also of the state, it cannot be separated from the strategic national aim – to be a sustainable state. Firstly, higher education, by reaching its aims and objectives, helps in reaching the aim of a sustainable state. Secondly, since higher education exists to meet the needs of society and it cannot be separated from the strategic national aim of being a sustainable state, and thus the higher education itself should also be sustainable. I.e., in contemporary society sustainable higher education can be discussed, covering three major blocks of issues: institutionality, relatedness to content and final outcome.

In the institutional perspective, it would be correct to speak, first and foremost, about a sustainable institution of higher education. One source explains that a sustainable institution of higher education, "as a whole or as a part, addresses, involves and promotes, on a regional or a global level, the minimization of negative environmental, economic, societal, and health effects generated in the use of their resources in order to fulfil its functions of teaching, research, outreach and partnership, and stewardship in ways to help society make the transition to sustainable life-styles."[17] There is an opinion that a sustainable university can be defined as "a university that, apart from seeking academic excellence, tries to embed human values into the fabric of people's lives; a university that promotes and implements sustainability practices in teaching, research, community outreach, waste and energy management, and land use and planning through a continuous sustainability commitment and monitoring."[18] Another source surveys several heads of institutions of higher education, and each of them provides their view on the understanding of what a sustainable institution of higher education is.[19] Admittedly, none of these views could be seen as wrong. In compiling these views, researcher S. Sterling has concluded that such principles or values as, for example, multidiscplinarity, critical thinking, collective responsibility, welfare, commitment, long-term orientation, high level of competences, systemic approach, changing emphasis on education appeared in all these views.[20] This means that each institution is not prohibited from defining and determining, advancing its own vision of the institution's sustainable development, respecting both the aim of the respective institution itself and the content of sustainability (as a concept).

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[16] Convention on the Recognition of Qualifications Concerning Higher Education in the European Region. Available: https://likumi.lv/ta/id/24653-par-eiropas-regiona-konvenciju-par-to-kvalifikaciju-atzisanu-kas-saistitas-ar-augstako-izglitibu [last viewed 24.03.2020].

[17] *Velazquez, L., Munguia, N., Platt, A., Taddei, J.* Sustainable university: what can be the matter? *Journal of Cleaner Production*, Vol. 14, issues 9–11, 2006, p. 812. Available: https://doi.org/10.1016/j.jclepro.2005.12.008 [last viewed 24.03.2020].

[18] *Nejati, Most., Nejati, Meh.* Assessment of sustainable university factors from the perspective of university students. *Journal of Cleaner Production*, Vol. 48, 2013, p. 107. Available: https://doi.org/10.1016/j.jclepro.2012.09.006 [last viewed 23.03.2020].

[19] In greater detail, see The Sustainable University: Progress and Prospects. *Sterling, S. et al.* (eds.). Routledge: 2013, pp. 24–27. Available: ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/lulv/detail.action?docID=1125266 ProQuest Ebook Central, Available: https://ebookcentral.proquest.com/lib/lulv/detail.action?docID=1125266 [last viewed 23.03.2020].

[20] *Sterling, S. et al.* (eds.) The Sustainable University: Progress and Prospects. Routledge: 2013, p. 27. Available: ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/lulv/detail.action?docID=1125266 [last viewed 23.03.2020].

The ideal or the aim of a sustainable university is usually included in the strategies, policy documents of an institution of higher education. For example, Harvard University[21], Yale University[22] have developed special Sustainability Plan. Yale University defines itself as a university where "sustainability is seamlessly integrated into the scholarship and operations of the university, contributing to its social, environmental, and financial excellence and positioning Yale as a local and global leader".[23] One study notes that universities ranking the highest in university ratings (TOP 10) have created in their management structures sustainability councils, groups or committees, whereas those, which are not among the TOP 10 universities, have established at least sustainability bureaus or advisory committees.[24]

Examination of the policy documents of major Latvian universities shows that the University of Latvia and the Riga Technical University see the university's contribution as one of the instruments that could help in reaching the common aim of society – becoming a sustainable state.[25] Thus, in these two largest universities, the strategies do not discuss a sustainable university *per se*. The aim of a sustainable university is very precisely and clearly defined at the Riga Stradiņš University (hereafter also RUS), which singles it out among major universities of Latvia. RSU has defined the sustainable development aims for the university itself.[26] The author has to admit that this line of thinking is very progressive and commendable in the context of sustainable higher education.

Content-wise, sustainable higher education means that all the activities that an institution of higher education engages in must be sustainable, it must offer education on sustainable development and education, in general, must be dedicated to sustainable development.[27] Sustainability of studies can be viewed both vertically and horizontally. The vertical perspective means that specific sustainability courses are included in programmes, whereas the horizontal perspective – that sustainability matters are explored in the existing study courses as one of the issues.[28] Here it must be noted that Latvia, by choosing to include imperatively the issues of environment protection in the content of study programmes, has demonstrated, in the context of sustainability, a quite advanced

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[21] Harvard University Sustainability Plan. Available: https://issuu.com/greenharvard/docs/harvard_sustainability_plan-web [last viewed 20.03.2020].

[22] Yale Sustainability Plan. Available: https://yale.app.box.com/s/xagi53f5qvpklkv31zdebe8rilgt3b6x [last viewed 20.03.2020].

[23] Yale Sustainability Plan. Available: https://yale.app.box.com/s/xagi53f5qvpklkv31zdebe8rilgt3b6x [last viewed 20.03.2020].

[24] *Salvioni, D. M., Franzoni, S., Cassano, R.* Sustainability in the Higher Education System: An Opportunity to Improve Quality and Image. *Sustainability*, Vol. 9, No. 6, 2017, p. 15; Available: https://doi.org/10.3390/su9060914 [last viewed 20.03.2020].

[25] See, for example, Development Strategy 2015–2020 (University of Latvia). Available: https://www.lu.lv/fileadmin/user_upload/LU.LV/www.lu.lv/Dokumenti/Dokumenti_EN/1/Summary_UL_strategy_EN_250517.pdf [last viewed 20.03.20.03.2020], and Strategy (Riga Technical University). Available: https://www.rtu.lv/writable/public_files/RTU_rtu_strategija2014.2020._g..pdf [last viewed 20.03.2020].

[26] Ilgtspējīgas attīstības mērķi [Sustainable development goals]. Available: https://www.rsu.lv/ilgtspejigas-attistibas-merki [last viewed 19.03.2020].

[27] *Sammalisto, K., Sundstrom, A., Holm, T.* Implementation of sustainability in universities as perceived by faculty and staff – a model from a Swedish university. *Journal of Cleaner Production*, Vol. 106, No. 1, 2015, p. 45. Available: http://dx.doi.org/10.1016/j.jclepro.2014.10.015 [last viewed 19.03.2020].

[28] *Ceulemans, K., De Prins, M.* Teacher's manual and method for SD integration in curricula. *Journal of Cleaner Production*, Vol. 18, issue 7, 2010, p. 645.

approach. Section 42 (1) of the Environmental Protection Law defines a general task for those delivering education on different levels to include in the mandatory content of a study subject or a course standard issues pertaining to environmental education and education for sustainable development.[29] Further on, the third part of the same Section defines an imperative obligation to include a separate course on sustainable development in the teacher training study programmes of all higher education establishments and colleges. Section 42 (2), in turn, defines the obligation to include in the mandatory part of all study programmes of higher educational establishments and colleges a course on environmental protection. Although the need to include a course on environmental protection in study programmes of higher education is understandable, taking into account the environmental challenges that the contemporary society faces, in the context of sustainability, environmental protection is only one of the issues. In the author's opinion, students of higher educational establishments would contribute more to the scope of their knowledge by studying matters of sustainability in the broader understanding of this concept.

In Europe, starting with the re-structuring of the University of Berlin at the beginning of the 19th century, scientific work has become an integral part of universities alongside studies.[30] If sustainability is the strategic national aim, then sustainable research should, likewise, be one of the priorities. This means that research funding should be envisaged in the aspects of developing a sustainable society and state. Moreover, as noted above, the assumption that a sustainable society (state) is formed only by environmental and nature protection is erroneous. Pursuant to para. 3 of Section 13 (2) and Section 34 (4) of the Scientific Activities Law, the Republic of Latvia Cabinet of Ministers has approved the priority directions in research[31], which, in general, encompass a very extensive range of issues and, undeniably, these are largely directed towards the development of a sustainable society and state.

Institutions of higher education foster the development of students and graduates – future employees, which, accordingly, will later shape a sustainable society and state. Education forms accomplished and knowledgeable members of society. A sustainable higher education must raise a graduate, who would be able to be critical, focus on higher ideals of reasoning and skills, be capable to think responsibly, etc.[32] A sustainable world cannot exist without a society

[29] Vides aizsardzības likums [Environmental Protection Law] (02.11.2006). Available: https://likumi.lv/ta/en/en/id/147917-environmental-protection-law [last viewed 19.03.2020].

[30] *Altbach, P. G.* The Past, Present, and Future of the Research University. In: Road to Academic Excellence: The Making of World-Class Research Universities, *Altbach, P. G., Salmi, J.* (eds.). World Bank Publications: 2011, pp. 31–32.

[31] The priority directions in research are: 1. Technologies, materials and systems engineering for increased added value products and processes, and cybersecurity. 2. Strengthening the security of energy supply, development of the energy sector, energy efficiency. 3. Climate change, nature protection and environment. 4. Research and sustainable use of local natural resources for the development of a knowledge-based bioeconomy. 5. Latvia's statehood, language and values, culture and art. 6. Public health. 7. Culture of knowledge and innovations for economic sustainability. 8. Demographics, sports, open and inclusive society, and social resilience. 9. State and public safety, and defence. Par prioritārajiem virzieniem zinātnē 2018–2021 [On the priority directions in science 2018–2021] (13.12.2017). Available: https://likumi.lv/ta/id/295821-par-prioritarajiem-virzieniem-zinatne-2018-2021-gada [last viewed 24.03.2020].

[32] *Wals, A. E. J., Jickling, B.* "Sustainability" in higher education: From doublethink and newspeak to critical thinking and meaningful learning. *International Journal of Sustainability in Higher Education*, Vol. 3, issue 3, 2002, p. 228.

shaped by, *inter alia*, higher education. No sustainable state will ever be able to exist without society's participation.[33] The better educated society is, the more it becomes involved in the process of democracy and, accordingly, also understands the importance of sustainability. Modern systems of higher education must prepare a graduate, who can think critically and integrate social, environmental and economic aspects in decision making, thus attaining the aim of sustainability. Undeniably, this is a long-term work – to attain and integrate the ideas of sustainability into the daily life of university graduates and society. However, if every institution of higher education understands and is aware of its responsibility, importance and contribution to society and the state, it would not easily deviate from reaching the common national aims, which include a sustainable state.

2. Constitutional Court and Higher Education: Finding Sustainable Normative Regulation on Some Issues Within Higher Education System

Sustainable legal regulation on higher educational establishments also is one of the elements or pre-requisites of sustainable higher education. It is the legislator's obligation and responsibility to create a sustainable legal framework for higher education. Sustainable legal regulation is such that complies with the norms, principles and values of the *Satversme* and in the process of adoption of which the norms in principles of the *Satversme* have been abided by, *inter alia*, the principle of good legislation, derived from the state governed by the rule of law.[34] The outcome of sustainable legislation must be well-considered, stable, it may not be hasty.[35] Hasty, ill-considered and constantly amended laws do not create and develop society's trust in the public power. The legislator, however, should strive for constantly advancing persons' trust in the state and law, as well as increasing understanding of the democratic process. This is an element of the principle of the state governed by the rule of law – to ensure that the state has stable laws that define the life of people and society.[36] This aspect is essential with respect to the important element of society – higher education. Laws, in the adoption of which substantial and procedural infringements have been made, cannot foster and ensure a sustainable national development. Such laws, *inter alia*, may also hinder sustainable development of institutions of higher education.

Systemic character is one of the quality criteria for normative acts. In general, normative acts should form a comprehensible and interconnected system. President E. Levits, addressing the Constitutional Court at the solemn hearing of

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[33] *Wals, A. E. J., Jickling, B.* "Sustainability" in higher education: From doublethink and newspeak to critical thinking and meaningful learning. *International Journal of Sustainability in Higher Education*, Vol. 3, issue 3, 2002, p. 225.

[34] Judgement of the Constitutional Court of the Republic of Latvia of 6 March 2019 in case No. 2018-11-01, para. 18.1. *Latvijas Vēstnesis*, 48 (6387), 08.03.2019; see about principle of good legislation in Latvia in *Pleps, J.* Satversmes tiesa un labas likumdošanas princips: piezīmes par spriedumu lietā Nr. 2018-11-01 [The Constitutional Court and the principle of good legislation: remarks on the judgment in the case No. 2018-11-01]. *Jurista vārds*, No. 12 (1070), 2019. Available: HTTPS://JURISTAVARDS.LV/DOC/274411-SATVERSMES-TIESA-UN-LABAS-LIKUMDOSANAS-PRINCIPS-PIEZIMES-PAR-SPRIEDUMU-LIETA-NR2018-11-01/ [last viewed 25.03.2020].

[35] See, for example, Judgement of the Constitutional Court of the Republic of 18 April 2019 in case No. 2018-16-03, para. 15.3. *Latvijas Vēstnesis*, No. 80 (6419), 23.04.2019.

[36] *Lautenbach, G.* The Concept of the Rule of Law and the European Court of Human Rights. Oxford: Oxford University Press, 2013, p. 21.

the Court on 10 January 2020, noted that the rule of law had at least 4 enemies: legal nihilism, formal application of law, circumvention of law, and abuse of law.[37] Any legal system is undermined by normative acts that include requirements which, for a reasonable person applying the legal norms, are incomprehensible and unjustified, and the ensuing necessity to obey this normative regulation. Regretfully, institutions of higher education, respecting the principle of the rule of law, are compelled to abide by, at times, absurd requirements and be "creative" in meeting these requirements. For example, to organise an open competition, announce election to a position, the holder of which is already known. This situation arises for the institutions of higher education as they become involved in post-doctorate project[38], in which, in accordance with the norms of the Scientific Activities Law, legal employment relationship had to be established via open competition with the winner of the post-doctoral competition – a particular person.[39] To put it differently, higher educational establishments, abiding

[37] Valsts prezidenta Egila Levita runa Satversmes tiesas svinīgajā sēdē [Speech by President of Latvia Egils Levits at the solemn sitting of the Constitutional Court]. Available: http://www.satv.tiesa.gov.lv/articles/valsts-prezidenta-egila-levita-runa-satversmes-tiesas-jauna-gada-atklasanas-svinigaja-sede/ [last viewed 25.03.2020].

[38] On 19 January 2016, the Cabinet Regulation No. 50 was adopted – Regulations Regarding the Implementation of Activity 1.1.1.2 "Post-doctoral Research Aid" of the Specific Objective 1.1.1 "To Increase the Research and Innovative Capacity of Scientific Institutions of Latvia and the Ability to Attract External Financing, Investing in Human Resources and Infrastructure" of the Operational Programme "Growth and Employment" (hereafter – Cabinet Regulation No. 50), which, *inter alia*, envisages the possibility also for the post-doctoral researchers to implement their scientific ambitions. Pursuant to para. 20 of Cabinet Regulation No. 50, a research application could be submitted, among others, by a research institution, which establishes legal employment relationship with a post-doctoral researcher and ensures access to the infrastructure and human resources for carrying out the research needed in the scope of the research application. In practice, submitting an application for the competition meant cooperation between the institution and a concrete post-doctoral researcher. If the submitted research application was supported [to put it differently – won in the competition], then, in the absence of such, the legal labour relationship had to be established between the concrete post-doctoral researcher and the research institution. It is important to underscore, that the research institution, which submitted the application, was not a decisive factor, instead, the content and the relevance of the research application were important, as well as the achievements of the concrete post-doctoral researcher, since the CV of the particular post-doctoral researcher was an integral part of the research application [see para. 23 of Cabinet Regulation No. 50]. Thus, the qualitative and quantitative research indicators of the concrete post-doctoral researcher were decisive in success of the application. Logically, the research institution should conclude an employment contract with a concrete natural person – a concrete post-doctoral researcher. However, pursuant to the Scientific Activities Law (Section 26), legal employment relationship could be established only by organising an open competition. See Darbības programmas "Izaugsme un nodarbinātība" 1.1.1. specifiskā atbalsta mērķa "Palielināt Latvijas zinātnisko institūciju pētniecisko un inovatīvo kapacitāti un spēju piesaistīt ārējo finansējumu, ieguldot cilvēkresursos un infrastruktūrā" 1.1.1.2. pasākuma "Pēcdoktorantūras pētniecības atbalsts" īstenošanas noteikumi [Operational Programme "Growth and Employment" 1.1.1. of the specific support objective "To increase the research and innovation capacity of Latvian scientific institutions and the ability to attract external funding by investing in human resources and infrastructure" 1.1.1.2. Implementing rules for the measure "Support for post-doctoral research"] (19.01.2016). Available: https://likumi.lv/ta/id/279803-darbibas-programmas-izaugsme-un-nodarbinatiba-1-1-1-specifiska-atbalsta-merka-palielinat-latvijas-zinatnisko-instituciju [last viewed 25.03.2020].

[39] Pursuant to Section 26 of the Scientific Activities Law, scientific institutions (also higher education institutions) have three types of academic positions: 1) senior researcher, which can be occupied by a person with a doctoral degree in science; 2) researcher – may be a person with doctoral or master's degree; 3) research assistant. Persons are elected to these academic positions for the term of six years in an open competition, which must be announced at least a month before by publishing

by the requirements of legal norms, "staged" the announcement of an open competition for a particular post-doctoral student, which, obviously, does not comply with the meaning and essence of an open competition.

Functioning of the Latvian institutions of higher education is regulated by the Law on Higher Education Institutions of 1 November 1995, which has been amended 34 times.[40] However, 2020 has brought new initiatives with respect to higher education. At the Cabinet's sitting of 18 February 2020, "Conceptual Report on Changing the Internal Governance Model of Higher Education Institutions"[41] (hereafter – the Conceptual Report) was supported. Clearly, the Conceptual Report is only the initial step on the path or on the probable path towards changes. It will be possible to discuss more precise changes only after the political ideas are included in legal norms, at least – in a draft law. However, it needs to be highlighted that the title of the Conceptual Report does not reflect in the least the envisaged changes in the higher education in Latvia. Content-wise, alongside a new model of governance, an entirely new typology of institutions of higher education, modification of the whole governance of higher education and also changes to the model of the academic staff members are envisaged.

Although the Conceptual Report is being criticised, the higher education policymakers will have to seek a compromise and the best solutions for a system, which might be called conservative but not such that would be unable to look at itself critically and accept the best solutions aimed at the general development of higher educational establishments. The greatest challenge for education policymakers will be the ability to develop such normative regulation that complies with the meaningful understanding of a sustainable law.

2.1. Constitutional Court and Its Impact on Higher Education

The best possible legal solution is always expected from the legislator – such that is both lawful and fair. If this aim is not reached, the constitutional court, the guardian of the rule of law, can give its contribution. In Latvia, it has been entrusted both with the safeguarding of the *Satversme* and of ensuring the constitutional justice.[42] Undeniably, the Constitutional Court has played an important role in developing a sustainable legal regulation. First of all, the Constitutional Court has been the one to speak about sustainable legal regulation and the criteria that constitute it (see above). Secondly, the Constitutional Court's judgement, which has *erga omnes* force, can be used to develop the so-called future legal relationships. In other words, the ideas expressed in the Constitutional Court's judgements must be kept in mind in developing new legal regulation. The *Saeima*'s obligation is to choose the most appropriate solution that would ensure the compliance of legal regulation with the *Satversme* and, in fulfilling this obligation, the *Saeima*, in accordance with

an announcement in the official journal *Latvijas Vēstnesis*. Zinātniskās darbības likums [Scientific Activities Law] (14.04.2005). Available: https://likumi.lv/ta/id/107337-zinatniskas-darbibas-likums [last viewed 24.03.2020].

40 Augstskolu likums [Law on Higher Education Institutions] (02.11.1995). Available: https://likumi.lv/doc.php?id=37967 [last viewed 24.03.2020].

41 Konceptuālais ziņojums "Par augstskolu iekšējās pārvaldības modeļa maiņu" [Conceptual Report on Changing the Internal Governance Model of Higher Education Institutions]. Available: http://tap.mk.gov.lv/lv/mk/tap/?pid=40483658&mode=mk&date=2020-02-18 [last viewed 24.03.2020].

42 Judgment of the Constitutional Court of the Republic of Latvia of January 18, 2010 in case No. 2009-11-01, para. 5, http://www.satv.tiesa.gov.lv/upload/judg_2009_11.htm [last viewed 30.03.2020].

the principle of good legislation, must take into account the findings expressed in the Constitutional Court's judgements.[43] Thirdly, the Constitutional Court has had and continues to have a direct significance in determining the normative regulation that applies to higher educational establishments. This is understood as rulings by the Constitutional Court, which have *expressis verbis* dealt with issues important for (in this instance) state[44] institutions of higher education, also – influencing their lives in the direct meaning of it.

One of the first cases, in which the Constitutional Court reviewed legal regulation, which directly applied to higher educational establishments, pertained to the constitutionality of the age limit set for academic and research staff.[45] In "Scientists' age limit" case, the Constitutional Court found that not the age, which in the contested legal norms – the first sentence of Section 27 (4) and Section 28 (2) of the law "On Institutions of Higher Education", as well as Section 29 (5) of the Scientific Activities Law, had been set as 65 years, but rather a person's abilities and qualification should be the decisive criterion in applying for the respective job at a higher educational institution.

When the contested legal norms, which restricted the fundamental rights enshrined in Article 106 of the *Satversme*, due to age, were recognised as being void *ex nunc*, the so-called age limit for academic and research staff also disappeared. In practice, this means that no age limits exist for taking an academic or scientific position at the institutions of higher education and science. It would not be correct to assert that only because no age limits exist in Latvia for taking an academic or scientific position, we can identify a rather concerning situation in terms of the renewal of the academic staff. It was established in 2017 that Latvia had a significantly lower indicator regarding the share of academic staff below the age of 50 years (Latvia – 51.4 %, EU average – 63.8 %) and accordingly, the highest indicator among all EU Member States regarding staff members above the age of 65 (Latvia – 15.8 %, EU average – 4.5 %), and a low number of staff members below the age of 35 (Latvia – 16.5 %, EU average – 23.5 %).[46] It must be also taken into account that remuneration in state-financed higher educational establishments is not attractive for specialists who are highly appreciated in the labour market and who might have the ambitions to join

[43] Judgement of the Constitutional Court of the Republic of Latvia of 12 April 2018 in case No. 2017-17-01, para. 21.3. *Latvijas Vēstnesis*, No. 74, 13.04.2018.

[44] As regards private institutions of higher education, a case has been initiated at the Constitutional Court regarding the compliance with the *Satversme* of the Law on Higher Education Institutions, which established the obligation to implement study programmes in the official language also to private institutions of higher education. Par lietas ierosināšanu: Satversmes tiesas 1. Kolēģijas 2019. gada 18. jūlija lēmums [Decision of the Constitutional Court Panel No. 1 on July 18, 2019 to initiate a case]. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/07/2019-12-01_PR_par_ierosinasanu.pdf#search= [last viewed 24.03.2020].

[45] Judgement of the Constitutional Court of the Republic of Latvia of 20 May 2003 in case No. 2002-21-01. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2002/12/2002-21-01_Spriedums_ENG.pdf#search=2002-21-01 [last viewed 24.03.2020].

[46] Sākotnējais novērtējums "Augstākās izglītības institūciju akadēmiskā personāla stiprināšana stratēģiskās specializācijas jomās" Eiropas Savienības struktūrfondi 2014.–2020. gadam 8.2.2. SAM "Stiprināt augstākās izglītības institūciju akadēmisko personālu stratēģiskās specializācijas jomās" [Preliminary Assessment "Strengthening of Academic Staff of Higher Education Institutions in Strategic Specialization Areas" European Union Structural Funds 2014-2020 8.2.2. SO "Strengthening Academic Staff in Strategic Specialization in Higher Education Institutions"]. Available: https://www.izm.gov.lv/images/ES_fondi/Sakotnejie_novertejumi/Sakotnejais_novertejums_822sam_final.pdf [last viewed 24.03.2020].

the academic environment. However, it is clear that the renewal of academic staff is an essential factor for the existence of qualitative, competitive and sustainable higher education.

The Constitutional Court returned to the issue of age limit for academic staff in another case in 2019, noting that "since the Constitutional Court's judgement of 20 May 2003 in case No. 2002-21-01 was pronounced, circumstances have changed, which could be the grounds for the legislator to review the regulation regarding the setting of retirement age for academic staff."[47] I.e., Latvia has a new generation of potential scientists, the number of persons with the doctoral degree has increased, compared to 2003. For example, in 2011, there were 5916 persons with the doctoral degree in Latvia, in 2016 – 7935, whereas in 2017 there were already 8045 holders of the doctoral degree.[48] Every year, several hundred persons obtain the doctoral degree. Thus, in the academic year of 2011/2012, 286 persons obtained the doctoral degree, in 2012/2013 – 313, but in the academic year of 2015/2016 – 256, the number was lower in 2017/2018 – 146 persons.[49] Understandably, each institution of higher education must elaborate a well-considered personnel development strategy to ensure continuous development of the study and research process. The practice of other European universities shows that age limits have been set, and these are within 60–67 years.[50] However, the legislator, in considering the age limits for academic and research staff, respecting, *inter alia*, the norms of the EU Directive 2000/78/EC[51], should be able to find balance and establish respectful relationships with persons, who have dedicated the major part of their lives to a higher educational establishment. Attaining of a certain age does not prohibit a person from sharing experience, tutoring, engaging in research work and inspiring the successors in their work.

Clearly, both education and science are very expensive. Financing or the lack of it is one of the major problems in the space of Latvian higher education. Therefore, the issue [in the near future] to be solved at the Constitutional Court regarding the financing of higher educational establishments could be important. In a case initiated on the basis of an application submitted by the subjects of abstract constitutional review, the Constitutional Court will have to examine the compliance with Article 1 and Article 66 of the *Satversme* of the programmes 03.00.00 "Higher Education", 02.03.00 "Higher Medical Education", 20.00.00 "Culture Education" and sub-programme 22.02.00 "Higher Education" of the state budget for 2019, insofar as these do not ensure the annual increase of the state financing for studies in the state-established institutions of higher education, as provided for in Section 78 (7) of the law "On Institutions of Higher Education", in the amount of at least 0.25 per cent of the gross domestic

[47] Judgement of the Constitutional Court of the Republic of Latvia of 7 June 2019 in case No. 2018-15-01. *Latvijas Vēstnesis*, 116, 10.06.2019, para. 17.1.

[48] Zinātne skaitļos [Science in figures]. Available: https://www.csb.gov.lv/sites/default/files/publication/2018-06/Nr%2028%20Zinatne%20skaitlos%20%2818_00%29%20LV.pdf [last viewed 24.03.2020].

[49] Pārskats par Latvijas augstāko izglītību 2017.gadā [Overview of Latvian higher education in 2017]. Available: https://www.izm.gov.lv/images/statistika/augst_izgl/AII_2017_parskats.pdf [last viewed 24.03.2020].

[50] *Weiss, G.* Age Bar Forces Europe's Senior Researchers to Head West. *Science*, Vol. 302, No. 5652, 2003, p. 1885.

[51] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OV, L 303, 02.12.2000, pp. 0016–0022. Available: https://eur-lex.europa.eu/eli/dir/2000/78/oj/?locale=LV.

product.[52] Thus, the Constitutional Court will have to decide on the norms of the law on [2019] state budget [the norms of the state budget law], which, in general, have not been often contested before the Constitutional Court: it ruled once on the compliance of the norms of the state budget law with the norms of the *Satversme*, on the basis of an application by members of the Parliament[53], and once – on the basis of constitutional complaints submitted by legal persons[54]. However, this case, definitely, will be important not only for the state-financed higher educational establishments hoping to receive more generous funding. This case will be interesting also from the perspective of the legal proceedings before the Constitutional Court and from the aspect of the "dialogue" maintained between the Court and the legislator. In addition to having to rule not only on the constitutionality of legal regulation no longer in force at the time of examining the case, the Constitutional Court also will have to state its opinion on how and whether the legislator abides by the commitments assumed in another law. Section 78 (7) of the Law on Higher Education Institutions stipulates that the Cabinet, upon submitting to the *Saeima* the annual draft state budget law, envisages therein an annual increase in the financing for studies in the state-founded higher educational establishments in the amount of at least 0.25 per cent of the gross domestic product, until the financing granted by the state for studies in the state-founded higher educational establishments reaches at least two per cent of the gross domestic product. From the moment when this norm was adopted and entered into force in 2011[55], the financing allocated for higher education has not increased in the way the legislator had intended. For example, in 2019, the financing increased only by approximately 0.007 % of the gross domestic product. The legislator is not prohibited *per se* from including in another normative act a promise to envisage appropriate financing in the state budget law. Keeping the promise in such cases is most important. The President has called the laws, which are not implemented in life, "the laws of empty promises", which have no place in a state governed by the rule of law. "The laws of empty promises" do not increase trust in the public power. The principle of the rule of law requires, first of all, the legislator itself, who has adopted the law, to comply with its requirements.[56] An institution, which ignores its own decisions, cannot enjoy trust. Hence, most probably, the Constitutional Court will provide, alongside the issue of utmost importance for state higher educational establishments, also considerations on many relevant issues. Ultimately, the Latvian politicians should

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[52] Par lietas ierosināšanu: Satversmes tiesas 4. Kolēģijas 2019. gada 25. novembra lēmums [Decision of the Constitutional Court Panel No 4 on 25 November, 2019 to initiate a case]. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/11/2019-29-01_Lemums_ierosinasana.pdf#search= [last viewed 24.03.2020].

[53] Judgement of the Constitutional Court of the Republic of Latvia of 3 February, 2012 in case No. 2011-11-01. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/05/2011-11-01_Spriedums_ENG.pdf#search=2011-11-01 [last viewed 24.03.2020].

[54] Par tiesvedības izbeigšanu lietā Nr. 2009-42-0103: Satversmes tiesas 2010. gada 17. februāra lēmums [Decision of the Constitutional Court to terminate a procedure on 17 February 2010 in case No. 2009-42-0103]. *Latvijas Vēstnesis*, 29, 19.02.2010.

[55] Grozījumi Augstskolu likumā [Amendments to the Law on Higher Education Institutions] (14.07.2011). Available: https://www.vestnesis.lv/ta/id/233707-grozijumi-augstskolu-likuma [last viewed 06.05.2020].

[56] Judgement of the Constitutional Court of the Republic of Latvia of October 1, 1999 in case No. 03-05(99), para. 1. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/1999/06/03-0599_Spriedums_ENG.pdf#search=03-05(99) [last viewed 24.03.2020].

finally become aware that the national welfare directly depends on investments into education and science.[57]

2.2. Terminated Employment Agreements with Professors: Judgement of the Constitutional Court and Its Implementation

Academic staff is the core of all institutions of higher education. Beyond fulfilling their direct duties in their own higher educational establishments, the faculty members perform additional functions in society: often they are opinion leaders, they are heard, quoted, they could be regarded as "group of cultural producers in modern society."[58]

Undeniably, one's job and its stability are an important element in the life of each person. This aspect was brought to the foreground in case "Employment contracts of academic staff I" .[59] J. Kārkliņš, the professor of the Faculty of Law of the University of Latvia, submitted a constitutional complaint, requesting the Constitutional Court to recognise with the incompatibility between the first sentence of Article 106 of the *Satversme* and the norms of the Law on Higher Education Institutions – Section 27 (5) and Section 30 (4), which envisaged concluding fixed-term (6 years) employment contracts with associate professors of institutions of higher education.[60] The Constitutional Court, broadening the limits of the claim[61], in this particular case examined the constitutionality of several norms, judging on the compatibility of the *Satversme* and the conclusion of fixed-term employment contracts with the professoriate (associate professors and professors).

Examining the contested legal norms as a united regulation, the Court arrived at the conclusion that the norms, insofar as they did not ensure protection against the abuse of successive fixed-term employment contracts, were incompatible with the first sentence of Article 106 of the *Satversme*. It is significant that the contested norms have become legally void *ex nunc* – as of 10 June 2019. The Constitutional Court, being aware that with the legal norms becoming void *ex nunc*, the questions would arise regarding the establishment of legal relationships in the absence of legal regulation, and included in the judgement also the following finding – "in the case under review, the fundamental rights of those persons, with whom successive fixed-term employment contracts have been concluded for

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[57] Judgement of the Constitutional Court of the Republic of Latvia of 7 June 2019 in case No. 2018-15-01. *Latvijas Vēstnesis*, 116, 10.06.2019, para. 14.1.

[58] *Macfarlane, B.* Intellectual Leadership in Higher Education: Renewing the Role of the University Professor. Routledge, 2012, p. 4.

[59] In the case "Employment contracts of academic staff II", issues related to the submitter of the constitutional complaint – J. Neimanis – were examined. In this case, the Court decided to terminate legal proceedings. See Par tiesvedības izbeigšanu lietā Nr. 2018-20-01: Satversmes tiesas 2019. gada 8. oktobra lēmums [Decision of the Constitutional Court to terminate a procedure on 8 October 2019 in case No. 2018-20-01]. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/09/2018-20-01_Lemums_izbeigsana.pdf#search=2018-15-01 [last viewed 24.03.2020].

[60] Par lietas ierosināšanu: Satversmes tiesas 1. Kolēģijas 2018. gada 3. augusta lēmums [Decision of the Constitutional Court Panel No. 1 on 3 August, 2018 to initiate a case]. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/08/2018-15-01_Lemums_ierosinasana.pdf#search=2018-15-01 [last viewed 24.03.2020].

[61] The Constitutional Court reviewed not only the legal norms that were contested in the constitutional complaint but also Section 28 (2) of the Law on Higher Education Institutions that applied to professors. Judgement of the Constitutional Court of the Republic of Latvia of 7 June 2019 in case No. 2018-15-01. *Latvijas Vēstnesi*s, 116, 10.06.2019, para. 10.

performing the duties of an associate professor or a professor, until the moment when the legislator adopts legal regulation that complies with the *Satversme* and ensures protection against the risk of abuse of such contracts, must be protected", therefore, an instruction was given "until new legal regulation is adopted, the right of the respective persons to maintain the existing employment should be examined by directly applying the first sentence of Article 106 of the *Satversme* and the findings included in this judgement."[62]

The Constitutional Court's judgement should ensure legal stability, clarity and peace within the social reality.[63] However, after this judgement by the Constitutional Court entered into force, uncertainties rather increased in the higher educational establishments themselves. In real life, after the contested norms became void, the legal employment relationships with associate professors and professors, established for the term of 6 years, were terminated in institutions of higher education, leading to the question – how an institution of higher education should develop relationships with its employees within the framework of the *Satversme*, respecting the findings included in the judgement. Clearly, each institution of higher education, in view of the individual nature of legal employment relationships and the findings included in the Constitutional Court's judgement, has resolved its cases. At the University of Latvia, for instance, this matter was resolved in the Senate, establishing a kind of transitional regulation until the new legal regulation is adopted by the *Saeima*.[64] An opinion about the Constitutional Court's judgement of 7 June 2019 was provided by the Council of Higher Education.[65] However, what the institutions of higher education and several thousand employees of these institutions expected the most was the *Saeima's* or the legislator's response and interest in regulating this very important matter – legal employment relationships with the professoriate of higher educational establishments. Until now (May 2020), the legislator's conduct has been rather passive – a draft law envisaging settling the legal relationships in accordance with the respective judgement by the Constitutional Court cannot be found on the *Saeima's* register of draft laws. However, the issue is important due to several reasons.

It cannot be excluded that different approaches to regulating legal employment relationships may develop in different higher educational establishments. Moreover, it is clear in the context of sustainability that academic staff is one of the elements in the sustainability of higher education. Justice of the Constitutional Court I. Ziemele has noted in her separate opinion, analysing the importance of the professoriate in the state, that "the existence of strong professoriate in the state is one of the mandatory preconditions for sustainable

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[62] Judgement of the Constitutional Court of the Republic of Latvia of 7 June 2019 in case No. 2018-15-01. *Latvijas Vēstnesis*, 116, 10.06.2019, para. 21.1.

[63] Judgement of the Constitutional Court of the Republic of Latvia of 21 December 2009 in case No. 2009-43-01, para. 35.1. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-43-01_Spriedums_ENG.pdf#search=2009-43-01 [last viewed 24.03.2020].

[64] LU Senāta 23.12.2019. lēmums Nr. 53. Par profesoru un asociēto profesoru darba līgumiem. Nepublicēts, pieejams LU informatīvajā sistēmā [University of Latvia Senate 23.12.2019. Decision No. 53. On Employment contracts of professors and associate professors. Unpublished]. Available in UL information system.

[65] Par Satversmes tiesas 2019. gada 7. jūnija spriedumu [On the judgment of the Constitutional Court of June 7, 2019]. Available: http://www.aip.lv/files/Nr_53_AIP_vestule_par_ST_spriedumu.pdf [last viewed 26.03.2020].

national development".[66] It is essential that this case *per se* demonstrates the dialogue between the Constitutional Court and the legislator – whether and how the legislator understands what should follow, what kind of response is required after the Constitutional Court's judgement has entered into force. The thesis that the legislator may choose the best legal solution is to be respected: it can either adopt or not adopt the necessary legal norms. However, in this case, it is clear that regulating the legal employment relationships in institutions of higher education is an essential matter, requiring corresponding attention.

The author believes that the regulation on the legal employment relationships with academic staff should be developed in a way to attain the meaning and essence of a sustainable higher educational establishment, the aims and objectives of higher education, *inter alia*, respecting the aim of both the university and the state – achieving sustainability. The legislator must look at the establishment of this legal relationship in a complex or systemic way. First of all, it must be underscored that the academic staff of higher educational establishments does not consist solely of professors and associate professors.[67] It is possible that the amendments to the Law on Higher Education Institutions are delayed because the Conceptual Report offers a quite promising perspective on the development of academic staff. The author of this article quite hopefully views the overarching aim included in the Conceptual Report – that a new model of the career of academic staff should be implemented, based on the unity of academic and research work, envisaging one position, to which academic staff is elected, 40-hour work week and workload, comprising research, teaching, administrative and "third mission" duties.[68] Hopefully, this would also eliminate absurd of a kind, requesting to elect the same person in the same institution of higher education to two positions: to the position of academic staff in compliance with the Law on Higher Education Institutions, and the scientific position in accordance with the Scientific Activities Law. However, the delay in regulating the legal employment relationships with the professoriate in institutions of higher education does not give a good and endorsable signal in the context of sustainable development.

2.3. Expert of Latvian Science Council: National Particularity

Legal proceedings before the Constitutional Court may conclude in two ways: The Constitutional Court may deliver a judgement or adopt a decision on terminating legal proceedings. At the end of 2019, on 12 December, legal proceedings were terminated in case No. 2019-02-03 "On Compliance of Para. 3 of the Cabinet Regulation of 12 December 2017 No. 724 "Regulation on the Qualification Criteria of the Experts of the Latvian Council of Science,

[66] Satversmes tiesas tiesneses Inetas Ziemeles Atsevišķās domas lietā Nr. 2018-15-01 [Separate opinion of the Constitutional Court judge Ineta Ziemele in case No. 2018-15-01], para. 4. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/08/2018-15-01_Atseviskas_domas-1.pdf#search=2018-15-01 [last viewed 26.03.2020].

[67] Section 27 (1) of the Law on Higher Education Institutions provides that the academic staff of a higher education institutions consists of: 1) professors, associate professors; 2) docents, senior researchers; 3) lecturers, researchers; 4) assistants. Augstskolu likums [Law on Higher Education Institutions] (02.11.1995). Available: https://likumi.lv/doc.php?id=37967 [last viewed 24.03.2020].

[68] Konceptuālais ziņojums "Par augstskolu iekšējās pārvaldības modeļa maiņu" [Conceptual Report on Changing the Internal Governance Model of Higher Education Institutions], p. 25. Available: http://tap.mk.gov.lv/lv/mk/tap/?pid=40483658&mode=mk&date=2020-02-18 [last viewed 24.03.2020].

Establishing of Experts' Committees and Organising of the Work thereof" and the decision of 15 January 2018 by the Latvian Council of Science No. 19-1-1 "The Procedure for Granting the Rights of an Expert of the Latvian Council of Science" with Article 1 and Article 64 of the *Satversme* of the Republic of Latvia".[69] The case had been initiated on the basis of an application by the Administrative District Court, pertaining to a dispute regarding granting the rights of an expert between a natural person and the Latvian Science Council, which, on the basis of the contested legal regulation had refused to grant the rights of an expert to this person. After the case was initiated, the Cabinet found that the contested legal norms had been issued *ultra vires*; therefore, by the Cabinet Regulation of 23 April 2019, No. 172 "Amendments to the Cabinet Regulation of 12 December 2017 No. 724 "Regulation on the Qualification Criteria of the Experts of the Latvian Council of Science, Establishing of Experts' Committees and Organising of the Work thereof"", para. 3 of Regulation No. 724 was deleted and, accordingly, also the Procedure of the Latvian Science Council became void. The legislator, the *Saeima*, on 13 June 2019, by adopting the law "Amendments to the Scientific Activities Law", included in Section 8 the authorisation to the Cabinet to determine the qualification criteria of an expert of the Latvian Science Council in a branch of science, the procedure for assessing them and for granting the rights of a Latvian Science Council's expert.[70] In view of this authorisation, the Cabinet adopted such regulation – Regulation No. 320 "Procedure for Granting the Rights of the Latvian Science Council's Experts and for Establishing of Experts' Committees" (hereafter Regulation No. 320) on 9 July 2019.[71] Thus, the set of criteria for granting the status of an expert, which is so important for the academic staff of institutions of higher education, can be found in Regulation No. 320.

From the perspective of the legal proceedings before the Constitutional Court, the Court's decision can be upheld, it, on the basis of para. 2 of Section 29 (1) of the Constitutional Court Law, adopted the decision on terminating legal proceedings because the contested legal norms had become void and the legal problem, presented in the application, had been eliminated.[72] This solution complies with the Constitutional Court's case law.[73] In view of the fact that the legal proceedings had been initiated on the basis of a court's application, respecting the objective of the concrete review, the Court presented its considerations also as to why it was not necessary to recognise the contested legal

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[69] Par tiesvedības izbeigšanu lietā Nr. 2019-02-03: Satversmes tiesas 2019. gada 12. decembra lēmums [Decision of the Constitutional Court to terminate a procedure on 12 December 2019 in case No. 2019-02-03]. *Latvijas Vēstnesis*, 252, 16.12.2019.

[70] Grozījumi Zinātniskās darbības likumā [Amendments to the Scientific Activities Law], (13.06.2019). Available: https://www.vestnesis.lv/op/2019/120.1 [last viewed 06.05.2020].

[71] Latvijas Zinātnes padomes ekspertu tiesību piešķiršanas un ekspertu komisiju izveides kārtība [Procedure for granting the rights of experts of the Latvian Council of Science and setting up expert commissions] (09.07.2019). Available: https://likumi.lv/ta/id/308118-latvijas-zinatnes-padomes-ekspertu-tiesibu-pieskirsanas-un-ekspertu-komisiju-izveides-kartiba [last viewed 25.03.2020].

[72] Satversmes tiesas likums [Constitutional Court Law] (05.06.1996). Available: http://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/ [last viewed 24.03.2020].

[73] Compare with Par tiesvedības izbeigšanu lietā Nr. 2015-23-01: Satversmes tiesas 2016. gada 12. septembra lēmums [Decision of the Constitutional Court to terminate a procedure on 12 September 2016 in case No. 2015-22-01]. *Latvijas Vēstnesis*, 178, 14.09.2016.

norms as being void from a past date.[74] The author, however, subjectively really wished to see the Constitutional Court's opinion on the merits of this case – the requirements set for the Latvian Science Council's (hereafter LSC) expert in social sciences, to be more precise, in the legal science.

Currently, pursuant to Regulation No. 320, the rights of LSC's expert in the legal science can be acquired by a person, who, in the last three years, has had either three anonymously reviewed scientific publications in a scientific journal or conference proceedings, indexed in the database *SCOPUS* or *Web of Science* or included in the database *ERIH+*, or two anonymously reviewed scientific publications in a scientific journal or publication of conference proceedings, which have been indexed in the database *SCOPUS* or *Web of Science* or included in the database *ERIH+* and a reviewed scientific monograph on one scientific topic or problem, and it comprised a bibliography. This means that the rights of LSC's expert in the legal science can be acquired only by a person, whose work has been published in editions, which, accordingly, have been indexed in any of the databases indicated. It's a paradox, yet, for example, a professor, who has written several monographs in Latvian, prepared commentaries on laws in Latvian, whose work will be quoted by courts, used by the legislator, students, cannot acquire the status of LCS's expert. It is noted in the annotation to the Cabinet Regulation No. 320 that "the concrete databases are the generally accepted practice globally for assessing the level of importance of scientific publications [..]"[75], nevertheless, this would require additional explanations. At the same time, it must be admitted that the science community of several East European countries has decided to support private entrepreneurs, who maintain the most famous databases. The opinion expressed by the Young Scientists' Association cannot be upheld, i.e., that "monographs are an important type of scientific literature but do not ensure the same quality as scientific articles, because they lack clear requirements regarding relevance and quality, which are set by *Web of Science* or *Scopus* databases [..]."[76] Surely, it is possible to set criteria also for monographs, the preparation of which *per se* may require more work than preparing an article. In other words, the issue is, whether only a person, who has the indicated publications, can be a Latvian expert of legal science but not an expert of legal science recognised by another international organisation.

In Latvia, the Latvian Science Council's expert is vested with a decisive and major significance. For example, scientists, who have the rights of LSC's expert,

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[74] Par tiesvedības izbeigšanu lietā Nr. 2019-02-03: Satversmes tiesas 2019. gada 12. decembra lēmums [Decision of the Constitutional Court to terminate a procedure on 12 December 2019 in case No. 2019-02-03]. *Latvijas Vēstnesis*, 252, 16.12.2019, para. 16.

[75] Ministru kabineta noteikumu projekta "Latvijas Zinātnes padomes ekspertu tiesību piešķiršanas un ekspertu komisiju izveides kārtība" sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Initial impact assessment report (annotation) of the Cabinet of Ministers draft regulations "Procedure for Granting Expert Rights of the Latvian Council of Science and Establishing Expert Commissions"]. Available: http://tap.mk.gov.lv/lv/mk/tap/?dateFrom=2019-03-06&dateTo=2020-03-05&mk&text=ekspertu+ties%C4%ABbu+&org=0&area=0&type=0 [last viewed 24.03.2020].

[76] Latvijas Jauno zinātnieku apvienības viedoklis par Latvijas Zinātnes padomes eksperta tiesību piešķiršanas kritērijiem [Opinion of the Latvian Young Scientists Association on the criteria for granting expert rights of the Latvian Council of Science]. Available: http://ljza.lv/wp-content/uploads/2017/09/LJZA-viedoklis-par-LZP-eksperta-kriterijiem-20170913_v1.pdf [last viewed 24.03.2020].

may be included in the Promotional Council.[77] The status of the LSC's expert may be a selection criterion in research and other projects. To phrase it differently, the status of the LSC's expert can be highly significant not only in the work of the institution of higher education but also for the employment prospects of the persons themselves. It is noted in the annotation to Regulation No. 320, *inter alia*, that "the matter of the expert's rights is also the matter of the employment, remuneration and reputation of the academic staff of the higher educational establishment."[78]

The status "the Latvian Science Council's expert" is a certain Latvian national particularity and, internationally, it is irrelevant, whether a person, who represents a Latvian branch of science, does or does not have this status. A researcher's international recognition can be ensured by publications in foreign languages and appreciation (usability) gained in the international scientific community. One can agree that this status in interconnection with the set requirements reveals the international recognisability of the particular person. Furthermore, undeniably, academic staff members must be able to publish their research in a foreign language so that the work could be indexed in the respective databases and that science should be open to the international community. This is not questioned. Unquestionably, in the 21st century, English has become the language of science.[79] However, the requirements analysed here mean that publications in journals, editions, which have not entered these databases, including articles, monographs in Latvian, in Latvia are perceived as being less significant. The Constitutional Court has repeatedly underscored that Latvian language is one of the values of the state.[80] Moreover, Latvian language has been recognised as the language of "the united discourse of a democratic society"[81] in Latvia. Therefore, Latvian scholars of law are responsible for development of legal Latvian vocabulary by means of high-quality research. It is worth noting the position taken by the Lithuanian Constitutional Court, which has emphasised that legal regulation, pursuant to which the Lithuanian language is construed to mean that the scientific work published in this language is held to be inferior, second-rate work, could not be established, because, as a matter of principle, that

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[77] Zinātniskā doktora grāda piešķiršanas (promocijas) kārtība un kritēriji [Procedures and Criteria for Awarding a Doctoral Degree]. (27.12. 2005), p. 5. Available: https://likumi.lv/ta/id/124787-zinatniska-doktora-grada-pieskirsanas-promocijas-kartiba-un-kriteriji [last viewed 24.03.2020].

