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719. SĒJUMS

Juridiskā zinātne

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Jurisprudence Latvijā pēc valsts dibināšanas 1918. gadā

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Publikācija ir veltīta latviešu nacionālās jurisprudences veidošanās procesiem pēc nacionālas valsts dibināšanas 1918. gada 18. novembrī. Rakstā tiek izvērtēti procesi, kas bija veidojuši juridisko kultūru un tiesību sistēmu Latvijas teritorijā līdz sava valstiskuma izveidošanai. Galvenā uzmanība rakstā vērsta uz juristiem, kas veidojuši Latvijas Republikas tiesību sistēmu un piedalījušies jurisprudences studentu apmācībā jaunizveidotajā Latvijas Universitātē.

Atslēgvārdi: Latvijas tiesību vēsture – die lettische Rechtsgeschichte, Latvijas jurisprudence - die lettische Rechtswissenschaft, multikulturāla nacionāla valsts – die multikultureller Nationalstaat, tiesību zinātņu profesori – die Professoren der Rechtswissenschaften.

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Einleitung

Durch den ersten Weltkrieg wurde die politische Karte Europas stark verändert. Die Imperien erlebten ihren Zusammenbruch und es entstand eine große Zahl neuer nationaler Staaten. Die neugebildeten Staaten mussten ihr Rechtssystem und vor allem ihre Verfassungen schaffen.[1] Viele dieser Staaten, darunter auch Lettland, waren noch nie zuvor selbständig gewesen. Der Aufbau der Staatlichkeit war unentbehrlich mit dem Aufbau des Rechts- und Gerichtssystems verbunden, aber, wenn man tiefer blickt, auch mit dem Verständnis der Rolle dieser Systeme und der eigenen juristischen Kultur. So wurde der bis zu diesem Moment vereinigte Rechtsraum Kontinentaleuropas national zersplittert.

Ziel dieses Artikels ist die Erklärung der Rechtskultur in der Lettischen Republik nach deren Gründung am 18. November 1918. Die lettische Rechtswissenschaft entstand auf der Basis der Traditionen, wobei sie auch durch die neuesten Strömungen im europäischen Rechtsdenken in den ersten Jahrzehnten des 20. Jahrhunderts beeinflusst wurde. Deshalb werden in diesem Artikel die juristischen Wurzeln der Letti schen Republik und die Ideen, die von den europäischen Autoritäten der Rechtstheorie

übernommen und entsprechend in das nationale Recht, in die Rechtstheorie und philosophie eingearbeitet wurden, veranschaulicht.

Die lettische Rechtsgeschichte ist bunt. Das Gebiet und das Volk der Lettischen Republik gehörten im Laufe der Zeit zu verschiedenen Staaten. Livland war ein von Deutschland abhängiges Vasallengebiet. Am Anfang der Neuzeit wurde das lettische Gebiet durch Schweden, Polen und Russland geteilt, aber nach dem Nordkrieg wurde das gesamte Gebiet Lettlands Bestandteil des Russischen Reiches.

1. Die historische Entwicklung des Rechtskultur im Teritorium des heutigen Lettlands

Im frühen Mittelalter gehörte das von baltischen Stämmen bewohnte Gebiet, wie auch Skandinavien, zum Randgebiet Europas. Balten, Finnougren und Nordgermanen gehörten auch nicht gerade zu den ersten Christen. Auch die Staaten entstanden hier später. Die im Baltikum lebenden Stämme hatten keinen direkten Kontakt zur römischen Kultur oder zu den Angehörigen des Römischen Reiches. In derselben Zeit, als im südlichen Teil Europas Reiche entstanden und die dort lebenden Heiden zu Christen wurden, lebte der Norden Europas – die östliche und nördliche Küste der Ostsee – nach den Gesetzen der Religion ihrer Urväter, nach den Gesetzen des Gewohnheitsrechts, und schrieb mit der Runenschrift. Die Denkmäler der Runenschrift umfassen die Zeit vom 6. bis 12. Jahrhundert. Im hohen Mittelalter kamen die ersten christlichen Missionare zu diesem Gebiet; zuerst erreichten sie die skandinavischen Gebiete. So reiste 829 der Mönch Anskar aus Dänemark nach Schweden.[2] Der christliche Glaube brachte auch eine neue Schrift mit sich. Das lateinische Alphabet wurde in Schweden im 12. Jahrhundert eingeführt. Das aufgeschriebene skandinavische Gewohnheitsrecht – *Gulathings-Lög*, *Frostothings- Lög,* u.a. – entstand im Vergleich mit westeuropäischen Aufschreibungen spät, etwa ein halbes Jahrtausend nach der *Lex Salica*.[3] Im Vergleich zu anderem europäischen Gewohnheitsrecht, das lateinisch aufgeschrieben wurde, ist es für das skandinavische Gewohnheitsrecht typisch, daβ es keinen Einfluss römischen Rechts aufweist und altskandinavisch geschrieben ist. Dies bildet einen grundlegenden Unterschied zu Kontinentaleuropa, wo in dieser Zeit die erste Periode der Rezeption des römischen Rechts erfolgte.[4] Das Gewohnheitsrecht der das lettische Gebiet bewohnenden Stämme wurde noch nach dem skandinavischen Recht erst im 14. Jahrhundert als Bauernrecht aufgeschrieben.[5]

Das Gewohnheitsrecht der die Ostseeküste bewohnenden Stämme wies keinen großen Unterschied zu den Rechtsvorstellungen anderer europäischer Stämme vor dem Christentum auf. Den einzigen Unterschied bildet der späte Übergang vom Heidnischen zum Christentum. Im Mittelalter wurde in der baltischen Region reger Handel geführt. Durch den Handel wurde auch die Vereinheitlichung der rechtlichen Vorstellungen begünstigt, weil es das wirtschaftliche Interesse verlangte. Deshalb kann man behaupten, dass an der Ostsee die Vereinheitlichung der Rechtsnormen, insbesondere der zivilrechtlichen Normen, schon im frühen Mittelalter begonnen hat. Das Christentum und die Entstehung der Staatlichkeit beeinflussten positiv auch die rechtliche Entwicklung.

Im 13. Jahrhundert wurde auf dem lettischen und estnischen Gebiet ein Ordenstaat Livland gegründet, der erst 1561 zusammenbrach. Livland stellte eine territoriale Einheit dar, die Reichsmarken und weltliche Macht waren vom Deutschen Kaiser, aber die geistliche Macht vom römischen Papst abhängig.[6] Seit dieser Zeit steht die lettische Rechtswissenschaft unter dem Einfluss des deutschen Rechts, der sich auch heute noch feststellen lässt.

Riga war in dieser Zeit eine Hansestadt, die nach ihrem Stadtrecht lebte. Im Laufe des 13. Jahrhunderts wechselte Riga mehrfach die Zugehörigkeit zu Rechtsfamilien. Ende des 13. Jahrhunderts trat in Riga eine überarbeitete Satzung in Kraft, die die rechtliche Unabhängigkeit Rigas betonte.[7] Aber auch in Livland gab es keine rechtliche und staatliche Einheitlichkeit in absoluter Form. So herrschten in den estnischen Städten Harju und Viru im 13. und im 14. Jahrhundert die Dänen, aber der Stadt Reval (der heutigen estnischen Hauptstadt Tallinn) wurde vom dänischen König Erich IV. Plogpenning das lübisches Stadtrecht verliehen. Bis zum 16. Jahrhundert gehörte das Erzbistum Tartu (in Estland) zu den Ländern des Erzbistums Riga.[8] Auch auf diesem Territorium blühte der in Europa herrschende rechtliche Partikularismus. Livland war rechtlich und staatlich zersplittert. Rechtlich näherten sich einander die zu verschiedenen Sprachgruppen gehörenden lettischen und estnischen Völker, die durch Livland einen einheitlichen Staat bildeten. Die kleinen und großen Städte wurden durch verwandtes Stadtrecht und durch die für die Hansestädte gemeinsame Rechtsquelle Rezess des Hansetags vereinigt. Das Hanserecht spielte seit dem 14. Jahrhundert eine große Rolle im Stadtleben an der Ostseeküste. So kam das deutsche Recht in die lettischen Städte nicht nur durch die Staatlichkeit Livlands sondern auch dadurch, dass der größte Teil der lettischen Städte zur Hanse gehörte.[9]