[78] Ministru kabineta noteikumu projekta "Latvijas Zinātnes padomes ekspertu tiesību piešķiršanas un ekspertu komisiju izveides kārtība" sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Initial impact assessment report (annotation) of the Cabinet of Ministers draft regulations "Procedure for Granting Expert Rights of the Latvian Council of Science and Establishing Expert Commissions"]. Available: http://tap.mk.gov.lv/lv/mk/tap/?dateFrom=2019-03-06&dateTo=2020-03-05&mk&text=ekspertu+ties%C4%ABbu+&org=0&area=0&type=0 [last viewed 24.03.2020].

[79] *Altbach, P. G.* The Past, Present, and Future of the Research University. In: Road to Academic Excellence: The Making of World-Class Research Universities, *Altbach, P. G., Salmi, J.* (eds.). World Bank Publications, 2011, p. 33.

[80] Judgement of the Constitutional Court of the Republic of Latvia of 21 December 2001 in case No. 2001-04-0103, para. 3.2. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2001/06/2001-04-0103_Spriedums_ENG.pdf#search=2001-04-0103 [last viewed 24.03.2020].

[81] Judgement of the Constitutional Court of the Republic of Latvia of 23 April 2019 in case No. 2018-12-01, para. 21.1. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/07/2018-12-01-12.-Saeimas-dep_latvie%C5%A1u-valoda-valsts-skol%C4%81s_ENG.pdf#search=2018-12-01 [last viewed 24.03.2020].

would mean that the Lithuanian language is an inferior or second-rate language.[82] "That is incompatible with the constitutional status of Lithuanian as the official language."[83] It is a paradox, but, examining the judgement by Latvian courts, the author has not observed references to works by Latvian scientists in foreign languages, which are assigned a higher value by Regulation No. 320. Quite to the contrary – the rulings included in the database of edited rulings show that the works by scholars of law, published in Latvian, are used in courts' rulings.[84]

Presumably, the Latvian legislator should look for the possibility to balance the openness of the legal science to the international community and the national or own needs, which will not always attract the interest of foreign scholars. Clearly, the science of law is "primarily national".[85] Social sciences and humanities differ from other branches of science because they are usually led by the particular society and its national, cultural and political problems, and the aim of these branches of science is creating and transmitting shared values, safeguarding values, the cultural and national identity of society.[86] Hence, also research in these areas is published in the national language and, although the outcomes of this research are not that universal by nature, these studies "are significant specifically to the concrete national, cultural and political community."[87] Likewise, it needs to be understood, whether the scientific value of work *per se* is higher if the article has been published in a journal, which is indexed in the respective database. Again, the finding must be upheld that the scientific value of a work should be assessed not only by considering fact that the publication has been indexed in an international database but "first of all, according to their novelty, original ideas, fundamentality, impact upon formation of new spheres and/or subject areas of scientific research, etc."[88] In other words, the fact that a publication is not found in a particular database does not prove that it should be seen, automatically, as less valuable.

Therefore, although Regulation No. 320 discussed above allows differentiating between the branches of science, another approach should be considered in determining a scientist's assessment within the space of Latvian science, respecting the special nature of a branch of science, including the science of law. It is absolutely right that "national science and natural sciences require a different approach. In natural sciences, to reach excellence, integration into the global science is needed, and there excellence can be assessed by ratings and

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[82] Ruling of the Constitutional Court of the Republic of Lithuania in case No. 18/06 on May 5, 2007, para 17. Available: https://www.lrkt.lt/en/court-acts/search/170/ta1402/content [last viewed 26.03.2020].

[83] Ibid.

[84] LR tiesu nolēmumi [Rulings of the Courts]. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 26.03.2020].

[85] Valsts prezidenta Egila Levita uzruna Latvijas Universitātes Juridiskās fakultātes 100-gades pasākumā [Address by President of Latvia Egils Levits at the 100th anniversary of the University of Latvia, Faculty of Law]. Available: https://www.president.lv/lv/jaunumi/zinas/valsts-prezidenta-egila-levita-uzruna-latvijas-universitates-juridiskas-fakultates-100-gades-pasakuma-25985 [last viewed 25.03.2020].

[86] Ruling of the Constitutional Court of the Republic of Lithuania in case No. 18/06 on May 5, 2007, para. 13. Available: https://www.lrkt.lt/en/court-acts/search/170/ta1402/content [last viewed 25.03.2020].

[87] Ibid.

[88] Ruling of the Constitutional Court of the Republic of Lithuania in case No. 18/06 on May 5, 2007, para. 16. Available: https://www.lrkt.lt/en/court-acts/search/170/ta1402/content [last viewed 25.03.2020].

publication points, but another perspective is required for the legal science".[89] To reiterate: without denying the fact that the legal science should also be open to the international research community, because truly modern science of law is simultaneously of a national and cross-border nature.[90] However, the state itself may not regard a high quality and fundamental research in the official state language as being inferior and less valuable.

Summary

1. In view of the role and objectives of the institutions of higher education, they are an indispensable part of the national strategic aim – becoming a sustainable state.
2. Modern institutions of higher education not only participate in attaining the common (national) sustainability but also develop themselves as sustainable institutions, formulating this strategy in their policy documents.
3. Institutions of higher education must offer education on sustainable development, and be dedicated, in general, to sustainable development. Modern institutions of higher education must prepare a graduate who is able to think critically and integrate various aspects in decision making, to adopt decisions aimed at reaching sustainability.
4. Policymakers in the area of higher education, in the context of the possible reform of higher education, should seek compromises and the best solutions for the system that might be called conservative, but not such that would be unable to consider themselves critically and would accept the best proposals aimed at the development of higher educational institutions in general. The greatest challenge for education policymakers will be the ability to develop a legal regulation that complies with a meaningful understanding of a sustainable law.
5. The norms that set an age limit for taking academic and scientific positions in higher educational establishments became legally void by the Constitutional Court's judgement; not solely because of these reasons, Latvia has faced a problem renewal of academic staff. The renewal of academic staff is an important factor for ensuring qualitative, competitive and sustainable higher education. Since the Constitutional Court's judgement in 2003, the circumstances have changed, which could be the grounds for the legislator to review the policy with respect to setting the retirement age for academic staff. However, most importantly, the legislator should establish respectful relationships with persons, who have dedicated the major part of their lives to the higher educational establishment. Attainment of a certain age does not prohibit a person from sharing experience, tutoring, engaging in research, and inspiring the successors in one's work.

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6. The norm of the law "On Institutions of Higher Education", which envisages a gradual increase of financing for higher education, is "a law of empty promises" because the legislator, having envisaged annual increase in financing of higher education, has not met this commitment. However, without financing, it is not and will not be possible to reach the ambitious aims of education and the state.
7. One's job and job stability are an important element in the lives of all persons. With the norms of the law "On Institutions of Higher Education", which provided conclusion of fixed-term contracts with the professoriate, becoming legally void, the legislator has not taken the necessary measures for adopting new legal regulation. Hence, the establishment of legal employment relationships with the professoriate has been left in the care of higher educational establishments themselves. Academic staff is also an element in the sustainability of higher education, the legal regulation on its employment is an essential matter.
8. The status "Latvian Science Council's expert" is a certain Latvian national particularity and internationally it is not relevant, whether a person representing a branch of science in Latvia, has or does not have this status. International recognition of a scholar can be ensured by publications in foreign languages and the use of their work by the international research community. However, in the working life in Latvia, the status of the Latvian Science Council's expert has been granted a decisive and major importance.
9. Without denying the fact that legal science should be open to the international research community, the state itself may not recognise a high quality and fundamental research in the official language as being inferior and less valuable. If legal science primarily is a national science, another approach should be considered in determining the value of a legal scholar in the Latvian space of science in the context of the Latvian Science Council's expert title.

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Problematics of Identification of a Continuous Criminal Offence

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The publication focuses on the issue of the substance of a continuous criminal offence and its features to draw a line of demarcation between a continuous criminal offence as a type of separate (unitary) criminal offence and the real concurrence of several independent criminal offences, which is required for the correct qualification of criminal offences. In searching for an answer to this, the criminal law regulation has been analysed, findings of the criminal law theory and judicature have been studied, the practice of applying the norms of criminal law in criminal cases of various categories, in providing the legal qualification of criminal offences, has been compiled.

Keywords: criminal law, continuous criminal offence, real concurrence of criminal offences, qualification of criminal offences.

Contents

Introduction

The pre-requisite for reaching the aim defined in Section 1 of the Criminal Procedure Law[1], – fair regulation of criminal legal relations, is the correct qualification of a criminal offence, the importance of which has been highlighted repeatedly in the judicature and in case law by referring to the findings of the legal doctrine, by the Supreme Court of the Republic of Latvia pointing out that, in qualifying a criminal offence, legally significant circumstances of the occurrence, which have been established by applicable, admissible, credible and sufficient evidence, are compared with the mandatory elements of a criminal offence as set out in the Criminal Law (object, objective side, subject, subjective side). Only in the case where the actual elements of the offence coincide with the elements of the particular criminal offence, envisaged in the Criminal Law, there are grounds for recognising that a criminal offence has been committed and for the correct qualification of it.[2]

The above statements are fully applicable to the matter examined in the article because the fact, whether an offence committed by a person is qualified as a separate continuous criminal offence or concurrence of multiple independent criminal offences, is significant and entails criminal law consequences since, in the first case, the person is accused of committing only one criminal offence, whereas in the second instance – of committing multiple criminal offences.

Problems in the understanding of a continuous criminal offence are revealed both in the publications on this topic by several authors and by the fact that the standing working group on the Criminal Law at the Ministry of Justice is developing corrections to the concept of the continuous criminal offence, as well as the fact that the case law related to this matter is not uniform, which will be presented below; however, the criminal law regulation and explanations of it will be examined first.

1. Separate (Unitary) Continuous Criminal Offence and Real Concurrence of Criminal Offences

The features of a separate (unitary) criminal offence have been normatively consolidated in Section 23 of the Criminal Law[3] (hereafter – also CL), where the legislator has provided that a separate (unitary) criminal offence is one

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[1] Kriminālprocesa likums: LV likums [The Criminal Procedure Law: Law of the Republic of Latvia]. *Latvijas Vēstnesis*, No 74, 11.05.2005.

[2] Augstākās tiesas Krimināllietu departamenta 06.09.2018. lēmums lietā SKK-186/2018 (11261000514 [Decision of 06.09.2018 by the Department of Criminal Cases of the Supreme Court in No. SKK-186/2018 (11261000514)]; Augstākās tiesas Departamenta 19.07.2018. lēmums lietā SKK-362/2018 (11331060914) [Decision of 19.07.2018 by the Department of Criminal Cases of the Supreme Court in No. SKK-362/2018 (11331060914)]; Augstākās tiesas Krimināllietu departamenta 28.03.2018. lēmums lietā SKK-J-138/2018 (11511002914) [Decision of 28.03.2018 by the Department of Criminal Cases of the Supreme Court in No. SKK-J-139/2018 (11511002914)]; Augstākās tiesas Krimināllietu departamenta 01.12.2017. lēmums lietā SKK-696/2017 (11351023714) [Decision of 01.12.2017 by the Department of Criminal Cases of the Supreme Court in No. SKK-696/2017 (11351023714)] u.c. See more: *Liholaja, V*. Noziedzīgu nodarījumu kvalifikācija. Palīglīdzeklis krimināltiesību normu piemērotājiem [Qualifiction of Criminal Offences. Aid to Parties Applying the Norms of Criminal Law]. Rīga: Tiesu namu aģentūra, 2020, pp. 32–33.

[3] Krimināllikums: LV likums [The Criminal Law: Law of the Republic of Latvia]. *Latvijas Vēstnesis*, No.199/200, 08.07.1998.

offence (act or failure to act), which has the constituent elements of one criminal offence, or also two or several mutually related criminal offences encompassed by the unitary purpose of the offender and which correspond to the constituent elements of only one criminal offence.

The theory of criminal law differentiates between simple separate (unitary) criminal offences and complex separate (unitary) criminal offences, where a separate (unitary) criminal offence comprises more than one unlawful action or failure to act, or also the adverse consequences caused by them.[4] A continuous criminal offence is one type of a complex separate (unitary) criminal offence, which, pursuant to the provisions of CL Section 23 (3), is constituted by several mutually related similar criminal acts, which are directed to a common objective, if they are encompassed by the unitary purpose of the offender, and therefore in their totality they form one criminal offence.

Hence, it follows from the legal provisions that a continuous criminal offence is characterised by the fact that all acts are 1) mutually related; 2) similar; 3) directed against the same interest; 4) are committed with a unitary purpose and have a common final objective. The unitary purpose and common objective are the principal binder, which unites multiple similar acts into a unitary criminal offence. Thus, in case of unlawful enrichment, a person is aware that several thefts must be committed, which are all united by one objective of the person – to gain maximum material benefit.[5]

The unitary purpose as the subjective basic criterion of a continuous criminal offence can be identified by the totality of objective features of multiple criminal offences, their interrelation. The unitary purpose is characterised by the fact that it is already initially directed at such a common objective that is achieved by several temporarily mutually related acts.

In analysing the criteria of a continuous criminal offence, U. Krastiņš also underscores the unitary purpose (objective) as one of the main binding elements in a continuous criminal offence, the existence of which, in his opinion, could be evidenced by systemic commitment of – at least three – similar unlawful acts.[6]

In upholding U. Krastiņš' opinion, it should be emphasised that the systematic nature of unlawful acts as the objective criterion of a criminal offence clearly "demonstrates" the mental activities of a person, leading to the conclusion that multiple offences committed by a person are encompassed by a unitary purpose and directed to a common objective. The link between the external manifestations of a criminal offence and a person's mental activity was once underscored also by the Supreme Court, noting "the fact that, in the procedural documents of pre-trial

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[4] *Krastiņš, U.* Noziedzīga nodarījuma sastāvs un nodarījuma kvalifikācija. Teorētiskie aspekti [Constituter Elements of a Criminal Offence and Qualification o fan Offence. Theoretical Aspects]. Rīga: Tiesu namu aģentūra, 2014, p. 294.

[5] *Liholaja, V., Hamkova, D.* O ponjatii i priznakah prodolzhaemogo prestupnogo dejanija [On the Understanding of the Features of a Continuous Criminal Offence. Sbornik XVI Mezhdunarodnoj nauchno-prakticheskoj konferencii "Ugolovnoe pravo: strategija razvitija v XXI veke" 24-25 janvarja 2019 goda [Proceedings of XVI International Scinentific-practical Conference "Criminal Law: Strategy of Development in XXI century"]. Moskva: MGJuA, pp. 570–576.

[6] *Krastiņš, U.* Turpināta noziedzīga nodarījuma problemātika krimināltiesībās [The Problems of a Continuous Criminal Offence in Criminal Law]. In: Tiesību zinātnes uzdevumi, nozīme un nākotne tiesību sistēmās. LU Juridiskās fakultātes 7. starptautiskās zinātniskās konferences rakstu krājums The Objectives, Significance of the Legal Science and the Future in Legal Systems. Proceedings of the 7th International Scientific Conference of the Faculty of Law of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2019, p. 350.

investigation and courts' rulings, the objective features of a criminal offence, i.e., the external manifestations of a person's conduct, are examined separately from their mental attitude towards the committed acts and the consequences caused by them, prevents from formulation of the form of guilt in full and qualifying the offence correctly".[7]

If a person has committed two or more independent, mutually unrelated offences, which do not correspond to the features of a continuous criminal offence, the real concurrence of criminal offences will form (CL Section 26 (3)), which is understood, as explained in the theory of criminal law, as cases, where one person, by taking actions or failing to act, these actions being separated in time, commits two or more successive independent criminal offences, for which the person, until the moment the judgement is delivered, has not been sentenced and with respect to which the limitation period has not set in.[8]

The following features of a real concurrence of criminal offences has been indicated in the theory of criminal law: "1) the same person has committed two or more criminal offences; 2) each of these offences comprises the constituent elements of a criminal offence (independent offence); 3) each criminal offence has been envisaged in a separate section or part of a section (paragraph) of the Special Part of the Criminal Law; 4) the person has not been sentenced for any of the offences forming the concurrence; 5) the limitation period of criminal liability has not set in with respect to any of the offences or no other grounds exist for releasing a person from criminal liability".[9]

Since by the law of 13 December 2012 "Amendments to the Criminal Law"[10], the repetition of criminal offences as a type of multiplicity and as a qualifying feature was deleted from the criminal law, multiple separate criminal offences, if they do not comprise the features of a continuous criminal offence and form the real concurrence of criminal offences, must be qualified independently, determining punishment for each criminal offence and setting the final punishment in accordance with the concurrence of criminal offences.

However, although the features of a continuous criminal offence and of the real concurrence of criminal offences have been consolidated in law, theory and practice, the understanding of them in the practice of applying the norms of criminal law is not uniform, which is proven by the case law in criminal cases with respect to criminal offences of several concrete categories.

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7 Tiesu prakse kriminālllietās par noziedzīgiem nodarījumiem, kas saistīti ar tīšu smagu miesas bojājumu nodarīšanu: Augstākās tiesas prakses apkopojums [Case law in criminal cases regarding criminal offences related to inflicting intentionally serious bodily harm: Digest of the Supreme Court's Case Law], 2004, p. 35.Available: www.at.gov.la/lv/judikatura/tiesu-prakses-apkopojumi/kriminaltisibas [last viewed 09.03.2020].

8 *Krastiņš, U., Liholaja, V.* Krimināllikuma komentāri. Pirmā daļa (I-VIII[2] nodaļa). Otrais papildinātais izdevums [Commentaries on the Criminal Law. Part One (Chapter I-VIII[2]). Second Supplemented Edition]. Rīga: Tiesu namu aģentūra, 2018, p. 123.

9 *Krastiņš, U.* Noziedzīga nodarījuma sastāvs un nodarījuma kvalifikācija. Teorētiskie aspekti [Constituter Elements of a Criminal Offence and Gualification of an Offence. Theoretical Aspects]. Rīga: Tiesu namu aģentūra, 2014, p. 307.

10 Grozījumi Krimināllikumā: LV likums [Amendments to the Criminal Law: Law of the Republic of the Latvia]. *Latvijas Vēstnesis*, No. 202, 27.12.2012.

2. Overview of Case Law

For the analysis of case law, rulings in criminal cases on multiple criminal offences were selected, the legal assessment of which illustrates most vividly the problem outlined in the article, and one of such criminal offences is illegal activities with the means of payment of another person, envisaged in CL Section 193, i.e., using the means of payment of another person.

Already in 2006, when the Supreme Court prepared a digest of the case law with respect to illegal activities with financial instruments and means of payment, the question was foregrounded, whether in those cases, where a person repeatedly used the means of payment of another person, withdrawing cash from ATM or paying for purchases or services, the offence committed by a person should be qualified as a separate continuous criminal offence or as the real concurrence of several criminal offences.

In the digest of case law, the Supreme Court has explained that, pursuant to the provisions of CL Section 23 (3), multiple withdrawal and / or use for paying for purchases or services of another person's monies, which has been done within a short interval from the same source (account) by uniform actions, having a unitary purpose and a common final objective – clearing the account or obtaining the maximum amount possible, purchasing goods until the account has sufficient coverage for the transaction, should be regarded as continuous illegal use of means of payment.[11]

The Senate and the Chamber of Criminal Cases of the Supreme Court of the Republic of Latvia, having examined the results of the digest at the general meeting of Judges, noted, additionally, that the repetition of illegal activities (use, destruction, damage, forgery, use or distribution of forgery) with means of payment was constituted by: activities with means of payment belonging to several persons, with several means of payment belonging to one person or activities within a longer interval of time, in another place, in another way or with another purpose with the same means of payment belonging to the same person.[12] However, it must be noted that, in accordance with the current criminal law regulation, the reference to repeated activities should be replaced by a reference to the real concurrence of criminal offences.

The examination of the case law of the recent years in cases, where the offender used several times the means of payment belonging to one person to pay for purchases or services or to withdraw cash from ATM, which was done within short intervals in time, it can be concluded that currently the offence,

[11] Tiesu prakse par nelikumīgām darbībām ar finanšu instrumentiem un maksāšanas līdzekļiem: Augstākās tiesas prakses apkopojums [Case Law Regarding Illegal Activities with Finansial Instruments and Means of Payment: Digest of the Supreme Court's Case Law], summary, para. 8.2., 2006, p. 38. Available: www.at.gov.lv/lv/judikatura/tiesu-prakses-apkopojumi/kriminaltiesibas/ [last viewed 09.03.2020].

[12] Par lietu izskatīšanu par nelikumīgām darbībām ar finanšu instrumentiem un maksāšanas līdzekļiem: Augstākās tiesas Senāta Krimināllietu departamenta un Krimināllietu tiesu palātas tiesnešu kopsapulces 2006. gada 5. decembra lēmuma 6. punkts [On Examining Cases Regarding Illegal Activities with Finansial Instruments and Means of Payment. Para. 6 of the General Meeting of Judges of the Department of Criminal Cases of the Supreme Court's Senate and the Chamber of Criminal Cases on 5 December 2006]. Available: www.at.gov.lv/lv/judikatura/tiesnesu-kopsapulcu-lemumi/krimināllietu-departaments [last viewed 09.03.2020].

basically, has been qualified as a separate continuous criminal offence.[13] However, there are also cases, where, in the presence of similar actual circumstances, the real concurrence of criminal offences occurs.

Hence, it follows from the judgement of 24 April 2018 by Zemgale District Court that, on 24 January 2017, person B robbed person C of means of payment – AS "Swedbank" debit card and PIN code, following which, on the same day, made various purchases and also withdrew cash from person C's account as well as attempted to pay for a purchase on 27 January. This offence was qualified as the real concurrence of nine criminal offences.[14]

To illustrate the problem, the judgement of 5 March 2018 by Zemgale District Court needs to be highlighted in particular, by it person A was recognised as being guilty of committing 158 criminal offences, each of which was independently qualified as a crime envisaged in CL Section 193 (2). In the period from 2 January 2016 to 14 July 2016, person A had used illegally the means of payment of person B, transferring monies from person B's account into his own and other persons' accounts, inflicting upon person B, in total, material damage in the amount of 14 483 EUR.[15]

The analysis of the case law of the recent years with respect to the illegal use of means of payment allows concluding that today the illegal use of the internet banking, by taking, in the name of another person, the so-called "pay-day loans", is the dominant type of using the means of payment of another person. In this regard, it must be noted that the qualification of these offences in the case law is pronouncedly non-uniform, i.e., in the presence of comparable actual circumstances, these offences are qualified both as the real concurrence or multiple independent criminal offences in accordance with CL Section 193 (2) and as a separate continuous criminal offence.

Thus, for example, by the judgement of 17 January 2018 by City of Riga Latgale District Court, person A was recognised as being guilty of committing 28 criminal offences, qualifying each of them in accordance with CL Section 193 (2), person A had illegally used the means of payment of another person – person C, and in the name of person C had taken out loans from various credit companies in the period from 30 January 2017 to 3 February 2017.[16] A similar solution to

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[13] Daugavpils tiesas 2019. gada 25. oktobra spriedums krimināllietā Nr. 11181009719) [Judgement of 25.10.2019 by Daugavpils Court in Criminal Case No. 11181009719]; Kurzemes rajona tiesas 2019. gada 10. oktobra spriedums krimināllietā Nr. 11261069515 [Judgement of 10.10.2019 by Kurzeme District Court in Criminal Case No. 11261069515]; Rīgas rajona tiesas 2019. gada 16. jūlija spriedums krimināllietā Nr. 11355028418 [Judgement of 16.07.2019 by Riga District Court in Criminal Case No. 11355028418]; Vidzemes rajona tiesas 2019. gada 15. marta spriedums krimināllietā Nr. 11300007818 [Judgement of 15.03.2019 by Vidzeme District Court in Criminal Case No. 113400007818]; Vidzemes rajona tiesas 2019. gada 26. jūnija spriedums krimināllietā Nr. 11280016116 [Judgement of 26.06.2019 by Vidzeme District Court in Criminal Case No. 11280016116]; Zemgales rajona tiesas 2019. gada 21. oktobra spriedums krimināllietā Nr. 11370024019 [Judgement of 21.10.2019 by Zemgale District Court in Criminal Case No. 11370024019].

[14] Zemgales rajona tiesas 2018. gada 24. aprīļa spriedums krimināllietā 1131002917 [Judgement of 24.04.2018 by Zemgale District Court in Criminal Case No. 1131002917].

[15] Zemgales rajona tiesas 2018. gada 5. marta spriedums krimināllietā Nr. 11310051516 [Judgement of 05.03.2018 by Zemgale District Court in Criminal Case No. 11310051516].

[16] Rīgas pilsētas Latgales priekšpilsētas tiesas 2018. gada 17. janvāra spriedums krimināllietā Nr. 11310010817 [Judgement of 17.01.2018 by City of Riga Latgale District Court in Criminal Case No. 11310010817].

qualification is found in the judgement of 10 November 2016 by Gulbene District Court.[17]

At the same time, upon having identified similar facts of the case, Tukums District Court, by its judgement of 16 December 2016, recognised person A as being guilty of committing the criminal offence envisaged in CL Section 193 (2), qualifying it as a separate continuous criminal offence. It follows from the text of the judgement that person A, from 27 October 2015 to March 2016, illegally used the means of payment transferred in the use of person B by applying for loans from various capital companies.[18] The offence by person D, who, from July 2015 until June 2016, using the means of payment of person F – the internet banking, had taken out payday loans in the name of person F at least 89 times, was qualified as a continuous crime.[19]

Judgement of 13 December 2016 by Aizkraukle District Court[20] needs to be mentioned, it follows from the judgement that person A had illegally used the means of payment of person B – the internet banking, applying for loans from various capital companies on the following dates – 22 and 26 April, 1, 9, 25 and 26 May, 1 and 7 June, 3 November 2013, 7 December 2017. Thus, the person was recognised as being guilty of committing 10 crimes in accordance with CL Section 193 (2). Presumably, the use of the means of payment from 22 April to 7 June 2013, within short intervals between each instance of use, should be qualified as one criminal offence, whereas the offences committed on 3 November 2013 and 7 December 2014, most probably, should be qualified as independent criminal offences.

As can be seen, in the presence of comparable circumstances the qualification of criminal offences is radically different. Since in this category of cases abridged judgements, as well as criminal proceedings examined in the procedure of agreement prevail, regretfully, arguments in favour of one or another solution to the qualification are absent. Notwithstanding the lack of reasoning, it should be concluded that, most probably, such differences in the legal assessment are ungrounded and do not ensure a fair resolution of criminal legal relation because, irrespectively of the similar circumstances of the offence, in one case a person has been sentenced for one criminal offence whereas in another – is recognised as being guilty of committing tens or even hundreds of criminal offences.

The authors' opinion is that in the case, where a person uses multiple times the means of payment of one person within a short interval of time and pay-day loans are taken from various capital companies, the offence should be qualified as a separate continuous criminal offence. In this category of cases, it is important to establish that a person is using the means of payment of one person, because the objective of multiple acts by the offender is directed at obtaining a maximum gain, by using another person's means of payment, and usually these acts are committed within relatively short intervals of time. If the period of time

[17] Gulbenes rajona tiesas 2016. gada 10. novembra spriedums krimināllietā Nr. 11170004616 [Judgement of 10.11.2016 by Gulbene District Court in Criminal Case No. 11170004616].

[18] Tukuma rajona tiesas 2016. gada 16. decembra spriedums krimināllietā Nr. 11390045616 [Judgement of 16.12.2016 by Tukums District Court in Criminal Case No. 11390045616].

[19] Daugavpils tiesas 2019. gada 21. februāra spriedums krimināllietā Nr. 11320011518 [Judgement of 21.02.2019 by Daugavpils Court in Criminal Case No. 11320011518].

[20] Aizkraukles rajona tiesas 2016. gada 13. decembra spriedums krimināllietā Nr. 11370021216 [Judgement of 13.12.2016 by Aizkraukle District Court in Criminal Case No. 11370021216].

between the instances of using another person's means of payment is longer, then the reasons for it, etc. should be examined on a case-by-case basis.

In identifying a continuous criminal offence and the real concurrence of criminal offences, a relevant problem is also the qualification of robbery of property, predominantly, theft on a small scale, which is committed systematically, from various sources, and the like, because, pursuant to CL Section 180 (1) each offence like this is qualified as a separate theft on small scale, although the total value of property stolen by the person exceeds small scale.

The problems in qualifying such robbery of property on small scale and possible decriminalisation was discussed at the sittings of the standing working group on Criminal Law of the Ministry of Justice of the Republic of Latvia, where U. Krastiņš expressed the opinion that returning to the previous case law was needed, where in the case of several thefts of small scale the total value of the stolen property and money was calculated for all thefts taken together and the offence was not qualified in accordance with CL Section 180, but in accordance with CL Section 175. Notably, this practice was based on the explanations included in Decision of 14 December 2001 by the Supreme Court No. 3 "Application of law in criminal cases regarding robbery of another person's property", referred to above, and Decisions of 23 July 1999 No. 3 "On the application of some norms of the law in criminal cases in connection with the coming into force of the Criminal Law", providing that in determining the amount of losses if multiple similar criminal offences had been committed (multiple thefts, multiple robberies, multiple fraud, multiple misappropriations), the value of the objects acquired by criminal offences should be added up.[21]

However, the Supreme Court has changed the previous practice by prescribing that each theft should be punished separately, irrespectively of the total value of stolen property, consistently reinforcing the thesis regarding inadmissibility of mechanical aggregation in several Supreme Court's decisions.[22] As predicted,[23]

[21] Likuma piemērošana krimināllietās par svešas mantas nolaupīšanu: Augstākās tiesas plēnuma 2001. gada 14. decembra lēmuma 7.5. punkts [Application of law in criminal cases regarding robbery of another person's property; para. 7.5 of the Supreme Court's plenary meeting on 14 December 2011]. In: Latvijas Republikas Augstākās tiesas plēnuma lēmumu krājums [Collection of Decisions by the Plenary of the Supreme Court of the Republic of Latvia]. Rīga: Latvijas Policijas akadēmija [Police Academy of Latvia]. 2002; Par likuma atsevišķu normu piemērošanu sakarā ar Krimināllikuma spēkā stāšanos, Augstākās tiesas plēnuma 1999. gada 23. jūlija lēmums Nr. 3 8.1. punkts [Para. 8.1. of Decision No. 3 of the Supreme Court's plenary meeting of 23 July 1999 "On the application of some norms of the law in criminal cases in connection with the coming into forse of the Criminal law"]. In: Latvijas Republikas Augstākās tiesas plēnuma lēmumu krājums [Collection od Decisions by the Plenary meeting of the Supreme Court of the Republic of Latvia]. Rīga: Latvijas Policijas akadēmija [Police Academy of Latvia], 2002, pp. 79, 65.

[22] Sk. Augstākās tiesas Senāta 2009. gada 17. aprīļa lēmums lietā SKK-155/2009 (11330045206) [Decision of 17.04.2009 by the Supreme Court Senate in case No. SKK-155/2009 (11330045206)]; Augstākās tiesas Senāta 2011. gada 13. septembra lēmums lietā SKK-J-509/2011 (11354019308) [Decision of 13.09.2011 by the Supreme Court Senate in case No. SKK-J-509/2011 (11354019308)]; Augstākās tiesas Senāta 2011. gada 19. decembra lēmums lietā SKK-671/2011 (15830511505) [Decision of 19.12.2011 by the Supreme Court Senate in case No. SKK-671/2017 (15830511505)].

[23] Sk. *Liholaja, V.* Kriminālsodu politikas koncepcija un no tās izrietošie grozījumi Krimināllikumā [The Concept of Policy on Criminal Punishments and Amandments to the Criminal Law Following from it]. LU žurnāls "Juridiskā zinātne" [Journal of the University of Latvia "Law"], No. 3. Rīga: Latvijas Universitāte, 2012, pp. 8–12; *Liholaja, V.* Grozījumi Krimināllikumā un to piemērošana sodu noteikšanas praksē [Amendments to the Criminal Law and Application thereof in the Practice of Determining Punishments]. In: Tiesību efektivitāte postmodernā sabiedrībā. Latvijas Universitātes 73. zinātniskās konferences rakstu krājums [The Effectiveness of Law in Post-Modern Society.

the situation was made even more complicated by deleting the repetition of a criminal offence from criminal law, as the result of which all criminal offences against property, the liability for repeated commitment of which was especially envisaged in the law, were qualified independently in accordance with the corresponding section of the Special Part of the Criminal Law.

In practice this solution is applied also to other categories of cases, which is confirmed by the decision of 28 February 2013 by the Supreme Court in case No. SKK-762013 regarding application of CL Section 148 (1).[24] In this decision, the Senate of the Supreme Court emphasised that the appellate instance court, in examining a case, had not assessed, how exactly the significant damage of this criminal offence, which had substantive elements of crime, had manifested itself with respect to the owner of each computer software referred to in the charges, i.e., whether by the actions committed by accused B.A. significant damage had been caused to each right-owner of the computer software programmes indicated in the charges.

Similarly, although in this case – in determining large scale, the issue was resolved in a criminal case, in which A. was charged with committing a crime envisaged in CL Section 148 (3) because Ltd. [X], in which A was a board member, stored in its computer system and used in its business activities 14 illegal (reproduced without the permission by the subject of copyright) computer software programmes, the total value of which was to be considered as being large scale. In revoking the judgement by the appellate instance court, by which A. was recognised as being guilty of committing the crime he was charged with, the Department of Criminal Cases of the Supreme Court in its decision of 28 February 2017 in case No. SKK-426/2017 indicated that the appellate instance court had not examined, whether, in the particular case, large scale had been determined correctly, by adding up the value of illegal software programmes, without taking into account the fact that the copyright to these software programmes belonged to nine owners, and the material damage caused to each of them did not amount to large scale. By referring to the decision of 28 February 2013 by the Senate of the Supreme Court in case No. SKK-76/2013, mentioned above, the Supreme Court noted that, in the particular case, before qualifying A.'s act in accordance with CL Section 148 (3), it had to be assessed, whether the damage inflicted to each of the copyright owners amounted to large scale.[25]

M. Leja, assessing critically the decision of 28 September 2017 by the Department of Criminal Cases of the Supreme Court in case No. SKK-426/2017, has validly noted that "in view of the fact that the Supreme Court had not contested that the storing of all 14 illegal software programmes had been one offence in the meaning of CL Section 23, the damage that had been caused by storing such illegal software programmes, had to be summed up (aggregated), irrespectively of the fact whether the owner of the illegal software programme was one person or several persons because these consequences followed from the same offence. It would be necessary to assess the damage caused by each

Proceedings of the 73rd Scientific Conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2015, pp. 192–203.

[24] Augstākās tiesas 2013. gada 28. februāra lēmums lietā SKK-76 /2013 (11816006611) [Decision of 28.02.2013 by the Supreme Court Senate in Criminal case No. SKK-76/ 2013 (11186006611)].

[25] Augstākās tiesas Krimināllietu departamenta 2017. gada 28. septembra lēmums lietā SKK-426/2017 (11816015611) [Decision of 28.09.2017 by the Department of Criminal Cases of the Supreme Court in case No. SKK-426/2017 (11816015611)].

illegally stored software programme separately only in the case if the storing of each software programme had been recognised as being a separate offence. Only this approach corresponds to the structure of a separate (unitary) criminal offence. The criterion advanced by the Supreme Court, which would allow aggregation of the consequences, i.e., one owner of the illegally stored software programmes, has nothing in common with the structure of the particular criminal offence. Hence, it is not the criterion for determining, whether the adverse consequences should be aggregated".[26]

To align this issue, the standing working group on Criminal Law of the Ministry of Justice had prepared and submitted a proposal to add Part 3^1 to CL Section 23 in the following wording: "A separate continuous criminal offence is constituted also by similar criminal offences that have been committed with a unitary purpose and the total value of its objects exceeds small scale or amounts to significant or large scale"; however, it was not approved by the Legal Committee of the *Saeima*. In 2020, the working group on Criminal Law plans to continue examining the issue of possible amendments to the Criminal Law to return to the case law, where in the cases of multiple criminal offences against property of the same type the total value of damages is calculated, thus making persons liable in accordance with the most severe section of the Criminal Law or part of the section, appropriate for the total amount of damage caused.

The criminal offences, examined above, depending upon particular circumstances of the case, may be recognised as being both continuous and separate independent criminal offences that constitute the real concurrence, however, there is also such group of criminal offences, which, although formally comply with the features of a continuous criminal offence, in view of their peculiarities and nature, should be recognised as such only in some exceptional cases. Thus, it is considered also in the German case law that a continuous criminal offence cannot occur if interests of pronouncedly personal nature of persons are jeopardised, for example, life, health, and freedom.[27]

It must be noted that already the digest of case law, prepared in 2007, on the qualification of sexual crimes and the crime of leading to depravity[28] identified a lack of uniform understanding of the features of a repeated and continuous criminal offence, indicated in CL Section 23 (3): 1) a person commits several mutually related similar acts; 2) these acts are directed to a common objective, and 3) they are encompassed by the unitary purpose of the offender. Although in many cases sexual acts with minors were perpetrated over the course of several years if the features indicated in CL Section 23 (3) were not identified the criminal offences were qualified as continuous, although, in accordance with

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[26] *Leja, M.* Krimināltiesību aktuālie jautājumi un to risinājumi Latvijā. Austrijā, Šveicē, Vācijā. Noziedzīga nodarījuma uzbūve: cēloņsakarība, vaina; krimināltiesību normu interpretācija un spēks laikā. I daļa [Current Criminal Law Issues and the Solutions to them in Latvia, Austria, Switzerland and Germany. The Stucture of a Criminal Offence: Causality, Guilt; Interpretation of the Norms of Criminal Law and their Validity Period. Part I]. Rīga: Tiesu namu aģentūra, 2019, p. 771.

[27] Vācijas Federālās Augstākās tiesas lieta [Case of the German Federal Supreme Court]: Urteil vom 17.10.1958, 5 St.R 296/58. Available: https://www.jurion.de/ueteile/bgh/1958-10/17/5-str-296-58/ [last viewed 10.03.2020].

[28] Tiesu prakse krimināllietās pēc Krimināllikuma 160. un 162.panta: Augstākās tiesas prakses apkopojums, 2006 [Case law in criminal cases on this basis of Section 160 and Section 162 of the Criminal Law: Digest of the Supreme Court's Case Law], 2006, pp. 15–16, 19–20. Available: www.at.gov.lv/lv/judikatura/tiesu prakses apkopojumi/kriminaltiesibas/ [last viewed 10.03.2020].

the criminal law regulation they had to be qualified as repeated criminal offences, but in accordance with the current regulation, in view of the fact that repetition has been deleted from criminal law, as separate independent criminal offences.

However, as noted in the Supreme Court's digest of case law of 2017 regarding criminal offences against morality and sexual inviolability, committed against minors,[29] likewise, there have been cases, where the courts, upon identifying several independent criminal offences, had qualified these as one criminal offence.

Thus, for example, the court established that in the period from spring of 2012 until September 2014, at times that were not established with greater precision during the investigation, the perpetrator, being an adult and knowing and being aware of the fact that his daughter, born on [..] 1999, had not attained the age of sixteen and was dependent materially and otherwise from him, while being inebriated, at least once per two months, made his daughter lie down on his bed and touched her body, including her sexual organs, as well as penetrated by fingers into her vagina, in some cases made her satisfy him orally by taking his penis in her mouth. The victim succumbed to the accused person's actions, being afraid that the accused could subject her to violence and also that he might drive her from home. The court recognised that the accused, by these actions, had committed a criminal offence envisaged, in CL Section 160 (6).[30]

In the period from mid-September 2016 until [..], the accused, being of age and knowing that the victim, born on [..] 2002, had not attained the age of sixteen, had with her at least five sexual intercourses at his place of residence. The court recognised that the accused, by these acts, had committed a criminal offence envisaged in CL Section 161, thus qualifying five sexual acts as one criminal offence and determining punishment for one criminal offence.[31]

In both digests the Supreme Court validly found that "each sexual act is one criminal offence, which has the features of the constituent elements of one criminal offence" and it had to be qualified as a separate criminal offence because there were no grounds for recognising that several separate sexual acts were mutually related. This finding is applicable also to sexual crimes and leading to depravity, envisaged in CL Section 160 and Section 161, which, as to their content and objective features, differ substantially from such criminal offences, which can be manifested as continuous, for example, theft, which can be done from the same source in several instances within short intervals and which in their concurrence form a completed unitary criminal offence. In the case of a continuous criminal offence, all identical acts by the offender are conducted within the framework of one criminal offence and are deemed as being completed, when these acts have been discontinued in accordance with the person's own will or due to reasons beyond their control.

Whereas sexual crimes are completed at the moment of initiating the sexual act or other activities that constitute the objective side of crimes envisaged in CL Sections 160 and 161; leading to depravity, in turn, is recognised as being completed when the offender has committed immoral actions directed at another

[29] Tiesu prakse krimināllietās par noziedzīgiem nodarījumiem pret tikumību un dzimumneaizskaramību, kas izdarīti ar nepilngadīgo: Augstākās tiesas prakses apkopojums, 2017 [Case law in criminal cases regarding criminal offences against morality and sexual inviolability, commites against minors: Digest of the Supreme Court's Case Law, 2017]. Available: www://at.gov.lv/judikatūra/tiesu-prakses-apkopojumi/kriminaltiesibas/ [last viewed 10.03.2020].

[30] Ibid., p. 11.

[31] Ibid., p. 16.

person. With each successive, newly initiated activity of sexual nature or immoral actions another criminal offence is committed, which jeopardises a person's interests anew and must be assessed as an independent criminal offence. An exception could be those cases, where it is established that the offender, the nature of whose sexual activities reveal a unitary purpose, without interrupting the abuse of the state of helplessness, violence or threat thereof, or interrupting these only for a short moment, commits successive sexual activities with the same person. Such understanding of continuous rape follows also from the German case law, where it is recognised that raping the same victim three times within 15–30 minute intervals is one offence in the legal meaning if the accused had initially decided to commit a sexual act with her multiple times and if following the initial use of violence (before the first instance of rape) the victim was no longer subjected to it, but the victim succumbed to the offender's demands under the influence of the initial violence.[32]

Studies of the experience of other countries could facilitate more accurate understanding of the concept of a continuous criminal offence, set out in the Criminal Law, as well as of the features characterising it and determining its role in the process of qualifying criminal offences, therefore an insight into the criminal law regulation on this matter of several foreign countries follows.

3. The Concept of a Continuous Criminal Offence and the Understanding of Its Features in Foreign Criminal Law

Research of several foreign criminal laws allows concluding that the institution of a continuous criminal offence has not been normatively consolidated in the criminal law of many countries, for example, Austria, Belarus, Belgium, Denmark, Estonia, the Russian Federation, Lithuania, Switzerland, the Federal Republic of Germany, and references to continuous criminal actions are found only in connection with determining the punishment. Thus, for example, Section 56 (1) of the Criminal Code of the Netherlands provides that if several offences are related in such a way that they have to be considered as one continuous act, notwithstanding the fact that each in itself constitutes a crime or a criminal offence, only one criminal provision is applicable.[33]

In those foreign criminal laws, which provide a definition of a continuous criminal offence, the features of it differ slightly. Thus, pursuant to Section 54 (2) of the Criminal Code of Bosnia and Herzegovina, a continuous criminal offence arises when the perpetrator intentionally commits a number of identical criminal offences or offences of the same type, which coincide as to the manner of

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[32] Vācijas Federālās Augstākās tiesas lieta [Case of German Federal Supreme Court]: Beschluss vom 22.11.2011., 4 StR 480/11, 7. rdk. Available: http://www.hrr-strafrecht.de/hrr/4/11/4-480-11.php Quoted from: *Leja, M.* Krimināltiesību aktuālie jautājumi un to risinājumi Latvijā, Austrijā, Šveicē, Vācijā. Noziedzīga nodarījuma uzbūve; cēloņsakarība; vaina; krimināltiesību normu interpretācija un spēks laikā. I daļa [Current Criminal Law Issues and the Solutions to them in Latvia, Austria, Switzerland and Germany. The Structure of a Criminal Offence: Causality, Guilt; Interpretation of the Norms of Criminal Law and their Validity Period. Part I]. Rīga: Tiesu namu aģentūra, 2019, p. 762.

[31] Criminal Code of the Kingdom of Netherlands. Available: https://www.legislationline.org/downloads/id/6415/files/Netherlands_CC-am2012_en.pdf [last viewed 13.03.2020].

[33] Criminal Code of Bosnia and Herzegovina. Available: https://www.legislationlinee,org/download/id/8499/files/CC_BIH_am2018_eng.pdf [last viewed 13.03.2020].

perpetration and other circumstances in the case;[34] Section (1) of the Criminal Code of the Republic of Georgia states that a crime provided for by one article or one part of an article, which contains two or more acts committed with a single purpose, constitutes a continuous crime;[35] it follows from Section 29 of the Criminal Code of the Republic of Moldova that a continuous crime is an offense committed with a single intention and is characterised by two or more identic criminal activities having a common purpose;[36] the legislator of the Czech Republic notes in Section 116 of the Criminal Code that in the case of a continuous criminal offence individual criminal acts are committed with a single purpose, target the same object, are conducted by the same or similar activity with close coincidence in time;[37] Article 32 (2) of the Criminal Code of Ukraine, differentiating between a repeated and a continuous crime, notes: "Repetition [..] shall not be present in commission of a continuing offence comprised of two or more similar acts connected by one criminal intent".[38]

It follows from the above that in all criminal laws examined, in defining a continuous criminal offence, first of all, it is noted that the offence is committed by several criminal acts, in some countries allowing not only the same but also similar acts, and, secondly, it is emphasised that these acts are encompassed by the offender's uniform purpose and these are directed towards a common objective. This, in turns, leads to the conclusion that the definitions of a continuous criminal offence, included in the Criminal Law of this country and the examined criminal laws of foreign countries, substantially do not differ.

In those countries, where the concept of a continuous criminal offence is not normatively regulated, its features are identified on the basis of findings of the criminal law doctrine and case law. In view of certain succession in the criminal law regulation, a brief insight into the way this matter has been resolved in the Russian Federation is provided and the opinions of criminal law experts from other countries are analysed.

In the Russian Federation, similarly to Latvia, by the reform of 2003, recurrent commitment of criminal offences, which is a variety of repetition, was deleted from the criminal code, hence, as noted by N. Kuznetsova, the problem of differentiating between a recurrent and continuous crime disappeared; however the problem remained in the qualification of actual recurrent crimes, although not recognised as such legally. The author gives an example that hundreds of committed thefts with simple constituent elements of the crime are qualified according to the episodes as single instances of theft, thus abandoning

[34] Criminal Code of Georgia. Available: https://www.legislationline.org/download/id/8540/files/Georgia_CC_2009_amAug2019_en.pdf [last viewed 13.03.2020].

[35] The Criminal Code of the Republic of Moldova. Pieejams http://www.legislationline.org/download/id/3559/files/Criminal Code RM.pdf [last viewed 13.03.2020].

[36] Criminal Code of the Czech Republic. Available: https://www.legislationline.org/download/id/6370/file?Czech Reppublic_CC_2009_am2011_en.pdf [last viewed 13.03.2020].

[37] Criminal Code of Ukraine. Available: https://www.legislationline.org/documents/action/popup/id/16257/preview [last viewed 14.03.2020].

[38] *Kuznetsova, N. F.* Problemy kvalifikacii prestuplenij. Lekcii po speckursu "Osnovy kvalifikacii prestuplenij" [Problems in Qualifying Crimes. Lectures of the Special Course "Fundamentals of Qualifying Crimes"]. Moskva: Gorodec, 2007, p. 313.

the principle that qualification must be compatible with the severity of the offence.[39]

Thus, noting that in the situation, where the Criminal Code of the Russian Federation does not comprise the legal concept of a continuous crime and the main features therefor but the Russian criminal law doctrine does not have uniform views on how to solve the problem related to the understanding of a continuous crime and differentiation thereof from the concurrence of crimes, G. Agayev and E. Zorina are offering their own concept of a continuous crime: a continuous crime should be understood as a threat that arises from several legally similar actions, which are mutually united by a single purpose and directed at reaching a common objective, which in their totality form a unitary crime. It is noted in the substantiation that the specificity of a continuous crime is manifested, in particular, in the unity of all committed criminal acts and their internal mutual relatedness because each act is only a necessary stage (part) of the totality, where each offence is targeting the same object, in the similarity of the way of committing them, in the unity of the consequences that have set in, as well as the unity of the criminal purpose of the perpetrator.[40]

Also A. Kozlov and A. Sevastyanov point to similar features of a continuous criminal offence and the understanding thereof, although their views differ slightly. Thus, the authors referred to above, in proposing to recognise as one of the typical features of a continuous crime several acts of conduct, recommend recognising as such not only the same acts but also actions of the same type, for example, open theft or stealth theft. Likewise, the authors believe that reference to the same source is not necessary since a continuous criminal offence would not change if some of the acts it comprises would be committed in another place, from another source. Moreover, there are such criminal offences that have no source and the location where these are committed is insignificant. In characterising the final objective, it is emphasised that it should be, to the extent possible, specified as to its scale, amount, number, mass, etc., but as regards the unitary purpose, it is emphasised, that this concerns direct purpose. The person is aware of the harm inflicted by their several common acts, is aware that the outcome can be achieved only by several acts, is aware of the development of an objective link between separate offences, separate outcomes and the common outcome, wishes to achieve each outcome separately and the common outcome.[41]

J. Sudnik, a representative of the Belarus State University, has expressed his opinion on the features of a continuous crime that should be included in the Criminal Code of the Republic of Belarus, noting that 1) the actions that constitute a continuous crime could be the same or of the same type; 2) a unitary purpose, which encompasses all episodes of the continuous crime, is a necessary feature of a continuous crime; 3) there should be one direct object (but one source, although this possibility is not excluded, is not a mandatory feature;

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[39] *Agaev, G. A., Zorina, E. A.* Prodolzhaemye prestuplenija i ih otgranichenie ot sovokupnosti prestuplenij [Continuous Crimes and Differentiation thereof from Concurrent Crimes]. Available: https://zakoniros.ru/?p=27116 [last viewed 13.03.2020].