Die wirtschaftlichen Beziehungen wurden in der baltischen Region im Mittelalter und auch später durch die Hanse vereinheitlicht. So wurden einheitliche Gewichts- und Masseinheiten eingeführt, es gab durch die Hanse geschützte Handelswege, einheitliche Rechtsnormen und –prinzipien. Insbesondere ist die Vereinheitlichung des Zivilrechts in der Hanse zu erwähnen, weil in den Hansestädten ein ähnliches Handels-, Familien- und Erbrecht herrschte.[10] Es galt nur für die Städte, aber das war sehr wichtig, weil gerade in den Städten das Rechtsdenken der Neuzeit entstand. Hier entwickelte sich rasch das Zivilrecht, weil ein reger Handel herrschte; hier standen die Stühle der Erzbischöfe; hier wurden die mittelalterlichen Universitäten gegründet, die das römische Recht in neuer Qualität in die christliche Welt einführten. Durch die Städte wurde die Rezeption des römischen und kanonischen Rechts durchgeführt.

Die mit der Lokalisierung der Rechte im Mittelalter verbundene Rechtszersplitterung war groß und störte erheblich den Stand der Kaufleute, der im Vergleich zu den sesshaften Bauern viel reiste. Jede Handelsfahrt war nicht nur mit den Gefahren auf dem Wege sondern auch mit der Unterwerfung unter andere Rechtsordnungen verbunden. Dieses Problem begann man schon im 12. Jahrhundert zu lösen, indem man besondere Privilegien schuf. Sowurde z. B.. gegen einen Kaufmann auch ausserhalb der Mauer seiner Heimatstadt das Recht nach seinem Heimatrecht gesprochen. Durch zwischenstädtische Verträge wurden Bünde von Handelsstädten gegründet; so ein Bund war auch das schon erwähnte Bündnis der deutschen Hansestädte, zu dem auch die stärksten lettischen und estnischen Städte gehörten.[11]

Die zweite Art, wie das Leben der Kaufleute erleichtert wurde, war die Bildung der sogenannten städtischen Rechtsfamilien. Nicht jede Stadt schuf selbständig ihr eigenes Recht. Wenn das Recht einer Stadt einen guten Ruf hatte, wurde diese von anderen Städten gebeten, ihr Recht an sie zu senden, damit diese es übernehmen könnten oder nach diesem Muster ein neues Recht kompilieren könnten. Auch die Herrscher verliehen oftmals an mehrere abhängige Städte gleiche Privilegien; meistens hatte man ein schon geltendes Stadtrecht als Vorbild. So entstanden größere und kleinere Rechtsfamilien, wo eine Stadt (deren Stadtrecht übernommen wurde) die Mutter oder Metropole war und die anderen (die dieses Recht rezipiert haben) die Töchter oder Rechtskolonien bildeten. Diesen Prozess nennt man Filiation (lat. filia – die Tochter); er spiegelte sich