[40] *Kozlov, A. P., Sevast'janov, A. P.* Edinichnye i mnozhestvennye prestuplenija [Unitary and Multiple Crimes]. Sankt-Peterburg: Juridicheskij centr Press, 2011, pp. 56–68.

[41] *Sudnik Ju. G.* Prodolzhaemye prestuplenija: poisk ischerpyvajushhego opredelenija ponjatija dlja razreshenija problem kvalifikacii [Continuous Crimes: Search for an Exhaustive Definition of the Concept to Resolve Problems of Qualification]. Available: elib.bsu.by/bitstream/123456789/35398/1/Судник.pdf [last viewed 13.03.2020].

4) the interval between separate episodes of a continuous crime can be of different length – from some minutes to several years.[42]

The publication by N. Pryahina and V. Schepel'kov is noteworthy; the authors advance a most interesting issue, which, in our opinion, calls for theoretical discussions, with respect to the concept of a continuous criminal offence. Not denying that a continuous criminal offence is a phenomenon of general nature, at the same time it is admitted that some of its aspects (features) are manifested differently in different criminal offences, pointing out that a line of demarcation should be drawn between the general features of a continuous criminal offence, which all criminal offences have and which should be regulated on the level of the general part of the criminal law, and those features, which are typical only of a certain type of criminal offence.

In view of the above, it is proposed to define a continuous criminal offence as committing several legally similar offences, having an objective and subjective link that allows assessing them as a whole, which would be the common features of a continuous criminal offence.

The authors explain that the legal sameness of actions means that actions in various episodes formally have the features that are set out in the same section of the criminal law, for example, two thefts.

The objective link between several offences can be manifested in different ways since, on the one hand, it is a common feature that is typical of the phenomenon in general but, on the other hand, with respect to various types of crime it can manifest itself differently. Thus, for example, for a continuous theft the objective link will be manifested by the fact that it has been committed from one source, fraud in the form of a financial pyramid is characterised by causing damage as the result of a mechanism that has been triggered once, and this condition objectively links several episodes of fraud; bribery would be continuous if money is transferred in several instalments for the same actions of a public official or their failure to act.

It must be noted that the criteria of a continuous criminal offence once used to be explained in the decisions of the plenary meeting of the Supreme Court of the Republic of Latvia and in the digests of case law, by taking into account the peculiarities of the constituent elements of certain criminal offences. Thus, for example, it is explained in para. 7.5 of the decision of 14 December 2001 by the plenary meeting of the Supreme Court of Latvia No. 3 "Application of law in criminal cases regarding robbery of another person's property" that such unlawful taking of another person's property from the same owner or from the possession of the same possessor, which consists of several uniform criminal acts, have a unitary purpose and common objective – to rob property in a certain amount or scope – and which in their concurrence constitute a unitary criminal offence, should be considered as continuous robbery. Likewise, it is noted that robbery of property cannot be considered continuous if it has been committed in different places, from different sources, by different type of robbery or in different circumstances, or if the successive robbery of property had occurred after a longer

[42] *Pryahina, N. I., Schepel'kov, V. F.* Otgranichenie prodolzhaemogo prestuplenija ot sovokupnosti prestuplenij [Differentiation between a Continuous Crime and Concurrence of Crimes]. *Kriminalist#*, No. 1 (8), 2011, pp. 7–11.

period of time or with purpose that had arisen separately, although the type of robbery had been the same.[43]

It follows from Para 6 of the decision of 21 June 1993 by the plenary meeting of the Supreme Court of Latvia No. 7 "On Case Law in Bribery Cases" that continuous bribery can manifest itself as receiving a certain amount of the bribe in several instalments as well as receiving the amount of the bribe, in accordance with a previous agreement, from several persons for the same official act. Likewise, the receipt of a bribe in a double or larger amount for various actions by a public official required by the same person or various actions required by several persons also should be assessed as continuous taking of a bribe.[44]

Whereas Para 4 of the decision of 22 December 1997 by the plenary meeting of the Supreme Court of Latvia No. 6 "On applying law in criminal cases regarding illegal (arbitrary) felling of trees, destruction or damaging of forests" indicates that the time and place of felling trees, as well as the interval between the instances of felling, the type of use of the timber as well as other circumstances in the case could be indicative of continuous arbitrary felling of trees.[45]

As regards qualification of evading payment of taxes and similar payments, it has been explained in the digest of the Supreme Court of Latvia: if the offender's offence is constituted by several acts or failures to act that are mutually interconnected and are directed at a common objective – evasion of paying taxes or similar payments, which are encompassed by the offender's unitary purpose, the offence should be recognised as being a separate (unitary) continuous criminal offence. In determining the losses caused to the state or the local government as the result of the continuous criminal offence, the total amount of all losses inflicted upon the state or the local government by evading the payment of one or several types of taxes is taken into account. However, if the offender had a separate intention to commit two or more evasions to pay taxes or similar payments each instance of evasion should be qualified independently. [46]

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[43] Likuma piemērošana krimināllietā par svešas mantas nolaupīšanu: Augstākās tiesas plēnuma 2001. gada 14. decembra lēmums Nr. 3, 7.5. punkts [Application of law in criminal cases regarding robbery of another person's property: Para. 7.5. of the Supreme Court's plenary meeting on 14 December 2001]. In: Latvijas Republikas Augstākās tiesas plēnuma lēmumu krājums Collection of Decisions by the Plenary Meeting of the Supreme Court of the Republic of Latvia]. Rīga: Latvijas Policijas akadēmija, 2002, p. 76.

[44] Par tiesu praksi kukuļošanas lietās: Augstākās tiesas plēnuma 1993. gada 21. jūnija lēmums Nr. 7 [On the Case Law in Bribery Cases. Decision No. 7 of the Supreme Court's Plenary Meeting on 21 June 1993]. In: Latvijas Republikas Augstākās tiesas plēnuma lēmumu krājums [Collection of Decisions by the Plenary Meeting of the Supreme Court of the Republic of Latvia]. Rīga: Latvijas Policijas akadēmija [Police Academy of Latvia], 2002, p. 39.

[45] Par likumu piemērošanu krimināllietā par koku nelikumīgu (patvaļīgu) ciršanu, meža iznīcināšanu vai bojāšanu: Augstākās tiesas 1997. gada 27. decembra lēmums Nr. 6, 4. punkts [Para. 4 of Decision No. 6 by the Supreme Court's the plenary meeting on 27 December 1997 "On Applying Law in Criminal Cases Regarding Illegal (Arbitrary) Felling of Trees, Destruction or Damaging of Forests"]. In: Latvijas Republikas Augstākās tiesas plēnuma lēmumu krājums [Collection of Decisions by the Plenary Meeting for the Supreme Court of the Republic of Latvia]. Rīga: Latvijas Policijas akadēmija, 2002, p. 59.

[46] Tiesu prakse lietās par noziedzīgi iegūtu līdzekļu legalizēšanu un par izvairīšanos no nodokļu nomaksas: Augstākās tiesas prakses apkopojums [Case law in cases regarding legalisation of the proceeds of crime and tax evassion: Digest of the Supreme Court's Case Law], 2013, Summary, para. 7, p. 90. Available: www://at.gov.lv/lv/judikatura/tiesu-prakses-apkopojumi/kriminaltiesibas [last viewed 09.03.2020].

In the opinion of N. Pryahina and V. Schepel'kov, the subjective link comprises also a unitary purpose, which can be identified in the following cases: 1) the specified purpose with respect to all offences or the common result arises before committing the first offence; 2) initially, there is an unspecified purpose; allowing the possibility, however, that several offences could be committed; 3) the purpose to commit successive acts arises in the process of committing the previous ones or within an insignificant interval in time.[47]

Upholding this presentation of the subjective part in general, the approach taken by the authors that the unitary purpose can be also indirect, hence, contesting the need to recognise the common objective as a feature of the subjective link, seems to be controversial. The objective is the intended outcome that the person wishes to reach by committing a criminal offence,[48] in the case of a continuous criminal offence, by committing several interconnected acts, which have to be directed at a common objective. Without identifying such final objective, there are no grounds for talking about a continuous criminal offence either.

An opposite view can be found in the criminal law literature regarding the features of a continuous criminal offence, i.e., that the understanding of a continuous criminal offence cannot depend upon the type of criminal offence, for example, one understanding in the case of robbery of property and different understanding in the case of another criminal offence.[49]

On the other hand, U. Krastiņš' view must be upheld that, in deciding on whether a continuous criminal offence has been committed or several similar criminal offences constitute the real concurrence of criminal offences, each case needs to be analysed individually, in accordance with the actual circumstances of the particular offence.[50]

In deciding on the issue of the existence of a continuous criminal offence, M. Leja's point should also be taken into account, i.e., that theses, which are used in the digests of case law and in court rulings to specify the features that characterise a continuous criminal offence, are sometimes perceived as an exhaustive enumeration and, therefore, in the absence of one feature, the possibility of a continuous criminal offence is excluded, without assessing other features. The author referred to above underscores that this is only an approximate guidance since due to the diversity of circumstances in the case an exhaustive list is altogether impossible. "Moreover, by taking only the features indicated in court rulings or digests as the guide, actually, distancing from the law the occurs, forgetting about the points made in it that a continuous criminal

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[47] *Pryahina, N. I., Schepel'kov, V. F.* Otgranichenie prodolzhaemogo prestuplenija ot sovokupnosti prestuplenij [Differentiation between a Continuous Crime and Concurrence of Crimes]. *Kriminalist#*, No. 1(8), 2011, pp. 7–11.

[48] *Krastiņš, U.* Noziedzīga nodarījuma sastāvs un nodarījuma kvalifikācija. Teorētiskie aspekti [Constitutent Elements of a Criminal Offence and Qualification of an Offence. Theoretical Aspects]. Rīga: Tiesu namu aģentūra, 2014, pp. 184–185.

[49] *Kozlov, A. P., Sevast'janov, A. P.* Edinichnye i mnozhestvennye prestuplenija [Unitary and Multiple Crimes]. SPb: Juridicheskij centr Press, 2011, p. 57.

[50] *Krastiņš, U.* Turpināta noziedzīga nodarījuma problemātika krimināltiesībās [The Problems of a Continuous Criminal Offence in Criminal Law]. In: Tiesību zinātnes uzdevumi, nozīme un nākotne tiesību sistēmās. LU Juridiskās fakultātes 7. starptautiskās zinātniskās konferences rakstu krājums [The Objectives, Significance of the Legal Scientific and the Future in Legal Systems. Proceedings of the 7th International Scientific Conference of the Faculty of Law of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2019, p. 348.

offence is constituted by 1) several mutually related similar criminal acts, 2) that are directed to a common objective if 3) they are encompassed by the unitary purpose of the offender. This definition of a continuous criminal offence, provided by the law, cannot be specified by a pre-prepared and detailed list of features".[51]

Summary

1. In defining a separate continuous criminal offence, the legislator has indicated the general features of a continuous criminal offence, which all criminal offences have and which must be regulated on the level of the General Part of the Criminal Law, pointing to several mutually related similar acts directed at a common objective, which are encompassed by the offender's unitary purpose, therefore they, in their totality, constitute a continuous criminal offence.
2. In difference to a continuous criminal offence, the real concurrence of criminal offences is constituted by several mutually unrelated offences, committed by a person, that comply with the constituent elements of several criminal offences.
3. In view of the peculiarities of the constituent elements of separate criminal offences, the theory and practice of criminal law add to the general features of a continuous criminal offence features that comply with the constituent elements of particular criminal offences, therefore, in deciding on whether a continuous criminal offence has been committed or several similar criminal offences constitute the real concurrence of criminal offences, each case requires an individual assessment, in accordance with the actual circumstances of the case, focusing mainly on the mutual link between the external manifestation of the criminal offence and the person's mental activities.
4. The Criminal Law has construed also such criminal offences as, for example, sexual offences, which, due to their content and objective manifestations, cannot be considered as being continuous criminal offences altogether. If in the case of a continuous criminal offence all identical acts by the perpetrator occur within the framework of one criminal offence and are deemed to be completed at the moment when these acts have been discontinued in accordance with the person's will or due to reasons beyond their control, the crimes provided for in CL Sections 159, 160 and 161 are deemed to be completed at the moment of initiating a sexual act or other sexual activities. With each successive, newly initiated act of sexual nature, another criminal offence is committed, which jeopardises a person's interests anew and is to be assessed as an independent criminal offence.
5. To ensure compatibility of the qualification of criminal offences with the severity of the offence and its degree of hazardousness, the matter of returning to the case law, where, in the case of several similar crimes directed at property, the total amount of damage had to be calculated, in accordance with which the offender had to be made criminally liable, should be resolved.

[51] *Leja, M.* Krimināltiesību aktuālie jautājumi un to risinājumi Latvijā, Austrijā, Šveicē, Vācijā. Noziedzīga nodarījuma uzbūve; cēloņsakarība; vaina; krimināltiesību normu interpretācija un spēks laikā. I daļa [Current Criminal Law and the Solutions to them in Latvia, Austria, Swizerlans and Germany. The Structure of a Criminal Offence: Causality, Guilt; Interpretation of the Norms of Criminal Law and their Validity Period. Part I]. Rīga: Tiesu namu aģentūra, 2019, pp. 867–868.

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Reducing the Threat of Cyber Warfare Through a Suitable Dispute Resolution Mechanism

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With each step of technological advancement, we are entering a global technological domain susceptible to cyber infiltration. The individual privacy and security are supposed to be protected by the states governed by laws that are specifically a part of the national legal systems. The transnational cyber infiltration targeting the state actors by using the cyberspace creates a new plethora of questions. The issue has been highly debated, whether the *jus ad bellum* is sufficient in regulating the various types of cyber infiltrations. The matter of classifying the cyber-attacks as armed attacks has been furtively debated on contextual basis. The legal principles governing the laws of war have been held insufficient by some in order to include the new forms of attacks conducted through global cyberspace. In the midst of such debate, one conclusion can be derived that the cyber operations globally are causing a threat to state sovereignty and security. The focus on issues related to transnational cyber operations is based upon the existing legal principles and laws. The debate conjures up a few problems which need to be addressed. This article analyses the different perspectives of the cyber warfare and the identified problems related with the issue. According to the current problems faced by the states, a measure of the remedial system for states in international law is taken into consideration. The current system of remedies fails to accommodate the grievances of the states with regard to the cyber operations. Hence, a new platform for the state remedies is suggested and proposed.

Keywords: cyber warfare, cyber-attacks, *jus ad bellum*, International Humanitarian Law; just war.

Contents

Introduction

The invasion of privacy through the medium of cyberspace is rapidly increasing. The rise in such invasions is directly related to the increasing virtual dependence. This dependence on the advanced technologies by public and private sector organizations in a sense incites the cyber experts to get involved in a technical but safer mode of attacks for personal gain. The attacks are often internal matters of a state to be regulated by the state laws, however, these attacks create more operational issues, when they adversely affect subjects on foreign grounds. The effects of these cyber-attacks can be devastating financially and from the perspective of international security. According to an estimate, the cyber-attacks have cost more than € 500 billion in damages worldwide only in 2016.[1] Similarly, the increasing reliance on technologies makes the civilian and military infrastructures more vulnerable to the outside attacks.[2] The ammunition required for such attacks can be acquired relatively cheaper, easier and lawfully in any location around the world.[3] The severity of the attacks involving cyberspace will increase keeping in view the dissemination and increasing reliance on advanced technologies.[4] This increases the risks of cyber-attacks leading to a kinetic warfare in the contemporary world. Although the attribution of these attacks to a state is problematic, in several cases it has been noted that there has been an apprehension of states being accomplices in certain cyber-attacks. China, for instance, has been suspected of several cyber-attacks committed against the United States.[5] In the Estonian cyber-attacks, a major governmental machinery including websites, newspapers, TV stations, banks and other targets was shut down for three weeks, allegedly by Russian attackers.[6] A similar attack was committed against Georgia's networks in 2008.[7] The attack on Iran's nuclear refining operations was committed through a Stuxnet virus program, allegedly

[1] See: Cyber Security: A Pillar of our Digital World. 2019. Available: https://new.siemens.com/global/en/company/stories/research-technologies/cybersecurity.html#30yearsofcybersecurity [last viewed 07.04.2020].

[2] The United States National Security Strategy. 2010. Available: www.whitehouse.gov/sites/defsult/files/rss_viewer/national_security_strategy.pdf [last viewed 07.04.2020], p. 27.

[3] Ibid., p. 6.

[4] See, for instance, McAfee Report: In the Crossfire – Critical Infrastructure in the Age of Cyber War. 2010. Available: Available:http://resources.mcafee.com/content/NACIPReport [last viewed 07.04.2020], p. 11.

[5] *Shackelford, S. J.* From Nuclear War to Net War: Analogizing Cyber-Attacks in International Law. *Berkeley Journal of International Law*, No. 27, 2009, pp. 192, 204.

[6] *Hollis, D. B.* Why States Need an International Law for Information Operations. *Lewis and Clark Law Review*, No. 11, 2007, 1023, pp. 1024–1025.

[7] *Swaine, J.* Georgia: Russia Conducting Cyber War. *The Telegraph*, 11 August 2008. Available: Available:https://www.telegraph.co.uk/news/worldnews/europe/georgia/2539157/Georgia-Russia-conducting-cyber-war.html [last viewed 07.04.2020].

initiated by the American and Israeli intelligence services with Dutch support.[8] In a more recent venture, the United States claimed to have used cyber-attacks against Iran in retaliation for the shooting down of a US drone.[9]

The importance of cyber security with regard to states is now found unfolded and the threat of cyber warfare seems real. The concern by the international community is shown in the General Assembly resolutions admitting that the means of information technology can be influential in affecting the interests of the international community.[10] It has also been acknowledged that the state actors may be deeply affected by the misuse of information technologies.[11] Importantly, the states have agreed that international peace and security may be at potential risk, if such technologies are used purposefully to achieve adverse objectives.[12] The threat of cyber warfare is illuminating, in a sense that unregulated activities within cyberspace may lead state actors into situations where an act of aggression might become unavoidable. However, the legality of actions or reactions of states to the attacks using cyberspace remains ambiguous and open to the interpretation of existing legal norms and principles. An attempt by scholars has been made to clarify these ambiguities. For instance, the Talinn Manual on the International Law Applicable to Cyber Warfare[13] is a step towards guiding states in cyber operations during conflicts.

The current article is an attempt to present a workable solution of the problems related specifically to the cyber operations having transnational effects. The modes of cyber-attacks, which may lead to cyber warfare are described through the different approaches within the relevant scholarly work. The already existing views regarding both terms are analyzed in order to understand their legal standing. No attempt has been made to introduce new variables for finding a newer version of definitions attached to these terms. As the laws of conflict are distributed in two sets of rules, i.e., *jus ad bellum* and *jus in bello*, this article deals with the applicability of *jus ad bellum* within the cyber warfare. The complications of the applicability of the *jus ad bellum* to cyber warfare are discussed and the major issues are identified. In the midst of these complications, the access to remedies for a state adversely affected by the cyber-attacks is analyzed. The cyber warfare can have devastating effect, if the states found themselves without accessible remedies or a forum to seek reparations. Hence, keeping the real threat of cyber warfare in view, and the laws pertaining to regulating the warfare and providing a forum for the states to access remedies is proposed. The final part of the article deals with the importance of a separate Arbitration and Enquiry Tribunal for Transnational Cyber Operations (AETTCO). This article does not

[8] Dutch Intel Aided U.S.-Israel Stuxnet Cyberattack on Iran. *Haaretz*, 03 September 2019. Available: https://www.haaretz.com/middle-east-news/iran/dutch-intel-aided-u-s-israeli-stuxnet-cyberattack-on-iran-report-reveals-1.7793561 [last viewed 07.04.2020].

[9] British Broadcasting Corporation (BBC). US launched cyber-attack on Iran Weapons Systems. 2019. Available: https://www.bbc.com/news/world-us-canada-48735097 [last viewed 07.04.2020].

[10] See GA Res 55/28 (20 November 2000); GA Res 56/19 (29 November 2001); GA Res 59/61 (3 December 2004); GA Res 60/45 (8 December 2005); GA Res 61/54 (6 December 2006); GA Res 62/17 (5 December 2007); GA Res 63/37 (2 December 2008); GA Res 64/25 (2 December 2009).

[11] See the Preambles of GA Res 55/63 (4 December 2000); GA Res 56/121 (19 December 2001);

[12] GA Res 58/32 (8 December 2003); GA Res 59/61 (3 December 2004); GA Res 60/45 (8 December 2005); GA Res 61/54 (6 December 2006); GA Res 62/17 (5 December 2007); GA Res 63/37 (2 December 2008); GA Res 64/25 (2 December 2009).

[13] *Schmitt, M. N.* (ed.). Tallinn Manual on the International Law Applicable to Cyber Warfare. Cambridge: Cambridge University Press, 2013.

intend to clarify the modes of operations for AETTCO, but to mark its value and a possible way out for states from ambiguities of the applicable laws (*jus ad bellum*) within cyber warfare.

1. From Cyber-Attacks to Cyber Warfare

The notion of cyber-attacks, which may lead to cyber warfare describes a phenomenon that occurs within the cyberspace. Cyberspace has been defined by Kuehl as "a global domain within the information environment whose distinctive and unique character is framed by the use of electronics and the electromagnetic spectrum to create, store, modify, exchange and exploit information via interdependent and interconnected networks using information-communication technologies."[14] The whole system of cyberspace works through independent computer networks. A large number of individuals working in official capacity for national, transnational, public or private organizations are involved as active actors within the cyberspace. In addition, millions of individuals in private capacity are a part of cyberspace involved in activities related to information systems which might have transnational effects. On the whole, the cyberspace may be termed as a single system based upon interconnected networks, whereas the actors involved with the system do not work under a single code of conduct, and their actions are not limited to standardized boundaries. The invasion of individual or organizational privacy using cyberspace would lead to cybercrimes. Many of the cyberspace abusers are involved in criminal activities for private gains.[15] The issue of cybercrimes is regulated through domestic laws of the states,[16] and the nature of the transnational activities involved has driven the states to adopt an international convention on the issue.[17] The issue of cyber-attacks against states or state entities is dealt with through the existing set of international laws. It is pertinent to understand the nature and modes of cyber-attacks in order to address the issue when the attacks may lead to cyber warfare.

1.1. Understanding Cyber-Attacks

It is difficult to define the term 'cyber-attack' or other relevant terminologies; a consensus has not been reached on a single definition of such terms.[18] In general, the usage of cyberspace in some adverse manner may amount to a cyber-attack. According to Schmitt, cyber-attacks come under the ambit of a broader category of "information operations".[19] The information operations include the systematic usage of the different operational systems including electronic and computer networks in agreement with other relevant capabilities in order "to influence, disrupt, corrupt, or usurp any negative human and automated decision

[14] *Kuehl, D. T.* Cyberspace to Cyberpower: Defining the Problem. In: Cyberpower and National Security, *Kramer, F. D., Starr, S. H., and Wentz, L.* (eds.). Washington: Potomac Books, 2009, p. 27.

[15] *Roscini, M.* Cyber Operations and the Use of Force in International Law. Oxford: Oxford University Press, 2014, p. 4.

[16] According to United Nations Conference on Trade and Development (UNCTAD), a total of 138 states have enacted legislation dealing with cybercrimes. Available: https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Cybercrime-Laws.aspx [last viewed 07.04.2020].

[17] Convention on Cybercrimes 2001, ETS No. 185.

[18] *Roscini*, above n. 15, pp. 10–16.

[19] *Schmitt, M. N.* Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework. *Columbia Journal of Transnational Law*, No. 37, 1999, pp. 885, 890–891.

making while protecting our own."[20] This usage of cyberspace in the information operations can be of an offensive or defensive nature. A cyber-attack would come under this broader perspective and may amount to actions of a different nature including, among others, attacks on nuclear reactors, military communication systems, the air traffic control systems, automated weapons etc. However, a simpler definition may be an "attack initiated from a computer against a web site, network, or individual computer that compromises the confidentiality, integrity, or availability of that system or stored information."[21] The purpose of the attack is to harm any person or organization or a state in a broader category, whereby the harm may be inflicted intentionally or resulting through the wider effects of an action because of lack of expertise, *inter alia*.[22] Some state actors encourage a wider and broader approach towards defining cyber-attacks. The Shanghai Cooperation Organization[23] has expressed an opinion that the use of new technologies in the information and communication systems (including the social media apparatus) can be a threat to the "security and stability in both civil and military spheres."[24] This approach seems to adopt an expansive vision of cyber-attacks to include the use of cyber-technology to undermine political stability. Some experts fear that this approach is adopted for targeting the political speech and justifying its censorship.[25] Hence, the scope of the cyber-attacks seems to be undefined and open to relative definitions adopted. A commonality between the approaches is merely teleological. The purpose or object of the attacks is to inflict harm on others, while the extent and nature of the harm is, however, undefined.

The modes of cyber-attacks can differ technically according to the resources and proficiency of the person(s) involved. The attacks are mostly based upon computer network operations. These operations include Computer Network Attack (CNA), Computer Network Defense (CND), and Computer Network Exploration (CNE).[26] The CNA operations are directed towards incapacitating a communication system or even damaging the external computer networks.[27] The CND is a defensive action against an adversary's CNA. The CNAs may involve the distributed denial of service (DDoS), trojan horses and logic bombs and viruses. DDoS attacks are mostly used for the corruption of the hardware. It isolates targets from the said network by flooding them with a large amount of

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[20] United States National Military Strategy for Cyberspace Operations. 2006. Available: www. dtic.mil/doctrine/new_pubs/jp3_13.pdf [last viewed 07.04.2020].

[21] *Springer, P. J.* (ed.). Encyclopedia of Cyber Warfare. California: ABC-CLIO, 2017, p. 40.

[22] See *Hodges, D.* and *Creese, S.* Understanding Cyber Attacks. In: Cyber Warfare: A Multidisciplinary Analysis, *Green, J. A.* (ed.). London: Routledge, 2015, p. 33.

[23] Shanghai Cooperation Organization is a security cooperation group composed of China, Russia, and most of the former Soviet Central Asian republics, as well as observers including Iran, India, and Pakistan.

[24] Shanghai Cooperation Organization, 61st plenary meeting, Agreement between the Governments of the Member States of the Shanghai Cooperation Organization on Cooperation in the Field of International Information Security, 2008.

[25] *Gjelten, T.* Seeing the Internet as an Information Weapon, 2010. Available: http://www.npr.org/templates/story/story.php?storyId=130052701 [last viewed 07.04.2020].

[26] U.S. Department of Defense, The National Military Strategy for Cyberspace Operations, 2006. Available: www.dod.gov/pubs/foi/ojcs/ 07-F-2105doc1.pdf [last viewed 07.04.2020], 3.

[27] *Roscini, M.* World Wide Warfare – *Jus ad Bellum* and the Use of Force. In: Max Planck Yearbook of United Nations Law, *Bogdandy, A. and Wolfrum, R.* (eds.). Leiden: Martinus Nijhoff Publishers, 2010, pp. 85, 93.

information and data, which causes a collapse of the network.[28] As a consequence, the system collapses and malfunctions. In the attacks against Estonian (2007) and Kyrgyzstan's (2009) systems, the DDoS mode of attacks was used.[29] Similarly, other means of attack are employed by getting access to different networks through emails, hacking, chipping or even using the Universal Serial Bus (USB).[30] These methods may lead to the complete or partial destruction of opponent's computer network systems, resulting in disabling of major logistics or administrative infrastructure. The CNE operations include different forms of activities targeted towards obtaining classified information. These activities may be classified as cyber espionage.[31] The espionage activities are not unlawful under the international law, but a criminal offence in most of the domestic legal systems.[32] The use of cyberspace for such covert operations opens up a new plethora of legal questions. The activity may be legal in the state from where the CNE operations are carried out, whereas illegal in the state where they are carried out. The state's territorial jurisdiction may apply to take action against the attackers; the likelihood of arresting the persons involved in cyber espionage is very low without the cooperation of the other state. The issue becomes of high importance when the military and state departments are targeted through CNE operations.[33] The investigation of such activities due to a complex nature of cyberspace is also not possible without joint co-operation.

1.2. Understanding Cyber Warfare

The concept of cyber warfare is a contemporary phenomenon and difficult to define, it would not constitute a war in its traditional concept.[34] A war is usually a form of collective violence between two or more states that is ordered and performed by professionals to achieve an economic, political, or religious aim that could or would be prevented by the antagonist group. The aim of a military in modern warfare is to target and subdue the armed forces of the opponent.[35] A war in cyberspace does not correspond to such a definition, since a single person with a laptop and an Internet connection could start a war in this environment by attacking a foreign government using methods well-known from diverse cybercrimes.[36] The approach of defining the cyber warfare in order to include the cyber-attacks into the ambit of warfare may be twofold. Firstly, some authors would define this phenomenon through the subject-based approach. Jeffrey Carr

[28] *Springer*, above n. 21, p. 40.

[29] See *Hollis*, above n. 6, pp. 1024-1025.

[30] *Roscini*, above n. 27, at p. 93; *Cox S.*, Confronting Threats through Unconventional Means: Offensive Information Warfare as a Covert Alternative to Preemptive War. *Houston Law Review*, No. 42, 2005, pp. 881, 888–889.

[31] See, for instance, *Stiennon, R.* A Brief History of Cyber Warfare. In: *Green J. A.* (ed.). above n. 22. Stiennon identifies various means of cyber espionage that actually have been used, where different state actors were involved in the operations.

[32] United States Department of Defense Memo. 2015, p. 516; *Tubbs, D., Luzwick, P. G. and Sharp, W. G.* Technology and Law: The Evolution of Digital Warfare. *International Law Society*, No. 76, 2002, pp. 7, 16; *Chesterman, S.* The Spy Who Came in from the Cold War: Intelligence and International Law. *Michigan Journal of International Law*, No. 27, 2006, p. 1071.

[33] See *Springer*, above n. 21, p. 58. In 2014, the Chinese attackers allegedly stole information related with the US F-35 fighter jet program. The action has a huge economic and national impact.

[34] See *Rid, T.*, Cyber War Will Not Take Place. *Journal of Strategic Studies*, No. 35, 2012.

[35] See Declaration Renouncing the Use, in Time of War of Explosive Projectiles Under 400 Grammes Weight. 1868. Available: http://www.icrc.org/ ihl.nsf/FULL/130? [last viewed 07.04.2020].

[36] *Springer*, above n. 21, p. 90.

offers a definition of cyber warfare as an "art and science of fighting without fighting; of defeating an opponent without spilling their blood."[37] This notion of defining warfare is not new, as Sun Tzu has written that the objectives of military forces are not limited only to the battlefields, he stated that "to win a hundred victories in a hundred battles is not the highest excellence; the highest excellence is to subdue the enemy's army without fighting at all".[38] These new weapons and a ground away from the territorial battlefield bring this old phenomenon of warfare back into practice. This approach may be miscalculated with regard to the cyber warfare, as it may involve the destruction of state infrastructure leading towards affecting (and even killing) hundreds of people by adversely affecting their lives. Secondly, the approach may be object-based and based upon the amount and modes of techniques used. The approach towards defining a cyber-attack by some scholars is through taking the computers and networks as objectives.[39] For instance, Richard Clarke, special advisor on cyber security to US president Bush (2001–2003), defines cyber war as "actions by a nation state to penetrate another nation's computers or networks for the purpose of causing damage or disruption".[40]

Taking the international law related to the armed conflicts, the object-based definition of cyber warfare would come into discussion. The damage or disruption caused by the cyber-attacks would then amount to an attack. The attacks are defined and understood separately in the realm of *jus in bello* and *jus ad bellum*. *Jus in bello*, which deals with the law during an armed conflict, has its own principles of describing attacks. Attacks are defined in the Article 49(1) of Additional Protocol I as "acts of violence against the adversary, whether in offence or defense." The violence would then be taken as an objective matter, i.e. a consequence of an act, if not the direct consequence. In cases where it results in consequences such as destruction of property, damage to civilian or military objects, they are attacks satisfying the criterion of an armed conflict.[41] Consequently, if we take the example of the Stuxnet attacks on Iran in the context of the laws of war, the actual damage to the centrifuge would amount to an attack. On the other hand, the laws related to the armed conflicts (*jus in bello*) are applied on the basis of their own principles, the inclusion of cyber-attacks into these principles create further specific difficulties to assess and apply the law.

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[37] *Carr, J.* Inside Cyber Warfare. 2nd ed., California: O'Reilly, 2012.

[38] *Tzu, S.* The Art of Warfare. In: *Giles, L.* (transl.), Sun Tzu on the Art of War, 2000: "the expert in using the military subdues the enemy's forces without going to battle, takes the enemy's walled cities without launching an attack, and crushes the enemy's state without a protracted war".

[39] *Nguyen, R.* Navigating *Jus ad Bellum* in the Age of Cyber Warfare. *California Law Review*, No. 101, 2013, pp. 1079, 1085.

[40] *Clarke, R. A. and Knake, R.* Cyber War: The Next Threat to National Security and What to Do About It. New York: Harper Collins, 2010.

[41] *Schmitt, M.* Cyber Operations and the *Jus in Bello*. In: International Law and the Changing Character of War, *Pedrozo, R. A. and Wollschlaeger, D. P.* (eds.). Newport: U.S. Naval War College 2011, pp. 89, 92–94. It has been suggested that operations falling below the threshold may also qualify; International Committee of the red Cross, Report 31IC/11/5.1.2, International Humanitarian Law and the Challenges of the Contemporary Armed Conflicts. 2011 (hereinafter ICRC Report); *Dörmann, K.* Applicability of the Additional Protocols to Computer Network Attacks. 2004. Available: http://www.icrc.org/eng/assets /files/other/applicabilityofihltocna.pdf [last viewed 07.04.2020]. The paper delivered at the International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law, Stockholm.

2. Application of *Jus ad Bellum* to Cyber Warfare

In order to deal with the application of *jus ad bellum* to cyber warfare, we will rely upon the assessment of both the subject-based and object-based approach towards cyber warfare. The reason is that the current laws of war do not specifically address the issue of cyber warfare. There are no treaties or conventions, which explicitly address the issue of cyber-attacks; the Charter of the United Nations also is silent about the legality of such attacks. However, the Additional Protocol I to the 1949 Geneva Conventions does make the point clear to an extent that the principles applicable in *jus ad bellum*[42] regarding the legality of weapons will apply to the cyber-attacks as it does to any other new weapons.[43] However, neither the extent of its application, nor the mode thereof have been determined. This lack of clarity in the laws may raise the issue of cyber-attacks as permissible under international law by the application of the *lotus principle* claiming "what international law does not prohibit, it permits."[44] Hence, we must look into the application of the existing principles to the cyber-attacks from both object-based and subject-based purposes. This approach brings the mode of the attack and the purpose of the attacks into question, according to which the *jus ad bellum* will apply, if the attack qualifies according to a certain principle, criteria. The ambiguity in application of the rules will still remain in the absence of direct laws. In the absence of direct laws or state practices, the states have historically developed new laws or regulatory regimes in order to extend the existing laws to include the new weapons.[45] Currently, the *jus ad bellum* has been termed as insufficient; the improvement to bring cyber-attacks into the realm of international law has been termed necessary.[46] Furthermore, as most parts of the *jus ad bellum* have been derived from the customary international law and to an extent the UN charter, they create the starting point for any discussion regarding the regulation of state practice related to cyber-attacks.[47] Therefore, to study the cyber warfare from the perspective of *jus ad bellum* and to know whether these laws are applicable to cyber-attacks, we have to determine the legality (or illegality) of these attacks. After meeting the criteria, the attacks must be attributed to the state in order to incur state responsibility.

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[42] *Jochnick, C. and Normand, R.* The Legitimation of Violence: A Critical History of the Laws of War. *Harvard International Law Journal*, No. 35, 1994, pp. 49, 52.

[43] Article 38, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I).

[44] See *Silver, D. B.*, Computer Network Attack as a Use of Force Under Article 2(4) of the United Nations Charter. *International Law Society*, No.76, 2002, pp. 73, 75 (discussing CNA and the prohibition on the use of force); *Haslam, E.* Information Warfare: Technological Changes and International Law. *Journal of Conflict and Security Law*, No. 5, 2000, pp. 157, 165 (use of force paradigm applies "only with difficulty"); Office of General Counsel, Department of Defense, An Assessment of International Legal Issues in Information Operations (Nov. 1999), reprinted in *International Law Society*, No. 76, 2002, pp. 459. Available: http://www.nwc.navy.mil/cnws/ild/studiesseries.aspx [last viewed 07.04.2020] [hereinafter DOD GC Memo]; *Brown, D.* A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict. *Harvard International Law Journal*, No. 47, 2006, pp. 179, 181.

[45] *Hollis*, above n. 6.

[46] Ibid., p. 1041.

[47] *Swanson, L.* The Era of Cyber Warfare: Applying International Humanitarian Law to the 2008 Russian-Georgian Cyber Conflict. *Loyola of Los Angeles International and Comparative Law Review*, No. 32, 2010, p. 303.

2.1. Question of an Armed Attack

In order to come under the ambit of the *jus ad bellum*, the cyber-attacks must pass the test of being an 'armed attack'.[48] The criteria laid down in the UN Charter must be fulfilled. The cyber-attacks have the potential to engage in actions within cyberspace, an action, which militaries have been carrying out through other destructive methods. The militaries can engage in depriving the opponents of infrastructure that may be helpful in military operations, for instance, disrupting the electrical or communication systems. The cyber-attacks also offer the advantage of achieving such targets without as much collateral damage, e.g., temporarily disabling an electrical grid. The purpose of these attacks comes into debate when it signifies a political objective. The targets go beyond the military objectives and the adverse activities within the cyberspace bring the purpose of activities to the foreground.[49] The current rule-based system can be interpreted differently by taking literal meaning or adopting an object-based approach. In order to know, whether the cyber-attacks are compatible with the notion of the 'use of force' under Article 2(4) of the UN Charter or an 'armed attack' under Article 51, if the literal meaning is taken, the cyber-attacks will not qualify under this test.[50] The purpose of the attacks is not taken into account, when this approach is applied. A cyber-attack objectively may not amount to a serious act, which may trigger the 'use of force' amounting to an 'armed attack', while the effects of the act in itself may be serious enough to trigger such rules. These apprehensions create doubts while applying the rules of war in cyber warfare. The ICJ has also discussed the question of what may amount to an armed attack in different cases. However, it has not given a direct account of what armed attack might be, it has only restricted itself to the attribution of attacks to the states.[51]

Three different possibilities may arise when analyzing the issue of a cyber-attack taken up as an armed attack. Firstly, as described, the cyber-attacks are not considered as armed attack because of the lack of direct physical force involved. [52]This approach relies upon the literal meaning and interpretation of the UN Charter. The text of the article 41 of the UN Charter can also be presented as an evidence of cyber-attacks does not involve any armed force.[53] A textual interpretation of Article 41 would suggest that cyber-attacks can never be regarded as armed attacks, since other means of communication do not involve

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48 Article 51, Charter of the United Nations.

49 *Hollis*, above n. 6, p. 1035.

50 *Green, J. A.*, The Regulation of Cyber Warfare under the *Jus ad Bellum*. In: *Green J. A.* (ed.), above n. 20, p. 102.

51 See *Ruys, T.* Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practices. Cambridge: Cambridge University Press, 2010; see also Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), Merits, International Court of Justice (ICJ), 27 June 1986; see also Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of Congo v. Uganda*); Request for the indication of Provisional Measures, International Court of Justice (ICJ), 1 July 2000.

52 *Kanuck, S. P.* Information Warfare: New Challenges for Public International Law. *Harvard International Law Journal*, No. 37, 1996, pp. 272, 288–89; *DiCenso, D. J.*, Information Operations: An Act of War?, Air and Space Power Chronicles, July 2000, Available: http://www.iwar.org.uk/iwar/resources/airchronicles/dicenso1.htm [last viewed 07.04.2020].

53 UN Charter, Art. 41. Since "means of communication" would include not only interpersonal communication (e.g., on the Internet) but how an operating system communicates with the infrastructure it controls, almost all CNA could qualify as targeting "means of communication."

the use of force.[54] Besides the normative discrepancies it has also been suggested that cyber-attacks cannot be regarded as armed attacks, if the cyber-attacks are not launched with the aim of taking lives; and the response to such attacks with the use of force in self-defense would be disproportional and therefore a cyber-attack could practically never reach the threshold of an armed attack.[55] This approach is based upon the damage caused by examining whether that damage would have typically been caused by a kinetic attack.[56] The effect is then used as the basis for assessing the aim or purpose of the attack. This kind of effect-based approach has long been used to separate traditional armed force from economic or political pressure.[57] The effects of an attack are calculated through a simple deductive analysis of creating a criterion to maintain whether a cyber-attack qualifies the test of an armed attack; however, it has seen criticism of not being an adequate tool because of a very simplified approach.[58] The major focus is on looking into the cyber-attack as an armed attack through the normative framework which identifies attack through physical force.

Secondly, according to some scholars, the targets of the attacks may be taken into consideration, when some critical national infrastructure is attacked, even without significant destruction or casualties.[59] Walter Sharp argues that an attempt to infiltrate the major computer systems controlling any state instalments should be considered as a hostile act.[60] Jensen is another scholar of a similar view; he regards the target of the attack as what should define the threat and appropriate response.[61] The amount of physical force is not taken as an indicator of whether a cyber-attack amounts to an armed attack. The ICRC also does not consider physical damage as a requirement of an attack.[62] Hence, many actors take the notion of physical force resulting in physical damage out of the question when drawing a yardstick for a cyber-attack amounting to an armed attack. Many states have also taken up this stance of relying upon the future consequences of attacks rather than the immediate consequences' approach. The Russian Federation in submitting its views to the Secretary General of the United Nations, declaring that the cyber-attacks "can have devastating consequences comparable to the effects of weapons of mass destruction".[63] A spokesperson for the Russian

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[54] *Holmberg, E. J.* Armed Attacks in Cyberspace. Thesis on file at Stockholm University, 2015. Available: http://www.diva-portal.org/smash/get/diva2:854660/FULLTEXT01.pdf [last viewed 07.04.2020], p. 32.

[55] *May, L.* The Nature of War and the Idea of Cyberwar. In: Cyberwar, Law and Ethics for Virtual Conflicts, *Ohlin, J. D., Govern, K., and Finkelstein, C.* (eds.). Oxford: Oxford University Press, 2015, pp. 1, 14.

[56] *Graham, D. E.* Cyber Threats and the Law of War. *Journal National Security Law and Policy*, No. 4, 2010, pp. 87, 91.

[57] *Handler, S. G.* The New Cyber Face of Battle: Developing a Legal Approach to Accommodate Emerging Trends in Warfare. *Stanford Journal of International Law*, No. 48, 2012, pp. 209, 226–227.

[58] *Schmitt*, above n. 17, at 911-912.

[59] See, e.g. *Sharp, W. G.* Cyberspace and the Use of Force. 1999, pp. 129–32; *Jensen*, *E. T.* Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense. *Stanley Journal of International Law*, No. 38, 2002, pp. 207, 229; *Condron, S. M.* Getting it Right: Protecting American Critical Infrastructure in Cyberspace. *Harvard Journal of Law and Technology*, No. 20, 2007, pp. 403, 415–416.

[60] *Sharp*, ibid., p. 130.

[61] *Jensen*, above n. 57, p. 234.

[62] ICRC Report, above n. 39, p. 37.

[63] *Johnson, P. A.* Is it the Time for a Treaty on Information Warfare? In: Computer Network Attack and International Law, *Schmitt, M. N. and O'Donnell, B. T.* (eds.), 2001, p. 443.

Military have also specified that "the use of warfare against the Russian Federation or its armed forces will categorically not be considered a non-military phase of a conflict whether there were casualties or not".[64] In another instance, the United Kingdom undersecretary for security and counter terrorism also declared that the attacks on a power station would be considered as an act of war.[65] The Estonian Defense minister has compared the cyber blockades to naval blockades on ports, which prevent the access of a state to the rest of the world.[66] However, most of the instances described within this approach might come under the violation of the principle of non-intervention in international law.[67] Consequently, the targeting of critical infrastructure will not trigger the right to self-defense in every instance, but only where it amounts to an armed attack. The targeting may amount to violation of principle of non-intervention, which equals a wrongful act but not a justification for an armed attack in self-defense. This approach perceives any targeting of the critical infrastructure with a hostile intent as an armed attack, which is apparently a flawed approach. It has also been criticized for establishing a dangerous standard by triggering the right to self-defense when a sensitive computer system is malfunctioning.[68] It is not always clear, whether a cyber-attack has taken place and even if it might seem like it has, such malfunctions can be a result of defective software or operator errors. Moreover, an event of cyber espionage will also amount to an armed attack under this approach. As discussed earlier, cyber espionage is not prohibited under international law.[69] It has been suggested that espionage involving "unauthorized access to servers and other computers in a foreign state generally constitutes illegal interventions into the sovereignty of that state" and might trigger the principle of non-intervention.[70] However, the operations pertaining to cyber espionage and other related actions which lack a coercive element will not amount to the violation of even the non-intervention principle.[71] Hence, only the cyber espionage operations, which are of a coercive nature, will amount to the breach of the principle of non-intervention.[72] However, based upon the targeting of critical

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[64] Quote from a speech of Russian Military Officer. In: *Jenkins, M. A.* Defining the Parameters of Cyberwar Operations: Looking for Law in all the Wrong Places? *Naval Law Review*, No. 51, 2005, pp. 132, 166.

[65] *Doward, J.* Britain Fends off Flood of Foreign Cyber Attacks. *The Observer*, 7 March 2010. Available: https://www.theguardian.com/technology/2010/mar/07/britain-fends-off-cyber-attacks [last viewed 07.04.2020].

[66] NATO Parliamentary Assembly, NATO and Cyber Defence, 2009, para. 59.

[67] The principle of non intervention is not a UN Charter principle except for a short mention in article 2(7). It is a customary international law principle approved by the ICJ in *Nicaragua* 1986 (para 2015); see also the UN General Assembly Resolutions e.g. GA Res 25/2625 (1970); GA Res 31/91 (1976), paras 1, 3 and 4; GA Res 36/103 (1981), paras 1 and 2; see also Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (UN Doc. A/RES/20/2131 (1965), paras 1 and 2; See also *Schmitt, M.* Legitimacy Versus Legality Redux: Arming the Syrian Rebels. *Journal of National Security, Law & Policy*, No. 7, 2014, pp. 139–59.

[68] *Robertson, H. B.* Self-Defense against Computer Network Attack under International Law. In: *Schmitt and O'Donnell*, above n. 63, p. 137.

[69] *Dinniss, H. H.* Cyber Warfare and the Laws of War. Cambridge: Cambridge University Publishers, 2012, p. 81.

[70] *Wrange, P.* Intervention in National and Private Cyberspace and International Law. In: International Law and Changing Perceptions of Security, *Ebbesson, J. et al.* (eds.), 2014, pp. 307, 322.

[71] *Tallinn Manual*, above n. 13, p. 44.

[72] *Roscini*, above n. 15, p. 65.

infrastructure theory, the cyber espionage operations will amount to an armed attack. This broader interpretation will cause more destruction than good to the overall international peace and security.

Thirdly, in establishing an armed attack, the reliance strictly placed upon the consequences of the attack. Thereby, an intention to cause an effect which a kinetic force could have instituted, will then constitute an armed attack.[73] The intention to cause a physical damage to persons or other tangible objects is then accepted as a yardstick for an armed attack.[74] The Tallinn Manual has also described the armed attack according to the consequences of the actions; the actions which "injures or kills persons or damages or destroys property" are considered as armed attacks.[75] Schmitt takes a step further and develops a seven point criteria to distinguish other forms of coercion that supplement the one which amounts to the use of force.[76] The right of self-defence under Article 51 of the UN Charter may be invoked in response to such acts of coercion.[77] However, there is a further consideration that any cyber-attack leading to an armed attack, according to this doctrine, which is based on consequences, will be a part of coordinated attacks, and the other elements of attacks will undoubtedly constitute an armed attack. An isolated cyber-attack in such context would be of little or no importance.[78] For instance, the acts including the cyber espionage, cyber theft and a brief interruption of non-essential cyber services would not qualify as armed attacks.[79] This view supports the object-based definition of the cyber-attacks ending up in cyber warfare. This approach encounters difficulties in cases where there are no direct physical incursions by a state through cyber-attacks amounting to violations of state sovereignty and territorial integrity. For example, the July 2009 attacks on South Korea and the United States were directed against a large amount of computers without involving any kind of physical territorial incursion.[80] The attacks posed a real threat to both states, but because of no physical incursions they would not qualify as 'armed attacks', unless a real physical damage was incurred.

3. Attribution of Cyber-Attacks

The most important obstacle in application of *jus ad bellum* to cyber-attacks is the difficulty of attributing a cyber-attack to a state. Attribution is defined by Wheeler and Larsen as "determining the identity or location of an attacker or an attacker's intermediary".[81] Identifying this identity becomes a tricky job in cases of cyber-attacks. In the case of Estonia it was demonstrated that the actor(s)

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[73] DOD Memo, above n. 32, p. 483; *Silver*, above n. 44, p. 85; *Dinstein, Y.* Computer Network Attacks and Self Defense. *International Law Studies*, No. 76, 2002, pp. 99, 105; *Robertson*, above n. 68, p. 133; see also *Schmitt*, above n. 19, p. 913.

[74] Schmitt, ibid., p. 935.

[75] *Tallinn Manual*, above n. 13, para. 6.

[76] See *Schmitt*, above n. 19; the criteria include severity, immediacy, directness, invasiveness, measurability, presumptive legitimacy and responsibility.

[77] Ibid., 935.

[78] *Schmitt*, above n. 17.

[79] *Tallinn Manual*, above n. 13, para. 6. See *Schmitt*, above n. 17.

[80] *Sudworth, J.* New "cyber-attacks" hit S. Korea. *BBC News*, 9 July 2009. Available: http://news.bbc.co.uk/1/hi/world/asia- pacific/8142282.stm [last viewed 07.04.2020].

[81] *Wheeler, D. A. and Larsen, G. N.* Techniques for Cyber Attack Attribution, Institute for Defense Analysis, IDA Paper P-3792, p. 1.

committing a cyber-attack can hide their identities and conceal the origins of an attack by ensuring that the attack is identified as coming from another source.[82] The attacks originated from countries such as the United States, Egypt, Peru and the Russian Federation. In the 1998 Solar Sunrise attack against the United States Department of Defense, people of different origins were involved through a computer based in another state.[83] In some situations, the cyber-attack may be a furtive act, whereby the victim has no knowledge of an attack, or it imitates effects of normal behavior, such as a simple software malfunction.[84] Anyone launching cyber-attacks can disguise their origin. The attackers remain anonymous, the attacks simply may point towards one origin, while the real origin might be different. Thereby, this does not necessarily point towards the state or even the computers involved in the attacks as the original perpetrators.[85] This circumstance makes the attribution more challenging in cases of cyber-attacks. The qualities of anonymity, usage of multiple resources, and quickness of action in cyberspace makes the question of attribution more significant.[86]

In cases where the perpetrators of a cyber-attacks can be identified, the attribution of their actions to a state becomes the leading question. The *jus ad bellum* principles and rules can only be applied, where modes of the law of the state responsibility can be fulfilled. As identified earlier, the cyber warfare does not follow the conventional warfare mechanism. Multiple actors can be involved, as the modes of attack are simpler than those of conventional warfare.[87] In cases where the attacks cannot be attributed to a state, the attacks may still be considered as an act of war if they qualify according to the criteria of warfare.[88] However, for the execution of remedies available to the state attacked, it is necessary that the attacks amounting to a wrongful action be attributed to a state or a non-state actor. In cases of a wrongful action by a state, the state entails international responsibility.[89] The state practice and *opinion juris* so support this notion of state responsibility.[90] For instance, the ICJ in Corfu Channel case, while dealing with the issue of attribution held that a state is under an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other states."[91] The attribution of wrongful actions to a state incurring state responsibility may have twofold dimension. Firstly, the attribution for actions of state organs; secondly, the attribution for the actions of non-state actors.

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82 See *Schmitt*, above n. 17, p. 892.
83 See *Shackelford*, above n. 5, 204.
84 *Jensen*, above n. 59, pp. 212–213.
85 *Brenner, S. W.* At Light Speed: Attribution and Response to Cyber- Crime/Terrorism/Warfare. *Journal Criminal Law and Criminology*, No. 97, 2007, p. 424.
86 *Tsagourias, N.* Cyber Attacks, Self-Defence and the Problem of Attribution. *Journal of Conflict and Security Law*, No. 17, 2012, pp. 229, 233.
87 *Schmitt and O'Donnell* (eds.), above n. 63, p. 181.
88 *Whetham, D. and Lucas, G. R.* The Relevance of the Just War Theory to Cyber Warfare. In: *Green J. A.* above n. 22, p. 166.
89 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/CN.4/L.602/Rev. July 26, 2001.
90 *Corfu Channel Case* (*U.K. v. Albania*), 1949 I.C.J. 4 (Apr. 9).
91 Ibid.

3.1. Responsibility of a State when Attack is Carried Out by a State Actor

The state responsibility for the actions of its organs is clearly mentioned within the ILC Draft Articles on State Responsibility.[92] State organs include the individuals or any entities making up the organization of a state.[93] A state is thus considered fully responsible for its agents, even when those agents act outside the scope of their duties. Discussing the question of responsibility the ICJ in Armed Activities on the Territory of the Congo held that "according to a well-established rule of a customary nature a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces."[94] This rule also applies to a person or entity that is not an organ of the state but nevertheless exercises elements of governmental authority.[95] In cases where a person, group of persons or an organization is involved in activities related to cyber information, this rule will apply. After the recent developments in cyberspace technology, a number of states have indulged in developing cyber units within their military or intelligence organs. For instance, China has formed cyberspace units and organs,[96] Israel also is involved in organizing an "Internet warfare" team,[97] the United States have recently established a military Cyber Command, to counter cyber-attacks,[98] Germany has also developed its own cyber unit called the Department of Information and Computer Network Operations,[99] while Italy is reported to be considering establishing one.[100] It is apparent that the conduct of such organs will be attributable to the state of which they are *de jure* organs.[101] Article 4 of ILC Draft Articles on State Responsibility state that "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State". Apparently, tracing of cyber-attacks is a tough challenge, but if the involvement of such cyber units is proven, the concerned state will be held responsible.

3.2. When Attacker is a Non-State Actor

The cyber-attacks may be conducted by individuals or corporations hired by states, or in some cases in their own personal capacity.[102] For instance, it is argued

[92] Draft Articles, Article 4, above n. 89.
[93] Ibid., Article 2.
[94] Case of the Armed Activities on the Territory of the Congo (*Dem. Rep. Congo v. Uganda*), 2005 I.C.J. 116, 214 (Dec. 19).
[95] Draft Articles, Articles 4 and 8, above n. 89
[96] *Condron, S. M.* Getting It Right: Protecting American Critical Infrastructure in Cyberspace. *Harvard Journal of Law and Technology*, No. 20, 2006–2007, pp. 373, 405; see also *Jensen*, above n. 59.
[97] *Eshel, D.* Israel Adds Cyber-Attack to IDF. 10 February 2010. Available: www.military.com/features/0,15240,210486,00.html [last viewed 07.04.2020].
[98] *Beaumont, P.* US Appoints First Cyber Warfare General. *The Observer*, 23 May 2010.
[99] *Goetz, J., Rosenbach, M. and Szandar, A.* National Defense in Cyberspace. *Spiegel Online International*, No. 2, 2009. Available: https://www.spiegel.de/international/germany/war-of-the-future-national-defense-in-cyberspace-a-606987.html [last viewed 07.04.2020].
[100] *Kington, T.* Italy Weighs Cyber-Defense Command. *Defense News*, 31 May 2010. Available: www.defensenews.com/story.php?i=4649478 [last viewed 07.04.2020].
[101] Draft Articles, Article 4, above n. 89.
[102] *Ophardt, J. A.*, Cyber Warfare and the Crime of Aggression: The Need for Individual Accountability on Tomorrow's Battlefield. *Duke Law and Technology Review*, No. 9, 2010; see also *Watts, S.* Combatant Status and Computer Network Attack. *Vancouver Journal of International Law*, No. 50, 2010, p. 392.

that the Russian Business Network (RBN) has been involved in the cyber-attacks against Georgia.[103] In such cases, the Article 8 of the ILC Articles provides that "the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct." This principle, also known as the "effective control" principle, is derived from the Nicaragua case, where the ICJ argued that for a state to be responsible it is to be proven that a state had "effective control of the military or paramilitary operation in the course of which the alleged violations were committed."[104] This effective control test has also been reaffirmed by the ICJ in the Genocide case.[105] The effective control points towards the fact that the non-state actors cannot be considered under the effective control of a state merely by "financing, organizing, training, and equipping the actors."[106] In contrast to the effective control test the ICTY in Tadic case applied an overall control test to attribute responsibility.[107] The overall control meant not only the "equipping and financing of the group, but also the coordinating or helping in the general planning of its military activity".[108]

In cases of cyber-attacks, some argue for the effective control test to be applied, while others contend that the overall control test is more suitable. Roscini argues in favor of the effective control test due to the clandestine nature and identification problems of cyber-attacks. He explains that the effective control test should be adopted in cyber-attacks cases, as it would prevent states being 'frivolously and maliciously' accused of cyber-attacks.[109] He also argues that the ICTY has applied the overall control test to organized and hierarchically structured groups, but such cyber groups are non-existent. Therefore, the difference of approach between the arguments of the ICTY and the ICJ do not have a bearing on cyber-attacks; the effective control test will continue to apply to them.[110] On the other hand, commentators like Shackleford maintain that the overall control test, which is more flexible and less restrictive, is more suitable for cyber-attacks given the technical challenges to identify the perpetrator in cyber-attacks, and should be adopted "as part of a future international regime" for cyber issues.[111] Under the effective control test, which is more restrictive, victim states may not receive justice even in a worst-case scenario.[112] In some cases, the 'due diligence' principle would apply as stated in the Corfu Channel case,

[103] *Markoff, J.* Before the Gunfire, Cyberattacks. *The New York Times*, 13 August 2008. Available: https://www.nytimes.com/2008/08/13/technology/13cyber.html [last viewed 07.04.2020].

[104] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*), ICJ Reports 1986, at para. 115.

[105] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*); Order of the Court on Provisional Measures, International Court of Justice (ICJ), 13 September 1993, paras 402–406.

[106] Nicaragua case, above n. 104, para. 115.

[107] *Prosecutor v. Dusko Tadic* (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999.

[108] Ibid., para 131.

[109] *Roscini*, above n. 15, pp. 39–40.

[110] *Schmitt, M. N.*, Below the Threshold Cyber Operations: The Countermeasures Response Option and International Law. *Virginia Journal of International Law*, No. 54, 2014, pp. 698, 709.

[111] *Shackelford, S. J.* State Responsibility for Cyber-attacks: Competing Standards for a Growing Problem. *Georgetown Journal of International Law*, No. 42, 2011, pp. 971, 987–988.

[112] Ibid., 993.

namely, when a state breaches its "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[113] The 'due diligence principle' is also adopted within the Tallinn Manual in cases of cyber-attacks.[114] For instance, if a group or individual conducts a cyber-attack by using the cyber infrastructure or computer system that belongs to or is located in the territory of a state, that state will be in breach of the due diligence principle, if it does not take 'necessary or reasonable' steps to prevent such an attack.[115]

4. Remedies in Cyber Warfare

The legal status of a wrongful act does not change, even if that action cannot be attributed to a state.[116] In cases of a wrongful act against a state, the remedy or at least an access to a remedy becomes a necessity. The wrongful act may lead to a dispute among states where the acts cannot be easily attributed to a state or a state does not consider an act to be wrongful. These disputes between state parties may involve legal and political issues. The states are obligated by the UN Charter to settle their disputes peacefully.[117] The PCIJ in *Mavrommatis Palestine Concessions (Jurisdiction)* case has defined dispute among states as "a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons".[118] The state parties may choose a way of peaceful settlement of a dispute, or the UN Security Council may call upon the state parties to settle a dispute peacefully.[119] The methods for the peaceful settlement of disputes include negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements.[120] All the methods available to settle disputes peacefully are operative only upon the consent of the particular states.[121] The grounds of a dispute include legal and political matters. The methods of negotiations, mediations, good offices and conciliation deal with the settlement of disputes by using diplomatic offices. The adjudicative methods including arbitration, judicial settlement and to an extent enquiry deals with the disputes in both legal and political perspectives. According to Jennings, "the adjudicative process can serve not only to resolve classical legal disputes, but it can also serve as an important tool of preventive diplomacy in more complex situations".[122] A matter involving transnational cyber-attacks and actions involving cyberspace can be settled through using diplomatic offices, where the issue does not involve complicated factual and legal problems. However, as discussed earlier,

[113] *Corfu Channel Case* (*UK v. Albania*) Judgment, 9 April 1949, ICJ Reports 1949, p. 22.
[114] Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, 2nd ed, 2017, Commentary to Rule 6 and 7.
[115] *Roscini*, above n. 15, p. 40.
[116] *Whetham and Lucas,* above n. 88, p. 166.
[117] UN Charter, Article 2(3) and Article 33. See also GA Res 2625 (XXV). See also the Manila Declaration on the Peaceful Settlement of International Disputes, GA Resolution 37/590; GA Resolutions 2627 (XXV); 2734 (XXV); 40/9; The Declaration on the Prevention and Removal of Disputes and Situations which may threaten International Peace and Security, GA Resolution 43/51 and the Declaration on Fact-finding, GA Resolution 46/59.
[118] PCIJ, Series A, No. 2, 1924, p. 11.
[119] Ibid.
[120] Ibid.
[121] With the exception of binding Security Council resolutions: see, for example, *Shaw, M.* International Law. 6th Edition, 2008, chapter 22, p. 1241.
[122] *Peck, C. and Lee, R. S.* (eds.). Increasing the Effectiveness of the International Court of Justice. London: Martinus Nijhoff, 1997, p. 79.

the technological development and increasing reliance on technology by state actors makes the actions within cyberspace more technical and difficult to understand. The peaceful settlement of these disputes among state actors would require procedures of enquiry and arbitration or judicial settlement.

In cases of differences of opinion on factual matters, a commission is made for an inquiry to be conducted by reputable observers and specialists to ascertain the facts in contention.[123] The ICJ under its statute has power under Article 51 to entrust "any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion". The procedure of inquiry has been used numerous times for the ascertainment of the factual realities.[124] In contemporary issues, according to Malcolm Shaw, inquiry has fallen out of favour as a separate mechanism.[125] The inquiry procedure may nevertheless be instrumental in arbitration between state parties. Perhaps in some circumstances the inquiry has been used more as an arbitration procedure and less as a fact-finding inquiry.[126] In cases of complex issues within cyberspace, the attribution of actions to the state parties would require fact finding inquiries.

The process of arbitration has been instrumental in settlement disputes between states.[127] The decision of an arbitration tribunal is binding upon the states.[128] It is a simple process, whereby the arbitrators are selected by the states, lay down the rules of procedure and laws applicable to the case. There are multiple regional and international dispute settlement bodies for specific purposes. The Permanent Court of Arbitration (PCA) was established in 1899 for the settlement of disputes among states through arbitration procedure.[129] This organ facilitates the states to settle their disputes with any legal issues. There are tribunals with specific scope and expertise, for instance, The International Centre for Settlement of Investment Disputes (ICSID) was established under the auspices of the World Bank by the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States, 1965 and administers *ad hoc*

[123] Inquiry as a specific procedure under consideration here is to be distinguished from the general process of inquiry or fact finding as part of other mechanisms for dispute settlement, such as through the UN or other institutions. See *Lillich, R. B.* (ed.). Fact-Finding Before International Tribunals. London: Brill, 1992.

[124] See, for instance, Bar-Yaacov, *N.* The Handling of International Disputes by Means of Inquiry. 1975, chapter 3; See also *Merrills, J. G.* International Dispute Settlement. 2011, p. 47; and *Scott, J. B.* The Hague Court Reports, 1916, p. 403.

[125] *Shaw*, above n. 121, p. 1022.

[126] *Merrills*, above n. 124, p. 56.

[127] In recent years, states have relied upon the arbitration procedure for peaceful settlements of disputes, the Eritrea – Yemen arbitration 114 ILR, p. 1 and 119 ILR, p. 417; Eritrea – Ethiopia Arbitration see 129 ILR, p. 1; See also *Shaw, M.* Title, Control and Closure? The Experience of the Eritrea–Ethiopia Boundary Commission. *International and Comparative Law Quarterly*, No. 56, 2007, p. 755; See also *the Guyana v. Suriname Maritime Delimitation Case,* award of 17 September 2007.

[128] See the Nottebohm Case (*Liechtenstein v. Guatemala*); Second Phase, International Court of Justice (ICJ), 6 April 1955, 111, 119; See also Arbitration Commission on Yugoslavia, Interlocutory Decision of 4 July 1992, 92 ILR, pp. 194, 197.

[129] *Hudson, M. O.* The Permanent Court of International Justice 1920–1942 (1943), p. 11; *Hamilton, P.* et al. (eds.). The Permanent Court of Arbitration: International Arbitration and Dispute Settlement. 1999; *Allain, J.* A Century of International Adjudication: The Rule of Law and its Limits. 2000, chapter 1; and *Jonkman, J.* The Role of the Permanent Court of Arbitration in International Dispute Resolution, in addresses on 6 and 27 July 1999 at the Hague Academy of International Law, Peace Palace, The Hague, on the Occasion of the Centennial Celebration of the Permanent Court of Arbitration, Vol. 279, 1999, p. 9.

arbitrations.[130] The jurisdiction of the centre extends to "any legal dispute arising directly out of an investment, between a contracting state [..] and a national of another contracting state, which the parties to the dispute consent in writing to submit to the Centre".[131] There are various bilateral and multilateral treaties giving jurisdiction to the ICSID in cases of disputes among the parties.[132] Other arbitration tribunals exist for specific purposes, for instance, the Court of Arbitration for the International Chamber of Commerce.[133] Hence, there are numerous dispute settlement bodies with specific powers, functions and jurisdiction. The common feature of these bodies is that they mostly work with a specific expertise and defined laws to apply in specific cases and adopt rules to carry on the procedure swiftly. There is no dispute settlement body for disputes related to cyberspace. The option for states with disputes related with cyberspace is to refer the matters to the PCA, however, the issues involving enquiries and more technical questions will require cyberspace specialists along with legal experts to deal with the disputes.

In addition to the arbitration procedures, the states may approach the International Court of Justice (ICJ) in cyberspace issues. In cases where violation of the UN Charter is in contention or the issue of non-intervention is involved, the ICJ may be consulted for reparations. The quantification of losses occurred due to the alleged attacks will be difficult; the collection of data from multiple institutions in multiple states would be a daunting task for the ICJ.[134] The jurisdiction of the ICJ is also limited, with compulsory jurisdiction in very few cases where states themselves have agreed to provide jurisdiction in similar cases. Moreover, it may issue advisory opinions on request under Article 96 of the UN Charter. Although the opinions are non-binding, they still are instrumental in the development of international law.[135] However, the opinions of the ICJ do not provide any appropriate remedy to the state parties.

In cases of the failure of the peaceful settlement of disputes, the state parties may, under Article 37(1) of the UN Charter, refer the matter to the Security Council, if the matter may endanger the maintenance of peace and security. Under the Chapter VII of the UN Charter, the Security Council has the authority to determine the existence of any threat to peace, breach of peace, or act of aggression.[136] The cases of an "unfriendly act" or an "ordinary breach of international law,"[137] do not come within the prohibition of a "threat or use of force", as that

[130] See *Lowenfeld, A. F.* International Economic Law. Oxford: Oxford University Press, 2008, p. 536; *Dolzer, R. and Schreuer, C.* Principles of International Investment Law. Oxford: Oxford University Press, 2008, p. 222; *Schreuer, C.* The ICSID Convention: A Commentary (2001); *Broches*, The Convention on the Settlement of Investment Disputes. *Columbia Journal of Transnational Law*, No. 3, 1966, p. 263; *Wetter, J. G.* (ed.). The International Arbitral Process: Public and Private. London: Oceana Publishers, 1979, p. 139; and *Muchlinski, P.* Multinational Enterprises and the Law. Oxford: Oxford University Press, 1995, p. 540.

[131] Article 25(1), The Convention on the Settlement of Investment Disputes.

[132] See *Pogany, I.* The Regulation of Foreign Investment in Hungary. 4 ICSID Review – *Foreign Investment Law Journal*, 1989, pp. 39, 51. See also *The Case of Asian Agricultural Products v. Sri Lanka*, 30 ILM, 1991, p. 577. See e.g. article 1120 of the NAFTA Treaty, 1992 and *Metalclad Corporation v. United Mexican States*, 119 ILR, p. 615. See also Article 26(4) of the European Energy Charter, 1995.

[133] See *Wetter*, above n. 130, p. 145.

[134] See *Roscini*, above n. 27, 111.

[135] See, for example, *Conforti, B.* The Law and Practice of the United Nations. Leiden: Martinus Nijhoff, 2005, p. 276.

[136] UN Charter, Art. 39.

[137] *Dinstein*, above n. 73.

term is used in Article 2(4) of the United Nations Charter. As discussed earlier in this article, an "inherent" right of self-defence is only triggered when "an armed attack occurs against a member of the United Nations."[138] The classification of a cyber-attack into an armed attack is contentious and open to interpretation from different perspectives. The lack of amicable remedies available to states against any cyber-attack will create more confusion with regard to the issues at hand and make the situation more complicated. It will present a serious threat to international peace and security, keeping in mind the growing importance of technological advances. Henceforth, a timely, efficient and relevant remedy must be provided to cover different aspects of the cyber-attacks.

5. Conclusion/Proposing a Dispute Resolution Mechanism

Keeping in view the discussion so far, let us consider the remedies available to the state A in a situation where the state authorities of the state B or other non-state entities working through transnational co-operation takes control of critical infrastructure of the state A through cyberspace operations. The attacks are conducted through DDoS mechanism or other available mechanisms coming under the realm of cyber-attacks; severely affecting the state A's economy. In a separate set of CNE attacks, some classified data dealing with the state A's defense mechanism is broken into, endangering the security of the state A. The economy and defense mechanism of the state A is in jeopardy because of the sudden cyber infiltrations. If the legal experts ponder over the situation in the state A in order to find legal measures of retaliation against the state B, firstly, they will have to establish that the attacks amount to armed attacks or international wrongful acts and secondly, they are attributable to the state B. The options of taking measures in self-defense can be explored after the attribution. However, as discussed above, there are difficulties in classifying such activities as armed attacks. Even if the intensity of the attacks can be used for considering them to be armed attacks, they need to be attributed to the state B. In cases where the state B officially recognizes the attack or takes responsibility, the matter becomes a bilateral issue to be solved by any available dispute resolution mechanism. In cases where the state B does not take responsibility, the issue would require an enquiry for attribution of the acts to a state. The enquiry may be carried out, if the UN Security Council passes a resolution mandating an enquiry committee, whereby a special committee would be formed on case by case basis. In cases of attribution of the acts to private entities, the cybercrimes law will apply to the criminal activities. In cases where the attacks can be attributed to a state, the options of legal remedies still remain very meagre. To be precise, there are no viable remedies for the state A in these circumstances; it has to take actions of its own cognizance. This might result in a severe danger to international peace and security. The questions related to the responsibilities of the states with regard to cyber-attacks in any form are not easy to answer. The ICRC notes that "it would appear that the answer to these questions will probably be determined in a definite manner only through future state practice."[139] In these particular cases, the states have limited options

[138] UN Charter, Art. 51.
[139] ICRC Report, above n. 41, 37.

of remedies, as the co-operation of one or more state actors is required in such transnational activities.

With such an imminent threat to the international peace and security, it is important to regulate state practice in order to come up with viable remedies available to the states. Thus, the state practice would amount to the development of law dealing with transnational cyber-attacks or cyber warfare in a broader perspective. An intermediary dispute settlement body which applies the existing principles upon the use of new technologies in cyberspace will be instrumental in regulating the state response to cyber-attacks. The customary international law will develop through the practices of this intermediary body offering a dispute resolution mechanism. There can be options of adopting specific rules for cyberspace operations, for example, a framework International Law for Information Operations (ILIO) as prescribed by Hollis.[140] It will offer and describe the cyber operations upon empirical evidence and will provide perspectives on unforeseen developments in cyberspace. This will be insufficient in cases where unseen technological equipment and methods are used in cyber-attacks.

Alternatively, the suggested dispute settlement mechanism will offer solutions based on factual circumstances of the case and develop laws through application of rules related with *jus ad bellum*. The wisdom through which international law has developed suggests that cyber warfare can be effectively regulated by the analogical approach. The rules which develop with state practice can then be devised within a framework forming a basis for customary international law. The states will be hesitant to accept any framework for cyberspace regulation because of the uneven pace of technological development of information systems. For instance, the suggestion for the formulation of new rules with regard to prohibition of new weapons within the information system was not taken positively by states.[141]

In order to deal with the transnational cyberspace issues and the limited remedies available to states, it is recommended that an Arbitration and Enquiry Tribunal for Transnational Cyberspace Operations (AETTCO) shall be formed. The states are in a situation of confusion, as far as the question of the legality of cyber-attacks is concerned. There are no specific norms regulating these situations; nor do the current norms remove the perplexities. The formation of AETTCO will help to eliminate confusion and doubt; it will develop state practice concerning this issue by providing adequate remedies and reduce the threat that cyber warfare poses to international peace and security. It is not, however, intended to offer details on the composition and working of the AETTCO, we aim to leave it for further discussion. However, we submit that it would be a viable solution in this challenging scenario.

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[140] See *Hollis*, above n. 6.

[141] See Letter Dated 23 September 1998 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, U.N. GAOR, 53rd Session, U.N. Doc. A/C.1/53/3(1998). Available: http://daccessdds.un.org/doc/UNDOC/GEN/N98/284/58/PDF/N9828458.pdf [last viewed 07.04.2020]; The Secretary-General, Developments in the Field of Information and Telecommunications in the Context of International Security, U.N. Doc. A/54/213 (Aug. 10, 1999) (of nine states submitting views, only Cuba and Belarus favored negotiations to restrict information warfare). Ultimately, the U.N. General Assembly passed Resolution 53/70, calling on Member States simply to promote consideration of existing and potential threats to information security. U.N. GAOR, 53rd Session 79th plenary meeting, at 1, U.N. Doc. A/RES/53/70 (Jan. 4, 1999).

We can safely pronounce the issues which the AETTCO can address in current situation. It has been discussed in detail that the attribution issues in cases of cyber-attacks can be a main hurdle in attaching responsibility. As we have no specific international body working on cyberspace-related transnational issues, the matter of investigation becomes solely states' own burden with limited co-operation. It is thereby suggested that the AETTCO should address the main issue of enquiry by independent and neutral investigators, the member states being under an obligation to co-operate in such enquiries. In cases where an act may be attributed to non-state actors, the issue can be resolved by the arbitration tribunal which should come up with a solution acceptable to all state parties. Moreover, in the current situation it will take years for the law related to cyber warfare to develop, creating a state of confusion for all actors. Thus, it will be difficult for states to forecast the outcome of any attacks against them or the legality of cyber operations they are involved in.

The current system offers no mechanism for investigating the cyber-attacks. The cyber espionage, for instance, introduces a new dimension to the covert operations previously committed by states. With perpetrators residing in different locations and hiding their identity, there is a far greater apprehension of state sovereignty being compromised. Hence, the AETTCO will provide a defense against such interventions through enquiry and arbitration by cyberspace and international law experts. The alternative to AETTCO may be to come up with a framework allowing states to intervene in their territories in cases of alleged cyber-attacks from their territory.[142] A unilateral action inside the territory of another state in retaliation to cyber-attacks will not be a solution-based option. Our contention is to safeguard the principle of non-intervention and use an international body to investigate and recommend states to comply with existing international rules.

It is suggested that a specialized body with powers of enquiry and arbitration shall be made within the United Nations system; preferably, by the UN Security Council, as the increasing use of cyberspace is becoming a threat to international peace and security. The specialized body (AETTCO) should also be able, upon request, to give an expert opinion to the UN Security Council on issues where interpretation of current principles of international law is necessary. The AETTCO would be influential in drafting specific rules on regulation of cyberspace according to the developing technologies in this field. The international law dealing with cyber warfare must evolve, focusing on providing remedies and developing state practice. The suggested specialized body (AETTCO) should focus on both these elements for developing the international law and practices.

Summary

The reality of cyber operations in global perspective is undisputable. One major effect of the cyber operations is their transnational nature threatening state sovereignty and international peace and security. This threat is unconventional and unprecedented but, nevertheless, real, hence, it is pertinent to know, which forms of cyber operations imperil state sovereignty. Some actions within the cyber operations can be regulated through already established norms and international laws. In some cases, the cyber operations require further actions

[142] *Hollis*, above n. 6, p. 1055.

to avoid a future catastrophe and threats to international peace and security. It is noted that the grievance mechanism in cases of cyber operations threatening state sovereignty is unfounded. The threat looming international security because of cyber operations can be negated with a viable grievance mechanism. The proposed Arbitration and Enquiry Tribunal for the Transnational Cyberspace Operations (AETTCO) is a grievance mechanism through which a major threat to the international peace and security can be avoided.

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Bioethics in Correlation with the Principle of Human Dignity

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The modern science is offering to expand opportunities open to a person, for example, to improve a person's intellectual abilities, to cure the incurable or to prolong lives by such manipulations that were not available before. Legal solutions to these problems cannot be found without the discourse on bioethics. Bioethics pertains to a number of issues that are of vital importance for society, for example, euthanasia, organ transplants, reproductive medicine, the limits and methods of patient care. All principles of bioethics have been created to protect the human being. In this respect, bioethical requirements correlate with a person's fundamental rights and legally they should be examined within the scope of human dignity. The implementation of scientific findings in the society is strictly limited by fundamental human rights. The constitutional courts, abiding by the bioethical principles, should provide the balance between the person's own responsibility with that of the State regarding respecting the human dignity and retaining humanity also in the age of technologies.

Keywords: bioethics, human dignity, human rights, the principle of personal self-determination.

Contents

Introduction

Humanists, first of all, but later enlightenment philosophers foregrounded the human being as the measure of all values and the point of reference. John Locke (1632–1704) stands among the founders of the modern concept of a person

and humanity ("human being").[1] He wrote, "men being, by nature, all free, equal and independent."[2] Constitutionalism, democracy and a state governed by the rule of law, i.e., a state that we recognise as being compatible with the contemporary world, were formed on the basis of liberal values. However, this radical change in rebuilding the state of feudal class society, where a person had a very limited right to self-determination, was brought about only because this was demanded by the new concept – a human being is reasonable and has the right to self-determination. A human being is a value and vested with inseparable dignity, which, first and foremost, needs to be legally protected from the State's arbitrariness. With the orientation towards human dignity, the Christian ethics focused[3] on the particular human being as an individual in the community of his equals to avoid the dead ends of both excessive individualism and collectivism.[4]

Simultaneously with the consolidation of the concept of humanism, to shape the new society and a state that would conform to it, two fundamental questions gained relevance: "Who is a human being?" and "How a human being may be treated?" In the course of a couple of centuries, the circle of subjects that were recognised as being "human beings", i.e., persons endowed with human dignity and equal in the fullness of their rights, significantly changed. First of all, at the end of 18th century, the issue of women's rights gained relevance because in the context of the French Declaration of the Rights of Man and of the Citizen of 1789, "a human being" was only male.[5] Almost at the same time, discussions about the inadmissibility of slavery and serfdom began due to anti-humanism of these institutions.[6] The consequences were the prohibition of slavery in the course of 19th century in the colonies of the Great Britain and France, as well as the United States of America,[7] and the abolition of serfdom in almost all European states where it existed.[8]

By providing an answer to the question: "Who is a human being?" the circle of equals was constantly expanded throughout 19th and 20th centuries, including in it both women and persons of diverse ethnic origins, and gradually the multicultural civic society, so well-known today, formed, with the principle of equality – prohibition of discrimination – as one of its fundamental values.[9]

However, by answering the question that has been raised: "Who is a human being?" with "All human beings are human beings!" we do not gain

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1 *Holland, S.* Bioethics. A philosophical introduction. Cambridge: Polity Press, 2003, p. 15.

2 *Locke, J.* Zwei Abhandlungen über die Regierung, Frankfurt am Main: Suhrkamp, 1977, S. 260.

3 The concepts referred to are the fruit of the Christian philosophy, moreover, until the mid-19th century all philosophers, basically, worked within the framework of Christianity.

4 *Fogels, B.* Centrā: cilvēka cieņa. Kristīgi atbildīga politiska rīcība. Kristīgā ētika kā palīdzība orientācijai [In the centre: the human dignity. Responsible Christian political action. Christian ethics as an aid to orientation]. Rīga: Konrāda Adenauera fonds, 2007, pp. 17, 18.

5 *Bock, G.* Bedeutung und Schicksal der Frauenrechtserklärung. In: *De Gouges, O.* Die Rechte der Frau. München: dtv, 2018, S. 11.

6 *Lazdiņš, J.* Baltijas zemnieku privāttiesības (XIX gs.) [Baltic peasants' private law (19th century)]. Rīga: BAT, 2000, pp. 119, 120.

7 *Vorenberg, M.* Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment. Cambridge: Cambridge University Press, 2001, pp. 2–4.

8 *Lazdiņš, J.* Baltijas zemnieku privāttiesības (XIX gs.), pp. 120, 121.

9 *Levits, E.* 91. panta komentārs [Commentary on Article 91]. In: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Zin. vad. R. Balodis. Rīga: Latvijas Vēstnesis, 2011, pp. 78, 79.

a comprehensive notion of the nature of a human being and the limits of the State's discretion in adopting decisions that affect a person. The question regarding the scope of the State's duties *vis-à-vis* a human being is equally important. The period spanning 18th to 20th centuries, first and foremost, unravelled the legal limits that restricted a person's rights by changing the penal policy, the nature of the institution of family, introducing the administrative procedure, providing the possibility to a person to turn against the State, etc. However, now, we have to collectively construct new legal limits, *inter alia*, between the discretion and responsibility of a human being and the State, within which society is to live sustainably in the future.

Legally, the very nature of a human being, in all its nuances, is protected by the concept of human dignity. Therefore, this research is dedicated to the concept of human dignity, revealing it through the requirements of bioethics, particularly relevant today. Due to the multi-dimensionality and noteworthy scope of the research issue, it will be limited to establishing the concept and content of bioethics, defining the principles of bioethics and revealing some principles of bioethics in interconnection with the concept of human dignity, as it is revealed in the jurisprudence of the Constitutional Court of the Republic of Latvia.

1. Science and Human Being – Symbiosis or Antagonism?

With the question of who a human being is and the genesis of fundamental rights, in the 19th century the relevance was gained also by the public wish to interfere with the natural order of things in the name of collective interests. Science, released from the restrictions of religion, preventively offered the possibility to free the society from the descendants of such individuals who might jeopardise the future welfare of the rest of the society. Another outcome of scientific development was the offer to improve an individual human being in the interests of the society in general, making him more handsome, healthier, smarter, etc.

The trend of freeing society from a potential threat by restricting a human being's freedom of choice and rights became vividly pronounced with the development of positive science, first of all, natural sciences.[10] Science identified "a potential threat" for the future welfare of society,[11] whereas the State, by laws and application thereof, preventively averted these "potential threats". In the 20th century, the attempts to use the most current scientific findings to revitalise society were made in many countries, first of all, by identifying "unfavourable persons" and then restricting their rights, exterminating them or rendering them sterile to prevent their reproduction. Among others, this affected the mentally ill, cancer patients, Jews, Gypsies in Nazi Germany, in the communist USSR – "enemies of the people", exploiters and their

[10] *von Stephanitz, D.* Exakte Wissenschaft und Recht. Berlin: Walter de Gruyter & Co., 1970, S. 197.

[11] The teaching by Cesare Lambroso, for example, was very influential: *Lambroso, C.* Neue Forschritte in den Verbrecherstudien. Gera: Griesbach, 1899; *Lombrozo, Ch., Ferrero, G.* Zhenshhina prestupnica i prostitutka [The female criminal and prostitute], 1893, *Mac Donald, A.* Criminology, with an Introduction by Cesare Lombroso. Funk & Wagnalls Company, 1893, etc.

descendants[12], in Sweden – prostitutes and vagrants, etc. The repressions against a certain part of society carried out by the Nazis and Bolsheviks were well-known before, because these states were not concealing this, and any information that was concealed came to light after the collapse of the regimes, whereas the scandal in Sweden in the last decade of the 20th century came as a surprise to the general public. The Swedish government officially admitted that persons belonging to certain social groups had been subjected to forced sterilisation, as part of a campaign organised in the country from 1936 up to even 1976[13], whereas in Japan the last forced sterilisation occurred in 1993 by applying the Eugenics Law.[14] Similarly, experiments with human beings on the basis of scientific findings of the time that it would be beneficial for the society in general, occurred also in other countries of the world, including the democratic ones.[15] Only the consolidation of a rule-of-law state and fundamental rights put an end to these horrendous social experiments, which disproportionally restricted some individuals' rights to self-determination in one of the most important areas – self-determination over one's body.

Currently, when the implementation of scientific findings in the society is strictly limited by fundamental human rights, instead of narrowing a person's possibilities, science offers to expand these more extensively, for example, to improve a person's intellectual abilities, to cure the incurable or, at least, to prolong their lives by such manipulations that were not available before, *inter alia*, by using the bodies of other human beings to obtain "spare parts"; by offering to an infertile family the possibility to obtain a child of their own who is carried by a surrogate mother, or the rebirth of a particularly loved deceased through cloning, etc. To develop, medicine needs research and experiments. Therefore, in the 1970s, the practice of creating human embryos in a test tube (Latin *in vitro*) was extensively developed to use this method not only for overcoming infertility but also for scientific research and experiments.[16] Society is interested in the outcomes of such experiments, since many of its members want to be clever, young, healthy, and perhaps even immortal. Therefore, a part of society pretended not seeing experiments with animals, human ova, embryos, etc., since these, after all, were not experiments with human beings. Consequently, we arrive at the need of legally defining the point of reference for the existence of a human being, entering the scope of rights protection, as well as considering what kind of treatment of a human being is admissible.

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[12] In the Soviet textbooks, crime was explained to lawyers as remnants of capitalism that would disappear with growing awareness in society. "To eradicate violations of law means liquidation of a particularly harmful manifestation in human consciousness and conduct of the remnants of non-socialist ideology, psychology and morals, speeding up our advancing towards communism." In: Padomju likumdošanas pamati [The basics of Soviet law]. *Samoščenko, I.* (ed.). Rīga: Liesma, 1974, p. 22.

[13] Zviedrija lems par sterilizācijas upuriem [Sweden will decide on the victims of sterilization]. Available: http://www.diena.lv/lat/arhivs/arzemju-zinas/zviedrija-lems-par-sterilizacijas-upuriem [last viewed 25.05.2020].

[14] *Krūmiņš,* M. Japānas piespiedu sterilizācijas upuri saņems kompensācijas [Compulsory sterilization victims in Japan will receive compensation]. *Neatkarīgā Rīta Avīze*, No. 80 (7970), 2019, p. 11.

[15] *Huonker, T.* Diagnose "Moralisch Defekt" Kastration, Sterilisation und "Rassenhygiene" im Dienst der Schweizer Sozialpolitik und Psychiatrie 1890–1970. Available: http://www.thata.net/thomashuonkerdiagnosemoralischdefektzuerich2003opt.pdf [last viewed 25.05.2020].

[16] *Brāzma, G.* Bioētika. Cilvēka dzīvības radīšana un pārtraukšana [Bioethics. Creation and termination of human life]. Jelgava: LLU, 2010, p. 6.

Legal answers to these questions cannot be found without the discourse on values and ethics. Since the second half of the 20th century, to deal with the new ethical problems that were, first of all, encountered by medical practitioners, representatives of various areas of science joined the discussion, each of them providing answers, from his own vantage point, regarding those limits that should be set in the treatment of a human being.[17] Religion contributes significantly to the discourse on human values, first of all, the Christian religion,[18] since the rapid scientific development started in the Christian cultural space. However, at the same time, medical practitioners, nature scientists, lawyers and, among others, researchers of criminal law,[19] human rights,[20] and medical law[21] also joined the discussions, leading to extensive interdisciplinary debate.[22]

2. Bioethics: Concept, Approaches, and Principles

In assessing the possible risks of harming, which the development of science could cause to nature, the concept "bioethics" was introduced in 1970 by the American biochemist Van Rensselaer Potter (1911–2001), to denote the "survival science" in the ecological field.[23] However, soon afterwards, André Hellegers (1926–1979) applied the term of bioethics to the science of medicine to create a branch of professional ethics to limit the threats that the science of medicine could cause for the human being himself and his selfhood (for example, genetic interference, eugenics).[24] Presently, we can note that bioethics had become one of the most relevant lines of applied ethics, which is closely linked not only to medicine but also, *inter alia*, genetics and evolutionary biology.[25] Bioethics pertains to a number of issues that are of vital importance for society, for example, euthanasia, organ transplants, reproductive medicine, the limits and methods of patient care.[26]

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17 *Kuhse, H., Singer, P.* What is Bioethics? A Historical Introduction. In: A Companion to Bioethics. *Kuhse, H., Singer, P.* (eds.). Blackwell Publishing Ltd., 2009, pp. 3, 4.

18 *Burguā, E.* Bioētika visiem [Bioethics for everyone]. Rīga: Nepaliec viens, 2010, pp. 29, 30.

19 Also, in Latvia, these matters have been researched by legal scholars specialising in criminal law, for example, *Liholaja, V.* Bioētika un krimināltiesības [Bioethics and criminal law]. *Latvijas Universitātes raksti*, Rīga: LU, 2008, *Hamkova, D.* Cieņas izpratne bioētikā [Understanding of dignity in bioethics]. *Jurista Vārds*, No. 21 (616), 2010, *Poļaks, R.* Tiesības uz nāvi. Eitanāzijas krimināltiesiskie, medicīniskie un ētiskie aspekti [Right to death. The criminal, medical and ethical aspects of euthanasia]. Rīga: TNA, 2017.

20 *Ielīte, K.* Nedzīvi dzimuša bērna un viņa vecāku pamattiesību aizsardzība [Protection of the stillborn child and the fundamental rights of its parents]. *Jurista Vārds*, No. 6 (960), 2017, pp. 10, 11, *Jansons, J.* Par nedzimuša bērna tiesībām [On the rights of the unborn child]. *Jurista Vārds*, No. 30 (729), 2012, pp. 12, 13..

21 See, for example, *Mazure, L.* Pacienta griba un tās civiltiesiskā aizsardzība [Patient's will and its protection in civil rights]. Rēzekne: [b. i.], 2014, *Vīķis, R.* Tiesības un bioētika. Cilvēka audu un orgānu nelikumīga izņemšana [Law and bioethics. Illegal removal of human tissues and organs]. *Jurista Vārds*, No. 25/26 (672/673), 2011, *Hall, M. A., Bobinski, M. A., Orentlicher, D.* Biotethics and public health law. New York: Aspen Publishers, 2005, Bioethics in a European perspective. *Ten Have, H., Gordijn, B.* (eds.). Kluwer Academic Publishers, p. 201.

22 *Düwell, M.* Bioethics methods, theories, domains. London, New York: Routledge, 2013, p. IX.

23 *Kuhse, H., Singer, P.* What is Bioethics? A Historical Introduction, p. 3.

24 *Burguā, E.* Bioētika visiem, pp. 29, 30.

25 *Brāzma, G.* Zinātniskas argumentācijas izmantošana bioētikā: uz "sudzisma" piemēra [The use of scientific reasoning in bioethics: an example of "speciesism"]. In: Zinātnieka ētika: Latvija, Baltija, Eiropa. Tēzes. Rīga: LU, 2012, pp. 122, 123.

26 *Düwell, M.* Bioethics methods, theories, domains, pp. 199–222.

Several groups of issues can be singled out that extend into bioethics:

1. Philosophers and scientists studying nature ask what is natural and what is unnatural. This question, for example, frames the discussions on stem cell therapy, xenotransplantation or grafting of animal and plant cells into the human body.[27] Lawyers could frame it, as follows: What kind of manipulations with the human body do not infringe upon human dignity?
2. Likewise, debates about life, death and killing evolve in the framework of bioethics. In this regard, it is important to clarify what a human life is worth, *inter alia*, what are the State's obligations in promoting the life expectancy of each person and in ensuring quality of life. Moreover, since medicine offers extensive possibilities to keep a person with severe injuries alive, the question of when death occurs has become relevant. One of the answers is that a human being is dead with the establishment of brain death.[28] However, this answer does not provide full clarity as to how long a patient in a come should be cared for. Moreover, society has to decide, whether allowing to die by discontinuing expensive medical care should be regarded as killing,[29] as well as on other legally relevant issues.
3. Another range of questions is linked to the protection of a person's identity and the right to self-determination. This is closely related to a person's right to decide about himself also in the course of medical care.[30] However, at the same time other issues related to the development of human personality enter the scope of this topic, for example, genetic intervention into foetal development.[31] Likewise, questions regarding transplantation of other person's organs[32] and blood transfusion gain momentum in this regard. For example, the religious conviction of Jehovah's Witnesses strictly rejects the possibility of transfusing another person's blood.[33] Moreover, I would like to examine the question of euthanasia not in the context of death but rather in the context of protecting a person's identity and self-determination since, primarily, it is a question of whether a person has the right to decide when he should die.
4. The commercialisation of the human body is another significant ethical problem that characterises contemporary society.[34] For example, it is important to clarify whether the following comply with human dignity: the fact that a live donor is economically forced to sell his organ to gain means of subsistence or that the organs of a dead body are auctioned off, or parents' right to buy "a baby from a test tube", i.e., whether these parents are consumers and the consumer rights apply to them, if the child turns out to be "deficient", etc.

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[27] *Holland, S.* Bioethics. A philosophical introduction. Cambridge: Polity Press, 2003, p. 91.

[28] *Kielstein, R.* Transplantation medicine. In: Bioethics in a European Perspective. *Ten Have, H., Gordijn, B.* (eds.). Dorderecht, Boston, London: Kluwer Academic Publishers, 2001, p. 159.

[29] *Holland, S.* Bioethics, p. 91.

[30] *Poļaks, R.* Eitanāzijas ētiskie un krimināltiesiskie aspekti. Promocijas darbs [Ethical and criminal aspects of euthanasia. Doctoral thesis]. Rīga: Latvijas Universitāte, 2017, pp. 44.

[31] *Holland, S.* Bioethics, p. 115.

[32] *Kielstein, R.* Transplantation medicine, pp. 159, 160.

[33] *Hall, M. A., Bobinsky, M. A., Orentlicher, D.* Bioethics and public health law. New York: Aspen, 2005, pp. 242, 242.

[34] *Burguā, E.* Bioētika visiem, pp. 134, 135.

Lisa Bellantoni, the researcher of contemporary ethics, by analysing the trends in the development of bioethics and its influence in the contemporary culture (since bioethics is not solely the matter of science), finds that two different trends of bioethics have evolved:

1. One represents "the cult of life", i.e., everything that happens naturally is good. The downside of this "back to nature" cult is rejecting scientific achievements accepted and used for generations,[35] it is said to jeopardise the security and welfare of a person and society, or even a person's life and health. Currently, as a manifestation of the "cult of life" parents' refusal to vaccinate their children could be mentioned, causing various epidemics (diphtheria, measles, rubella, etc.),[36] a rather widespread return to home birth, which, in certain circumstances, can jeopardise the new-born's life and health,[37] choosing only homeopathic methods of treatment, etc. L. Bellantoni refers to the example of the debates among specialists of bioethics about the vaccine against the human papillomavirus.[38]
2. "The cult of law", in turn, basically deals with the matters of how to legally resolve matters related to bioethics; i.e., by providing incentives for, allowing or restricting further development of particular scientific research, for implementing of scientific achievements, production, etc. To achieve the desired outcomes, stakeholders or some individuals exert pressure on the legislator by using petitions, demonstrations or even "eco-terrorism". For example, to decrease global warming, the legislator is required to restrict emissions, to prohibit certain types of engines and fuel, etc. Namely, international treaties and laws are employed to restrict economic development in order to safeguard environment by living responsibly.[39] Or, to decrease the risk of obesity in children and raise a healthy young generation, the principles of catering in schools, pre-school institutions and children's homes are reviewed, etc. As a result of this, children at orphanages may be denied the birthday cake since its ingredients do not meet the standard of healthy nutrition. Some of the adherents of "the cult of law" are active in political parties and run for a parliamentary election, for example, the friends of nature in the Green Party, those representing the Christian ethics in the Party of Christian Democrats. Thus, if elected, they influence the legislator's activity directly rather than indirectly. L. Bellantoni is of the opinion that sometimes, by dictating narrowly examined rules for society and also for the future generations, the possible consequences in the life of society and their impact on the society's development in the future have not been properly considered.[40]

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35 *Bellantoni, L.* The Triple Helix: The Soul of Bioethics. Publisher: Palgrave Macmillan, 2011, pp. 8–29.

36 Masalu uzliesmojuma Eiropā dēļ Latvijas iedzīvotājus aicina vakcinēties [Due to the measle outbreak in Europe, people in Latvia are asked to get vaccinated]. Apollo. 11.11.2018. Available: https://www.apollo.lv/6450796/eiropa-noverots-masalu-uzliesmojums-latvijas-iedzivotajus-aicina-vakcineties [last viewed 25.05.2020].

37 Reanimācijā nonāk bērni, kam mājdzemdības ir bijušas liktenīgas [Children admitted to intensive care after a fatal home birth]. Egoiste, 01.10.2009. Available: https://www.tvnet.lv/4926149/reanimacija-nonak-berni-kam-majdzemdibas-ir-bijusas-liktenigas [last viewed 25.05.2020].