in der zweifachen Nennung des Stadtrechtes wider, bei der das erste Wort den Namen der Rechtsmetropole und das zweite den Namen der Kolonie bezeichneten, z. B. das wisbisch–rigänsische Recht.[12] Diesen Prozess kann man gerade beim deutschen Stadtrecht am besten beobachten. Gerade das deutsche Stadtrecht wurde von deutschen Kolonisten und Kaufleuten im 12. und 13. Jahrhundert sehr schnell in Zentral- und Osteuropa verbreitet, wie es der berühmte Stadtrechtler W. Ebel in seinem Werk „Deutsches Recht im Osten“ verfolgt hat. Obwohl auch für andere europäische Länder die Rezeption des Stadtrechts nicht fremd war, entstanden dort nicht so feste Familien der Stadtrechte. Ein einheitlicher Rechtsraum wurde hier (in Frankreich, Normandien, Flandern und anderswo) eher durch das Bestehen ähnlicher Rechtsnormen in verschieden Städten aber nicht durch die Familien der Stadtrechte mit ihrer rechtlichen Rangordnung erreicht, wie es für das deutsche Stadtrecht charakteristisch war. Es entstand eine erhebliche Zahl dvon Familien der Stadtrechte, aber die bedeudendsten in Zentral- und Osteuropa waren die der Städte Magdeburg und Lübeck. Ihre Rechte waren auch in den baltischen Städten verbreitet; so entstand eine rechtliche Beziehung zu anderen Städten an der Ostsee. Das Recht der Stadt Lübeck gewann dadurch an Bedeutung, dass Lübeck die führende Hansestadt war. Magedeburg aber war durch viele Jahrhunderte das Zentrum für den Handel mit den slawischen Gebieten und seit 968 auch das Zentrum für die Kriegszüge nach Osten.[13] Im Recht der Stadt Magdeburg wurde stark auf die Rechtssätze des Sachsenspiegels zurückgegriffen. Der Sachsenspiegel wurde zum Gesetzbuch für die ostdeutschen und norddeutschen Kolonisten. Der Sachsenspiegel war in vielen von Deutschen bewohnten Gebieten in Kraft. Er wurde auch in Polen und der Ukraine rezipiert, aber in Livland erschien eine Variante des Sachsenspiegels.[14] Der Sachsenspiegel umfasste das Landesrecht, aber das Recht der Stadt Magdeburg übernahm es und passte es für die Stadt an. In den Handschriften des magdeburgischen Rechts vom 1261, in den Weistümern des Schöffengerichtes, gibt es umfassenden Bezug zum Sachsenspiegel; diese Rechtsquelle wird auch zitiert. Der Sachsenspiegel galt als eine Rechtsquelle neben dem magdeburgischen Stadtrecht. Es soll erwähnt werden, dass bis zum Jahr 1900, als in Deutschland das neue für den ganzen deutschen Staat geltende Bürgerliche Gesetzbuch in Kraft trat, in vielen Gerichten in Nord- und Ostdeutschland die Normen des Sachsenspiegels angewandt wurden.[15] Im größten Teil der Städte in Polen, in der Ukraine, in Russland, Weißrussland, Preußen und Litauen wurde das magdeburgische Stadtrecht rezipiert. In Königsberg, Kaunas, Vilnus, Trakai, Minsk, Smolensk, Vitebsk, Polozk, Tschernigow, Kijev und anderen, insgesamt um achtzig Städten galt das magedeburgische Stadtrecht. Der deutsche Rechtswissenschaftler Wilhelm Ebel begründet die Rezeption des magedeburgischen Stadtrechts wie folgd: „Das magdeburgische Recht war das Recht der Kolonisierung inländischer Städte, natürlich geltend auch für solche großen Handelsstädte wie Leipzig, Breslau, Krakow, aber ebenso geltend in kleinen Bauernstädten“.[16]

Die christliche Kirche war die verbindende Kraft in der mittelalterlichen Welt. So wurden in den neubekehrten Gebieten am Anfang die örtlichen Traditionen anerkannt, aber im großen und ganzen wurde das gleiche kanonische Recht, das für andere christliche Territorien galt, angewandt.[17] So kann man schlussfolgern, dass Lettland keine Ausnahme unter den Nachbarländern war. Spezifisch war nur die verhältnismäβig späte Christianisierung. Doch die nordöstlichen Gebiete des Ostseeraumes wurden überhaupt sehr spät in die süd- und zentraleuropäischen Prozesse, auch die rechtlichen, einbezogen. Die Ostsee war für die antike Welt ein weit entferntes Randgebiet, das vom Einfluss und von der Armee des römischen Reiches nicht erreicht wurde. Als auf den Trümmern Roms die mittelalterliche barbarische Welt entstand, gab es im Baltikum diese Trümmer nicht, weil die Grenze des römischen Einflusses im Süden Deutschlands

lag. Ähnlich wie die Skandinaven setzten die in Lettland lebenden Stämme ihre Entwicklung im frühen Mittelalter ohne großen Einfluss der römischen und christlichen Kultur fort, indem die traditionelle Kultur im Wege der Evolution weiterentwickelt wurde. An der Ostsee, in den lettischen Gebieten, lebten Kuren und Liven. Die Kuren führten wie die Wikinger Raubzüge über die See, aber nicht zu so entfernten Ländern wie England. Kuren raubten an der Wikingerküste in den Perioden, wo die Wikinger selbst auf Raubzügen unterwegs waren. Durch die Hanse wurden die vor ihrer Entstehung vorhandenen Handels- und Rechtsbeziehungen geordnet und vereinheitlicht. In dieser Region gab es keine erste Periode der Rezeption römischen Rechtes. Auch die zweite, die von der Tätigkeit der Glossatoren und Kommentatoren geprägt war, beeinflusste die Region nur mit Verspätung, denn sie begann schließlich bereits im 11. und 12. Jahrhundert mit der Gründung der Universitäten in Italien. Man kann feststellen, dass das europäische kulturelle Zentrum im Mittelalter im Süden Europas lag. Deshalb erreichten die neuen kulturellen Richtungen, darunter auch die rechtliche Kultur, den Ostseeraum erst mit gewisser Verspätung. Auch die Universitäten wurden hier viel später gegründet. Die ersten Universitäten der baltischen Region entstanden in Königsberg, dann in Vilnius und später in Dorpat. Das bedeutete nicht, dass es hier keine ausgebildeten Juristen gab, aber die studierten anderswo, an deutschen oder polnischen Universitäten.