38 *Bellantoni, L.* The Triple Helix: The Soul of Bioethics, p. 179.

39 *Thoresen V. W.* "1+1=5". In: Enabling Responsible Living. *Schrader, U., Fricke, V., Doyle, D.* (eds.). Springer Science & Business Media, 2013, p. 10.

40 *Bellantoni, L.* The Triple Helix: The Soul of Bioethics, pp. 8–29.

L. Bellantoni writes that none of these trends provides exhaustive answers for the future development of civilisation because they do not offer a solution but force to choose between two extremes, for example, between natural health and functionality of a body, forgetting about the human life as the supreme value.[41]

The State may not remain disengaged in these processes since, traditionally, the State protects the values that are most important for the society, as well as moral norms by regulating these within the legal system, thus introducing homogeneity, mandatory nature and predictability in the processes of public importance.[42] It is the legislator who, as the decision-making body of the nation, in the name of collective will has the obligation to adopt political decisions on all relevant matters. It is the legislator who has been authorised by the nation to perform this duty. The legislator's decisions that are not adopted today, under the influence of rapid scientific development may be overdue tomorrow. New political concepts have entered the range of national politics, alongside economic, social, international policy, among others, "thanatopolitics" or the politics of death,[43] which denotes the policy of the state in matters that pertain to the process of dying, abortions, euthanasia, discontinuing futile activities of a physician.[44]

The second new line in the national policy in the context of bioethics is the line of protecting human life and quality of life, pertaining to the policy of healthcare, occupational medicine, policy on demographic control,[45] environment protection, etc. It is important to note that development of contemporary science and bioethics has led to definition of new principles, based on the concept of human dignity, for example, the principle of the patient's autonomy. In accordance with the principle of the patient's autonomy, each capable patient has the right to be actively involved in taking decisions regarding methods and means that are used in his treatment, and he is ensured not only the right to receive medical care but also the right to refuse it, even if the refusal could cause damage to his health or even life.[46]

Science offers to introduce significant changes into the life of society; therefore, the whole legal system needs to be realigned to regulate the relationships provided by the new scientific possibilities. At the same time, both the legislator and those applying legal norms must respect the principles of bioethics, of which I would like to mention the following as, in my opinion, the most important ones:

1. in deciding on any issue, social values, first and foremost, human dignity must be taken into account,[47]
2. the principle of awareness of moral responsibility, deciding truly and fairly,[48]

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41 *Bellantoni, L.* The Triple Helix: The Soul of Bioethics, pp. 202, 203.

42 *Raiser, T.* Grundlagen der Rechtssoziologie. Tübingen: Mohr Siebek, 2007, S. 165.

43 The concept has been developed on the basis of Michel Foucault's and Giorgio Agamben's philosophy. The findings of postmodern philosophy, predominantly, focus on death, fatal outcome and promote apocalyptical feelings in society. *Kivle, I.* Filosofija: teorētiska un praktiska mācība [Philosophy: theoretical and practical lessons]. Rīga: autorizdevums, 2011, p. 231.

44 *Sīlis, V.* Bioētika un tanatopolitika – izaicinājums vai sabiedrotais [Bioethics and thanatopolitics – challenge or ally]. In: Zinātnieka ētika: Latvija, Baltija, Eiropa. Tēzes. Rīga: LU, 2012, p. 236.

45 *Burguā, E.* Bioētika visiem, p. 32.

46 *Poļaks, R.* Eitanāzijas ētiskie un krimināltiesiskie aspekti., p. 44.

47 *Burguā, E.* Bioētika visiem, 2010, pp. 48, 49.

48 Ibid., p. 45.

3. physical life is a value, whereas health is a value that is subordinated to life and follows from it,[49]
4. the principle of subsidiarity, i.e., in examining a benefit to a person, it must be balanced with the interests of society.[50]

Moreover, it should be taken into account that respect for the principles of bioethics in national policy, since the last decade of the 20th century, has been promoted and determined by a number of international acts (conventions, declarations, international treaties), for example, the Council of Europe Convention on Human Rights and Biomedicine of 4 April 1997, UNESCO Universal Declaration on the Human Genome and Human Rights of 11 November 1997, and the International Declaration on Human Genetic Data of 16 October 2003.[51] UNESCO Universal Declaration on Bioethics and Human Rights, adopted on 19 October 2005, contributed significantly to the unification of the principles of bioethics, it addresses "ethical issues related to medicine, life sciences and associated technologies as applied to human beings, taking into account their social, legal and environmental dimensions."[52]

Thus, it can be concluded that over the last 50 years three dimensions have evolved in bioethics: the dimensions of applied ethics, national law and international law, which through reciprocal control constitute the totality of requirements, and, first and foremost, restrict uncontrolled scientific experiments with human beings to promote protection of person's human rights.

3. Principle of Human Dignity in Jurisprudence of the Constitutional Court of the Republic of Latvia

All principles of bioethics have been created to protect the human being. In this respect, bioethical requirements correlate with a person's fundamental rights[53] and legally they should be examined within the scope of human dignity (in the case of Latvia, the Preamble and Article 95 of the *Saversme* – Constitution of the Republic of Latvia[54]), a person's private autonomy or the right to self-determination (a person's private life safeguarded by Article 96 of the *Satversme*[55]), the right to healthcare (Article 111[56]), the right to benevolent environment[57] (Article 115[58]), and other fundamental rights. However, to protect the human being by differentiating between the natural and admissible and

[49] *Burguā, E.* Bioētika visiem, 2010, pp. 55., 51.
[50] Ibid., p. 54.
[51] *Andorno, R.* Article 3: Human dignity and human rights. In: The UNESCO Universal Declaration on Bioethics and Human Rights. Background, principles and application. *Ten Have, H. A., Jean, M. S.* (eds.). UNESCO Publishing, 2009, p. 91.
[52] UNESCO 2005. gada 19. oktobra Vispārējā bioētikas un cilvēktiesību deklarācija [The UNESCO Universal Declaration on Bioethics and Human Rights]. Available: http://www.unesco.lv/files/Bioethics_Human_Rights_Declaration_lv_fb737eec.pdf [last viewed 25.05.2020].
[53] *Brownsword, R.* Human dignity, ethical pluralism, and the regulation of modern biotechnologies. In: New Technologies and Human Rights. *Murphy, T.* (ed.). Oxford: Oxford University Press, 2010, pp. 38, 39.
[54] Latvijas Republikas Satversme [The Constitution of the Republic of Latvia]. Rīga: Latvijas Republikas Saeimas izdevums, 2017, pp. 3, 46.
[55] Ibid., p. 47.
[56] Ibid., p. 49.
[57] *Brownsword, R.* Human dignity, ethical pluralism, and the regulation of modern biotechnologies. pp. 31, 32.
[58] Latvijas Republikas Satversme, p. 50.

the unnatural and the inadmissible, with respect to treatment or the conditions created for the human being, first of all, the scope of the concept of human dignity needs to be clarified.[59] It is exactly in this respect, i.e., development of the concept of human dignity and its consolidation in a way binding to society, to my mind, is the most important area of a constitutional court's work. Therefore, the concept of human dignity is the first aspect that I would like to single out in the jurisprudence of the Constitutional Court.

Throughout the period of its activities, the Constitutional Court has revealed the scope of human dignity in its various aspects in a number of rulings, for example, in the judgement of 22 October 2002 in case No. 2002-04-03,[60] in the judgement of 26 January 200 in case No. 2004-17-01,[61] in the judgement of 23 April 2009 in case No. 2008-42-01,[62] in the judgement of 20 December 2010 in case No. 2010-44-01,[63] in the judgement of 19 December 2017 in case No. 2017-02-03,[64] in the judgement of 29 June 2018 in case No. 2017-25-01.[65] The Constitutional Court underscores: "Human dignity and the value of each individual is the essence of human rights. Therefore, in a democratic state governed by the rule of law, both the legislator, in adopting legal norms, and the party applying the legal norms, in the application thereof, must respect human dignity."[66] Another important finding in the jurisprudence of the Constitutional Court, which I would like to highlight, is: "The legislator must take "anthropocentric" perspective on the environment, i.e., viewing it as the environment of a human being or such environment that is necessary for human survival and for providing for human needs. The right to live in a benevolent environment primarily protects the person, his or her interests, i.e., the possibility for a person to live in such an environment, where he or she can fully function and develop, and where human dignity is respected."[67] However, on this occasion, speaking about human dignity, I would like to turn to one of the most recent judgements, i.e., the judgement of 5 March 2019 in case No. 2018-08-03. In the cases I mentioned above, the human dignity was

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[59] Latvijas Republikas Satversme, pp. 83, 84.

[60] Satversmes tiesas 2002. gada 22. oktobra spriedums lietā Nr. 2002-04-03 secinājumu daļas 3. punkts [Judgment of the Constitutional Court of the Republic of Latvia in case No. 2002-04-03 October 22, 2002]. Available: https://www.satv.tiesa.gov.lv/cases [last viewed 25.05.2020].

[61] Satversmes tiesas 2005. gada 26. janvāra sprieduma lietā Nr. 2004-17-01 10. punkts [Judgment of the Constitutional Court of the Republic of Latvia in case No. 2004-17-01 January 26, 2005]. Available: https://www.satv.tiesa.gov.lv/cases [last viewed 25.05.2020].

[62] Satversmes tiesas 2009. gada 23. aprīļa sprieduma lietā Nr. 2008-42-01 8. punkts [Judgment of the Constitutional Court of the Republic of Latvia in case No. 2008-42-01 April 23, 2009]. Available: https://www.satv.tiesa.gov.lv/cases [last viewed 25.05.2020].

[63] Satversmes tiesas 2010. gada 20. decembra sprieduma lietā Nr. 2010-44-01 8.1. punkts [Judgment of the Constitutional Court of the Republic of Latvia in case No. 2010-44-01 December 20, 2010]. Available: https://www.satv.tiesa.gov.lv/cases [last viewed 25.05.2020].

[64] Satversmes tiesas 2017. gada 19. decembra sprieduma lietā Nr. 2017-02-03 19.1. punkts [Judgment of the Constitutional Court of the Republic of Latvia in case No. 2017-02-03 December 19, 2017]. Available: https://www.satv.tiesa.gov.lv/cases [last viewed 25.05.2020].

[65] Satversmes tiesas 2018. gada 29. jūnija sprieduma lietā Nr. 2017-25-01 20.2. punkts [Judgment of the Constitutional Court of the Republic of Latvia in case No. 2017-25-01 June 29, 2018]. Available: https://www.satv.tiesa.gov.lv/cases [last viewed 25.05.2020].

[66] Satversmes tiesas 2017. gada 19. decembra sprieduma lietā Nr. 2017-02-03 19.1. punkts.

[67] Ibid.

recognized as applying during the entire lifetime of a person,[68] whereas since the case No. 2018-08-03 the Constitutional Court had to decide on the dignity of a deceased person and the attitude towards burying the body of the deceased that would be compatible with it.[69]

The norms that were contested in the case were para. 18 of the Binding Regulation of the Jūrmala City Council of 4 September 2014 No. 27 "Regulation on the Operations and Maintenance of the Municipal Cemeteries of Jūrmala City" (hereinafter – the Binding Regulation No. 27): "The leaseholder acquires the right to rent a grave by concluding a rental agreement with the company that maintains the cemeteries.", and para. 20: "The leaseholder of the grave pays to the company that maintains the cemeteries an annual rental payment, which is approved by the decision of the Jūrmala City Council." The case was initiated on the basis of the Ombudsman's application; in the framework of verification procedure, he had concluded that the Jūrmala City Council had established a rental payment for using a grave, thus violating the principle of a state governed by the rule of law, enshrined in Article 1 of the *Satversme*. Allegedly, cemeteries have the status of public property; therefore, their civil turnover is restricted. The Ombudsman entered the case and held that the Jūrmala City Council did not have the right to establish either a fee or rental payment for using a grave because the legislator had not authorised local governments to set such a payment. Therefore, this institution turned to the Jūrmala City Council, requesting it to revoke the contested norms. However, the Council refused to eliminate these deficiencies with the term set. Finally, the Ombudsman submitted an application to the Constitutional Court. At a first glance, the case might seem rather simple – in Latvia, a local government has the right to issue binding external regulatory enactments only strictly within the framework of the authorisation granted by the legislator.[70] Moreover, local governments' regulations are on the lowest step of the hierarchy of legal norms[71] and, *inter alia*, the legality thereof is supervised by the Ministry of Environment Protection and Regional Development.[72] The Constitutional Court, in examining the legality of external regulatory enactments issued by local governments, found that it followed from the principle of legality and separation of powers that the local government had the right to issue binding regulations only in cases stipulated in law, within the framework of law, and they could not be incompatible with the norms of the *Satversme* nor other legal norms

[68] Satversmes tiesas 2012. gada 2. maija sprieduma lietā Nr. 2011-17-03 12.3. punkts [Judgment of the Constitutional Court of the Republic of Latvia in case No. 2011-17-03 May 2, 2012]. Available: https://www.satv.tiesa.gov.lv/cases [last viewed 25.05.2020].

[69] Satversmes tiesas 2019. gada 23. aprīļa spriedums lietā Nr. 2018-12-01 [Judgment of the Constitutional Court of the Republic of Latvia in case No. 2018-12-01 April 23, 2019]. Available: https://www.satv.tiesa.gov.lv/cases [last viewed 25.05.2020].

[70] Latvijas Republikas Saeimas 1994. gada 19.maija likums "Par pašvaldībām" ar grozījumiem [Law "On Local Governments" of the Saeima of the Republic of Latvia of May 19, 1994, as amended] Available: https://likumi.lv/doc.php?id=57255 [last viewed 25.05.2020].

[71] For example, this has been established in Section 15 of the Administrative Procedure law, which regulates "Application of External Regulatory Enactments, General Principles of Law and Legal Norms of International Law." See, Latvijas Republikas Saeimas 25.10.2001. Administratīvā procesa likums ar grozījumiem [Administrative Procedure Law, as amended]. Available: https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law [last viewed 25.05.2020].

[72] Latvijas Republikas Saeimas 19.05.1994. likums "Par pašvaldībām".

of higher legal force,[73] whereas in the case under review, the Court found rather early on that a legislator's authorisation of this kind had been absent.

The Court reviewed the legality of the contested norms in the light of the Article 1 of the Constitution. It provides: "Latvia is an independent democratic republic." Notably, this Article is a part of the unchangeable core of the constitution of the Republic of Latvia.[74] Article 1 of the *Satversme* defines both a part of the state law identity of our state and also the identity of the state order.[75] It has been recognised in the doctrine that, due to its high level of abstraction, this Article of the *Satversme* serves as the general clause of the Latvian public law.[76] In case No. 2018-08-03, the Constitutional Court, on the one hand, had to decide on the compliance with the principle of separation of powers, examining the relationship between the central and the municipal power, i.e., whether the central power had authorised the municipal power to act. However, on the other hand, the Court also had to decide on the matter that is very important in our culture – appropriate burial of a person and maintaining his grave in the future because the contested regulation pertained to the field of burials and maintenance of graves. These issues directly concern the dignity of the particular person – the deceased person – and values that are important for the Latvian society. The Constitutional Court found that the protection of human dignity after death was based also on cultural and religious traditions, which form a part of the Latvian *savoir-vivre*, which is an autonomous legal notion included in the Preamble to the *Satversme*.[77] The Latvian folk wisdom (in Latvian – *dzīvesziņa*), which is mentioned in the Preamble to the *Satversme,* is a concept that is difficult to translate into a foreign language. Philosopher Roberts Mūks defines it, as follows: "the Latvian folk wisdom is a totality or mental and moral values, which, in the course of the cultural historical development, have been cultivated by the people, determines and shapes the Latvian selfhood (identity), its core and culture as a universal human value of the European and the global culture."[78] Values of the Latvian folk wisdom are the shared historical memory of the nation, ideals, symbols and archetypes uniting it. Respect towards the deceased person and culture of cemeteries, which, *inter alia*, has been included in the Latvian cultural canon[79] are among these values and, obviously, influence the scope of bioethical principles within the Latvian

[73] Satversmes tiesas 2016. gada 12. februāra sprieduma lietā Nr. 2015-13-03 14.3. punkts [Judgment of the Constitutional Court of the Republic of Latvia in case No. 2015-13-03 February 12, 2016]. Available: https://www.satv.tiesa.gov.lv/cases [last viewed 25.05.2020].

[74] Latvijas Republikas valsts prezidenta izveidotās konstitucionālo tiesību komisijas 2012. gada 17. septembra viedoklis "Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu" [Opinion of the Commission for Constitutional Rights of the President of the Republic of Latvia of September 17, 2012 on the constitutional foundations of the State of Latvia and the untouchable core of the Constitution]. Available: http://www.president.lv/images/modules/items/PDF/17092012_Viedoklis_2.pdf [last viewed 25.05.2020].

[75] *Grigore-Bāra, E., Kovaļevska, A., Liepa, L., Levits, E., Mits, M., Rezevska, D., Rozenvalds, J., Sniedzīte, G. 1.* Latvija ir neatkarīga demokrātiska republika [Latvia is an independent democratic republic]. In: Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi. Zin. vad. R. Balodis. Rīga: *Latvijas Vēstnesis*, 2014, p. 149.

[76] Ibid., pp. 151, 152.

[77] Satversmes tiesas 2019. gada 5. marta sprieduma lietā Nr. 2018-08-03 11. p.

[78] *Mūks, R.* Latviskā dzīvesziņa [The Latvian folk wisdom]. Available: http://latviskadziveszina.lv/ [last viewed 25.05.2020].

[79] *Mellēna, M.* Kapu kopšanas tradīcija [Grave care tradition]. In: Latvijas kultūras kanons. Available: https://kulturaskanons.lv/archive/kapu-kopsanas-tradicija/ [last viewed 25.05.2020].

cultural space. The Constitutional Court, for the first time in its jurisprudence examining the protection of human dignity after death underscored that "the State must protect human dignity, identity and integrity both during the lifetime of a person and after his death."[80] The Constitutional Court noted that "[h]uman dignity also comprises a person's right to decide about his body. It means respecting the wish expressed during a person's lifetime to be buried in a certain way or donating one's body to scientific research."[81] Through the latter finding, the Constitutional Court emphasised the connection between human dignity and a person's right to self-determination, by adopting certain decisions about one's body, which must be respected not only during a person's lifetime but also after death, whereas by referring to a person's right to donate his body to scientific research, the Constitutional Court became involved in a discussion that falls within the bioethical discourse.

The concept of human dignity and the principle of personal self-determination derived from it, at the time, were established to allow a person to lead a life worthy of a human being. It is a matter of discussion, whether the concept of human dignity, which sets a high standard for the State's respect and care of the person in this respect, also restricts the freedom of a person to act contrary to preserving his or her own human dignity. Should the society and the State do everything possible to safeguard the dignity and self-determination of a person, who does not respect himself, does not respect society as an environment for full-fledged human life and has done everything possible to ruin his health? This is one of the most essential questions to which the constitutional courts, abiding by the bioethical principles, should provide an answer already today, balancing the person's own responsibility with that of the State regarding respecting the human dignity and retaining humanity in the age of technologies.

Summary

1. A human being is a value and he is vested with inseparable dignity, which, first and foremost, needs to be legally protected from the State's arbitrariness. The state should create the protection of a person's identity and guarantee the individual the right to self-determination. This is closely related to every person's right to decide about himself.
2. Science, freed from the restrictions established by religion, provided the opportunity to proactively liberate society from the descendants of such people who could jeopardize the future well-being of the rest of society. Another result of scientific development was the proposal to improve a person to make him more beautiful, healthy, smart, etc. That is why the collective desire to intervene in the natural order of things became relevant in the 19th to 20th centuries. Therefore, the research dedicated to the concept of human dignity, revealing it through the requirements of bioethics, is particularly relevant today.
3. The concept "bioethics" was introduced in 1970 by Van Rensselaer Potter, to denote the "survival science" in the ecological field. André Hellegers applied the term "bioethics" to the science of medicine to create a branch of professional ethics to limit the threats that the science of medicine could

[80] Satversmes tiesas 2019. gada 5. marta sprieduma lietā Nr. 2018-08-03, 11. p.
[81] Ibid.

cause to the human being himself and his selfhood. The concept of bioethics is closely related to the concept of human dignity. In the end of 20th and the beginning of the 21st century, bioethics had become one of the most relevant lines of applied ethics, closely linked not only to medicine but also to genetics and evolutionary biology, and the field of work for national and international legislators.

4. By analysing the trends in the development of bioethics and its influence upon the contemporary culture, we can find that two different trends of bioethics have evolved: "the cult of life", i.e., everything that happens naturally is good, and "the cult of law", which basically deals with the matters of how to legally resolve matters related to bioethics.
5. All principles of bioethics have been created to protect the human being. In this respect, bioethical requirements correlate with a person's fundamental rights and they legally should be examined within the scope of human dignity by constitutional courts. If the legislator does not solve bioethical problems in legal norms, the constitutional court becomes involved in a discussion that falls within the bioethical discourse.
6. Throughout its activity, the Constitutional Court of the Republic of Latvia has made numerous judgments about the extent of human dignity in its various aspects. The Constitutional Court has found that the protection of human dignity is protected not only during individual's lifetime, but also after death, and this ruling is based on cultural and religious traditions, which form a part of the Latvian *savoir-vivre*.

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Acquisition of Ownership Through Prescription (Usucaption)

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The article contains comparative analysis of acquisitive prescription, its legal and factual preconditions and consequences in Latvian law. The purpose of the acquisitive prescription is to remove legal uncertainty created by internal defects of the conditions of acquisition of the property *inter vivos*. However, the complex system of acquisitive prescription under Latvian law does not always achieve this goal. It seems that the system is overly complicated. The cases in which acquisitive prescription is the last resort for the claimant to ascertain his or her ownership of immovable property are leaving the question of ownership unsolved. Introduction of another, simplified alternative to the existing one could be helpful for the solution of numerous cases of failed attempts to prove ownership.

Keywords: prescription, acquisition, immovable, title, possession, good faith, registration.

Contents

Introduction

Acquisitive prescription terminates the ownership of one person and establishes the ownership of another. Acquisitive prescription is a combination of encroaching by the latter on property owned by the former and waver of rights by inaction on the part of the former.

Acquisitive prescription differs from ordinary prescription (statute of limitation). The latter precludes the owner from exercising the right. For instance, obligation after expiration of prescription period could not be enforced. However, this does not necessarily mean that this has changed structure of the rights. If the defendant did not object, i.e., did not base his or her defence on prescription, or if she or he paid after expiration of this term, the payment could not be reclaimed,[1] as is also the case under Italian law.[2]

In order for the acqusition of title to an immovable through prescription under Latvian law, the following is required: 1) subject-matter that may be acquired through prescription;[3] 2) a legal basis;[4] 3) good faith on the part of the holder;[5] 4) uninterrupted possession;[6] 5) elapse of the set period;[7] and 6) that the owners of the property are legally able to exercise their right over the property.[8]

The purpose of this article is to find out whether such regulation provides legal certainty, which is the purpose of acquisitive prescription.

1. Subject Matter That May Be Acquired Through Prescription

Things that may be acquired by prescription are called *res habiles* (Latin).[9] Ownership through prescription may not be acquired with regard to subject matter, which cannot be privately owned,[10] of which the law absolutely prohibits the alienation,[11] and the subject matter obtained by criminal means.[12]

In case No. SKC-11, 2010,[13] Supreme Court decided to leave the judgment unamended and to dismiss the complaint over the validity of the existing judgment, which dismissed the re-vindication claim by the heirs of deceased owner of the apartment from the acquirer in good faith. The apartment changed hands several times before the defendant in the case bought the apartment. The first acquirer, who bought the apartment, was dealing with the representative of the owner. The person who represented the owner of the apartment in this transaction apparently operated using a forged letter of attorney, which was issued at the time when the issuer of the proxy was already dead (brutally murdered).

[1] Civil Law, § 1911.

[2] The Italian Civil Code and Complementary Legislation, § 2934. Translated in 1969 by Mario Beltramo, Giovanni E. Longo, John H. Merryman. Supplemented, translated and edited by Mario Beltramo (from 1970 through 1996). Subsequently supplemented, translated and edited by Susanna Beltramo. Book three. Property Rights. Articles 810–1172. Release 2007-1, Issued April 2007. Oceana, Book three, Booklet 5, p. 3.

[3] Civil Law, §§ 1000–1005.

[4] Civil Law, §§ 1006–1012.

[5] Civil Law, §§ 1013–1017.

[6] Civil Law, §§ 1018–1022.

[7] Civil Law, §§ 1023–1024.

[8] Civil Law, §§ 1025–1029.

[9] Black's Law Dictionary Seventh Edition. *Garner, B. A.* (ed.-in-chief). St. Paul, Minn: West Group, 1999, p. 1310.

[10] Civil Law, § 1000.

[11] Civil Law, § 1001.

[12] Civil Law, § 1003.

[13] Par nekustamā īpašuma labticīga ieguvēja aizsardzības priekšnoteikumiem. Augstākās tiesas civillietu departamenta spriedums lietā Nr. SKC-11/2010 [On preconditions for the protection of the acquiror of the immovable in good faith in the case No. SKC-11/2010]. *Jurista Vārds*, 28.09.2010. Available: https://juristavards.lv/doc/218519-par-nekustama-ipasuma-labticiga-ieguveja-aizsardzibas-prieksnoteikumiem/ [last viewed 22.01.2020].

The documents for the entry in the Land Register of the acquirer on the face of them gave him the right of ownership, which, in fact, was not acquired. The court ruling confirmed that the first acquirer did not become an owner. However, in view of majority of seven judges, presumption that consecutive acquirers acted in good faith, i.e., the principle of public reliability of Land Register outweighed the fact that the apartment was obtained by criminal means.

One of seven judges wrote a dissenting opinion,[14] in which he cited Article § 1003 of Civil Law. In his opinion, the immovable property, once acquired by "criminal means", remains forever contaminated by this "original sin", and for this reason may not be acquired by anyone, unless returned to the true owner. Acquisition by prescription of such property naturally is out of question. Such rigorous following of the principle of causality as is reflected in this dissenting opinion found a lot of followers.

Amendments to the Criminal Procedure Law entered into force on 1 January 2011, and provided that during pre-trial criminal proceedings, the property may be recognised as criminally acquired by decision of a person directing the proceedings (investigative judge) and returned to the owner.[15]

The abovementioned amendments were contested in the Constitutional Court of Latvia. The applicant–AS DNB (investment bank) considered that the contested norms are incompatible with the norms of the Constitution of Latvia, in particular, with Article 105, which protects property rights and corresponds with Article 1 of Protocol No. 1 of the ECHR.

On 7 February 2011, the applicant purchased immoveable property at an auction. However, already in 2008, criminal proceedings with respect to the fact that this immoveable property had been obtained fraudulently had been initiated, the applicant allegedly not being aware of this. On 24 November 2011, a decision was adopted within the framework of criminal proceedings to seize this property and an entry was made into the Land Register. The applicant, in turn, had been granted the status of a third person in the criminal proceedings. On July 15 2015, concurrently with the decision by the official in charge of proceedings on terminating criminal proceedings, the immoveable property owned by the applicant was recognised as being criminally acquired and, on the basis of Section 360(1) of the Criminal Procedure Law, the decision was taken to return it to the owner, who had lost the immoveable property as a result of a criminal offence.

The Constitutional Court held contested norms to be in compliance with Latvian Constitution.[16] All this could only give another devastating blow to already shattered faith in reliability of publicly available records of Land Register. Public reliability of the Land Register data is not the subject of this article. However, it is worth mentioning, that on top of the problem of unreliability

[14] Senatora Alda Laviņa atsevišķās domas lietā Nr. SKC – 11, 2010 [Dissenting opinion by Judge A. Laviņš in the case No. SKC–11, 2010]. *Jurista Vārds*, 28.09.2010.

[15] Criminal Procedure Law, §§ 356, 360. Available: https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law [last viewed 22.01.2020].

[16] Judgement of the Constitutional Court in the case No. 2016-07-01. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/05/2016-07-01_Spriedums_ENG.pdf#search= [last viewed 22.01.2020].

of public registers,[17] the above amendments to the Criminal Procedure Law could create additional complexity to the issue of acquisitive prescription. The issue whether the subject matter that may be or may not be acquired through prescription becomes dependent on remote decisions by little-known institutions under procedures merely covered by the obligation of non-disclosure of an investigative secret.

Notably, understanding if person obtained the property by criminal means does not depend on whether that person himself or herself was aware of criminal activities as the situation described above clearly illustrates. Whether the acquirer in case No. SKC-11, 2010, did or did not know about his or her counterpart acting on the basis of forged documents was never scrutinized. However, unfair as it may seem at the first glance, such objective attitude must be considered correct, if taken into account in view of whether the given immobile property could or could not be regarded as a "thing" which could or could not be acquired through prescription because in this context the immovable property is regarded simply as something which either is available for acquisition through prescription (*res habilis*) or not.

Ownerless immovable property is another category of "things" which could not be acquired by anyone, i.e., it falls outside the category of *res habilis*. It does not matter whether a land plot never has been considered to be under ownership of anyone, or was abandoned, or the owner has passed away without leaving heirs, – such property could not be acquired by anybody, because it *ipso iure* belongs to the state from the very moment when the owner abandoned it or ceased to exist.[18] This novelty, which was introduced back in 1925 by the so-called Local Civil Laws of 1864[19] and included in the Civil Law of 1937, when this latter replaced the previous Civil Laws of 1864[20]. This innovation in practice does not lead to immediate seizure of land plot as soon as it becomes ownerless. Such

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[17] *Torgāns, K.* Prettiesiski iegūta īpašuma tālāknodošanas sekas [The Consequences of the Alienating of Illegally Acquired Property]. *Jurista Vārds*, 07.12.2010. Available: https://juristavards.lv/doc/222168-prettiesiski-ieguta-ipasuma-talakpardosanas-sekas/ [last viewed 22.01.2020]; *Rozenfelds, J.* Lietu tiesību normu piemērošana tiesu praksē [Practice of Implementation of the Norms on Property Rights]. *Jurista Vārds*, 19.03.2011. Available: https://juristavards.lv/doc/228812-lietu-tiesibu-normu-piemerosana-tiesu-prakse/ [last viewed 22.01.2020]; *Kolomijceva, J.* Civiltiesību un krimināltiesību mijiedarbība [Mutual Interference of the Civil and Criminal Law]. *Jurista Vārds*, No. 17 (920). 26.04.2016, Available: https://juristavards.lv/doc/268472-civiltiesibu-un-kriminaltiesibu-mijiedarbiba/ [last viewed 22.01.2020].

[18] Civil Law, § 930.

[19] Original of the Civil laws of 1864 (Part III of the Codification of Local Laws or the CLL). Issued in Russian and German. Digitalized version of the original of the Civil laws (in Russian) of 1864 (Part III of the Codification of Local Laws). Available: https://www.lndb.lv/Search/Search?FreeFormQuery=1864&PageIndex=2&PageSize=12&SearchEndpointID=0&SearchResultViewMode=List&IsCustomViewMode=False&SortingField=Relevance&IsStopwordRemovalDisabled=False&IsDuplicateCollapsingDisabled=False&SelectedDocumentSets=DOM [last viewed 22.01.2020].

[20] Amendment regarding ownerless land belonging to the state was added to the § 713, which corresponds to the § 930 of CL by law of 1924 to the Latvian version of the Civil laws of 1864 or CLL. Civillikumi (Vietējo likumu kopojuma III daļa) Tulkojums ar pārgrozījumiem un papildinājumiem, kas izsludināti līdz 1935.gada 1. janvārim, ar dažiem paskaidrojumiem. Sastādījuši: Prof. Dr. iur. A. Būmanis, Rīgas apgabaltiesas priekšsēdētājs. H. Ēlerss, Kodifikācijas nodaļas vadītājs. J. Lauva, Kodifikācijas nodaļas sekretārs. Rīgā, 1935. g. Valtera un Rapas akc. sab izdevums [Civil Laws. Chapter III of the Collection of Local Laws. Translation with Changes and Supplementations up-to-date as of the 1 January 1935 with some Explanations. Compiled by Professor PhD A. Būmanis, Head of the Codification Subdivision Judge H. Ēlerss, J. Lauva, Secretary of the Codification Subdivision]. 1935, p. 113.

immovable properties are apprehended by state institutions on case by case basis. There are no known cases, when someone would contest the right of the state to heirless immovable property on the grounds of acquisitive possession. The law contains no provisions regarding this. There is a dilemma. On the one hand, it could be asserted that from the moment the immobile property has become state-owned *ipso iure*, there is no way how another person can acquire such land by. On the other hand, a plot of land that has been abandoned for a long time, uncared for by state or any other person, contradicts the very idea of the acquisition through prescription. It is created by law for maintaining order and preventing lawlessness. Examples of other legislations show that the land belonging to the state could be acquired through prescription, although the prescription period is significantly longer than ordinary prescription term. For instance, in Australia, there is a long-established principle of public reliability of land registration the form of Torrans system, such prescription period was 60 years, just like in English law, but this period has been later shortened to 30 years, still remaining twice as long as the usual 12–15-year period, in which the true owner could take repossession.[21]

2. Legal Basis

Acquisition in good faith in Latvian law may be a precondition for acquisitive prescription only if there is a legal basis for acquisition.[22] Latvian law does not recognize acquisitive prescription, if the acquirer cannot prove any title.

Some systems, for instance, English law, regard a great variety of facts as a legal basis for acquisitive prescription. "A "paper" title is one where the documents on the face of them give the true owner the right to such possession."[23] Document means either deeds or entries on the register.[24]

Legal basis or title as a precondition for acquisitive prescription under Latvian law consists of two elements:

1) Transaction, which creates an obligation to deliver ownership (purchase, gift, barter etc.);
2) Actual delivery of the ownership, i.e., discharge of an obligation, which was created on the part of the deliverer by the transaction.

Latvian law makes a strict distinction between this transaction and actual delivery of the disposed-of movable into possession of the acquirer or registration of the acquirer in the Land Register as an owner of the disposed-of immovable.

Some authors suggest that an application for registration in the corroboration journal should as such be regarded as a transaction.[25] The alternative view[26] is that an application for registration only amounts to execution of the transaction between the owner and the acquirer (deed). However, it seems impossible to prove

[21] *Burns, F.* Adverse possession and title-by-registration systems in Australia and England. *Melbourne University Law Review*, Vol. 35(3), 2011, p. 787.

[22] Civil Law, §§ 1006–1012.

[23] *Jourdan, S.* Adverse Possession. Butterworths. LexisNexis, 2003, p. 63.

[24] Ibid.

[25] *Kalniņš, E.* Tiesisks darījums. Grām.: Privāttiesību teorija un prakse. Raksti privāttiesībās. Rīga: TNA, 2005, pp. 142–145.

[26] *Torgāns, K.* Darījumu notariālas formas nepieciešamības pamatojumi [Arguments on Behalf of Necessity of the Notarial Form of the Transactions]. *Jurista Vārds*, No. 51 (954), 20.12.2016, pp. 36–39. Available: https://juristavards.lv/doc/269849-darijumu-notarialas-formas-nepieciesamibas-pamatojumi/ [last viewed 22.01.2020].

legal basis, i.e., title, as a necessary precondition for acquisitive prescription by a person who could rely on transaction (purchase, barter, gift etc.) and could not prove that actual delivery has taken place.[27]

Transfer of property by contract *inter vivos* requires a transaction between the owner and the acquirer (deed). Delivery of property into the possession of the acquirer alone does not constitute a transfer of property to the acquirer. If one and the same movable property is sold to two buyers, then the priority will be given to the one to whom the property has been delivered.

In the sale of immovable property, the buyer whose contract has been registered in the Land Register, has the priority.[28]

Likewise, if any other kind of transaction is taking place in order to transfer ownership to someone else (barter, gift), stepping into the transaction itself does not transfer the ownership without actual delivery of the property taking place.

An application for registration alone may not be regarded as a legal precondition for transfer of an immovable to the acquirer. It is not sufficient, if the transaction (deed) is declared ineffective.

If a transaction (deed) is declared void, registration of ownership in the name of the acquirer can be rectified by court decision. In order to recover his or her property rights, the owner may bring an ownership action.[29] Even prescription (ten years for immovable property) is not sufficient for a possible defendant.[30] Courts may also reject the claim and rule in favour of the defendant, if it is believed that the defendant can rely on Land Register records. Acquirers of the immovable in Latvia are somewhat hesitant to register their ownership rights. In order to make participants to a transaction register their rights, sanctions are imposed on hesitant acquirers. The State fee for registration of ownership rights in the Land Register is calculated by applying a ratio of 1.5 %, if over six months have passed from the day of signing the document confirming the rights to be registered or from deletion of a statement that hinders voluntary registration of rights.[31]

In one of the recent court cases, court found that the claimant had bought immovable back in 2000. The vendor signed the purchase agreement but also a notarized application for registration. Such document under Latvian law is equal to delivery of the immovable.[32] However, due to various reasons, the claimant failed to register her rights. She only filed the claim over registration of her ownership in 2016, as having possessed the immovable property in good faith for more than 10 years. Her claim was discharged by the court of first instance, but dismissed by the court of appeal, whose decision was overturned by the Supreme Court, which decided to revoke the whole judgment or a part

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[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, p. 33.

[28] Civil Law, § 2031.

[29] *Rozenfelds, J.* Ownership Claim. *Journal of the University of Latvia. Law.* No. 6, *Lazdiņš, J.* (ed.-in-chief). Riga: University of Latvia, 2014, pp. 91–107.

[30] Civil Law, § 1009.

[31] Regulation "On State Fee for Registering Ownership Rights and Pledge Rights in the Land Register", No. 1250, adopted on 27 October 2009, § 16.[1]

[32] Civil Law, §§ 992, 993.

thereof, and transfer the case for re-examination to an appellate court. [33] The case is still pending.

There is a long line of court decisions, confirming an ownership of the plaintiff, who has signed an agreement (purchase, barter, gift etc.) and moved into the house behaving like an owner (paying taxes etc.), although failing to register the ownership. It should be taken into account that such procrastination in the past did not preclude the acquirer from vindication of the immovable still registered in the name of previous owner.[34] If the court felt that the interests of the claimants in abovementioned cases outweighs the extremely strict demands for acquisitive transaction be completed and turned a blind eye to the fact that only claimants themselves could be blamed for failing to do so, this only proves once more that rigorous conditions of usucaption as provided for by Latvian law are sometimes not in step with common apperception of the law in the society.

Another trend which features prominently in numerous cases where claim is based on acquisitive prescription is inability of the party to produce evidence of the existence of the legal basis for acquisition, because during transitional period from Soviet occupation period towards market economy the neglect towards private property led to lack of decent paperwork.[35]

There are decisions whereby Supreme Court has ruled to revoke the whole judgment or a part thereof, and transfer the case for re-examination to an appellate court or the court of first instance, urging for more lenient attitude by the court towards lack of necessary documents, for example, the required construction permits.[36]

The difference between the existing terms for prescription (§§ 999–1029 CL) and a more lenient approach, which is based simply on the fact of uninterrupted possession for at least 30 years, is known as that of *longi temporis prescriptio* (the so-called ordinary prescription)[37] and *longissima temporis prescriptio* (the so-called extraordinary prescription)[38] in Roman law. The latter does not require either a title or a good faith.

Land registration, which has existed for more than 30 years, becomes irreversible under German law.[39]

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[33] Judgement by the Supreme court No. SKC-74/2019. Available: file:///C:/Users/JanisR/Downloads/Anonimizets_nolemums_378829-2789.pdf [last viewed 22.01.2020].

[34] *Rozenfelds, J.* Ownership Claim. *Journal of the University of Latvia. Law.* No. 6, *Lazdiņš, J.* (ed.-in-chief). Riga: University of Latvia, 2014, pp. 91–107.

[35] Judgement of the Supreme Court, case No. SKC-1065/2012. Available: http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?year=2012 [last viewed 22.01.2020]; Judgement of the Supreme Court, case No. SKC-115/2017. Available: http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?year=2017 [last viewed 22.01.2020].

[36] Judgement of the Supreme Court, case No. SKC-7/2010. Available: http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?year=2010 [last viewed 22.01.2020].

[37] Ibid., §§ 141-146, pp.65–73.

[38] *Baron, Ju.* Sistema Rimskogo Grazhdanskogo prava. Vypusk vtoroj [System of Roman Civil Law. Second edition]. Perevod L. Petrazhickago. Tret'e izdanie. S.-Peterburg: Sklad izdanija v knizhnom magazine N. K. Martynova, 1909. Kniga pervaja. Razdel pervyj, V, § 147, p. 73.

[39] § 900 BGB. Available: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3694 [last viewed 22.01.2020].

3. Good Faith on the Part of the Holder

Term "good faith" points to the subjective attitude of the person. A person who acts "in good faith" could be understood as "the encroacher who labours under the misimpression that he occupies his own land".[40]

There is no legal definition of good faith in Latvian law. There is only one section in the CL, where a short description of what is meant by acquisition in good faith is provided. This very brief description is applicable only in transactions between spouses and only as regards movable property.[41]

Good faith is based on objective criteria. It may relate only to facts.[42]

Acquisition in good faith is a momentous fact. A person has either acquired property in good faith or otherwise. As a momentous act, the acquisition in good faith could never be turned into its antipode – the acquisition in bad faith. The acquisition in good faith is presumed. This presumption could be overturned by proving that the acquirer either knew or he or she should have known that there were obstacles for acquiring the property. These obstacles for acquiring property are factual, not legal. The acquirer could not claim ignorance of positive law. Usually the obstacles for acquiring property appear in the shape of better rights exercised by another person. For instance, acquirer based his or her right on purchase, being unaware that the vendor did not have the right or authority to sell.

Possession in good faith, contrary to acquisition, is a lasting condition. One who possesses in good faith can become a possessor in bad faith. For instance, from the time when action is brought against the defendant, the defendant shall be presumed a possessor in bad faith, even if he or she until then has been in possession of the property in good faith.[43]

The two categories indicated above – acquisition in good faith and possession in good faith – are rather frequently confused.[44]

In the context of the problem of acquisitive prescription, uncertainty could arise from the unclear wording of the law.

Although the wording used with regard to property is "possessed",[45] it must be concluded from the context that possessors' knowledge must be scrutinized regarding the facts which apply at the moment of acquisition. Holders in good faith are those who are convinced that no other person has a greater right to hold the property than they.[46]

The right over the property could not be "greater" or "smaller". Either it exists or it is non-existent. A person's knowledge as to whether their right exists or not is another thing. A person could become aware of the facts previously unknown. So, whereas it is impossible for any person to make defective acquisition of the property good, the reverse is also impossible. Only the person who in reality

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[40] *Fenell, L. E.* Efficient Trespass: The Case for "Bad Faith" Adverse Possession. *Northwestern University Law Review*. Vol. 100, No. 3, printed in USA, 2006, p. 1038.

[41] Civil Law, § 122.

[42] Civil Law, § 1013.

[43] Civil Law, § 1053.

[44] *Rozenfelds, J.* Lietu tiesību normu piemērošana tiesu praksē. Aktuālas problēmas [Practice of Implementation of the Norms on Property Rights. Actual Problems]. *Jurista Vārds*, 19.03.2011, No.16 (663), pp. 7–9. Available: https://juristavards.lv/doc/228812-lietu-tiesibu-normu-piemerosana-tiesu-prakse/ [last viewed 22.01.2020].

[45] Civil Law, § 1013.

[46] Civil Law, § 912.

did not acquire ownership could become aware of this fact within period of time limitation set by law.

If the distinction between possession in good faith or bad faith depends simply on the knowledge of certain facts, then person who should have known that this particular immovable property already had an owner who could rely on the registration in the Land Register could not be considered possessor in good faith from the very moment she or he acquired the property. This leads us to inevitable dilemma: either we have to accept the principle of public reliability of the Land Register data and thereby deny the very possibility to acquire immovable by prescription, or we have to admit that this principle has certain limits, i.e., it does not deserve to be called a principle.

4. Uninterrupted Possession

Someone basing acquisition of their ownership on prescription must prove a possession and a continued possession throughout all the required period. However, if they prove the beginning of their possession and its continuation when the prescriptive period has elapsed, it will be presumed that their possession has continued without interruption during the interim, as well. Where a dispute arises, someone who has acquired an ownership on the basis of a prescriptive period must prove their legal basis for possession; if he or she has done so, then that person will also be presumed to be a holder in good faith, so long as the contrary is not proved. The legal basis of acquisition need not be proved documentarily in every case; other methods of proof are also admissible.[47]

5. Elapse of the Set Period

Ownership of a property may be acquired through prescription, if the acquirer has held it as his or her own for the period set by law, that is, one year for movable property[48] and ten years for immovable property.[49]

Someone who has held an immovable property for a ten-year period in line with the rules on prescription[50] and who has not registered the property in their name in the Land Register, will be recognised as having acquired the immovable property through prescription, and has the right and the duty to apply for the acquisition be registered in the Land Register in their own name.[51]

Beginning of the term is the moment when a person acquired possession of the property (if the delivery followed the transaction between the owner and the acquirer, or (if the property in issue already was in the possession of the acquirer – the moment when the transaction came into force (by way of *constitutum possessorium*).[52]

The case would be specific, if the possession had started before 1 September 1 1992. The possession which has been established in line with the law up-to-date as of 1 September 1992 should be protected in accordance with the CL.[53]

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47 Civil Law, §§ 1030-1031.
48 Civil Law, § 1023.
49 Civil Law, § 1024.
50 Civil Law, §§ 1000-1022.
51 Civil Law, § 1024.
52 Civil Law, § 886.
53 Law "On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937", § 12.

This mechanism could be applicable to various cases provided by laws on privatisation.[54]

The elapse of the prescription period for immovable property does not take place without the person actively enforcing his or her rights. Person has the right and the duty to exercise this right to register property in the Land Register. Until the acquirer does this, he or she only has the rights provided for in Section 994, Paragraph two – person has the right *in personam*, i.e., claim, but not yet the right *in rem*. Ownership could only be acquired by a positive activity of the interested person. It does not come into existence *ipso iure*[55], as was the case under Civil Laws of 1864, i.e., until CL of 1937 came into force.

One interwar publication addresses this amendment by focussing on the changes in the wording of the law.[56] The author of this publication claimed that by adding this additional phrase, the legislator had aimed at precluding acquisition through adverse possession of immovable property ipso iure. In other words, change in the wording of Section 1024 precluded the so-called usucapio contra tabulas[57], which in the context of the abovementioned publication meant that adverse possession of the immovable property, which already had been registered under the name of the adversary is no longer possible.

This rather simple idea that usucaption of the immovable property could not coexist with the system of obligatory public land registration, which seems self-evident and is accepted by other legal systems[58] has somehow gone unnoticed by Latvian legal scholars and judges.

Apart from this all but forgotten publication, so far little if any attention has been paid to the altered wording of the law. Some authors still insist that the immovable property, although already registered in the name of one owner, could be acquired through prescription by another person.[59] This assertion is rooted in well-known interwar decision by the Supreme Court, which is based on the wording of the Section 855 of Civil Laws of 1864 (analogue of Section 1024 CL without the addition of the last sentence, which intended to remove the very possibility to acquire an immovable *ipso iure*).

When CL of 1937 was drafted, there was another, much longer period for acquisition of the immovable held by the claimant. The previous law included several norms devoted to the possession held from "immemorial time."[60]

The wording of this chapter of the Civil Laws of 1864 suggests that it was introduced for situations, where, due to lack of any evidence, it was impossible

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[54] Land Reform in the Cities of the Republic of Latvia Law; Land Privatisation in Rural Areas Law; Law "On Privatisation of State and Local Government Residential Houses".

[55] *Ipso iure* [Latin "by the law itself"], i.e. by the operation of the law itself, despite the parties' actions, the property will revert to another person. Black's Law Dictionary Seventh Edition. *Garner, B. A.* (ed.-in-chief). St. Paul, Minn: West Group, 1999, p. 834.

[56] Publication of unknown date included in the collection of works by this author: *Vīnzarājs, N.* Ieilguma nozīme civiltiesību sistēmā. Civiltiesību problēmas [Significance of the prescription in the system of civil law]. *Kalniņš, E.* (ed.). Published by Erlens Kalniņš and Viktors Tihonovs. Rīga, 2000, pp. 83–94.

[57] *Usucapio* (Latin), i.e. usucaption – the acquisition of ownership by prescription. Black's Law Dictionary Seventh Edition. *Garner, B. A.* (ed.-in-chief). St. Paul, Minn: West Group, 1999, p. 1542.

[58] *Jourdan, S.* Adverse Possession. Preface. Butterworths. LexisNexis, 2003, pp. VI–VII.

[59] *Grūtups, A., Kalniņš, E.* Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. Otrais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2002, p. 158.

[60] Civil Laws of 1864, §§ 700–706.

to establish whether such possession was acquired legally. One hundred years would be regarded as "immemorial" for the purposes of this chapter. Existence of the possession from immemorial time could be proved by evidence of witnesses under condition that:

1) Their memories reach back "at least one generation, i.e., 40 years";
2) They acknowledge not only that the possession in issue remained all the time in the present state, but also that "they never heard of older people anything contrary to that".[61]

In one of the commentaries on a contemporary court decision from the interwar period (Judgement of the Supreme Court of 1931 in Case No. 2091), when the aforementioned rules were enforceable, was inserted that possession from immemorial time does not lead to acquisition by prescription. Such possession only provides the evidence sufficient to presume that the possession in issue was acquired by legal means.[62]

This specific kind of possession was linked to the so-called extraordinary prescription, which was based on "very long" prescription (*longissimi temporis praescriptio*). The latter did not rely on any title of good faith of the possessor. [63]

The chapter on possession from "immemorial time" was not included in CL. As interwar period of *de facto* independence was so short-lived, the issue of acquisition without title never came into being. Now, whereas the beginning of land reform in Latvia is approaching the 30th anniversary and acknowledging that there is an abundance of unsettled cases of ownership due to inability by interested parties to produce a proper documentation, the time could be right to introduce more lenient terms of acquisitive prescription.

6. Ability of the Owners of the Property to Exercise Their Right Over the Property

> *If there are legal impediments to the exercise by the owner of a property, against whom a prescriptive period is running, of his or her rights in regard to such property, then during the time such impediments exist, the prescriptive period ceases to run.*[64]

Some of the legal impediments are outdated. For instance, absentees are regarded as persons protected during the period of their absence against the consequences of the prescription. [65]

Such rule contradicts the principle that

> *Actions against natural persons shall be brought before a court based on their declared place of residence.*[66]

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[61] Civil Laws of 1864, § 704.

[62] Civillikumi ar paskaidrojumiem. Otrā grāmata. Lietu tiesības. Sastādījuši: Sen. F. Konradi un Rīgas apgabaltiesas loceklis A. Walter. Likuma teksts Prof. Dr. iur. A. Būmaņa, H. Ēlersa un J. Lauvas tulkojumā. "Grāmatrūpnieks" izdevumā. 1935. Neoficiāls izdevums, 70. lpp.

[63] *Baron, Ju.* Sistema Rimskogo Grazhdanskogo prava. Vypusk vtoroj [System of Roman Civil Law. Second edition]. Perevod L. Petrazhickago. Tret'e izdanie. S.-Peterburg: Sklad izdanija v knizhnom magazine N. K. Martynova, 1909. Kniga pervaja. Razdel pervyj, V, § 147, c. 73.

[64] Civil Law, § 1025.

[65] §§ 1027, 1502.

[66] Civil Procedure Law, § 26.

Ability of the owners of the property to exercise their right over the property could be paralysed by occupation of the whole state.

"During wartime, the running of a prescriptive period shall cease in cases provided for in Section 1898, Clause 1[67]" (i. e., when the work of a court has been temporarily completely interrupted due to war conditions).[68]

As uninterrupted *de facto* independence of Latvia never exceeded even a 30-year period, the issue whether institutions in general and the courts in particular established by occupational powers counts.

Private property was virtually non-existent during the period of Soviet occupation. It was gradually restored only after *de facto* independence was regained (21 August 1991).[69] The Civil Law was reintroduced[70] with minor changes.

The attitude towards individual acts by Soviet institutions by no means could be characterised as an outright denial of any legal meaning of establishing various rights regarding ownership and use of land, let alone movables.

On the one hand, almost all laws regarding the terms and procedure for applying for restoration of property rights by previous owners or by their heirs (two of these dealt with restoration of nationalized land;[71] two other acts regulated restoration of nationalized dwelling houses.[72]) included declaration of invalidity of Soviet legislation. On the other hand, rights in immovable property, which could arise from the erection of the buildings "in regard with the law which was in force before 1 September 1992" are declared as legal under the re-established Civil Law.[73]

During discussions over the principles of restoration of property rights, which were seized by Soviet occupational powers, there were attempts to apply acquisitive prescription to the owners who had acquired such rights under

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67 Civil Law, § 1029.

68 Civil Law, § 1898.

69 Law on the Statehood of the Republic of Latvia. Available: https://likumi.lv/ta/en/en/id/69512-law-on-the-statehood-of-the-republic-of-latvia [last viewed 22.01.2020].

70 Law "On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937" (effective since 01.09.1992). Available: https://likumi.lv/doc.php?id=75530 (in Latvian) [last viewed 22.01.2020]; Law "On Time and Procedures for Coming into Force of Obligations Law Part of the Renewed Civil Law of the Republic of Latvia of 1937" (effective since 01.03.1993). Available: https://likumi.lv/doc.php?id=62911 (in Latvian) [last viewed 22.01.2020]; Law "On Time and Procedures for Coming into Force of Family Law Part of the Renewed Civil Law of the Republic of Latvia of 1937" (effective since 01.09.1993). Available: https://likumi.lv/doc.php?id=57034 (in Latvian) [last viewed 22.01.2020].

71 Land Reform in the Cities of the Republic of Latvia Law of 1991. Available only in Latvian: https://likumi.lv/doc.php?id=70467 [last viewed 22.01.2020], and the Land Privatisation in Rural Areas Law of 1992. Available: https://likumi.lv/ta/en/en/id/74241-on-land-privatisation-in-rural-areas) [last viewed 22.01.2020].

72 On the Denationalisation of Building Properties in the Republic of Latvia. Available: https://likumi.lv/ta/en/en/id/70829-on-the-denationalisation-of-building-properties-in-the-republic-of-latvia [last viewed 22.01.2020]; On the restoration of the ownership of dwelling houses to the rightful owners, available only in Latvian at: https://likumi.lv/doc.php?id=70828 [last viewed 22.01.2020].

73 Law "On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937", § 14.

the Soviet legislation.[74] This idea was met by fierce criticism, citing, *inter alia*, Section 1029 of CL[75]

However, inconclusive judgements regarding the attempts to legalise ownership acquired on the basis of individual grants of so-called land use for construction of individual dwelling houses show that more lenient terms for acquisition could be appropriate.

Summary

1. Acquisition by prescription under Latvian law rarely, if ever serves its target, i.e., to achieve legal certainty. Conditions for acquiring ownership, which are based on the principle of causality of the acquisition *inter vivos*, are far too complicated for being applied in reality.
2. Latvian law lacks another, more lenient form of acquiring the so-called *longissimi temporis prescriptio*, which would be applicable to various, sometimes very complicated and even murky cases of acquiring ownership. There are situations when the parties simply cannot produce the necessary documentation in order to support their case. It would be preferable to open a possibility to solve such cases through abovementioned, more lenient conditions of acquisition through prescription for a significant time period (30–40 years), rather than leave such cases interminably pending.
3. The principle that any ownerless plot of land automatically, i.e., *ipso iure* should be regarded as state-owned does not work. Leaving such plots unattended for indefinite time does not serve the interests of society, which aspires for law and order. It would be much better to allow the long-term occupants of such abandoned lands to acquire ownership.
4. It would be good to establish an amendment in the CL that a person who claims acquisition of the immovable property on grounds of prescription could not be regarded as possessor in good faith, if she or he is claiming an immovable which is already registered as being in ownership of somebody else.
5. It would be recommendable to establish an amendment in the Section 1065 after the wording "if the owner has, in good faith, entrusted a moveable 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." the following: "if an action *in personam* against the person to whom the owner has entrusted his or her property is not filed within the period of one year since the property was delivered to this person, the latter could claim that she or he has acquired this property through prescription".
6. In order to balance the interests of the society, it would be fruitful to open the discussion whether the principle that the state should take care of every

[74] *Bojārs, J.* Uz denacionalizējamo īpašumu iestājies ieilgums [Acquisitive prescription should be applied to the property which otherwise would be denationalized]. *Neatkarīgā Cīņa*, 27.11.1991.

[75] *Rožukalns, V.* Ieilgums uz laupījumu neattiecas [Prescriptions do not apply to looted property]. *Neatkarīgā Cīņa*, 14.01.1992.

abandoned land plot it would be necessary to introduce a prescription term for any claims towards a person who has settled on an abandoned plot of land.

7. Since "adverse possession advances important policy goals [..], and has created comprehensive civil law regimes that carefully balance owners' and squatters' interests",[76] apart from the 10 year period for acquisitive prescription it would be necessary to establish a 30 year period of acquisitive prescription, i.e., if a person or his or her predecessors have held an immovable property, which is not registered in the name of any other perso, for more than 30 years, they could claim ownership through prescription.
8. It is established by case law that someone who has held an immovable property for ten years, in line with the rules on prescription may acquire ownership as a result of discharge of an ownership claim against someone who is registered as an owner. If the court satisfies the claim, it should then also rule the previous registration of the owner as rectified. The rights of a claimant to immovable property based on a judgment should be registered in the Land Register.[77]

The article contains comparative analysis of acquisitive prescription, its legal and factual preconditions and consequences in Latvian law. The purpose of the acquisitive prescription is to remove legal uncertainty created by internal defects of the conditions of acquisition of the property *inter vivos*. However, the complex system of acquisitive prescription under Latvian law does not always achieve this goal. It seems that the system is overly complicated. The cases in which acquisitive prescription is the last resort for the claimant to ascertain his or her ownership with regard to immovable property leave the question of ownership unsolved. It seems that introduction of another, simplified alternative to the existing one could be helpful in solving the numerous cases of failed attempts to prove ownership.

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[77] Land Register Law, § 44.

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Jānis Pliekšāns' (Rainis') "Formula of Happiness"

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The article focuses on the analysis of the understanding of "formula of happiness" of Jānis Pliekšāns (Rainis), lawyer, philosopher and the most famous Latvian poet. Rainis' works were created at the end of the 19th – beginning of the 20th centuries. This is the time when the legal consciousness of the Latvian State was evolving and the Republic of Latvia was proclaimed (1918). Rainis' views in the philosophy of law were significantly influenced by the theory of Marxism and the fight for rights described by Rudolf von Ihering. Rainis' "formula of happiness" means interminable self-improvement in the struggle for personal happiness with the aim of leading the whole humanity towards happiness. The ultimate happiness is work for the benefit of all people.

Keywords: Jānis Pliekšāns, Rainis, happiness, formula of happiness, struggle for happiness.

Contents

Introduction

Until now, happiness as a category of law has drawn little attention of lawyers and scholars of law. Predominantly, lawyers limit themselves to search for justice as the purpose of law in accordance with the particular conflict of laws. Only the right to pursuit of happiness, included in The Declaration of Independence of the Unites States of America (1776),[1] has gained global fame. However, what is more important for a human being– justice or happiness? One can assume that, with rare exceptions, the response would be – happiness. It is self-evident.

[1] The Declaration of Independence and the Constitution of the United States of America. Washington: Cato Institute, 2002, p. 13 (they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness).

For instance, what do we wish one another on the eve of the New Year? Most probably, a Happy New Year or happiness in the New Year. Latvians have not been heard wishing each other justice on the New Year's Eve. Therefore, it is strange or even inexplicable, why the minds of lawyers/scholars of law have been so seldom occupied with the concept of happiness.

Neither can the Latvian legal science boast of researchers who have written about happiness. In fact, the only one is lawyer, poet and philosopher Jānis Pliekšāns (Rainis).

Rainis' path of life was not simple. Born in a prosperous family (1865),[2] he studied law in the capital city of the Russian Empire Saint Petersburg.[3] Already in his youth, he decided to serve the Latvian people. In the second part of the 19th century, the majority of the people were rural or urban proletarians. Therefore, Rainis had to become a Marxist.[4] He was tried for his views and deported to Central Russia (1897–1903). Following the Revolution of 1905, Rainis had to emigrate to Switzerland (Castagnola) to escape a repeated trial. He greeted the proclamation of the Republic of Latvia (1918) in exile. Being already a well-known poet, returned to the native land, welcomed by thousands of people (1920), was elected to the Constitutional Assembly from the list of social democrats. Rainis is one of "the fathers of the *Satversme* [Constitution]"[5], and apart from poetry wrote about the significance of the constitution,[6] served as a deputy of the *Saeima* (the Parliament) until his death (1929)[7]. Although, in the author's opinion, he was the best candidate for the President's office, due to political intrigues ("bargaining") he was not elected to this position.[8]

Bruno Kalniņš recalled that there had been the idea to nominate Rainis as the candidate for the Nobel Prize and the probability that the Latvian poet would have been awarded it had been high (1928). However, the University of Latvia did not propose Rainis for the Nobel Prize. "If Rainis had been awarded the Nobel Prize at the time, the Latvian writing and our nation would have joined the circle of world culture. The University's Council precluded this possibility and did not allow the spiritual giant of the Latvian nation to rise in the atmosphere of the world literature. The petty spirits, political adversaries of Rainis had reached their aim".[9]

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2 *Birkerts, A.* J. Raiņa dzīve [Rainis' Life]. Rīgā. Grāmatu apgādniecība A. Gulbis, 1937, pp. 9–14.

3 Ibid., pp. 52–62.

4 *Biezais, H. J.* Smaidošie dievi un cilvēka asara [The Smiling Gods and a Human Tear]. [N.p.]: Senatne, 1991, pp. 9–44; *Cielēns, F.* Rainis un Aspazija. Atmiņas un pārdomas [Rainis and Aspazija. Memories and Reflections. [N.p.]: Apgāds "Lietusdārzs", 2017, pp. 56–57; *Johansons, A.* Latviešu literatūra. 3. Grāmata [Latvian Literature. Volume 3]. Stokholmā: Apgāds Trīs zvaigznes, 1954, pp. 165–166; *Ziedonis, A.* Jāņa Raiņa reliģiskā literatūra [The Religious Philosophy of Jānis Rainis]. Rīga: Zinātne, 1994, p. 66.

5 *Amoliņa, D.* Rainis. Latvijas valsts idejas "gals un sākums" [Rainis. "The Beginning and End" of the Notion of the Latvian State]. *Jurista Vārds*, No. 45 (897), 17.11.2015, p. 11.

6 *Rainis.* Kopotie raksti [Collected Works]. Rīga: Zinātne, 18. sēj. [Vol. 18], 1983, pp. 379–396.

7 *Amoliņa, D.* Rainis, pp. 16–18.

8 In Latvia, the President is elected by the members of the *Saeima*. See: Latvijas Republikas Satversme [The Constitution of the Republic of Latvia], Art. 35. Available: https://likumi.lv/ta/id/57980-latvijas-republikas-satversme; https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [last viewed 11.02.2020]

9 *Kalniņš, B.* Rainis kā brīvības cīnītājs. In: Kastaņola: pa atmiņu pēdām otrā dzimtenē. Atmiņas un apceres [Rainis as Fighter for Liberty. In: Castagnola: Tracing Memories in the Second Fatherland. Memories and Reflections]. Västerås: Västmanlands Folkblads Trykeri, 1965, p. 261.

It would not be correct to state that in inter-war Latvia (1918–1940) Rainis was not respected or that his creative work was unappreciated. However, genuine "worshipping" of Rainis began only in the years of Soviet occupation. The aim, of course, was purely ideological. After his death (1929), for the Soviet power Rainis "had to become" the proletarian poet, who had not been sufficiently honoured in the "bourgeois" Latvia. Irrespectively of the political system and the opinions of their ideologists, Jānis Pliekšāns (Rainis) is the most famous Latvian poet of all times. His views on happiness also hold a lasting value. The author sets as the objective of this article the exploration of Rainis' "formula of happiness", analysing the reflections on happiness "scattered across" many of his works.

1. Personal Happiness

That, which "has to be won by struggle in bitter, bloody sweat of body and soul, that, as an ordinary man thinks, is not happiness at all, but the result of work, deservedly attained by one's own power"[10]. Rainis disagrees with this opinion of the ordinary man categorically. True happiness is not the one "which comes unexpectedly, which is "destined" by the fate and is not self-made"[11]. By this, the opinion of an average person of happiness that comes on its own or as a gift from the fate, or winning in lottery, is dismissed.

Rainis denotes a happy person as "a complete man". "A complete man" means "standing firmly on one's own feet"; i.e., being able to act and to judge in his own way. This is a person with personal dignity, respecting himself and the value of his work. The topic of work takes a special place in reflections of Raini as a Marxist social democrat. For a good reason, Zenta Mauriņa characterises the motto of Rainis' philosophy – "in the beginning was the work"[12], rather than the word, mind or power![13]

Mans vārds ir viens, viņš liksies skarbs:
Kad gars tev ir kūtris un saīdzis,
Kad pats sev par nastu tu palicis,
Viens vienīgs tad ir līdzeklis:
Darbs.[14]

One word I have, harsh as it might seem:
When idle and sullen your spirit is,
When you have become a burden to yourself
There is but one remedy to be found:
Work.

Professor Rudolf von Ihering once wrote: "Struggle is the eternal work of rights. There are no rights without struggle, like there is no property without work. Next to the commandment "By the sweat of your brow you will eat

[10] *Akots, P. J.* Raiņa domas par laimi [Rainis' Reflections on Happiness]. *Jēkabpils Vēstnesis*, No. 2, 14.01.1943, p. 3.
[11] *Pliekšāns, J.* Jaunu laimi [New Happiness]! *Dienas lapa*, No. 1, 2./14.01.1895, p. 1.
[12] *Mauriņa, Z.* Vadmotīvi Raiņa mākslā [Leitmotifs in Rainis' Art]. In: Latviešu literatūras vēsture [The History of Latvian Literature]. Rīgā: Literatūra, IV. sēj. [Vol. IV], 1936, p. 169.
[13] Ibid., p. 192.
[14] *Rainis.* Kopotie raksti [Collected Works]. Rīga: Zinātne, 2. sēj. [Vol. 2], 1977, p. 153.

your food" stands one equally true – "By struggle you will gain your rights". At the moment when rights give up their readiness for struggle, they give up themselves [..]."[15] If Ihering sees no rights without struggle, Rainis sees no happiness without struggle. Of course, the author does not regard happiness and rights to be the same. However, both concepts are closely interconnected. Happiness without rights would not be true happiness, and rights without happiness most probably would be "not law" (*Unrecht*)[16], known in the philosophy of Professor Gustav Radbruch.

Rainis' "complete man" should not wish for a happiness similar to the fate's gift, but rather aspire to "renewed power to struggle, to win one's own happiness – independence; should be wished the ability and will to become aware of one's own value, to encourage oneself to make one's own judgement, to ascertain everything and settle everything in the best way in his own mind"[17]. Befittingly, Latvians have the proverb: every man is the blacksmith of his own fortune.

In Rainis' creative work, the philosophy of "the self" is no less important than the concepts of work or struggle. "[..] a man himself creates the happiness, the man who uses the time allocated to him to improve himself and to attain what he has intended, the man himself is the creator of both time and happiness."[18]

Pats cīnies, palīdz, domā, spried un sver,
Pats esi kungs, pats laimei durvis ver.[19]

Fight, help, think, judge and weigh for yourself,
Be a master, open the door to happiness yourself.

In the struggle for transformation of life, one must differentiate between the good and the evil. In doing good, evil cannot be caused. This is one of the fundamental principles of Rainis' ethics. To discern the good and the evil, Rainis, like Socrates, needs wisdom.[20] "[N]ot the poverty of the spirit brings happiness but just the opposite – the richness of spirit"[21]. Wisdom means developing one's own understanding of the nature of things and people rather than relying on what others have written or suggested.

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[15] "der Kampf ist die ewige Arbeit des Rechts. Ohne Kampf kein Recht, wie ohne Arbeit kein Eigentum. Dem Satz: "Im Scweiβe deines Angesichts sollst du dein Brot essen", steht mit gleicher Wahrheit der andere gegenüber: "Im Kampfe sollst du dein Recht finden." Von dem Moment an, wo das Recht seine Kampfbereitschaft aufgibt, gibt es sich selber auf [..]". See: Ihering von, R. Der Kampf um's Recht [The fight for justice]. Available: http://www.koeblergerhard.de/Fontes/JheringDerKampfumsRecht_hgvErmacora1992.pdf / [last viewed 11.02.2020]; *Jērings, R. fon.* Cīņa dēļ tiesībām [The fight for justice]. Pēterburga:A. Gulbja apgādībā, [N.d.], titullapa [title page], p. 65.

[16] *Radbruh, G.* Filosofija prava [Philosophy of Law]. Moskva: Mezhdunarodnye otnoshenie, 2004, pp. 233–234.

[17] *Pliekšāns, J.* Jaunu laimi [New Happiness], p. 1.

[18] *Andžāne, I.* Aspazijas un Raiņa – laimes formulas meklējumi [Aspazija's and Rainis' Search of the Formula of Happiness]. *Latvijas Zinātņu Akadēmijas Vēstis*, 69. sēj. [Vol. 69], No. 5/6, 2015, p. 86.

[19] *Rainis.* Kopotie raksti [Collected Works]. Rīga: Zinātne, 1. sēj. [Vol. 1], 1985, p. 28.

[20] *Platons.* Dialogi. No sengrieķu valodas tulkojis Ābrams Feldhūns [Dialogues. Translated from the Ancient Greek by Ābrams Feldhūns]. [B.v.]: [Publishing House] Zinātne, 2015, pp. 949–952.

[21] *Birkerts, A.* Rainis kā domātājs. Monogrāfija [Rainis as a Thinker]. Rīgā: A. Raņķa grāmatu tirgotavas apgādībā, 1925, p. 87.

Uz gudriem vīriem neatsaucies,
Pats visā iegremdēties traucies;
Kas pats zin atrast labu, ļaunu,
Tas pasauli zin celt par jaunu.[22]

Do not allude to wise men,
Strive to delve in everything yourself;
The one who can the good and evil find,
Shall be the one to build the world anew.

"Rainis wanted to achieve the understanding among his nation, the youth in particular, that the great struggle of the future was still to come and that it would require immense spiritual power, effort filled with the energy of the heart, rather than calculated risk."[23] Victory is the aim of struggles; however, victory will not come on its own. Victory will require great courage and perseverance.

Lai ir grūt',
Vajag spēt:
Stipram būt
Uzvarēt.[24]

Hard as it may be,
One must:
Be strong,
To win.

Thus, personal "[h]appiness is found in being satisfied with oneself, when you have spent all your strength, to the utmost, when you have seen yourself grow through your work, when you stand, in your own power, free, independent – a complete man, in the most dignified meaning of the word, having no one to thank, having no one to bow to".[25] However, this will not be the ultimate happiness, "[b]ecause what is the worth of the highest development of one's own person, if this person cannot yield his strength to others [..]".[26] For the ultimate happiness, the framework of one's own egoism must be overcome.

2. Ultimate Happiness

"The whole nation, not only individual persons, must strive for liberation."[27] Contrary to the Russian communists, Rainis emphasizes the right of all people to freely develop their national identity. "Each nation, including the Latvian nation, has this instinct of life: to not perish, to evolve, to develop into self [..]."[28] "The stage of national development of humankind cannot be leapt over, landing into cosmopolitism without nations. This is [..] non-dialectic

[22] *Rainis.* Kopoti raksti [Collected Works], 1. sēj. [Vol. 1], p. 398.
[23] *Ziedonis, A.* Jāņa Raiņa reliģiskā filozofija [The Religious Philosophy of Jānis Rainis], p. 116..
[24] Quoted from: *Birkerts, A.* Rainis kā domātājs [Rainis as a Thinker], p. 61.
[25] *Pliekšāns, J.* Jaunu laimi [New Happiness], p. 1.
[26] Ibid.
[27] *Ziedonis, A.* Jāņa Raiņa reliģiskā filozofija [The Religious Philosophy of Jānis Rainis], p. 116.
[28] *Birkerts, A.* Rainis kā domātājs [Rainis as a Thinker], p. 100.

and non-evolutionary thinking [..]".[29] Therefore, for example, Pauls Dauge was reproached for giving up the idea of reinforcing the Latvianness. "We have so little confidence in our existence, recently we were "fake Germans" [*kārklu vācieši*] and "lazy Russians" [*spaļu krievi*], now we are cosmopolites [..]."[30] Each nation must reach cosmopolitism through a long path of development. It is an organic development without sudden "jerks" or "leaps". Yes, nations will merge but it will happen in the name of supreme goals – in the name of humankind.[31] No nation wants to "die as a nation and be reborn as proletariat."[32]

The Latvian nation is inconceivable without the Latvian language, national awareness (or soul) and its land (or state). Happiness is embodied in this trinity. In July 1916, when the front line divided the Latvian lands into the "occupied" territory of the German Empire and the "non-occupied" part of the Russian Empire, the poem "We and Our United Land"[33] was created. Later the poetry lines were included in the long poem "Daugava".

Daugav' abas malas
Mūžam nesadalās:
I Kurzeme, i Vidzeme,
I Latgale mūsu.

Laime, par mums lemi!
Dod mums mūsu zemi!
Viena mēle, vienā dvēsle
Viena zeme mūsu.[34]

Both sides of the Daugava River,
Never to separate:
Kurzeme is, Vidzeme is,
And Latgale is ours.

Laime, decide our fate!*
Give us our land!
One tongue, one soul,
One land that is ours.

* the deity of Fortune in Latvian mythology

The play "I Played, I Danced" (1915) was also written during the First World War. In the personage Lelde Rainis creates the symbol of Latvia, still to be won. In his fight with the worldly and the otherworldly evil, the protagonist

[29] Rainis, J. Dzīve un darbi [Life and Work]. Rīga: A. Gulbja apg., 9. sēj. [Vol. 9], 1925, p. 378.
[30] Quoted from: *Biezais, H. J.* Smaidošie dievi [The Smiling Gods and a Human Tear], p. 19.
[31] *Birkerts, A.* Rainis kā domātājs [Rainis as a Thinker], pp. 97–102.
[32] Quoted from: *Mikainis, Z.* Humānisma un proletāriskā internacionālisma ideju vienotība Raiņa darbos [The Unity of Ideas of Humanism and Proletarian Internationalism in Rainis' Work]. Rīga: Latvijas PSR Zinību biedrība, 1983, p. 22.
[33] *Kalniņš, J.* Rainis. Biogrāfisks romāns [Rainis. A Biographical Novel]. Rīga: Izdevniecība "Liesma", 1977, p. 473.
[34] *Rainis.* Kopotie raksti [Collected Works]. Rīga: Zinātne, 12. sēj. [Vol. 12], 1981, p. 222.

of the play – Tots – beyond overcoming hardships learns to bring sacrifices. Altruism for the people, sacrificing the man's supreme value– life – is heroism.[35]

– Pulcējaties, Latves ļaudis! –
– Ejam post Latves sētu! –
– Kalsim sirdis, kalsim bruņas! –
– Varoņos brīvi tapsim –
– Saulē celsim jauno Latvi![36]

– Gather, people of Latve!-*
– Let's go adorn Latve's home! –
–Let's forge hearts, forge armour! –
– Becoming heroes will set us free –
– Let's lift young Latve into sunshine!

* a poetic name for Latvia

For Rainis, the ideal state is a socialist state.[37] In the current understanding, it would be a socially responsible state. Assumedly, it is a state where the disparity between prosperity and poverty is not great and where everyone has a guaranteed work. Moreover, for the man of the future, work would have become joy: "Now work is still a yoke, in the future work will be a joy for you."[38] Joy is an integral part of happiness. In the play "The Fire and the Night", Rainis figuratively substitutes striving for happiness by striving for the Sun. For Latvians as a Northern European nation, the Sun as the symbol of warmth and everything that is good occupies a special place in its culture. The poet, putting his words in the mouth of the Old Man of the Times, sets the task for the protagonist Lāčplēsis:

Ļauj Latvijā gaišiem tapt visiem prātiem,
Ļauj visām sirdīm laimību just,
Ļauj visām vaimanām klust.
Lai visi vienādā pilnībā staigā:
Lai visiem darbs, lai visiem dusa,
Lai katram vaļa pēc saules sniegties …[39]

Let all minds in Latvia become clear,
Let all hearts feel happiness,
Let all laments subside.
Let all walk in completeness:
Let all have work, let all have rest,
Let all be free to strive for the Sun…

[35] *Birkerts, A.* Rainis kā domātājs [Rainis as a Thinker], p. 96.
[36] *Rainis.* Kopotie raksti [Collected Works]. Rīga: Zinātne, 11. sēj. [Vol. 11], 1981, p. 478.
[37] Literārais mantojums. 1. sēj. Tautas dzejnieks Jānis Rainis [Literary Heritage. Vol. 1. People's Poet Jānis Rainis]. Rīga: Latvijas PSR Zinātņu Akadēmijas izdevniecība, 1957, pp. 329, 352.
[38] Quoted from: *Mikainis, Z.* Rainis – internacionālists un patriots [Rainis – an Internationalist and a Patriot]. Rīga: Liesma, 1978, p. 89.
[39] *Rainis.* Kopotie raksti [Collected Works]. Rīga: Zinātne, 1980, 9. sēj. [Vol. 9], p. 220.

The altruism of one or a few heroes is not sufficient. Thus, for example, Galileo Galilei, when tortured by the Inquisition, was able to rise above pain and suffering, and cried, in the name of the truth: "And yet it moves!"[40] Although heroic, it was Galileo's individual conviction. The people did not understand him at the moment. It is different with collective will. It cannot be as easily eradicated. Unity holds power. Therefore, Rainis writes – we, i.e., the Latvians, are able to win our own state by struggle, by taking a stand against empires as a united nation.

Brāz bangas, tu, naidīgā pretvara –
Mēs tāles sniegsim, kur laimība!
Tu vari mūs šķelt, tu vari mūs lauzt –
Mēs sniegsim tāles, kur saule aust![41]

Blow billows, you hostile counterforce –
We shall reach horizons of happiness!
You may divide us, you may break us –
We shall reach the horizons of dawn!

Similarly to John Locke[42], Rainis also tightly links happiness to freedom. The happiness and freedom of a person, a nation and the state are inseparable notions. When meeting Spīdola[43] on the Island of Death, Lāčplēsis points to his duty and fulfilment thereof:

Kad laimīga, brīva būs Latvija,
Tad mana gaita būs izbeigta.[44]

When Latvia happy and free becomes,
My course will run to its end.

"It is one thing – to win freedom by struggle; however, it is not enough, therefore Rainis warned: do not stop, do not settle."[45] For the first time, Rainis expressed the idea of eternal Latvia through the personage of Spīdola.[46] And yet, how eternal can Latvia be, between Germany and Russia? Interwar Latvia *de facto* existed for about mere 22 years. *De iure,* the State of Latvia survived the years of Soviet occupation. If Latvia changes, as Spīdola encouraged Lāčplēsis, towards clarity (completeness)[47], assumedly, it will be eternal. However, Rainis' work does

[40] *Birkerts, A.* Rainis kā domātājs [Rainis as a Thinker], p. 81.
[41] *Rainis.* Kopoti raksti [Collected Works], 1. sēj. [Vol. 1], p. 137.
[42] *Locke, J.* An Essay Concerning Human Understanding. Hertfordshire: Wordsworth Classics of World Literature, 2014, pp. 224–270.
[43] Similarly to Lāčplēsis and Laimdota, Spīdola also is an important character in the Latvian national literature.
[44] *Rainis.* Kopotie raksti [Collected Works], 9. sēj. [Vol. 9], p. 262.
[45] *Hausmanis, V.* Latvijas valstiskuma idejas Raiņa lugās[The Idea of Latvian Statehood in Rainis' Plays]. Latvijas Zinātņu Akadēmijas Vēstis [Herald of the Latvian Academy of Sciences], 69. sēj. [Vol. 69], No. 5/6, 2015, p. 26.
[46] *Rainis.* Kopotie raksti [Collected Works], 9. sēj. [Vol. 9], p. 262; see also: *Rudzītis, J.* Spīdola nāves salā. Meditācija par Raiņa tēmu [Spīdola on the Island of Death. Meditation on Rainis' Theme]. Lībeka: J. Šins, 1948, pp. 16–21.
[47] *Mauriņa, Z.* Vadmotīvi Raiņa mākslā [Leitmotifs in Rainis' Art], p. 200.

not reveal how to combine reflections on eternal Latvia with inevitable merging of nations in the future.

Rainis' cosmopolitism cannot limit itself to the happiness of only one nation. A man is the citizen of the world, a view similar to that held by Immanuel Kant.[48] "The ultimate happiness cannot be reached by everyone on their own, the whole humankind should be brought towards happiness, so that each person could feel satisfied, [because] the whole humankind thirsts for happiness, eternal, infinite happiness is the final goal of all humankind".[49] Therefore, "[t]he greatest, endless work, working for everyone, is also the greatest personal satisfaction – happiness"[50], and at the same time – ultimate happiness.

Ik vienam ir rokas jāpieliek,
Lai lielais darbs uz priekšu tiek

Lai palīdz katris to namu celt,
Kur vien tik cilvēces laime var zelt[51]

Every single one must lend a hand,
For the great work to proceed

To help in building the only house
Where human happiness may flourish

Unfortunately, the peers did not always notice and fairly appreciate the work for the benefit of all. However, there are no grounds for pessimism. In this case, the awareness that you have fostered the development of the spiritual and material life of any person, nation, the whole humankind, by helping to create a new order of life – fairer, more humane, ethically better – will help. If not now, then in time people will understand that you have brought them happiness through your work.

Tu savu sajūsmu devi:
Nāks laiks un mīlēs tevi;
Un ja tavas acis to neredzēs: –
Tu tomēr to darījis esi,
Tu darbā savu laimi nesi.[52]

You have given your rapture:
Time will come and you will be loved;
And if unseen by your own eyes: –
And yet, you've done it,
You brought happiness in your work.

[48] *Kant, I.* Zum ewigen Frieden [Perpetual Peace]. Stuttgart: Philipp Reclam Jr., 2010.
[49] *Pliekšāns, J.* Jaunu laimi [New Happiness], p. 1.
[50] Ibid.
[51] *Rainis.* Kopoti raksti [Collected Works], 1. sēj. [Vol. 1], p. 240.
[52] Quoted from: *Akots, P.* J. Raiņa domas par laimi [Rainis' Reflections on Happiness], p. 3.

Summary

1. Rainis as a lawyer, philosopher and people's poet cannot conceive striving for happiness without personal and national freedom. Freedom is the precondition of happiness.
2. Happiness is not a gift given by the fate. It must be won through hard work of self-improvement.
3. Personal happiness is not the opposite of ultimate happiness.
4. Work for the benefit of nation and humankind is the ultimate happiness.
5. Rainis' "formula of happiness" means incessant work of self-improvement, fighting for personal happiness with the aim of bringing the whole humankind towards happiness.

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22. *Pliekšāns, J.* Jaunu laimi! [New Happiness!] *Dienas lapa*, No. 1, 2./14.01.1895, p. 1.
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29. *Rainis.* Kopotie raksti [Collected Works]. Rīga: Zinātne, 1983. 18. sēj. [Vol. 18].
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Artificial Intelligence and Civil Liability[1]

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Although modern innovations already provide an artificial intelligence-driven devices or software's capability to function fully autonomously without the involvement of any person, the issue of the specificity of the application of civil liability is, *inter alia*, weighed at the European Union level. This is linked to the current legal framework of the European Union and its Member States, which has been developed and adopted over a period of time when the operation of devices or software has requested at least an indirect involvement of a person in order to execute a specific task. In contrast, contemporary technological achievements in the design of artificial intelligence provide the ability of an artificial intelligence-driven device and software to take independent decisions regarding the conduct of a particular activity, or, on the contrary, on abstaining from carrying out a particular activity, without any person's involvement. In such circumstances, there is a need to review and reassess the content of the existing regulation with regard to the application of civil liability both in the fault liability and in the model of strict liability (including product liability), and to establish certainty in the conceptual understanding of artificial intelligence and its isolation from simple process automation.

Keywords: artificial intelligence, fault-based liability, strict liability, damage, causation.

Contents

[1] *Mg.iur.* Ritvars Purmalis, has made a significant contribution to the development of this article.

Introduction

News headlines mention the words "artificial intelligence"[2] and contemplate its impact on the economic sector and related economic prospects increasingly often.[3] At the same time, economic forecasts suggest that profits of the artificial intelligence software market might exceed the threshold of 100 billion euro in 2025,[4] which, in turn, quite clearly illustrates the goal enshrined in society to reach a new technological breakthrough similar to that made at some point by the creation of an internal combustion engine. Although historically a person's liability in relation to damage inflicted upon a third party was evaluated using the fault-based liability model recognised in the Roman law, the industrial revolution and the mechanical solutions that have been created as part of it challenged the possibility of its application. Notably, the use and presence of steam engines, railway, sources of increased risk on a daily basis set the framework for determining civil liability of a specific person within a strict liability model or the so-called "no-fault liability". If we consider historical events in conjunction with current achievements of the technology sector, we can concur with the opinion that further development of artificial intelligence might result in the fourth industrial revolution, which would, in turn, change the world economy, society as a whole, and, consequently, also the field of jurisprudence.[5] It cannot, therefore, be excluded that increasingly broader daily use of artificial intelligence will be the foundation for improving the current legal regulation, thereby fostering correct application of civil liability for the damage inflicted as a result of operation of artificial intelligence.

1. Understanding the Concept of Artificial Intelligence and Forms of Its Manifestation

Since critical functions today are already performed by means of software, the note of the European Commission that artificial intelligence is already part

[2] See, for instance: *Marr, B.* Is Artificial Intelligence (AI) A Threat to Humans? *Forbes*, 2020. Available: https://www.forbes.com/sites/bernardmarr/2020/03/02/is-artificial-intelligence-ai-a-threat-to-humans/#5a406685205d [last viewed 05.03.2020]; Open Future. Don't trust AI until we build systems that earn trust. *The Economist*, 2019. Available: https://www.economist.com/open-future/2019/12/18/dont-trust-ai-until-we-build-systems-that-earn-trust [last viewed 05.03.2020]; *Kirkland, R.* The economics of artificial intelligence. McKinsey & Company, 2018. Available: https://www.mckinsey.com/business-functions/mckinsey-analytics/our-insights/the-economics-of-artificial-intelligence# [last viewed 05.03.2020].

[3] See, for example: Artificial Intelligence in the Real World. The business case takes shape. The Economist Intelligence Unit, 2016. Available: https://eiuperspectives.economist.com/sites/default/files/Artificial_intelligence_in_the_real_world_1.pdf [last viewed 03.03.2020].

[4] See, for instance: Statista. Revenues from the artificial intelligence (AI) software market worldwide from 2018 to 2025. Available: https://www.statista.com/statistics/607716/worldwide-artificial-intelligence-market-revenues/ [last viewed 05.03.2020]; *Abdallat, A.* From ROI To RAI (Revenue From Artificial Intelligence). Forbes, 2020. Available: https://www.forbes.com/sites/forbestechcouncil/2020/01/15/from-roi-to-rai-revenue-from-artificial-intelligence/#63fdb8001fcc [last viewed 05.03.2020].

[5] See Ministry of Environmental Protection and Regional Development. Informative report "On development of artificial intelligence solutions". 2019, p. 6. Available: http://www.varam.gov.lv/lat/likumdosana/normativo_aktu_projekti/publiskas_parvaldes_joma/?doc=27521 [last viewed 14.02.2020].

of our lives can be regarded as *prima facie* justified.[6] Thus, for instance, certain software is used to pilot drone aircraft, perform surgeries,[7] calculate radiation doses,[8] diagnose melanoma,[9] and complete transactions for acquisition and disposal of shares on a stock exchange.[10] Moreover, in the United States an algorithm is used to evaluate the probability that a specific person will reoffend.[11] The recently published communication from the European Commission "On Artificial Intelligence – A European approach to excellence and trust" assumes that artificial intelligence will be able to change our lives by improvements in an number of sectors.[12] However, prior to providing a further evaluation of the probability of application of civil liability in case of damage caused by artificial intelligence, the concept of artificial intelligence should be elaborated.

The origins of the definition of the concept of artificial intelligence are linked to the explanation provided by the British cryptographer Alan Turing in the second half of the 20th century. According to him, any device may be regarded as "intelligent", if its manifestation is equivalent to or hard to distinguish from other person.[13] It has been generally recognised that artificial intelligence is closely related to computer sciences, where intellectual processes are automated via intelligent software.[14] Furthermore, in the aspect of automation of intellectual processes, notably, it is manifested as the ability of the respective software to obtain and process the information necessary for making specific decisions

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[6] European Commission. Communication from the Commission: Artificial Intelligence from Europe. Brussels, 2018, p. 1. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0237&from=EN [last viewed 02.02.2020].

[7] *Vladeck, D. C.* Machines without Principals: Liability Rules and Artificial Intelligence. *Washington Law Review*, Vol. 89, issue 1, 2014, p. 118.

[8] *Chagal, K.* Am I an Algorithm or a Product? When Products Liability Should Apply to Algorithmic Decision-Makers. The 46th Research Conference on Communication, Information and Internet Policy. 2018, p. 32. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241200 [last viewed 01.03.2020]; See also: *Lenardon, J. P. A.* The Regulation of Artificial Intelligence. Tilburg, 2017, p. 43. Available: http://arno.uvt.nl/show.cgi?fid=142832 [last viewed 02.02.2020].

[9] For details, see: *Lappuķe, R.* Mākslīgais intelekts kā cilvēces darbarīks. *Jurista Vārds*, No. 38 (1096), 2019, p. 13.

[10] See European Commission. Commission Staff Working Document: Liability for Emerging Digital Technologies. Brussels, 2018, p. 11. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0137&from=en [last viewed 02.02.2020]; See also: *Chagal, K.* 2018, pp. 3–5. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241200 [last viewed 01.03.2020].

[11] *Stankovic, M., Gupta, R., Rossert, B. A., Mayers, G. I., Nicoli, M.* Exploring Legal, Ethical and Policy Implications of Artificial Intelligence. White Paper, 2017, p. 28. Available: http://globalforumljd.com/new/sites/default/files/documents/resources/Artificial-Intelligence-White-Paper-Draft-5Oct2017.pdf [last viewed 30.01.2020]; See also: *Kucina, I.* Mākslīgais intelekts (algoritmi) tiesās un prognostisku lēmumu taisnīgums. *Jurista Vārds*, No. 38 (1096), 2019, pp. 1415.

[12] European Commission. White Paper on Artificial Intelligence: a European approach to excellence and trust. Brussels, 2020, p. 1. Available: https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf [last viewed 23.02.2020].

[13] See *Turing, A.* Computing Machinery and Intelligence. *Mind*, Vol. LIX, issue 236, 1950.

[14] See *Bathaee, Y.* The Artificial Intelligence Black Box and the Failure of Internet and Causation. *Harvard Journal of Law & Technology*, Vol. 31, issue 2, 2018, p. 898. Available: https://jolt.law.harvard.edu/assets/articlePDFs/v31/The-Artificial-Intelligence-Black-Box-and-the-Failure-of-Intent-and-Causation-Yavar-Bathaee.pdf [last viewed 08.02.2020].

or predicting the initially unknown outcome[15] via *machine learning*[16] or self-learning, and as the ability of a system driven by artificial intelligence to mimic the mental capacity that is specific to a human.[17]

Similarly, Professor at Stanford University John McCarthy once characterised artificial intelligence as intelligent software development science,[18] which, in turn, resulted in public discussions whether intellect may be more than an inherent feature of a biological being, i.e., whether it can be artificially created.[19] At the same time, the paradigm of complete autonomy upheld by artificial intelligence theorists provides that "smart" algorithms are able to "feel – think – act" without other person's involvement. Such an attitude, *inter alia*, correlates with the opinion once expressed by the Professor at Oxford University Nick Bostrom that unlike other technologies, artificial intelligences are not merely tools, they are potentially independent agents.[20]

As apparent from the communication from the European Commission of 25 April 2018, "On Artificial Intelligence" the concept of "artificial intelligence" refers to "[..]. systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals [..]. artificial intelligence based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or artificial intelligence can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones, etc.)".[21] Similarly, the expert group specifically set up by the European Commission has admitted that artificial intelligence should be related to such software systems designed by humans, which are capable of not only independently interpreting the available set of information for making a specific

[15] Artificial Intelligence and Human Development: Toward a research agenda. International Development Research Centre. Canada, 2018, p. 10. Available: https://www.idrc.ca/sites/default/files/ai_en.pdf [last viewed 10.02.2020]; See also: *Smith, C., McGuire, B., Huang, T.* The History of Artificial Intelligence. University of Washington, 2006, p. 4. Available: https://courses.cs.washington.edu/courses/csep590/06au/projects/history-ai.pdf [last viewed 01.01.2020].

[16] When artificial intelligence uses the so-called machine learning abilities and deep learning abilities. For details, see: *Nguyen, G., Dlugolinsky, S., Bobak, M., Tran, V., Lopez, G., Heredia, I., Malík, P., Hluchý, L.* Machine Learning and Deep Learning frameworks and libraries for large-scale data mining: a survey. Artificial Intelligence Review. 52, 2019, pp. 80–85. Available: https://www.researchgate.net/publication/329990977_Machine_Learning_and_Deep_Learning_frameworks_and_libraries_for_large-scale_data_mining_a_survey [last viewed 08.02.2020].

[17] *Kingston, J. K. C.* Artificial Intelligence and Legal Liability. 2016. Available: https://www.researchgate.net/publication/309695295_Artificial_Intelligence_and_Legal_Liability [last viewed 10.01.2020].

[18] *Smith, C., McGuire, B., Huang, T.* 2006, p. 4.

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[20] *Bostrom, N.* When Machines Outsmart Humans. *Futures*, Vol. 35:7, 2000, pp. 759–764. Available: https://nickbostrom.com/2050/outsmart.html [last viewed 20.01.2020].

[21] European Commission. Communication from the Commission: Artificial Intelligence from Europe. Brussels, 2018, p. 1. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0237&from=EN [last viewed 09.02.2020].

decision, but also capable of introducing correction and adapting their behaviour by analysing the consequences resulting from their actions.[22]

It follows from the provided explanations that, beyond a known degree of autonomy, artificial intelligence also features the ability to alter its operation. In other words, artificial intelligence can generally be characterised by four vital elements, namely, the ability of the system:

- to alter its initial algorithm via *machine learning*;
- to adapt to previously unknown situations;
- to independently interpret the available set of information for making a specific decision;
- to perform a set of actions, which cannot be done by a traditional computerised system.

The Chairman of the Department for Civil Cases of the Supreme Court of the Republic of Latvia A. Strupišs has expressed his opinion that any type of "intellect" can be suggested only if functioning of a software (incl. a device) does not depend on an algorithm developed by a specific person.[23] The provided explanation is acceptable, since functioning of artificial intelligence primarily does not rest on a uniform linear series of codes, but instead depends upon the experience available to the system for resolution of specific problems, which, in turn, distinguishes artificial intelligence from traditional computerised systems (simple automation of processes or data processing).[24]

In the aspect of understanding the concept of artificial intelligence, the stages of development of artificial intelligence should be considered, which, despite being interrelated, should be distinguished:[25]

- Artificial *narrow* intelligence, whose main operation is mainly intended for performing one narrowly defined or limited task. An example here is voice assistants, which collect and adapt necessary information to provide answers as accurate as possible to the question being asked. However, it should be noted that the manifestation of artificial *narrow* intelligence in the form of a voice assistant will be unable to independently complete transactions for acquisition and disposal of shares on a stock exchange and vice versa. Although artificial *narrow* intelligence-based software is able to

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[22] European Commission. High-Level Expert Group on Artificial Intelligence. A Definition of AI: Main Capabilities and Disciplines. Brussels, 2018, p. 6. Available: Https://ec.europa.eu/futurium/en/ai-alliance-consultation [last viewed 10.01.2020]; See also: *Chagal, K.* The Reasonable Algorithm. *Journal of Law, Technology & Policy*, Forthcoming. 2018, p. 117. Available: http://cyber.haifa.ac.il/images/Publications/THE%20REASONABLE%20ALGORITHM.pdf [last viewed 23.02.2020].

[23] See *Strupišs, A*. No diskusijas konferencē "Komerctiesības un mākslīgais intelekts: Quo vadis?" [From the discussion at the conference "Commercial Law and Artificial Intelligence: Quo Vadis?"]. *Augstākās Tiesas Biļetens*, No. 16, 2018, p. 111. Available: http://www.at.gov.lv/files/uploads/files/2_Par_Augstako_tiesu/Informativie_materiali/BILETENS16_WEB.pdf [last viewed 31.01.2020].

[24] *Cole, G. S.* Tort Liability for Artificial Intelligence and Expert Systems. *10 Computer L.J.*, No.10 (2), 1990, p. 145. Available: https://repository.jmls.edu/cgi/viewcontent.cgi?article=1416&context=jitpl [last viewed 03.03.2020].

[25] See also: Ministry of Environmental Protection and Regional Development. Informative report "On development of artificial intelligence solutions". 2019, p. 4. Available: http://www.varam.gov.lv/lat/likumdosana/normativo_aktu_projekti/publiskas_parvaldes_joma/?doc=27521 [last viewed 14.02.2020]; See also: *Terjuhana, J.* Mākslīgā intelekta trenēšana, izmantojot personas datus [Training artificial intelligence by using personal data]. *Jurista Vārds*, No. 38 (1096), 2019, p. 31; *Kaplan, A., Haenlein, M.* Siri, Siri in My Hand, Who's the Fairest in the Land? On the interpretations, illustrations and Implications of artificial intelligence. *Business Horizons*, 62 (1), 2019. Available: https://www.sciencedirect.com/science/article/pii/S0007681318301393 [last viewed 31.01.2020].

introduce changes in the way it processes information and makes decisions via *machine learning*, it is not capable of functioning outside the areas of activities initially defined by a specific person (the framework of their algorithm). This allows for recognition that artificial *narrow* intelligence-based software entirely depends on its developer. For example, according to experts, the stage of development of artificial *narrow* intelligence includes state-of-the-art computer systems, such as *Watson*[26] and *AlphaGo.*[27]

- Artificial *general* intelligence, whose main operation is intended for imitating the human decision-making process in a broadly defined "task" field.[28] Current developments in creating artificial *general* intelligence by the non-profit organisation established by Elon Musk can be mentioned as an example.[29] The main operation of artificial *general* intelligence, unlike that of artificial *narrow* intelligence, is not limited to the performance of a single specific task, because artificial *general* intelligence aims to mimic a human-level skill set in a number of situations,[30] at the same time ensuring the ability of such a system to continuously improve its operation.[31] In other words, artificial *general* intelligence will secure the ability of software to function in several (incl. not interrelated) task fields regardless of the set of information available to it.