Die Neuzeit, während der das europäische kulturelle Zentrum nördlicher lag, begann indessen auf dem lettischen Territorium ohne Verspätung. Es lag nicht mehr weit entfernt von den Erreignissen der europäischen Philosophie und Rechtswissenschaft. Die Reformation und der Humanismus waren mit Frankreich, Deutschland und England verbunden, die der baltischen Region näher liegen. Deshalb war der Einfluss neuer Ideen viel stärker und rascher als bisher, als das europäische kulturelle Zentrum in Italien und Südfrankreich gelegen hatte.[18] So wurden zum Beispiel die Texte aus dem Katechismus schon am Anfang der Reformation 1526 ins Lettische übersetzt. Die Grundlage für die Übersetzung bildete das damals in Deutschland verbreitete Büchlein Layen Bibel, das im Zeitraum von 1525 bis 1530 in vielen niederdeutschen Auflagen veröffentlicht worden war.[19] Die Veränderungen in der europäischen Gesellschaft wurden auch in den staatlichen und rechtlichen Transformationen in der baltischen Region widergespiegelt. Im 16. Jahrhundert zerbrach Livland und wurde die Reformation begonnen. Die Reformation hatte auch direkte rechtliche Folgen, weil alle Christen unter der Rechsprechung der Kirche standen. Die Zersplitterung der Kirche führte auch zur Zersplitterung der Gesellschaft und zu politischen Auseinandersetzungen. So blieb der Nachbarstaat Livlands Litauen zusammen mit Polen katholisch, aber in Estland und Lettland breitete sich der Protestantismus aus. Unter dem Einfluss des Humanismus änderte sich die Einstellung des gebildeten Teiles der Gesellschaft zum Recht überhaupt. Die Zeit des Rechtspartikularismus war vorbei. Die europäische Monarchien begannen ihre Rechtsordnungen zu vereinheitlichen.

Im Mittelalter wie auch in der Neuzeit waren das Gebiet des heutigen Lettlands und die Stämme, die durch ihre Vereinigung das lettische Volk bildeten, mit anderen baltischen Staaten und Völkern in Deutschland, Polen, Estland, Litauen, Schweden und Russland verbunden. Deshalb soll betont werden, dass es unmöglich ist, eine wesentlich unterschiedliche Rechtskultur und Rechtswissenschaft auszubilden, wenn man eng mit der Genesis und Evolution des regionalen und gesamteuropäischen Rechts verbunden ist. Obwohl die Großmächte (Schweden und Russland) bei der Einschließung lettischer Gebiete in ihre Territorien die Privilegien örtlicher deutschbaltischer Hofbesitzer behielten, wurden auch Elemente eigener Rechtskultur eingeführt. Die Trennung von der gesamtbaltischen Rechtsentwicklung ist mit der Einschließung in das zarische Russland zu verbinden. Aber selbst das Zarenreich achtete die örtliche Spezifik und die rechtlichen Traditionen der baltischen Gouvernements. Im 18. Jahrhundert herrschte auch