If we look at the breakdown of artificial intelligence into its development stages, a conclusion can be made that the explanation of the concept of "artificial intelligence" provided by the senator A. Strupišs characterises artificial *general* intelligence, autonomous functioning and further development of which is not influenced by other person or the content of the task initially defined for the system. Although we can admit that artificial *general* intelligence is related to future technologies,[32] most of the industry representatives consider

[26] The Watson computer system uses cognitive computing to provide the most relevant answers resulting from interpretation of available information. For details, see: International Business Machines Corporation. Watson Anywhere. Available: https://www.ibm.com/watson [last viewed 09.02.2020]; It is also worth to mention that the treatment plan prescribed to cancer patients by the Watson computer system matches the one prescribed by 99 % of qualified doctors. For details, see: Ministry of Environmental Protection and Regional Development. Informative report "On development of artificial intelligence solutions". 2019, p. 8. Available: http://www.varam.gov.lv/lat/likumdosana/normativo_aktu_projekti/publiskas_parvaldes_joma/?doc=27521 [last viewed 14.02.2020].

[27] AlphaGo is the first computer programme, which has won in the GO table game world championship. For details, see: DeepMind AlphaGo. Available: https://deepmind.com/research/case-studies/alphago-the-story-so-far#what_is_go_ [09.02.2020]; See also: *Yu, R., Ali, G.* What's Inside the Black Box? AI Challenges for Lawyers and Researchers. *Legal Information Management.* Vol. 19, issue 1, 2019, p. 5. Available: https://www.cambridge.org/core/journals/legal-information-management/article/whats-inside-the-black-box-ai-challenges-for-lawyers-and-researchers/8A547878999427F7222C3CEFC3CE5E01 [last viewed 11.02.2020].

[28] For details, see: *Chagal, K.* The Reasonable Algorithm. 2018, pp. 115–118.

[29] The OpenAI non-profit organisation established by Elon Musk in cooperation with other industry companies are committed to ensure that artificial general intelligence benefits all the humankind. Individual projects being implemented by OpenAI can be last viewed on this website: https://openai.com/progress/ [last viewed 31.01.2020].

[30] *Rosa, M., Feyereisl, J.* A Framework for Searching for General Artificial Intelligence. 2016, p. 6. Available: https://arxiv.org/pdf/1611.00685.pdf [last viewed 05.03.2020].

[31] *Yampolskiy, R., Fox, J.* Artificial General Intelligence and the Human Mental Model. Singularity Hypotheses: A Scientific and Philosophical Assessment. Springer, 2012, p. 8. Available: http://intelligence.org/files/AGI-HMM.pdf [last viewed 05.03.2020].

[32] *Terjuhana, J.* 2019, No. 38 (1096), p. 32.

that the development stage of artificial *general* intelligence might be reached to the fullest in the first half of the 21st century.[33] Regardless of whether such forecasts are correct or not, there is a reason to start discussions about the matters of civil liability application, because in case of simple automation of processes the developer of the respective algorithm would, most probably, face civil liability (unless other factors excluding liability of the developer of the algorithm were stated).

A *prima facie* evaluation might lead to a recognition that the "developer" of the system would face liability for causing damage to a third party in case of artificial *narrow* intelligence, because the main functioning of artificial *narrow* intelligence, although it is autonomous and unpredictable, does, to a known extent, depend on its developer (for example, in terms of the functions the specific system implements). However, despite the previously mentioned, the considerations in the context of this article regarding artificial *general* intelligence may also apply to artificial *narrow* intelligence-based software, because the decisions made as part of its operation may be objectively unpredictable for its developer, and the decision-making process of such systems may limit the possibility of finding causation.

To resume, the concept of "artificial intelligence" in this article may apply to the stage of development of artificial *general* intelligence, i.e., systems developed by human beings, autonomous functioning of which may change on its own and differ completely from the initially built algorithm, and, as a result, a system similar to human intellect is able via *machine learning* to take independent, unpredictable decisions without involving other persons in several, not interrelated task fields.

2. Compliance of Currently Existing Regulatory Framework and Potential Analogy

Throughout the development of the mankind, there has always been the risk of damage being inflicted as a result of operation of mechanical devices, however, the probability of occurrence of these risks was mainly caused by the involvement of a specific person.[34] However, in case of artificial intelligence, the situation is different – the probability of occurrence of a risk depends on the decisions independently made within the scope of autonomous functioning of artificial intelligence rather than on the involvement of a specific person. Moreover, it should be taken into account that as a specific automated system becomes more complex, its functioning and even faults over time may become not just unpredictable, but also unavoidable.

Being influenced by legal vacuum, the European Parliament has once proposed to conceptually evaluate whether, for instance, it would be reasonable to grant autonomous robots the status of "electronic persons" and establish

[33] *Mack, E.* These 27 Expert Predictions About Artificial Intelligence Will Both Disturb and Excite You. https://www.inc.com/eric-mack/heres-27-expert-predictions-on-how-youll-live-with-artificial-intelligence-in-near-future.html [last viewed 21.02.2020].

[34] See *Asaro, P. M.* The Liability Problem for Autonomous Artificial Agents. 2016, p. 190. Available: https://www.aaai.org/ocs/index.php/SSS/SSS16/paper/download/12699/11949 [last viewed 10.01.2020]; See also: *Abbott, R.* The Reasonable Computer: Disrupting the Paradigm of Tort Liability. University of Surrey School of Law. *George Washington Law Review*, No. 86, issue 1, 2018, p. 2. Available: http://epubs.surrey.ac.uk/821098/ [last viewed 10.01.2020].

the need for obligatory insurance.[35] However, it was quite reasonably recognised in the report published by the expert group of the European Commission relatively recently that such a proposal is generally evaluated as contradictory and challenging with regard to the ethical dimension.[36] At the same time, we should recognise that, according to a *prima facie* evaluation, such a solution would, in fact, restrict any application of liability to the natural and legal persons, who own such an "electronic person",[37] not to mention the method and procedure of securing victim's ability to bring its claim for compensation of damage against an "electronic person". Similarly, also the summarised conclusions of the conference "Commercial law and artificial intelligence: quo vadis" of the University of Latvia and the Ministry of Justice of 2017 provide that liability for the damage inflicted by artificial intelligence should be requested not from a "synthetic creature", but from a specific person,[38] which, unambiguously, can be accepted.

It has already been generally recognised that civil liability is a liability that results from an unauthorised action, supplements or replaces other, already violated liability or newly arises due to tort and manifests as the tortfeasor's duty to prevent or mitigate the damage caused to the victim as a result of the unauthorised activity.[39] Therefore, civil liability may be understood as the tortfeasor's duty towards the victim with regard to the compensation for inflicted damage. In turn, wrongful actions in private law can be stated only if there has been an infringement of rights (unlawful conduct).[40] This, *inter alia*, already follows from the "result theory" included in the content of Section 1635 of the Civil Law,[41] which means that a precondition for statement of a wrongful action is an infringement of rights (rather than a bare consideration whether the action of the person meets the reasonable person standard).[42]

So far, there has been no doubt and it is possible to reasonably recognise that liability for the damage inflicted as a result of autonomous functioning of artificial intelligence would be related to the evaluation of conformity of action of a specific person subject to law. However, it should be taken into account that in the fault-based liability model it is first necessary to state negligence or malicious intent, where negligence is stated on the basis of objective criteria existing outside

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[35] European Parliament. Report with recommendations to the Commission on Civil Law Rules on Robotics. 2017, p. 18. Available: https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.pdf [last viewed 23.02.2020].

[36] European Commission. Liability for Artificial Intelligence and other emerging digital technologies. Report from the Expert Group on Liability and New Technologies – New Technologies Formation. 2019, p. 38. Available: https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608 [last viewed 08.02.2020]; See also: *Lappuķe, R.* Mākslīgais intelekts kā cilvēces darbarīks [Artificial intelligence as a tool of humankind]. *Jurista Vārds*, 2019, No. 38 (1096), pp. 14–15.

[37] European Commission. Liability for Artificial Intelligence and other emerging digital technologies. Report from the Expert Group on Liability and New Technologies – New Technologies Formation. 2019, p. 38. Available: https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608 [last viewed 08.02.2020].

[38] *Lielkalne, B., Cehanoviča, A.* Komerctiesības un mākslīgais intelekts: quo vadis? *Jurista Vārds*, 2017, No. 50 (1004), pp. 6–8.

[39] See *Torgāns, K.* Saistību tiesības. I daļa. Mācību grāmata. Rīga: Tiesu namu aģentūra, 2006, p. 205.

[40] *Kārkliņš, J.* Vainas, prettiesiskas rīcības un atbildības ideja privāttiesībās. LU: *Juridiskā zinātne*, No. 8, 2015, p. 170.

[41] Civillikums: LV likums [Civil Law] Amended: 28.01.1937. Available: https://likumi.lv/ta/id/225418-civillikums [last viewed 11.02.2020].

[42] See *Kārkliņš, J.* 2015, p. 171.

psyche (reasonable person standard), while malicious intent is stated on the basis of the person's psychic attitude to his or her wrongful action.[43] Meanwhile, in the strict liability model it is necessary for the specific risk to materialise, which is considered the cause of the inflicted damage.

In accordance with Section 1649 of the Civil Law, in claims arising from wrongful action, the tortfeasor shall be liable for any, even ordinary negligence. This, in turn, means that the measure of "ordinary negligence" is the standard of care of a "reasonable person"[44]. Therefore, in order to determine a person's civil liability for a tort, it should be established that the person did not act as a reasonable person in respective conditions. However, a rhetorical question can be posed – how a failure to follow the required standard of care can be stated in actions of a specific person in accordance with the degrees of fault regulated by the Civil Law (in the form of negligence or intent), if autonomous functioning of artificial intelligence occurs outside any person's control. *Inter alia*, the opinion has been publicly expressed, proposing that in the places where technology is acting autonomously, it should be unreasonable to regard action of a specific person as incompliant with the reasonable person standard.[45] At the same time, it is recognised in the legal doctrine that if the developer of artificial intelligence is unable to anticipate the probability of occurrence of negative consequences, then all the more so the probability of occurrence of such consequences cannot be anticipated by some other third party.[46]

It should also be taken into account that artificial intelligence software is based on complex neural networks and those consist of several layers of electronic synapsis, which considerably restrict or even prevent obtaining of information about the decision-making process of that artificial intelligence.[47] Modern innovations already secure the ability of artificial *narrow* intelligence to gain experience via *machine learning* from its previous attempts and committed mistakes similarly to biological beings, while at the same time keeping the reasoning of the decision taken unknown to others. This, in turn, may restrict the possibility of applying civil liability, because causation is one of preconditions of civil liability, which exists both in contract and tort law, and applies to the preconditions for compensation of pecuniary and non-pecuniary damage.[48] At the recent 78th international conference of the University of Latvia, Professor

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[43] See *Torgāns, K., Kārkliņš, J.* Civiltiesiskās atbildības modeļi pēc vainojamības pazīmes. *Jurista Vārds*, 2015, No. 35 (887). Available: www.juristavards.lv; See also: *Kārkliņš, J.* 2015, p. 156; See also: *Buls, L.* Vainas nozīme deliktu tiesībās. LU 72. konferences rakstu krājums. Tiesību efektīvas piemērošanas problemātika. Rīga: LU Akadēmiskais apgāds, 2014, p. 198.

[44] *Von Bar, C., Clive, E., Schulte-Nölke, H.* (eds.). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). New York: Oxford University Press, 2010, p. 3275.

[45] *Borges, G.* Liability for machine-made decisions: gaps and potential solutions. Saarland University. Available: https://www.rechtsinformatik.saarland/images/pdf/news/2017-10-27-OECD-AI-Conf-Borges-position-paper.pdf [last viewed 03.09.2018].

[46] See *Bathaee, Y.* 2018, p. 924.; See also: *Yu, R., Ali, G.* 2019, p. 5.

[47] See *Yu, R., Ali, G.* 2019, p. 5.

[48] *Torgāns, K.* Līgumu un deliktu tiesību problēmas. Rīga: Tiesu namu aģentūra, 2013, p. 185; See also: *Torgāns, K.* Saistību tiesības. Otrais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2018, p. 170.

Kalvis Torgāns also recognised that the aspect of causation is a matter to be considered separately.[49]

The ability of artificial intelligence to function autonomously compels to review the methodology of determining causation in case of damage caused by artificial intelligence, because, for example, within the framework of the cause intervention doctrine, a decision taken within the scope of autonomous functioning of artificial intelligence might be regarded as an "external cause", and the causal link would, therefore, cease to exist and the possibility of application of civil liability would be excluded. The communication from the European Commission of 2020 "On Artificial Intelligence" provides that the application of the currently existing regulatory framework may potentially be challenged, because the possibility to track the decision-making process of artificial intelligence-based software is relatively limited,[50] which, in turn, may complicate the possibilities of victims to get compensation for inflicted damage in accordance with the legal framework of the European Union and Member States.[51]

It is, therefore, necessary to find alternative technological solutions, whereby it would be possible to track the decision-making process of artificial intelligence, thus determining how much and to what extent the specific person or other circumstances have affected autonomous functioning of artificial intelligence. Such an approach would ensure differentiation between the initial algorithm of artificial intelligence and the set of information accumulated via *machine learning*, as well as determining how autonomous functioning of artificial intelligence has been influenced by other, initially unknown factors. Thus, for instance, some work is already ongoing for the achievement of this goal to create systems, which will be able to identify and provide comprehensive information on decision-making process of artificial intelligence.[52] This information, in turn, might be used to correctly apply civil liability and its allocation among the persons involved, who would have affected functioning of artificial intelligence-based software or device. Considering the fact that the purpose of this article is not a profound analysis of all the challenges that have been identified so far (understanding the clause of a reasonable person, identification of causation and possibility of application of strict liability), individual details will be covered further below, which together raise doubts about suitability of the currently existing regulatory framework for the application of civil liability for damage inflicted by artificial intelligence.

In the fault-based liability model, problems are identified already in the possibility of application of Section 1635 of the Civil Law, because, in accordance

[49] 78th international scientific conference of the University of Latvia – Civil Law and its Significant in the Next Decade, 2020. Available: https://www.youtube.com/watch?v=OzwLUff-Bw0 [last viewed 04.03.2020].

[50] European Commission. White Paper on Artificial Intelligence: a European approach to excellence and trust. Brussels, 2020, p. 10. Available: https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf [last viewed 23.02.2020].

[51] European Commission. White Paper on Artificial Intelligence: a European approach to excellence and trust. Brussels, 2020, p. 12. Available: https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf [last viewed 23.02.2020].

[52] See, for instance: *Wiltz, C.* DeepMind Is Working on a Solution to Bias in AI. 2019, Available: https://www.designnews.com/design-hardware-software/deepmind-working-on-solution-bias-ai/114545260161648 [last viewed 14.02.2020]; See also: Microsoft. Causality and Machine Learning. Available: https://www.microsoft.com/en-us/research/group/causal-inference/ [last viewed 14.02.2020].

with the grammatical structure of this provision, the victim is entitled to ask for satisfaction "[..]. from the infringer [person subject to law – author's comment] insofar as he or she may be held at fault for such act". Considering the fact that in case of damage caused as a result of autonomous functioning of artificial intelligence this "autonomously functioning source of damage" rather than its owner would have to be regarded as tortfeasor and, taking into account the fact the current regulatory framework does not provide for recognition of artificial intelligence as a person subject to law, a conclusion can be made that the application of civil liability based on Section 1635 of the Civil Law is impossible, not to mention the possibilities of establishing fault of software, because the actions performed by it, in essence, do not and cannot exhibit negligence or intent.[53]

Although one might agree with the opinion expressed in the legal doctrine that the fault-based liability model is not intended for determining liability for damage caused by such a device, which has *machine learning* abilities,[54] however, the possibility should be evaluated to establish civil liability for the damage caused to a third party by properties of a thing in ownership or possession. Namely, one of types of tort liability, when liability is not established for own fault, is liability for a thing – animals, safety of immovable property and so on.[55]

Liability for damage caused by artificial intelligence by its structure might *prima facie* most closely correspond to responsibility for damage caused by an animal. There is also an opinion in the legal doctrine that the liability applied for damage caused to a third party as a result of autonomous functioning of artificial intelligence might be related to the cases, when damage has been caused by a domestic animal,[56] because a device driven by artificial intelligence would not be considered a thing in its classical meaning.[57] It is also recognised that there is a certain similarity between artificial intelligence and an animal, because they may have a form of consciousness and ability to react to the environment, as well as the ability to act autonomously[58] and unpredictably.[59] This gives rise to a presumption that civil liability of a specific person might be established by analogy with liability applicable for damage caused by domestic animals.

Thus, for instance, Section 2363 of the Civil Law 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 or she took all safety measures required by the circumstances, or that the damages would have occurred notwithstanding all of the safety measures". It should be considered that civil liability under Section 2363 of the Civil Law is established in the fault-based liability model with the help of presumption of fault. If a person is unable to prove that he or

[53] *Bathaee, Y.* 2018, p. 906.

[54] *Hilgendorf, E., Uwe, S.* Robotics, Automatics, and the Law: Legal issues arising from the Autonomics for Industry 4.0 Technology Programme of the German Federal Ministry for Economic Affairs and Energy. Nomos, 2017, p. 17.

[55] See *Torgāns, K., Kārkliņš, J.* 2015., No. 35 (887); See also: *Torgāns, K., Kārkliņš, J., Bitāns, A.* Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā. Prof. K. Torgāna zinātniskā redakcijā. Rīga: Tiesu namu aģentūra, 2017, pp. 311–315.

[56] For details, see: *Chessman, C. F.* Not Quite Human: Artificial Intelligence, Animals, And the Regulation of Sentient Property. University of California. 2018, p. 7.; See also: *Asaro, P. M.* 2016, p. 193.

[57] *Vladeck, D. C.* 2014, p.121.; See also: *Lenardon, J. P. A.* 2017, p. 29.

[58] *Chessman, C. F.* 2018, p. 7.

[59] *Turner, J.* Robot Rules: Regulating Artificial Intelligence. Palgrave Macmillan, 2018, p. 56.

she took all safety measures to prevent the damage, he or she shall be liable for the damage.[60] This, in turn, means that similarly to Section 1635 of the Civil Law we still have an unresolved issue of determining criteria for establishment of fault of the owner of artificial intelligence, i.e. which action is to be regarded as sufficiently reasonable to prevent occurrence of liability. There is an opinion in the legal doctrine that, for example, in case of automated devices, it would be reasonable to evaluate whether the device performed as well as it should have, i.e. performed up to the standards achievable by the majority of such devices, as well as the performance specification set by its manufacturer rather than evaluate compliance of certain person's action in accordance with the reasonable person standard.[61] Considering the fact that liability for damage caused by domestic animals is evaluated in the fault-based liability model, the owner of artificial intelligence would have an opportunity to defend himself or herself demonstrating that all the required safety measures have been taken. Since artificial intelligence functions autonomously, the security of the initial algorithm would have to be verified, however, this might, in turn, restrict the possibility of application of civil liability in general.

Consequently, none of the reviewed civil liability models are applicable, because the liability included in Section 1635 of the Civil Law cannot be applied in essence, while the potential analogy to the application of liability under Section 2363 of the Civil Law does not solve the previously described problems in the possibility of identification of causation, as well as the ability of the owner of artificial intelligence to respond by taking all the necessary security measures.

While it should be borne in mind that the relevant exceptions form the possibility to impose strict liability model when, for example, the direct cause of the damage is not the materialization of the risk of the increased risk source (if artificial intelligence-driven software or device were to be recognized as such), but rather the action exercised by a third party,[62] the problem with civil liability in the case of damage caused by artificial intelligence would not be solved just by applying the strict liability model. This is mainly due to the fact that strict liability for damage caused as a result of operation of software is not widely known in the European Union, although such a civil liability model is applied to operators of narrowly defined computer systems in individual cases.[63] All the more so, the autonomous nature of artificial intelligence challenges the possibility of application of product liability regulation, because there is still uncertainty whether artificial intelligence as a set of algorithms can be covered

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[60] See *Torgāns, K., Kārkliņš, J., Bitāns, A.* 2017, p. 314; See also: *Torgāns, K.* (sc. ed.). Latvijas Republikas Civillikuma komentāri: saistību tiesības (1401.–2400. p.). Rīga: Mans īpašums, 1998, p. 643.

[61] See *Vladeck, D. C.* 2014, p. 132.

[62] For details, see: *Karklins, J.* Third-party's fault as an exclusion from strict liability. Legal Science: Functions, Significance and Future in Legal Systems II 16–18 October, 2019, Riga. Collection of research papers in conjunction with the 7th International Scientific Conference of the Faculty of Law of the University of Latvia. Riga, LU Akadēmiskais apgāds, 2020.

[63] European Commission. Liability for Artificial Intelligence and other emerging digital technologies. Report from the Expert Group on Liability and New Technologies – New Technologies Formation. 2019, p. 26. Available: https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608 [14.02.2020]; See also: European Commission. White Paper on Artificial Intelligence: a European approach to excellence and trust. Brussels, 2020, p. 13. Available: https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf [last viewed 23.02.2020].

by the "product" concept,[64] as well as whether the unpredictable decisions within the scope of autonomous functioning of artificial intelligence may be regarded as a "defect".[65]

Finally, the civil liability system aims to protect third parties against harm, and therefore, the reasonable question is whether artificial intelligence is a third party, which is protected from harm by the legislator? It is also unclear who would be responsible for harm and towards whom, if harm were to beinflicted by one object of artificial intelligence to another artificial intelligence. Since civil remedies aim to protect pecuniary and non-pecuniary benefits of a person, then artificial intelligence as an object to be protected would have to be classified into one of these groups. If it is considered to be pecuniary asset (property), then any compensation is received by its owner. However, if the owner would not be responsible for the damage caused by artificial intelligence, would it be justified to grant that person a compensation for damage, if someone damages or destroys his or her object of artificial intelligence? Perhaps the owner is only entitled to compensation of non-pecuniary (moral) damage?

3. Alternatives and future prospects

Although this paper does not intend to review and provide an extensive evaluation of all the publicly declared alternatives in resolving the problems that have been identified so far, the author points out individual opinions, which are worth to mention for illustration purposes. Thus, for instance, the European Parliament has proposed to determine the scope of civil liability depending on the level of instructions given to an artificial intelligence-based system and its degree of general autonomy, thereby setting the scope of liability proportionally among the subjects involved in the development of the artificial intelligence-based system.[66] The European Commission also offers to follow "risk-based approach", and therefore a special regulation would have to be developed only for individual sectors considering the specifics of the sector and the intended use of artificial intelligence.[67] Thus, for instance, the European Commission believes that the use of artificial intelligence potentially involves high risk where it meets the following cumulative criteria: (a) artificial intelligence is employed in a sector where significant risks can be expected to occur (for instance, healthcare, transport, energy and so on); (b) the artificial intelligence application in the sector in question is used in such a manner that significant risks are likely to arise (however, whilst healthcare generally is the "risk sector" referred to in clause (a),

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[64] European Commission. Liability for Artificial Intelligence and other emerging digital technologies. Report from the Expert Group on Liability and New Technologies – New Technologies Formation. 2019, pp. 26–29. Available: https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608 [last viewed 08.02.2020].

[65] See, for instance: *Barfield, W.* Liability for autonomous and artificially intelligent robots. Paladyn. *Journal of Behaviour of Robotics*, Vol. 9, issue 1, p. 196. Available: https://www.degruyter.com/view/j/pjbr.2018.9.issue-1/pjbr-2018-0018/pjbr-2018-0018.xml [last viewed 20.03.2019].

[66] European Parliament. Report with recommendations to the Commission on Civil Law Rules on Robotics. 2017, p. 17. Available: https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.pdf [last viewed 23.02.2020].

[67] European Commission. White Paper on Artificial Intelligence: a European approach to excellence and trust. Brussels, 2020, p. 17. Available: https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf [last viewed 23.02.2020].

a flaw in the appointment scheduling system in a hospital will normally not pose risks of such significance as to justify legislative intervention).[68]

The possibility of introducing an obligatory insurance system is also considered, according to which the manufacturer of an artificial intelligence-based device would be obliged to insure the devices it developed, at the same time establishing an additional compensation fund in order to ensure that damages can be compensated for in cases where no insurance cover exists,[69] or there would be problems in the possibility of application of existing regulation.[70] At the same time, it is indicated that the compensation fund might be funded via contributions from tech industry representatives, but with administration function being performed by some independent or public authority.[71] It is interesting to note that back in 1928 Professor of the University of Latvia Vasilijs Sinaiskis expressed a farsighted opinion that "[..] in the cases where a technical fault is the reason of people's losses and there is no and cannot be any person's fault, then, as we see, we should speak not of no-fault liability in case of infringement of rights, because such liability does not exist, but of such a concept, which has nothing in common with infringements of rights. This concept is the concept of legal solidary assistance".[72]

According to Professor V. Sinaiskis, the "concept of legal solidary assistance" would be manifested as an obligatory insurance, whereby people, in accordance with the rules set out in the regulatory enactments, would be obliged "[..] to take care of those, who are related to them in some way [..]".[73] Although Professor V. Sinaiskis applied this concept to "employers and lessors", as well as "persons with no social insurance", he also thereby quite clearly illustrated the need to find solutions in cases, where the damage caused cannot be related to the fault of a particular person. It must be recognised that such an approach is similar to the proposal of the European Parliament to establish a collective "compensation fund", which would provide settlement in the cases, when regulatory enactments do not sufficiently resolve the matter of compensating the damage caused by artificial intelligence. It is quite likely that the existence of such an alternative concept in the modern age of technology is required, because it cannot be denied that legal regulation cannot anticipate all situations in life (relating to further stages of development and yet unknown forms of manifestation of artificial intelligence), which might, in turn, result in an infringement of specific person's rights.

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[68] European Commission. White Paper on Artificial Intelligence: a European approach to excellence and trust. Brussels, 2020, p. 17. Available: https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf [last viewed 23.02.2020].

[69] See European Parliament. Report with recommendations to the Commission on Civil Law Rules on Robotics. 2017, p. 20. Available: https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.pdf [last viewed 23.02.2020].

[70] *Van Rossum, C.* Liability of robots: legal responsibility in cases of errors or malfunctioning. Ghent University, 2017, p. 43. Available: https://lib.ugent.be/fulltxt/RUG01/002/479/449/RUG01-002479449_2018_0001_AC.pdf [last viewed 23.02.2020].

[71] *Yeung, K.* A Study of the Implications of Advanced Digital Technologies (Including AI Systems) for the Concept of Responsibility Within a Human Rights Framework. Council of Europe, 2019, p. 62. Available: https://rm.coe.int/responsability-and-ai-en/168097d9c5 [last viewed 03.03.2020].

[72] *Sinaiskis, V.* Tiesību pārkāpuma ideja senatnes un tagadnes civiltiesiskā sabiedrībā. *Jurists*, 1928, pp. 144–150. Available: http://periodika.lv/periodika2-viewer/view/index-dev.html?lang=fr#issueType:P|issue:/p_001_juri1928n05|article:DIVL136|panel:pa [last viewed 01.03.2020].

[73] *Sinaiskis, V.* 1928, pp. 144–150.

The reviewed alternatives just provide a comprehensive idea of potential solution models and further evaluation is required for the specifics of application of civil liability in case of damage caused by artificial intelligence. Moreover, it should be taken into consideration that artificial intelligence makes us re-evaluate a number of other aspects related to civil liability, for instance, patenting of a constantly changing algorithm[74], determining copyright to the work created as a result of artificial intelligence, unauthorised infringement of reputation of artificial intelligence and so on. Although current technological solutions have only been a basis for starting a discussion of the problems identified in present-day regulatory framework, it cannot be excluded that new forms of manifestation of artificial intelligence will neccessitate creating a completely new regulation, which would be suitable for artificial intelligence.

Summary

1. The conceptual scope of artificial intelligence should be viewed in conjunction with the classification of artificial intelligence by its development stages – artificial *narrow* intelligence and artificial *general* intelligence. The classification of artificial intelligence into development stages is particularly important in evaluation of the scope of applicable civil liability.
2. Modern technologies have developed only at the level of artificial *narrow* intelligence and therefore autonomous functioning of software is limited only to the performance of narrowly defined tasks, for example, processing of information using a voice assistant or the ability of vehicles to function in limited way without involvement of a person and similar processes. Although artificial *narrow* intelligence-based software to a certain extent depends on its developer, it uses the already mentioned *machine learning*, which makes it different from a traditional computerised system.
3. In order to bring certainty to the concept of artificial intelligence and its difference from simple automation of processes, artificial intelligence should be understood as systems developed by human beings, autonomous functioning of which may change on their own and differ completely from the initially built algorithm, and, as a result, a system similar to human intellect by means of *machine learning* is able to take independent, unpredictable decisions without involving other persons in several, not interrelated task fields. Autonomy and independence are the fundamental features differentiating artificial intelligence from a simple automation of processes.
4. In case of damage caused by simple automation of processes, the developer of the respective algorithm would, most probably, face civil liability, unless other factors excluding liability of the developer of the algorithm were stated. On the other hand, in case of damage caused by artificial intelligence, the application of civil liability is challenged, due to the fact that the decision

[74] Comp. Intellectual Property Office. Artificial Intelligence – a worldwide overview of AI patents and patenting by the UK AI sector. 2019, p. 4. Available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817610/Artificial_Intelligence_-_A_worldwide_overview_of_AI_patents.pdf [last viewed 05.03.2020]; European Patent Office. Patenting Artificial Intelligence. Conference summary. 2018. Available: http://documents.epo.org/projects/babylon/acad.nsf/0/D9F20464038C0753C125829E0031B814/$FILE/summary_conference_artificial_intelligence_en.pdf [last viewed 05.03.2020].

made within the scope of autonomous functioning of those systems and the causal link may be untraceable, thus limiting the possibility of determining causation.

5. The application of civil liability for damage inflicted by artificial intelligence causes problems, because in the fault-based liability model it is, first of all, necessary to identify negligent action of a specific person (at least in the form of ordinary negligence) or intent, which, in turn, has a direct causal link to the damage caused to a third party. On the other hand, according to the strict liability model, in case of product liability – a defect in the respective product, which is considered to be the cause of the damage, or in case of a source of increased risk – the materialisation of the risk of the source of increased risk, which is considered the cause of the inflicted damage.
6. Until now, artificial intelligence-based software has increasingly been made of complex neural networks and those consist of several layers of electronic synapsis, which, in turn, can make it impossible to track the decision-making process of that artificial intelligence. Consequently, this calls for reviewing the methodology of determining causation in case of damage incurred by artificial intelligence, because, for example, within the framework of the cause intervention doctrine, a decision taken within the scope of autonomous functioning of artificial intelligence might be considered an external cause (the causal link would cease to exist and the possibility of application of civil liability would be excluded).
7. In order to promote the possibility to identify causation, it is necessary to find alternative technological solutions, whereby it would be possible to track the decision-making process of artificial intelligence, thus determining how much and to what extent the specific person has affected autonomous functioning of artificial intelligence. Such an approach would not only ensure differentiation the initial algorithm of artificial intelligence and the information accumulated via *machine learning*, but also contribute to determining how the functioning of artificial intelligence has been influenced by other unknown factors. Some work is already ongoing to attain this goal – to create systems, which potentially would be able to identify and analyse the basis for the decisions made within autonomous functioning of artificial intelligence. Such information, in turn, might potentially be used to correctly determine the scope of civil liability and its distribution among the persons involved, who have affected the functioning of artificial intelligence.
8. Section 1635 of the Civil Law does not solve the problem of application of civil liability for the damage caused by artificial intelligence, because the specific infringement of rights by act or omission, which has caused damage to a third party, would have been committed by artificial intelligence rather than a specific person. In addition, the application of Section 1635 of the Civil Law is limited by the fact that software does not and cannot exhibit negligence or intent with regard to the actions performed by it.
9. Although Section 2363 of the Civil Law might apply by analogy in case of damage caused by artificial intelligence, it would not limit the opportunity of the owner of the artificial intelligence to refer to the implementation of "objectively necessary security measures" and "impossibility to anticipate the harm", thus limiting the application of civil liability in essence. This, in

turn, makes it necessary to review the reasonable person's action standard, if damage has been caused by artificial intelligence.

10. The possibility of application of the strict liability model is doubtful due to the fact that strict liability for damage caused as a result of operation of software is not widely known in the European Union, although such a civil liability model is applied to operators of narrowly defined computer systems in individual cases. At the same time, the autonomous nature of artificial intelligence also challenges the possibility of application of product liability regulation, because there is still uncertainty whether artificial intelligence as a set of algorithms can be covered by the "product" concept, as well as whether the unpredictable decisions taken within the scope of autonomous functioning of artificial intelligence may be regarded as a "defect".

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Application of the Concept of Indirect Discrimination by Latvian Courts

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The article provides the analysis of Latvian national court practice on application of the concept of non-discrimination. The concept was introduced into Latvian legal system by EU law. The definition and case law of the CJEU on indirect discrimination cases demonstrate numerous aspects to be taken into account for the correct application of respective concept. As the concept of indirect discrimination is new in Latvian legal system and, in addition, its complex national court practice reveals numerous aspects posing difficulties in its precise and correct application.

Keywords: indirect discrimination, EU law, substance, interpretation, Latvian court practice, application.

Contents

Introduction

The aim of the article is to provide analysis of Latvian court practice on application of the concept of indirect discrimination.

The concept of indirect discrimination is a relatively new concept. In EU law, it has been recognized for four decades, while in Latvian law it 'appeared' only 18 years ago. It took more than 10 years until Latvian court practice started applying the concept of indirect discrimination in practice.

Since the concept is relatively new and thus 'unknown' to those not directly involved with non-discrimination law issues, the article provides a short insight

into the origins of this concept. It also explains the substance of the concept, however, very briefly, by addressing the main constituents and emphasising the most relevant aspect to be taken into account in the context of this article. This approach was chosen due to the limited volume of the article, while there is extensive case law of the Court of Justice of the European Union (CJEU), as well as scholarly writings on numerous aspects and problems in application of the concept of indirect discrimination.

1. Roots of Concept of Indirect Discrimination

The concept of indirect discrimination has its origins in case law under Title VII of the US Civil Rights Act 1964 and was subsequently introduced into UK law and into European Union (EU) law through judicial interpretation of equal pay right as provided by Article 157(1) of the Treaty on the Functioning of the European Union (TFEU)[1]. This was the case of *Jenkins*[2], referred by the British Employment Appeal Tribunal, in which the CJEU held that a difference in pay between full-time and part-time workers does amount to indirect discrimination, if it is a way to reduce the pay of part-time workers, which predominantly consist of women. Thereby, indirect discrimination was recognized by EU law.

However, application of the concept of indirect discrimination was problematic partially because the EU law itself did not provide a definition[3]. A definition of indirect discrimination first appeared in Directive 97/80/EEC[4] and later in subsequently adopted gender equality[5] and non-discrimination[6] directives.

Meanwhile, the European Court of Human Rights (ECtHR) expressly recognized protection against indirect discrimination under the European Convention for the Protection of Human Rights and Fundamental Freedoms

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1 *Barnard, C., Hepple*, B. Substantive equality. *Cambridge Law Journal*, 59(3), November 2000, pp. 562–585. That time it was Article 119 of EC Treaty.

2 *J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd.*, 96/80, 31 March 1981, European Court Reports 1981, p. 00911. Available: http://curia.europa.eu/juris/showPdf.jsf;jsessionid=CBC022A9C08053A28B0DEB13A56275D7?text=&docid=90793&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5186230 [last viewed 12.04.2020].

3 *Prechal, S.* Combating Indirect Discrimination in Community Law context. *Legal Issues of European Integration*, Vol. 19, No. 1, 1993.

4 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998, pp. 6–8 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV). Special edition in Latvian: Chapter 05, Vol. 003, pp. 264–266. No longer in force, date of the end of validity: 14/08/2009. Repealed by Directive 2006/54/EC.

5 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37–43 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV); Directive2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23–36 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, SK, SL, FI, SV).

6 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV) Special edition in Latvian: Chapter 20, Vol. 001, pp. 23–27. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV) Special edition in Latvian: Chapter 05, Vol. 004, pp. 79–85.

(ECHR) only on 2007 in case *D. H. and Others v. Czech Republic* on segregation of Roma children in education.[7]

Latvian legal system expressly introduced the concept of indirect discrimination by implementation of gender equality and non-discrimination directives in Latvian laws due to the accession to the EU in 1 May 2004 and the requirement to implement *acquis communautaire*. Consequently, the first normative acts providing definition of indirect discrimination were the Labour Law (Article 29) adopted on 2001,[8] and law "On Social Security" (Article 2^1) amended on 2005.[9]

2. Scope of Application

The EU gender equality and non-discrimination law does not apply in all fields of life. So far, respective directives cover the following fields: employment, where discrimination is prohibited on six grounds – sex, race and ethnic origin, disability, age, religion or belief and sexual orientation (Directives 2000/43/EC, 2000/78/EC; 2006/54/EC); social security, where discrimination is prohibited on two grounds – race and ethnic origin, and sex (only with regard to some types of social benefits)(Directives 2000/43/EC; 79/7/EEC[10]); access to and supply of goods and services – on the grounds of race and ethnic origin and sex (Directives 2000/43/EC; 2004/113/EC).

Speaking about the scope of protection against discrimination under the EU law, it must be mentioned that Article 21 of the Charter of the Fundamental Rights of EU (CFREU) also prohibits discrimination on more extensive list of grounds than provided by the directives. However, CFREU is not universally applicable. According to Article 51(1) of the CFREU, it applies only with regard to the measures and actions taken by EU institutions and as far as the EU Member States implement EU law. Therefore, only in limited number of cases the prohibition of discrimination as provided by the CFREU may come into play. It is well demonstrated by one of Latvian court decisions discussed below, raising the issue of possible discriminatory application and thus contrary to the CFREU of the EU secondary legal act by the EU Member State.

Latvian law explicitly prohibits indirect discrimination within the scope required by the EU law and a little beyond it. It is due to the fact that EU gender equality and non-discrimination directives were implemented in the laws regulating particular fields of life. Since some of the laws transcend the scope covered by the EU law, the implemented non-discrimination provisions also apply in extended scope. For example, prohibition of discrimination is implemented

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[7] Dijk van Pieter, Hoof van Fried, Rijn van Arjen, Zwaak Leo (eds.). Theory and Practice of the European Convention on Human Rights, Intersentia, 5th edition, 2018, p. 1006.

[8] Darba likums [Labour Law]. *Official Gazette* No. 105, 06.07.2001. Available: https://likumi.lv/ta/id/26019-darba-likums [last viewed 12.04.2020].

[9] Grozījumi likumā "Par sociālo drošību" [Amendments to the Law "On Social Security"], *Official Gazette*, No. 205, 22.12.2005. Available: https://likumi.lv/ta/id/124266-grozijumi-likuma-par-socialo-drosibu- [last viewed 12.04.2020].

[10] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.1.1979, pp. 24–25 (DA, DE, EN, FR, IT, NL), special edition in Latvian: Chapter 05, Vol. 001, pp. 215–216.

in law "On Social Security"[11] which covers the entire Latvian social security system, thereby going far beyond the scope of Directive 79/7/EEC prohibiting sex discrimination with regard to specific types of social security benefits. As a result, prohibition of discrimination, including indirect discrimination, is applicable to all branches of social security system and all types of social security benefits.

There is also one specific case where protection against discrimination is provided beyond the scope of the EU directives. It regards non-discrimination in access to and supply of goods and services, where EU directives require protection on the grounds of sex and race and ethnic origin, while Latvian implementing law – the Law on the Protection of Consumer Rights[12] – which prohibits discrimination also on the ground of disability. It reflects the obligations deriving from UN Convention on the Rights of Persons with Disabilities.

3. Substance of Concept of Indirect Discrimination

As explained by one of the top European scholars having done extensive research on the concept of indirect discrimination – Christa Tobler, the concept means the following:

> *Put simply, it relates to measures that appear to be unproblematic on their face but that, due to the circumstances in which they apply, nevertheless have discriminatory effect on a particular group of people. In other words, such measures appear acceptable on an abstract level but are problematic on a concrete level.*[13]

Different legal sources yield slightly different definitions.

The EU law stipulates explicit prohibition of indirect discrimination by providing a definition of indirect discrimination in several legal acts. In particular, gender equality[14] and non-discrimination directives present the following definition: indirect discrimination is

> *where an apparently neutral provision, criterion or practice would put persons [because of their non-discrimination trait] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is*

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[11] Likums "Par sociālo drošību" [Law "On Social security"], *Official Gazette*, No. 144, 21.09.1995. Available: https://likumi.lv/ta/id/124266-grozijumi-likuma-par-socialo-drosibu- [last viewed 14.04.2020].

[12] Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law], *Official Gazette*, No. 104/105, 01.04.1999. Available: https://likumi.lv/doc.php?id=23309 [last viewed 14.04.2020]

[13] *Tobler, C.* Limits and potential of the concept of indirect discrimination. European network of legal experts in the non-discrimination field, European Commission, 2008, p. 8. Available: http://ec.europa.eu/social/BlobServlet?docId=1663&langId=en [last viewed 12.04.2020].

[14] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp. 37–43 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV); Directive2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23–36 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, SK, SL, FI, SV).

> *objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*[15]

The ECHR itself provides neither explicit definition nor names prohibition of indirect discrimination as such, nevertheless, according to the interpretation given by the ECtHR, the ECHR prohibits indirect discrimination. The ECtHR has defined indirect discrimination in the following way:

> *The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group [..], and that discrimination potentially contrary to the Convention may result from a de facto situation [..].*[16]

Although slightly different, both definitions in substance contain the same basic elements.

The discrimination must occur due to a 'measure' or 'practice', where measure might be a legal norm or a policy measure. Indirect discrimination can arise not only from a provision or criterion, which are usually fixed in written form. It can also arise from practice. Thus, the definition covers official written requirements, as well as practice, which is usually unwritten.

A provision, criterion, or practice is discriminatory if it has a discriminatory effect irrespective of the intent.[17]

Then such 'measure' or 'practice' must "put or might put persons at a particular disadvantage compared with other persons" or "has disproportionately prejudicial effects on a particular group". It is understood as stipulating that the provision, criterion, or practice is indirectly discriminatory, if it might or has already affected negatively not only a group of the persons but also a single individual, as for the first time recognized by the CJEU in case *O'Flynn*[18] and reapproved, for example, in case *Leone*.[19] As regards requirement of putting "at a particular disadvantage", the CJEU so far has explained it in greater detail only pertaining to race, ethnic origin and sex. With regard to race and ethnic origin 'particular disadvantage' means "that [..] particularly persons of a given

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[15] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22–26 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV). Special edition in Latvian: Chapter 20, Vol. 001, pp. 23–27.
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV). Special edition in Latvian: Chapter 05, Vol. 004, pp. 79–85.

[16] Decision of the ECtHR in case *D.H. and Others v. Czech Republic*, 13 November 2007, application No. 57325/00, para. 175.

[17] See, for example, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, CJEU 16 July 2015, C-83/14. Available: http://curia.europa.eu/juris/document/document.jsf?text=&docid=165912&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5191114 [Last viewed 12.04.2020]; decision of the ECtHR in case *D.H. and Others v. Czech Republic,* 13 November 2007, application No. 57325/00, para. 179.

[18] *John O'Flynn v. Adjudication Officer*, the CJEU 23 May 1996, case C-237/94, European Court reports 1996, p. *I-02617.* Available: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=99869&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5198270 [last viewed 12.04.2020].

[19] *Maurice Leone, Blandine Leone v. Garde des Sceaux, ministre de la Justice, Caisse nationale de retraite des agents des collectivités locales*, the CJEU 17 July 2014, No. C-173/13. Available: http://curia.europa.eu/juris/document/document.jsf?text=&docid=155113&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5197491 [last viewed 12.04.2020].

ethnic origin who are at a disadvantage because of the measure at issue".[20] With regard to the sex, such element is mostly judged by using statistical evidence, for example, where statistical evidence discloses that the measure negatively affects a much higher percent of females[21] or the group predominantly consisting of females.[22] Regarding the requirement "compared with other persons", it must be stressed that definition allows for hypothetical comparator. The matter of finding a relevant comparator has been a long-standing issue of debates, since it is very complex, thus, Christa Tobler stresses that "the comparison should always be between the groups of people relevant in the context of the type of discrimination at issue".[23] It also must be emphasised that indirect discrimination does not cover only the situations where persons who are in different situations are treated similarly, but also the situations where persons are in similar situations, but treated differently.[24]

Finally, indirect discrimination may be justified or, in other words

> *provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*

Under EU regulations, this is the main feature distinguishing direct and indirect discrimination, since direct discrimination cannot be justified. The EU law under this requirement implies a three-stage proportionality test: (1) there must be a legitimate aim; (2) the means must be appropriate to achieve the legitimate aim; (3) the means must be necessary to achieve the legitimate aim.[25] The same applies to justification of indirect discrimination under the ECHR – the state should prove that a 'measure' or a 'practice' was the result of objective factors not related to any grounds for discrimination.[26]

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[20] See, for example, *Jyske Finans A/S v. Ligebehandlingsnævnet*, ECJRU 6 April 2017, C-668/15, para. 27. Available:http://curia.europa.eu/juris/document/document.jsf?text=&docid=189652&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7053049 [last viewed 12.04.2020].

[21] *Hoogendijk v. The Netherlands*, the ECtHR decision on admissibility, 6 January 2005, application No. 58641/00. Available: https://hudoc.echr.coe.int/eng#{"appno":["58641/00"],"itemid":["001-68064"]} [last viewed 12.04.2020].

[22] *Regina v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, the CJEU 9 February 199, case C-167/97, ECR, 1998, p. I-05199, para. 62. Available: http://curia.europa.eu/juris/document/document.jsf?text=&docid=44408&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5197989 [last viewed 12.04.2020].

[23] Tobler Christa, Limits and potential of the concept of indirect discrimination, European network of legal experts in the non-discrimination field, European Commission, 2008, p. 40. Available: http://ec.europa.eu/social/BlobServlet?docId=1663&langId=en [last viewed 12.04.2020].

[24] See, for example, Decision of the ECtHR in case *D.H. and Others v. Czech Republic*, 13 November 2007, application No. 57325/00, para. 180; *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, the CJEU 13 May 1986, case 170/84, European Court reports, 1986, p. 01607. Available: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=93347&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5201801 [last viewed 12.04.2020].

[25] *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, the CJEU 13 May 1986, case 170/84, European Court reports, 1986, p. 01607. Available: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=93347&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5201801 [last viewed 12.04.2020].

[26] *Van Pieter, D., Van Fried, H., Van Arjen, R. Zwaak, L.* (eds.). Theory and Practice of the European Convention on Human Rights. 5th edition. Intersentia, 2018, p. 1007.

4. Latvian Court Practice

Altogether, seven decisions directly or indirectly addressing the right not to be indirectly discriminated against were detected. Not all of them are discussed in this article, as some of them do not deal with indirect discrimination stemming from legal regulation or practice, but rather from an incorrect application of the legal norms.[27] Two of the decisions are taken in the same case by a court of different level, thus only the decision of the Supreme Court is analysed.[28]

Four of the cases address indirect discrimination on the grounds of sex in the field of social security, in particular, the effect of the use of the right to parental leave on the entitlement and calculation method of social benefits. The disputed cases concerned the employment periods taken into account for the purposes and calculation of long-term service pension for an official of the state system of interior,[29] the periods taken into account for the purposes of the calculation of disability pension[30] and unemployment benefits.[31] In all the cases, national courts accepted the argument that the situation where person is treated less favourably with regard to the right to social security because a person has exercised such right is indirectly discriminatory against females, because they are still the group making use of the parental leave in absolute majority of the cases in comparison to males.

From the perspective of the concept of indirect discrimination, such conclusion is correct – indeed, the statistics demonstrate this fact, thus, any legal measures or practice disadvantaging persons who have exercised their right to parental leave has a disadvantageous effect on female persons. At the same time, in none of the decisions the second aspect of the concept of indirect discrimination was addressed, in particular, the words calling for examination whether

> *provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*

Additionally, in one the decisions under the discussion the court failed to identify direct discrimination instead of indirect discrimination. The dispute was whether the period from 1 January 1996 to 9 January 1997, when the applicant was on parental leave, had to be taken into account for the purpose of the calculation of long-service pension for the servant of the state system of

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[27] Decision of 28 November 2017 of the Administrative District court in case No. A420187916, ECLI:LV:ADAT:2017:1128.A420187916.1.S. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/336195.pdf [last viewed 13.04.2020]; Decision of 11 February 2020 of Rēzekne Administrative Court in case No. A42-00830-20/43, ECLI:LV:ADRJRTN:2020:0211.A420261519.2.S. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/404160.pdf [last viewed 13.04.2020].

[28] Decision in case No. SKA-143/2019, ECLI:LV:AT:2019:0308.A420281216.3.L. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/378215.pdf [last viewed 13.04.2020]

[29] Decision of 11 February 2020 of Rēzekne Administrative Court in case No. A42-00830-20/43, ECLI:LV:ADRJRTN:2020:0211.A420261519.2.S. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/404160.pdf [last viewed 13.04.2020]; Decision of 9 February 2015 of the Senate of the Supreme Court in case No. SKA-286/2005. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/235739.pdf [last viewed 13.04.2020].

[30] Decision of 2 December 2014 of Administrative District Court in case No. A420303917. Available in Latvian: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/194331.pdf [last viewed 13.04.2020]

[31] Decision of 28 November 2017 of the Administrative District Court in case No. A420187916, ECLI:LV:ADAT:2017:1128.A420187916.1.S. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/336195.pdf [last viewed 13.04.2020].

interior[32]. The Supreme Court supported the conclusion of the Court of Appeals (Regional Court), which ruled that parental leave period must be taken into account, otherwise it would lead to indirect discrimination against female servants, since they predominantly exercise the right to parental leave. Such finding is partially incorrect, because the right to parental leave until 1 June 2002 was granted to female employees (officials) only,[33] thus, this is the case of direct discrimination. Such erroneous decision, however, has no impact on the just outcome, namely, that such period must be taken into account as employment period. A correct identification of the type of discrimination – is it direct or indirect, might play a crucial role in case a dispute falls within the scope of the EU law, as in this case, because under the EU law direct discrimination cannot be justified,[34] while indirect discrimination could be justified.

Two cases decided by Latvian courts concern discrimination on other grounds than sex – one regards discrimination on the grounds of disability, and the other – on religious belief.

The judgement on discrimination on the grounds of disability concerns the notification of a debtor in writing on the existence of a debt.[35] In the respective case, the court of appeals found indirect discrimination based on disability, because the creditor failed to notify the debtor about the debt in an understandable manner. The debtor, due to disability, was unable to write and read. In this decision, the court also did not analyse whether the situation was directly or indirectly discriminatory. Instead, the court based its finding on the definition of indirect discrimination provided by Consumer Rights Protection Law,[36] copying the definition word for word from Directives 2004/113/EC and 2000/43/EC, namely, that indirect discrimination occurs where seemingly neutral criterion may cause negative consequences to a person on the grounds of sex, disability or ethnic origin. Firstly, the present case falls outside the scope of the EU law, since it prohibits discrimination in access to and supply of goods and services on two grounds only – sex and race and ethnic origin, as provided by the directives mentioned before, thus, national court was not formally obliged to follow any interpretation given by the CJEU on the matter. Secondly, if the matter were to fall within the scope of the EU law, it would be disputable whether the case concerned direct or indirect discrimination. According to the case law of the CJEU, if formally neutral measure or practice is applied intentionally to a person or group holding non-discrimination characteristic, knowing that such measure would put a person or a group in disadvantageous position, it has to be

[32] Decision of 9 February 2015 of the Senate of the Supreme Court in case No. SKA-286/2005. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/235739.pdf [last viewed 13.04.2020].

[33] Article 173 of the Labour Code, *Official Gazette,* No. 17, 27 April 1972, in force until 1 June 2002. Available in Latvian: https://likumi.lv/ta/id/310175-latvijas-darba-likumu-kodekss [last viewed 13.04.2020].

[34] See, for example, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, the CJEU decision 8 November 1990 C-177/88. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61988CJ0177 [last viewed 13.04.2020].

[35] Decision of 17 January 2019 of Zemgale Regional Court in case No. CA-0178-19/12, ECLI:LV:ZAT:2019:0117.C16079916.7.S. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/373266.pdf [last viewed 13.04.2020].

[36] Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law], *Official Gazette*, No. 104/105, 1 April 1999. Available in Latvian: https://likumi.lv/doc.php?id=23309 [last viewed 13.04.2020].

considered as direct discrimination.[37] Consequently, if the creditor was aware of the particular type of disability of a debtor and notified him/her in the manner not understandable due to that disability, then the creditor discriminated against a debtor in direct manner.

Finally, the last and most 'visible' decision dealing with indirect discrimination is the decision of the Senate of the Supreme Court that concerns the right of a person receiving state-paid (compensated) medical treatment in another EU Member State under Regulation 883/2004,[38] because Latvian health care service does not provide specific medical manipulation that corresponds to religious belief of the applicant. Latvian state refused to compensate medical treatment in another EU Member State and the question was raised whether such refusal by the state to compensate a specific medical treatment in another EU Member State, that would comply with the applicant's religion might lead to the discrimination on the grounds of religious belief, as provided by Article 21(1) of the CFREU. [39] Respective questions were referred to the CJEU.[40] In the decision itself, the Senate started elaborating on the concept of indirect discrimination, however, in the view of the present author it was again done, erroneously. Instead of establishing whether the respective situation involved direct or indirect discrimination, the Senate started with the statement that this was the case of indirect discrimination, because indirect discrimination prohibited equal treatment in different situations. Such a statement is mistaken, knowing that both direct and indirect discrimination may occur in both situations – where equals are treated differently and where unequals are treated similarly.[41] At the same time, this decision was the first one, where the court addressed the issue of possible justification of discrimination.

As follows from the analysis above, there is still plenty of work for Latvian courts for improving knowledge on application of the concept of indirect discrimination. As identified, Latvian courts, first of all, in some cases fail to distinguish between direct and indirect discrimination, which might lead to erroneous outcome and, secondly, in establishing indirect discrimination, the national courts, except for one decision, fail to provide a further examination whether indirect discrimination in particular case is justified.

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[37] *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, the CJEU decision 16 July 2015, C-83/14, para. 95. Available: http://curia.europa.eu/juris/document/document.jsf?text=&docid=165912&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5191114 [last viewed 13.04.2020].

[38] Consolidated text: Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02004R0883-20140101 [last viewed 13.04.2020].

[39] Decision of 8 March 2019 of the Senate of the Supreme Court in case No. SKA-143/2019, ECLI:LV:AT:2019:0308.A420281216.3.L. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/378215.pdf [last viewed 13.04.2020].

[40] Request for a preliminary ruling from the Augstākā tiesa (Senāts) (Latvia) lodged on 20 March 2019 – *A v. Veselības ministrija*, case No. C-243/19. Available: http://curia.europa.eu/juris/document/document.jsf?text=&docid=214565&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2611276 [last viewed 13.04.2020].

[41] *Tobler, C.* Limits and potential of the concept of indirect discrimination. Available: file:///C:/Users/user/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/limpot08_en%20(1).pdf [last viewed 13.04.2020].

Summary

The concept of indirect discrimination in itself is comparatively new. In Latvian legal system it 'appeared' only 18 years ago. It explains the fact that national case law applying such concept is even more recent, and there are only seven detected decisions dealing with indirect discrimination.

The concept of indirect discrimination has been implemented into Latvian legal system by the EU law, although concept of indirect discrimination is also recognized in another important international agreement – the ECHR. The concept is defined explicitly by the EU legal acts and interpreted in numerous decisions of the CJEU. Due to extensive material on the concept of indirect discrimination, only substantial constituents and relevant aspects were addressed here.

Decisions of Latvian courts demonstrate the need for improving the knowledge not only on the concept of indirect discrimination, but also on EU non-discrimination law, since incorrect identification of the type of discrimination – direct or indirect – might lead to a mistaken outcome. At the same time, when the case indeed involves indirect discrimination, national courts must not only establish it, but also address the issue of whether indirect discrimination might be justified.

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Preventive Detention as a Personal Preventive Measure in Criminal Law of Chile

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Two decades ago, Chile took action and started a process that modified its entire criminal system, a process that did not commence in Chile alone, but in the majority of South American countries who followed the same path; in Chile, the adversarial system was gradually implemented, and since 2005 it remains in force in every part of the country. Perhaps, the most important objective and/or effect that this change brought to the Chile's criminal law was to ensure the complete respect towards the fundamental rights of those who were under investigation in the criminal system, overcoming the problems and obstacles that the previous inquisitorial system presented.

Thereby, one of the aspects that this new criminal system improved was granting the authority to judges to issue a preventive detention as a personal preventive measure during the aftermath of the criminal process, whilst such measure was applied in a massive and general manner within the previous system. This article aims to present the main impacts that the application of this new system of criminal procedure has introduced in Chile, regarding the use of the preventive detention as a personal preventive measure during the development of the criminal processes. The author intends to examine whether the overhaul of the criminal procedure system in Chile has been a useful tool to streamline the use of the preventive detention measure in the criminal process, namely, if such change has been able to create a conduct consistent with the internationally recognized values and that should guide the use of this preventive measure, especially regarding its exceptional nature and the right to be considered innocent before trial.

To comply with the previously stated purpose, this article is divided into two sections. The first one, beyond analysing the context of the preventive detention during the Chilean inquisitive system in the scope of the changes at a normative level that the new criminal procedure system proposes, is also used as a baseline for contrasting the outcomes obtained after implementation of these changes. The second section is dedicated to analysing the impact of the overhaul of the criminal procedure system with regard to applying the preventive detention in Chile and the series of changes that have been implemented.

Keywords: preventive detention, criminal process, overhaul of the criminal procedure system, fundamental rights.

Contents

Introduction

Chile, after retaining the Criminal Process Code in force for 140 years and following previous discussions in the parliament, modified this code and applied an Inquisitorial Criminal System for the criminal process and modified it once more for a Criminal Procedure Code that respects the fundamental rights of people, becoming an accusatory or adversarial Chilean criminal procedure.

This new reality caused multiple alterations in Chile's criminal justice, among them some of the most relevant, from the author's point of view, was the necessary means, requirements, period and standard to deliver or maintain the preventive detention of those who were accused of a certain crime while waiting for the investigation to be concluded and subsequent conviction.

This article aims to analyse the modifications of Chile's criminal justice regarding the preventive detention brought by the transition from an inquisitorial procedure to an adversarial one and the consequences thereof. Firstly, the relevant aspects of the preventive detention within the inquisitorial system will be analysed. Thus, we can clearly observe the extent of the changes that came with the enforcement of an adversarial system.

Further on, the article will more meticulously explore the characteristics of the adversarial system in Chile, following the objective – analysis of the preventive detention as a preventive measure in Chilean law. Thereby, we will reflect upon its requirements, its treatment and the standard that the Chilean judge needs to issue or maintain one.

The readers will be given all the judgmental elements to enable understanding the changes applied to Chilean system of justice in this context and bringing to attention the question of whether these are coherent with the extent of the established legislative changes.

Finally, the author will provide his thoughts as to whether such changes have achieved the expected outcomes after the modifications have been applied to the criminal process. This study is supported by figures obtained through Chile's National Gendarmerie for the purpose of the proposed analysis.

1. Preventive Detention in the Inquisitorial System in Chile

The application of the preventive detention during the development of the inquisitorial system was not completely homogenous in Chile, therefore, since the beginning of the XX century and until 1976 there was incarceration system that impeded the release of the accused, and representing the wide range of crimes that were considered as serious by the legislator. Thereupon, it was established that the preventive detention measure was absolutely imperative and, in consequence, the judge had not the authority to lift it and, instead, issue a probation for the accused. Naturally, a high percentage of people undergoing a criminal process (in case of severe cases, all of them) were under preventive detention during the period of the process.

In 1976, the Constitutional Act Number three, for the first time, enabled judges to order a provisional release in all the cases. This was later reaffirmed by the Constitution of 1980; since then, the Constitution established a system based on three legal foundations that a legitimate issue of a preventive detention by a judge concerns three purposes: a) victim's protection, b) protection of the investigation; and c) preventing a public security threat.[1]

With this new design, it was expected that imposition of the preventive detention as a preventive measure would no longer be an automatic response of the system, but instead, the judge would have the task to evaluate every case to identify compliance with the three constitutional assumptions that justify the issue of a preventive detention. However, this new design did not bring the expected effects and the preventive detention measure continued to be applied in a general manner, especially with the most severe cases.

During 1992 and 1994, the Law School of the Universidad Diego Portales carried out an empirical study that gathered a random sample of 180 files acquired from six criminal courthouses of the city of Santiago, all of those concluded with a definitive sentence. The aforesaid study shows that in a 100 % of the cases the accused were under preventive detention at some point during the development of the process, overlooking that 14 % of those cases were closed with an absolutory sentence.[2]

During 2001, the Foundation Paz Ciudadana conducted a study about the inquisitorial system in Chile, which consisted of a review of 2990 cases closed with a condemnatory sentence in four regions of the country, and considered within the seven categories of crimes with the highest social impact: robbery, theft, drug trafficking, homicide, rape, sexual abuse and injuries[3], a wider study than the previous one, but limited to the most severe crimes of the system. However, if we analyse how the preventive detention measure works in those cases, the results are consistent with the previous study and the percentage of people who were under a preventive detention at some point of the process represent almost 100 % of those who were sentenced, with the exception of injuries (a crime that, in Chile, may be adjudged other types of sentences than

[1] Constitution of Chile, (11.03.1980), Article 19, No. 3. Available: https://www.leychile.cl/Navegar?idNorma=242302 [last viewed 24.04.2020].

[2] *Jiménez, M. A.* El Proceso Penal Chileno y los Derechos Humanos: Vol. II Estudios Empíricos, Legal Analysis Notebook, special issue No. 4, Law School of Diego Portales University, Santiago, 1994, 276 p.

[3] *Hurtado, P., Jûnemann, F.* Estudio Empírico de Penas en Chile. Foundation Paz Ciudadana, Santiago, 2001, 276 p.

incarceration). The previous outcomes reveal the generalized use given to the preventive detention as a preventive measure.

Both studies perceive that, within the inquisitorial system in Chile, regarding severe and less severe crimes (for example, theft), the accused had already spent a long period under preventive detention by the time the sentence was issued, an aspect that also highlighted the fact that sometimes the length of the sentence had been mostly completed in the time spent in prison during the prevention detention period. Likewise, this situation has made it very difficult to achieve an absolutory sentence, as it was difficult for the judge to justify these long periods of incarceration, if the accused was subsequently found not guilty. Without limiting the foregoing, a 14 % of the file samples were the cases where the accused was found not guilty[4], as presented in the study carried out by Diego Portales University.

The figures indicated reflect a press statement published during the period while the inquisitorial system was in force in 1998, according to which, in Chile, 32 % of all the accused, in all types of crimes, were under preventive detention.[5] In addition, this also allowed to anticipate that a much higher level than the total of the accused was indeed under a preventive detention at some point of the criminal process.

The second problem in the use of the preventive detention within the inquisitorial system in Chile relates to the length of this measure. The study developed by the foundation *Paz Ciudadana*, previously stated, includes information about the length of the preventive detention during such period and, according to these results, it is possible to appreciate that the length of the preventive detention exceeded relevant periods of time, which increased if they belonged to the most severe crimes (homicide and trafficking of drugs). Most of the crimes involved preventive detention that would last between 6 months to a year, a period that decreased for less severe crimes, for example, for criminal injury 54 % of those who were under preventive detention were incarcerated for less than 30 days. The use of the preventive measure for such short periods of time makes it difficult to examine whether it has ensured accurate results for the process in cases where the incarceration would last ten times longer[6], which showed that this measure was applied with a purpose not related to the presence of the accused during trial.

Finally, an additional critique of the use of the preventive measure in the inquisitorial system has to do with a different punitive use and distance from the very purposes of this preventive measure. Its extended use for short periods of time (as mentioned before) is an indicator of this situation. During 2004, a study conducted by the Public Prosecution Office of Chile and the Vera Institute of Justice[7] allows us to underscore this conclusion, given that the study within 15 months tracked 1 900 cases admitted in two criminal courthouses of the city of Santiago between January and February of 2002. According to the results, it was stablished that 14.5 % of the cases commenced with a person

[4] *Jiménez, M. A.*, op. cit., p. 109

[5] Two out of three defendants are free. *La Tercera Journal*, 29 July 1998.

[6] *Duce, M., Riego, C.* La Reforma Procesal Penal en Chile. Proceso Penal en América Latina y Alemania, Konrad Adenauer, Caracas, 1994, p. 160.

[7] Public Prosecution Office and Vera Institute of Justice, Analizando la Reforma a la Justicia Criminal en Chile: Un estudio comparativo entre el nuevo y el antiguo sistema penal. Lom, Santiago, 2004, 28 p.

under arrest, whereas only 6.9 % of the total had been sentenced to fifteen months from the beginning, most of which were convicted for other motives[8]. In other words, the criminal sanction applied by the system, effectively, was the period of confinement on the grounds of the arrest and the preventive detention.

2. Preventive Detention in the New Adversarial System in Chile

One of the main objectives set by the new adversarial system regarding the individual guarantees, is streamlining the use of the personal preventive measures and especially the preventive detention measure. To achieve that objective, it was decided that the preventive measure would be applied only in those cases where this measure is essential to comply with the specific preventive needs of the criminal process. Such objective specifically addresses the use of the preventive detention, which constitutes the most severe personal preventive measure, or contributes a higher level of restrictions to the individual rights of people. Thereby, streamlining application of these measures would enable compliance with the principle of exceptionality, which must encourage a preventive system in a criminal process that respects individual rights and, mainly, the right to be considered innocent before trial.

This purpose arises as a reaction to a highly critical assessment about the extensive use of the preventive detention in the inquisitorial system in Chile, which constituted the main preventive measure of this system. Consistently, we can indicate that the message sent by the executive authority to the Congress regarding the new Criminal Procedure Code, as one of its objectives explicitly presents overcoming the poor situation created by the extensive use of the preventive measure within the previous inquisitorial system.[9]

2.1. Modifications of the Adversarial System to Criminal Justice in Chile

The new criminal procedure system introduced different modifications, not only concerning the design or structure of the system, but also regarding the norms that regulate the institution itself. With the aim to streamline the use of the preventive measure, we will review some of the main changes proposed in order to provide a contextual information that allows the reader to understand the strategy followed and the tools designed for it.

a) **Change of paradigm:** in the system of the new Criminal Procedure Code of Chile, the preventive measures are no longer an automatic effect of the bill of indictment, which disappears, and constitutes exceptional measures regarding an accused protected by the right to be considered innocent before trial, which must be pleaded and certified by the prosecutor[10]. Hence, preventive measures are discussed concerning a precise accusation, in the context of a hearing where the prosecutor must present the criminal records that justify the criminal assumptions that authorize the requested measures. Meanwhile, if the prosecutor makes an accusation but does not substantiate or justify the origin of the criminal assumptions for

[8] Public Prosecution Office and Vera Institute of Justice, Analizando la Reforma a la Justicia Criminal en Chile: Un estudio comparativo entre el nuevo y el antiguo sistema penal. Lom, Santiago, 2004, p. 19.

[9] Message No. 110-331 of S. E. the President issues a New Project Law that stablishes a new Criminal Procedure Code. Santiago, 9 June 1995.

[10] Criminal Procedure Code of Chile, Articles 122 and 139 respectively.

the preventive detention (independently from the accusation itself), the person under investigation, at first, will be released without any restrictions.

b) **Segregation of duties:** a second structural change under the logic of the new adversarial system arises from the fact that this new system has presented a clear segregation of the duties between the body responsible of the criminal prosecution (in charge of the assessing its necessity and, then, request the personal preventive measures), and the jurisdictional body (in charge of issuing these measures). The fact that the new adversarial system had created the institution of the public prosecutors, with the responsibility of continuing the prosecution process with a specific, clear role, has allowed judges to find themselves in an institutional position that much better ensures its objectivity and neutrality for resolving the origin of the preventive measures. In this sense, a great advantage or guarantee of this new criminal outline, is the fact that the judge is not compromised with the concerns of the criminal prosecution and, hence, judges find themselves much less restrained in rejecting the requests for preventive detentions presented by the prosecutor that do not meet the needs stablished by the law.

c) **Restrictions to the hypothesis of origin:** as a preliminary review of the general rules that establish the legal basis for a preventive detention as a preventive measure, it can be concluded that it has been maintained, generally, in a same manner as in the previous inquisitorial system. This is a consequence of the inability to bring constitutional change forward due to the lack of consensus. That said, as no changes were introduced to the norms of the constitution, the legal text had to maintain the logic of a system of relatively open measures and with implications that go beyond of the pure necessity to ensure the presence of the accused within the process. In this manner, the Criminal Procedure Code, under the Article 140 (c), strictly stipulates (following the Chilean constitutional text under the Article 19, 7 (e) what are the procedural aspects that might require protection. which are the criminal objectives that can be under protection. In other words, the Code formulates the legal grounds for requesting personal preventive measures. In this context, the question is in what sense, from the point of view of the legal basis underlying a preventive measure, this overhaul meant a restriction towards what happened in the old system. The answer is that such measure was given an opportunity by delivering a specific content to each legal basis restraining the scope traditionally applied in the case law of the old system and, therefore, reducing its use.

d) **Alternative response system:** a relevant change is that the newly established system focuses on the regulation of a catalogue of personal preventive measures that differ from the preventive detention (regulated by the Article 155 of the Code) with the objective to employ less severe mechanisms regarding the individual freedom than the preventive measure, but equally appropriate to ensure the purposes of the procedure. The idea was that the criminal prosecution could appeal to these mechanisms instead of the preventive detention in cases, where restrictions of rights are considered to ensure the purposes of the proceeding, but without

demanding a restriction as severe for the person under investigation. In this manner, the new system's idea was to avoid the use of the preventive detention in those cases, where the objective can be achieved by less severe means since these alternative preventive measures had to be use in preference to the preventive detention when the objective pursued can be reasonably achieved with less severe restrictions of freedom.

e) **Principle of proportionality and time limits on use of preventive detention:** it was clear that the preventive detention period had to be limited in time, and with this in mind the principle of proportionality was established. This brought two particular consequences: on the one hand, the preventive measures in general, or one in particular, must be excluded when they pertain to the processes of less severe crimes that, most of the time, end up with a minor sentence than the assigned measure. On the other hand, the length of the preventive measures must be always limited, considering the duration of the possible sentence that the accused could receive, considering not only that the length of the measure should not exceed the sentence's length, but also that the duration of detention should not even approach that period because, otherwise, the sentence would lack relevance and sense.

2.2. The Impact of Adversarial System Regarding Use of Preventive Detention

The criminal procedure overhaul in Chile was implemented systematically during a five-year-process and one of the main effects was the reduction in the use of the preventive detention as a personal preventive measure issued by judges. The data of the new adversarial system in Chile reveal that only a low proportion of the total of the accused who are under an investigation go through this preventive measure, as concluded by the studies carried out on the first[11] and second[12] year since the new system is in force. The figures delivered by the Public Prosecution Office of Chile[13] exhibit that the proportion of accused under a preventive detention measure in the adversarial system is 11.4 % compared with the total of accused under investigation. Logically, it was expected that through a minor use of this measure the average of the daily percentage of people under preventive detention within a Chilean prison would have a significant fall and, consequently, would increase the percentage of accused. The figures of National Gendarmerie of Chile[14] display a progressive decrease in the percentage of incarcerated accused under preventive detention in all prison facilities in Chile, which rectifies perception of impact of the system regarding the penitentiary flow. Thus, in 2010, a 48.5 % of the total of incarcerated people in Chilean prisons were under the preventive detention measure and the 51.5 % were the people sentenced

[11] *Baytelman, A.* Evaluación de la Reforma Procesal Penal Chilena, Law School of Universidad Diego Portales and Universidad de Chile, Santiago 2002, p. 95.

[12] *Baytelman, A., Duce, M.* Evaluación de la Reforma Procesal Penal: Estado de una Reforma en Marcha. Law School of Universidad Diego Portales and the Justice Studies Center of the Americas, Santiago, 2003, pp. 187–201; and *Ritter, A.* Evaluación de la Reforma Procesal Penal Chilena desde la perspectiva del Sistema Alemán. German Corporation for International Cooperation (GTZ), Santiago, 2003, pp. 58 and 59.

[13] Public Prosecution Office, Statistics Newsletter 2016, pp. 43 and 44; Statistics Newsletter 2017, pp. 34 and 35; Statistics Newsletter, First Semester of 2018, pp. 19, 20, 42, 43.

[14] *Gendarmería de Chile* is the public service in charge of the prison facilities. It is a militarized entity ruled by the Executive Authority, specifically, by the Ministry of Justice.

for a certain crime. Meanwhile, in 2017, 24.0 % of incarcerated people in Chilean prisons were under preventive detention and 76 % were sentenced for a certain crime.[15]

Against the above background, it seems possible to conclude that the new adversarial system in Chile is, indeed, producing a streamlining effect in the use of the preventive detention such as it was expected during its design stages. However, this streamlining effect may not have been developed equally with regard to all types of crimes, it can be noted[16] that it is imperative to distinguish thereof. Firstly, preventive detention practically disappears in less severe crimes, especially concerning an accused that does not have a previous criminal background or has so far committed minor felonies; the second group of crimes, where there was a decrease in the use of the preventive detention, containing a certain group of crimes or cases that could be considered as intermediate in terms of its severity, in other words, that could be sanctioned with time in prison equal or above three years, yet they are not considered as minor crimes and, finally, the most severe cases of the system, which are the cases with sentences exceeding five years in prison had not achieved a significant decrease in the use of the preventive detention as a preventive measure within the adversarial system.

2.3. The Use of Other Diverse Preventive Measures of Preventive Detention

One of the aspects that has made an important contribution to reducing the use of the preventive detention is the application of alternative measures to preventive detention. One of the main objectives of creating a preventive measure system that differs from the preventive detention is to present the possibility to the State criminal prosecution to use tools to ensure the total compliance of the criminal process, but without as severe an impact upon the individual rights of the accused.

The figures[17] provided by the Public Prosecution Office of Chile clearly show that the numbers are in average four times greater than the preventive detentions. A study conducted by Baytelman and Duce concluded that there was a vast consensus between the system agents about the effectiveness of these preventive measures, it was estimated that only between a 10 % and a 20 % of the cases there would reveal problems with the compliancy and that the majority of the problematic cases are related to the accused with a previous experience of colliding with criminal justice. It was determined, however, as a concern regarding the increasing concentration of preventive measures of this kind that could be construed as a decrease in its effectiveness, as long as it lacks of a more systematic organization to control the compliance thereof.[18]

3. Convincing Proof Standard to Issue a Preventive Detention

Chilean law holds no stipulations regarding a convincing proof standard to issue personal preventive measures (in contrast to the regulation of the final

[15] *Álvarez, P., Marangunic, A. and Herrera, R.* Impacto de la Reforma Procesal Penal en la Población Carcelaria del País. *Estudios Criminológicos y Penitenciarios Magazine*, Gendarmerie of Chile, p. 122.

[16] *Baytelman, A., Duce, M.* op. cit., pp. 188 and 189.

[17] Public Prosecution Office of Chile, Statistics Newsletter, 2018, pp. 20 and 43.

[18] *Baytelman, A., Duce, M.* op. cit., pp. 197 to 201.

sentence). In this regard, Oliver, G.[19] has gathered different dogmatic opinions that aim to clarify this overlooked standard, indicating that "some conclude that we need to ensure that the proof allows to foresee a trial, with a high probability to get a conviction, where the evidence will be examined in detail and accounted for the final sentence"[20]. Similarly, he indicates that "other demand proof to enable a high level of certainty regarding the existence of the crime and the participation of the accused in such crime"[21]. Lastly, other authors note that "through the acknowledgment of a committed crime, the law demands that the proof justify it, while when it refers to the participation of the accused it is require that the proof shows that is well-founded, that the standard would be higher when it refers to the act and not the participation"[22]. As the legislation does not include any objective proof standard as a requirement for every decision, and especially the decisions regarding the issue of preventive measures, we will have to pursue a possible and objective, convincing proof system. For that purpose, it is necessary to make a clear distinction between the material assumptions and the need of preventive measures, as in essence both have to meet their own, unique requirements to certify the issue of preventive measures.

Indeed, the convincing level that must be met by one or the other assumption has and must be assessed differently. Therefore, a different convincing proof standard can exist for each assumption, each having to be levelled up to be considered as a whole and in each case detected if the standards have met. This proposal will result in the judge having to deny the request of a preventive measure in those cases were the material assumptions could meet the requested convincing level, but at the same time, the requested convincing level for a preventive measure does not overweigh the beyond a reasonable doubt standard.

3.1. Optimal Standard for Material Assumptions

The material assumption, also known as "*fumus boni iuris*"[23] (the smoke of good law), "…means the probability that a punishable act has taken place and that the accused has been involved", Beltrán warns that "over such factual structure it is not possible to determine the reasonable doubt threshold. This happens because, despite having a founded, but preliminary proof, strictly, is not possible to have a complete certainty of the facts"[24].

On the contrary, a low convincing proof standard would allow to easily restrict the freedom of the accused without a previous trial, keeping the accused in jail without a legal conviction, lacking well-founded grounds. Moreover, from a mistakes distribution point of view, a low standard (despite being reasonable), as a prevailing possibility, shows the existence of a relatively high proportion of cases, where the probability of an act used as an argument to make a decision

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[19] *Oliver, G.* Apuntes de Derecho Procesal Penal 1. Valparaíso, Pontificia Universidad Católica of Valparaíso Law School, 2015.

[20] *Duce, M. & Riego, C.* Proceso penal. Santiago, Legal Publishing House of Chile, 2007, p. 252.

[21] *Castro Jofré, J.* Introducción al derecho procesal penal chileno. 2º edition, Santiago, Legal Publishing, 2008, p. 294.

[22] *Horvitz, M. & López, J.* Derecho. Volume I, cit. No. 108, p. 401; *Maturana, M. C., & Montero López, R.* Derecho. Volume I, cit. No. 137, p. 372.

[23] *Guillermo, O.* Currently, this requirement is expressed in Latin *fumus comissi delicti*. *Oliver, G.* Apuntes, cit. (n. 119), p. 113.

[24] *Beltrán, R.* Estándares de prueba y su aplicación sobre el elemento material de la prisión preventiva en Chile. *Polít. Crim.* Vol. 7, No. 14, Art. 6, 2012, pp. 454–479.

being incorrect is lower than the probability for it to be correct, even when it is considered as significant[25].

In addition, concerning the convincing level that must be met regarding the material assumption of the preventive detention and the other personal preventive measures, it is appropriate to conclude that it is impossible to establish a very high standard at the early stage of the penal process and, in contrast, demanding an inferior standard is not acceptable in a system that protects the fundamental rights because it would expressly tolerate high probabilities of wrongfully sending people to jail, the people that should be considered innocent in the first place. Personal preventive measures, because they are an exception within the system, must be interpreted as congruent as possible with that general norm. So, if possible, the convincing proof standard for the material assumption to issue a preventive measure must be the same requested for the final sentence. However, because of the its material aspect, it is impossible, from a procedural point of view, to use such elevated convincing level, hence, there must be demanded and used the standard that reaches an accurate level, which is known as "clear and convincing proof" or "high probability of the facts".

3.2. Optimal Standard for the Need of Preventive Measures

The need of preventive measures or *periculum in mora* (danger in delay) lies in "the threat that the accused could obstruct the purposes of the process"[26].

Preventive measures are required due to a current danger that corresponds to one of the assumptions previously established by the Chilean norm; therefore, as the material assumptions relate with past facts, the need of preventive measures relates to a present and actual danger clearly seen by the judge, even when its foundation lies directly on the same arguments used for the material assumption. Hence, I believe that the reasonable doubt is the accurate standard on which to base the decision regarding the need for preventive measures, substantiating the legitimacy of incarceration, which, in a system that respects the fundamental rights is allowed only under the condition of a proper process which, through use of a beyond a reasonable doubt standard, clearly expresses the convincing standard regarding the responsibility and guilt of an accused in a punishable, criminal act. In this manner, personal preventive measures should demand to be as close as possible to this standard, because it is perfectly feasible for the need of prevention, an aspect that contrasts in terms of the material assumptions in which the beyond reasonable doubt standard is not considered. It is imperative to bear in mind that, in case of the involvement of a fundamental right, according to professor Aldunate[27], for it to be legally eligible, firstly, it must be examined regarding its legal basis (constitutional or legal authorization); then, whether there is a public interest in this involvement or in the purpose of the norm, and finally, the accurate proportion in a wider sense and within its three main elements that constitute its pertinence, necessity and proportion in a strict sense.

The consequences of implementing a convincing proof standard as a requirement to issue preventive measures, particularly the preventive detention, which is the most severe measure in the Chilean system, would depend upon

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[25] *Tarufo, M.* Conocimiento científico y estándares de la prueba judicial. *Comparative Legal Mexican Newsletter,* No. 114, 2005, pp. 1285–1312.

[26] *Belrán, R.* cit. No. 24, p. 468.

[27] *Aldunate, E.* Derechos Fundamentales. Santiago, Legal Publishing, 2008.

a greater control over the judge's decision. Thereby, both parties of the penal process would detect if there is a lack of legal argument, as previously stipulated by the standard, on the legal judgement, and could identify the accurate arguments that would justify an appellate procedure in such cases.

Summary

The above analysis clearly shows that Chile has taken a relevant step regarding the guarantees and fundamental rights of people, the progress towards an adversarial criminal process has meant, among a lot of things, an diverse approach of the personal preventive measures and, particularly, with the preventive detention, which progressed from the most used measure in the criminal process within the inquisitorial system to a preventive measure that, at least with minor and medium felonies, has meant a significant fall in its application by Chilean judges. Therefore, the use of the preventive detention measure within the system has dropped substantially, which we can consider as an accomplishment that must be perpetuated in the future.

On the other hand, no major transformations have taken place with regard to severe crimes, and the prevention detention remains a preventive measure extensively applied by Chilean judges. This tendency, perhaps, has become more pronounced due to legal changes introduced a few years ago, as well as the public pressure that comes along with those crimes with sentences above five years in prison, which are considered as the most severe sentences by the system.

In the context of an adversarial system, the described situation can create new problems that deserve a further identification and investigation. One of those is the possibility that this situation can create incentives for prosecutors to attribute more severe crimes aiming to obtain the preventive detention measure against the accused.

Without limiting the foregoing, so far, the figures endorse the decision of the State and the adversarial system has shown a respect for people's rights that the Chilean criminal system never had in 140 years of its history.

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Crime Qualification as an Act of Interpretation

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The universal quality of interpretation as a method of cognition of the surrounding reality is addressed in the article. When qualifying a crime, the author considers not only the interpretation of the text of the criminal law rule, but also the events of the crime.

Keywords: law and order reality, interpretation, multiple interpretations, hermeneutic approach, crime qualification.

Contents

Introduction

In the theory of law, the legal reality (legal actuality) is interpreted broadly. Hence, S. S. Alekseev defines legal reality as four interrelated groups of phenomena: phenomena-regulators that constitute the basis and the regulation mechanism (rules of law, provisions of practice, individual directions, rights and duties); phenomena of legal form – normative and individual acts; phenomena of legal reality – law making, law enforcement, interpretation; phenomena of subjective side of legal reality – legal awareness, subjective elements of legal culture, legal science[1]. N. Nenovski defines legal reality more broadly. He includes in its essence legal awareness, rules of law, creation of law and law-making, realization of law, legal behaviour, legal activity, etc.[2]

[1] *Alekseev, S. S.* Pravo: azbuka – teoriya – filosofiya: Opyt kompleksnogo issledovaniya [Law: ABC – theory – philosophy: the experience of integrated research]. Moscow: "Statut", 1999, p. 14.
[2] *Nenovski, N.* Pravo i cennosti [Law and values]. Moscow: "Progress", 1987, pp. 36–40.

Thus, in the theory of law the interpretation is included in the legal reality. At the same time, the interpretation is the way of cognition of legal reality as one of the elements of surrounding reality.

Recently, in the sciences of the criminal cycle, attention has been given to interpretation as a hermeneutic procedure[3]. However, these studies probe only certain legal aspects (for example, the interpretation of criminal law). Meanwhile, the professional and practical activities of the officials conducting the criminal process, while qualifying crimes, are associated with a wider spectrum of legal reality, which may become the object of interpretation. In this sense, hermeneutic and phenomenological interpretation techniques, undoubtedly, become relevant. The purpose of the proposed research is to clarify, the methodological significance of the interpretation of legal reality in the process of qualification of the crime from the point of view of the hermeneutic approach.

1. Interpretation in the Process of Crime Qualification

In the sphere of criminal justice, the crime qualification is considered as a separate part of law enforcement process. In the theory and practice of crime qualification, the application of the criminal law rule in the narrow sense is considered as professional and practical activity of bodies that conduct criminal procedure and provide the application of the criminal law rule to the specific case.

In the process of the crime qualification, the interpretation is understood in the narrow sense in the context of law enforcement – as establishment of the correspondence between the real event and the features of crime, the type of which is described in the criminal law rule.

There are the grounds to consider the interpretation activity of a public official who conducts criminal procedure in the process of crime qualification in two aspects: the interpretation of facts of the case as the data that has the criminal law significance, and the interpretation of criminal law rules.

In the first aspect, it is important that the crime is not revealed immediately in front of the person who conducts criminal procedure. However, this person can reconstruct the crime through symbolism, objectification sings, "symbolic universes" that have absorbed different fields of meanings and that assign meanings to objects. The elucidation of facts that characterize the real event presupposes the interpretation of concrete data. These data become the facts that have the significance with regard to criminal law only as a result of legal interpretation. V. V. Suslov, on the basis of P. Ricoeur's research concludes that an investigator, for example, during examination of the scene of action, does not deal with objects, but with their symbols. Ordinary everyday objects during examination in connection with the committed crime gain "indirect,

[3] *Suslov, V. V.* Germenevtika i yuridicheskoe tolkovanie [Hermeneutics and legal interpretation]. Gosudarstvo i pravo, No. 6, 1997, pp. 115–118; *Pycheva, O. V.* Germenevtika ugolovnogo zakona. Avtoref. kand. diss [Hermeneutics of the criminal law]. Extended abstract of PhD dissertation (Law). Moscow State Law Academy, Moscow, 2005, 392 p.; *Golik, Y. V.* Istina v ugolovnon prave: analiticheskij doklad [Truth in the criminal law: the analytical report]. St. Petersburg: "Yuridicheskij centr Press", 2013, 53 p.; *Zaginej, Z.* Kriminalno-pravova germenevtika: monografiya [Criminal law hermeneutics: monograph]. Kiev: "ArtEk", 2015, p. 380; Yuridicheskaya germenevtika v XXI veke: monografiya [Legal hermeneutics in XXI century: monograph] / *Tonkov, E. N., Vetyutnev, Y. Y.* (eds.). St. Petersburg: "Aletejya", 2016, 440 p.; *Bochkaryov, S. A.* Filosofiya ugolovnogo prava: postanovka voprosa [Criminal law philosophy: raising the issue]. Moscow: "Norma", 2019, 424 p.

allegorical sense, become symbols, the modality of which requires decoration and interpretation"[4].

If the nature of a symbol is considered in rational aspect, then a symbol contains the data on object that has been received by logical means, while processing sensory impressions. A symbol may be imagined as a form in which human mind transforms the manifestations of external world. In the process of the crime qualification, a person who conducts criminal procedure interprets appropriate symbols, considers them as possible sources of evidences, and thus establishes, as philosophers say, "interpreted being". In this sense, the cognitive activity of an authorized person always leads him/her to the problem sphere of hermeneutics. The person conducting the criminal procedure is regarded not as a certain reflective person, but as a person who cognizes, understands and interprets the existing facts that he/she has to assess as a cognizing person. At the same time, a person who enforces law has to understand and interpret the available facts with relation to the requirements on relevance of evidence, as he or she conducts an appropriate procedural act.

Determination of the scope of the case's facts is specified by the interpretation of the meaning of the criminal law rule. Otherwise, a public official conducting criminal procedure is not able to determine which facts have the criminal law significance and which rule should be applied in the specific case. In the aspect of the crime qualification, an authorized person comprehends the meaning of the criminal law rule in the view of the specific event of the crime.

In hermeneutical tradition, the interpretation process of any text is connected with the reconstruction of the author's initial concept. It should be noted that the hermeneutic methodological standard is characterized by the tolerance toward the plurality of the interpretation results[5]. In general, this issue is important for the cognitive process, but it is not entirely in compliance with the objectives and aims of the legal interpretation. In the theory of law, the interpretation of legal rule is considered as a cognitive activity directed at disclosure of the meaningful context of the legal rule[6]. Furthermore, as long as jurisprudence views "the author's concept" as legislator's will, the interpretation of the legal rule is nothing else than elucidation of the meaning of legislator's will. As applied to a criminal law rule, the interpretation is directed at the elucidation of the meaning of legislator's will on unlawful criminal behaviour. In such a case, plurality of legal interpretations can distort legislator's will and disorientate a person who enforces law.

2. Conflict of Legal Interpretations

At the same time, a conceptual instrument used in some criminal law rules creates the prerequisites not only for the plurality of interpretations, but

[4] *Suslov, V. V.* Germenevtika i yuridicheskoe tolkovanie [Hermeneutics and legal interpretation]. Gosudarstvo i pravo, No. 6, 1997, pp. 116–117.

[5] *Kuznecov, V. G.* Slovar filosofskih terminov [A dictionary of philosophical terms]. Moscow: "INFRA-M", 2005, p. 111.

[6] *Shlyapochnikov, A. S.* Tolkovanie sovetskogo ugolovnogo zakona [Interpretation of the Soviet criminal law]. Moscow: "Yuridicheskaya literature", 1960, p. 84; *Brainin, Y. M.* Ugolovnyj zakon i ego primenenie [Criminal law and its application]. Moscow: "Yuridicheskaya literatura", 1967, p. 105.

also for their conflicts. For example, the application of evaluative features in the criminal law rules impartially entails an ambiguity in understanding of them by investigative and judicial practice. Lexical polysemy that takes place in many criminal law rules also inevitably creates textual (semantic) polysemy.

The interpretation of the criminal law rule in the crime qualification process is casual. However, the decision-making process on application of the rule to the specific case by an authorized person is influenced by the official interpretations that sometimes are contrary to each other.

The jurisprudence has already developed certain techniques to resolve the conflict of legal interpretations. One of these techniques is the subordination of normative legal acts on their legal force. For example, after the entry into force of the 1999 Criminal Code of the Republic of Belarus, court practice showed significant disagreements on the issue of the legal end of illegal catching of fish or aquatic animals (Article 281 of the Criminal Code). Some courts defined this crime as completed from the moment of the actual taking of the fish, that is, from the moment of its withdrawal from the natural state in the process of illegal fishing or slaughter. Other courts interpreted the moment of the end of poaching in a different way: the crime was declared to have been completed since the start of the catch, regardless of whether the fish was actually obtained. The reason for this discrepancy in the qualification was the extremely unfortunate term used by the legislator in describing this type of crime – "illegal catching". In order to uniformly apply the criminal law, the Plenum of the Supreme Court of the Republic of Belarus in its decision of 18 December, 2003 No. 13 "On the application by courts of legislation on liability for offenses against environmental safety and the natural environment" clarified that illegal catch of fish or aquatic animals means actions aimed at actually taking possession of fish or aquatic animals, regardless of the result. In accordance with such a judicial interpretation of the notion of "illegal catching", the end of poaching is determined there: the illegal catching of fish or aquatic animals will be over from the moment of taking actions aimed at the direct seizure of fish or aquatic animals, regardless of whether they were caught. However, the Fishery and Fisheries Regulations approved later by the Head of the State (Decree of the President of the Republic of Belarus of 8 December, 2005 No. 580 "On some measures to increase the efficiency of hunting and fishery activities, and improve state management of them") defines "catching of fish" as "the removal of fish from its environment without saving its life". Since the Presidential Decree has a greater legal force in relation to the decision of the Plenum of the Supreme Court of the Republic of Belarus, catching of fish as defined in the Rules of Fishery and Fisheries gives reason to interpret the end of this crime differently: illegal catching of fish or other aquatic animals should be considered legally ended from the moment of removal (catching) of the corresponding aquatic animal from its habitat. Actions aimed at catching fish or other aquatic animals should be considered as an attempt to commit a crime.

In general, it should be stated that the conflict of interpretations (explanations) of the legal norm is a negative aspect of law enforcement activity, as it gives rise to relativism. The solution to the problem of the conflict of legal interpretations should be sought not only in the elimination of the causes of such conflicts, which are mainly caused by the shortcomings of the legislative technique in the design of legal rules, but also in the status pertaining to the rule of law in the state.

3. Interpretation and Application of Criminal Law Rules

In the theory of law, the term "interpretation" is customarily used in two meanings: clarification of the content of the legal rule (internal form) and explanation of the clarified meaning and content of the legal rule (external form of interpretation). The interpretation of the criminal law rule in the process of qualifying a crime is casual, i.e. relevant only to a specific case. In the context of the hermeneutic paradigm of cognition of social reality, the interpretation of the criminal law rule in the process of qualifying a crime is reduced in applying the rule of criminal law to a specific case.

The interpretation of the criminal law rule forms an understanding of its meaning. A complete and adequate understanding of the meaning of the rule of law is based on a synthesis of preliminary understandings. In the aforementioned aspect, the pre-knowledge and the prediction are of a particular importance for interpretation. H.-G. Gadamer noted: "The accurate establishment of the normative content of the law requires historical knowledge of the original meaning, and only for the sake of this last an interpreter-lawyer takes into account the historical significance, communicated to the law by the law itself. He cannot, however, rely solely on that he has been informed about the intentions and thoughts of those who developed this law, the protocols of parliamentary meetings. On the contrary, he must realize the changes in legal relations that have occurred since then and, accordingly, redefine the normative function of the law"[7]. Such an approach does not mean at all that the person conducting the criminal process in such a situation arbitrarily interprets the rule of criminal law. The interpretation carried out by the law enforcer must always comply with the principles of criminal law and modern ideas of understanding law.

The interpretation of the criminal law rules is closely related to the hermeneutic circle method. For example, Article 399 of the Criminal Code of the Republic of Belarus provides liability for unlawful exemption from criminal liability of a person suspected or accused of committing a crime. In order to understand the essence of this crime, we must refer to other rules of the Criminal Code, determining the grounds and conditions for exemption from criminal liability, and the rules of criminal procedure legislation providing for the respective legal decision-making. In the context of the development of a conflict criminal relationship, the clarification of these issues allows us to interpret and adequately understand the criminal law nature of this crime and, through the interpretation of its other features, permits to establish the limits of criminal behaviour. The hermeneutic circle helps to understand the structure of compound crimes (crimes consisting of several acts, each of which is a separate crime), which contributes to the solution of questions about their qualification.

At the same time, in the early stages of pre-trial proceedings, there may be a "prejudgment", which performs the function of a preliminary decision (version of the qualification of the crime). H.-G. Gadamer assessed the legal value of the preliminary decision, as follows: "With regard to judicial practice, this is a legal pre-decision, preceding the final verdict. For a participant in a lawsuit,

[7] *Gadamer, H.-G.* Istina i metod: Osnovy filosofskoj germenevtiki [Truth and method: Fundamentals of philosophical hermeneutics]. Moscow: "Progress", 1988, pp. 385–386.

imposing such a preliminary sentence against him, of course, leads to a decrease in his chances"[8].

From the position of philosophical hermeneutics, the hermeneutic application procedure, which is due to interpretation, acquires great importance in the process of qualifying a crime. H.-G. Gadamer notes: "The application is not an application to the specific case of a certain universality, which was originally given and understood by itself, but the application is the real understanding of the universality itself, which is the text for us. Understanding turns out to be a kind of action (*Wirkung*) and knows itself as such"[9]. This H.-G. Gadamer's judgment has a deep meaning that allows us to have a different look at the essence of the application of the criminal law rule in the process of qualifying a crime. Hereby, the application does not act as some kind of independent stage of implementation of the legal rule. The task of understanding and interpreting, as noted by H.-G. Gadamer, is "the essence of the task of concretizing the law in a particular case, that is, the task of application"[10]. Application, in this case, determines the phenomena of understanding and interpretation in their entirety. With this approach, the text of the criminal law rule is not considered as the very "universality", which is then used only by an authorized official to apply to the particular. The application of the rule of the criminal law in the hermeneutic perspective serves as its practical understanding in the framework of the arising criminal legal situation.

Summary

1. A phenomenon of interpretation (exposition) in jurisprudence manifests itself in two ways. On the one hand, the interpretation is a part of legal reality. On the other hand, it serves as the means of understanding legal reality. However, universal character of interpretation allows it to be the means of comprehension of the environment as a whole.
2. While qualifying crimes, the interpretation should be considered in the narrow sense, in the context of application of laws. In the process of crime qualification, the interpretation manifests itself as a comprehension of, in respect of a concrete criminal case, the essence of an event that has taken place, and the sense of criminal legal rule, which is applicable to the event.
3. The understanding of a criminal legal rule in the process of crime qualification is casual, relevant to a concrete event. In the context of hermeneutic paradigm of comprehension of the environment, the interpretation of a criminal legal rule in the process of crime qualification forms the understanding of its sense, and, finally, it leads to the application of a rule of criminal law to the concrete case.
4. The multiplicity of interpretations (expositions) of legal rules is a negative aspect of law enforcement activity, and it contradicts the principle of legality. The solution of the problem of multiplicity of interpretations should be acquired by strictly abiding by the rules of law-making techniques while creating legal rules.

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[8] *Gadamer, H.-G.* Istina i metod: Osnovy filosofskoj germenevtiki [Truth and method: Fundamentals of philosophical hermeneutics]. Moscow: "Progress", 1988, p. 323.

[9] Ibid., pp. 402–403.

[10] Ibid., p. 389.

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