in Russland eine aufgeklärte Monarchie. Katharina II reformierte das Recht nach dem Vorbild der französischen Philosophie.[20] In dieser Zeit hob die Zarin die Todesstrafe für die freien russischen Staatsangehörigen auf. Deshalb kann man nicht behaupten, dass der Anschluss an Russland die lettische Rechtskultur von den allgemeinen Entwicklungstendenzen Kontinentaleuropas getrennt hatte. Im 18. Jahrhundert spielten einerseits im europäischen Staats- und Rechtsverständnis die Ideen der französischen Aufklärer die Hauptrolle, die von den russischen Monarchen eingeführt wurden, doch kamen anderseits die aus Deutschland importierten Ideen des Naturrechts. Hier kann man die Tätigkeit des deutschbaltischen Pfarrers Georg Eisen in Lettland erwähnen, der den Abbau der Leibeigenschaft der Bauern mit Begründung im Naturrecht verlangte.[21] Durch die späte Aufhebung der Leibeigenschaft behinderte das russische Reich die Rechtsentwicklung der baltischen Staaten, insbesondere die Entwicklung des bürgerlichen Rechts, aber sie wurden nicht von allgemeinen Entwicklungstendenzen des romanisch-germanischen Rechts ausgeschlossen. Im 19. Jahrhundert beeinflusste das russische Reich erheblich das Recht in den baltischen Gouvernements, insbesondere durch die Rechtsreform des russischen Reiches. Das wesentliche war die Einführung der orthodoxen Kirche, wodurch die konfessionelle Landschaft bereichert wurde. Vor dieser Zeit herrschten in diesen Gebieten katholische und evangelische Kirchen. Die orthodoxe Kirche war die staatliche Kirche des russischen Reiches, deshalb beinflusste ihre Dogmatik auch das Recht, insbesondere das Ehe- und Familienrecht. 1864 wurde im baltischen örtlichen Gesetzbuch das Trauungsrecht nicht nur der orthodoxen sondern auch der evangelischen Kirche anerkannt. Das Gesetz sah vor, dass die Ehe auch vor den Geistlichen anderer Kofessionen geschlossen werden konnte.[22] Im Laufe der Rechtsreform wurde in Russland das französische Zivilprozessrecht eingeführt. So entstand im lettischen Gebiet ein Dualismus, der bis zum heutigen Tag besteht. Die materiellen Normen und das System des bürgerlichen Rechts sind mit dem deutschen Pandektenrecht verwandt, aber die Grundlage für den Zivilprozess bildet das französische Modell.

Bei der Betrachtung der juristischen Wurzeln Lettlands, wie sie zum Jahr 1918 bestanden, kann man daher feststellen, dass das lettische nationale Recht stark vom deutschen, schwedischen, russischen und über Russland auch vom französischen Rechtsdenken geprägt war. Den größten Einfluss hatte das deutsche Rechtsdenken, weil Livland von Deutschen nach deutschem Recht konstituiert worden und das deutsche Stadtrecht in die Städte gekommen war. Das Recht örtlicher Deutschbalten wurde von allen späteren Besitzern – Polen, Schweden, Russland anerkannt. Noch in der Mitte des 19. Jahrhunderts gingen diejenigen Letten, die studieren wollten, nach Dorpat (jetzt Tartu), wo es eine typisch deutsche Universität gab. Unter den bekanntesten Absolventen der Universität Dorpat kann man einen der Grundleger der lettischen juristischer Terminologie, August Bielenstein (1826 - 1907), nennen, der als erster die Gerichtsordnung von 1864 ins Lettische übersetzte.[23] Erst Ende des 19. Jahrhunderts begannen die lettischen Studenten durch die Russifizierungspolitik im Baltikum das Recht an russischen Hochschulen – an den Universitäten in Moskau und Petersburg – zu studieren. Andrejs Stērste, der auch die Gerichtsordnung von 1864 aus dem Russischen ins Lettische übersetzte, hatte die Universität in Petersburg absolviert.[24] Am Anfang des zwanzigsten Jahrhunderts war in der Entwicklung der lettischen Rechtswissenschaft eine schon früher klare Tendenz zu bemerken: Es gab sehr wenig ausgebildete lettische Juristen, weil die juristische Ausbildung in lettischer Sprache nicht zugänglich war. Die Letten, die Recht studierten, taten dies in deutscher oder russischer Sprache. Der größte Teil der Juristen war deutscher, russischer oder auch polnischer Herkunft. Sie veröffentlichten wichtige Werke zum geltenden Recht und zur Rechtsgeschichte in deutscher oder russischer Sprache.[25]

2. Die lettische nationale Rechtswissenschaft nach der Gründung des lettischen Staates

Als nach dem Ersten Weltkrieg die drei baltischen Staaten gegründet wurden, geschah dies paralell mit anderen Staatsgründungen auf den Trümmern der europäischen Reiche. Es wurden Polen, Finnland, die Weimarer Republik u.a. proklomiert. Auch in dieser Hinsicht gehört die Gründung des lettischen Staates mit ihren Spezifika in den Rahmen der gesamteuropäischen Entwicklung. An der Gründung der Lettischen Republik nahmen auch die Juristen teil: Jānis Čakste und Jānis Pliekšāns (der Dichter Rainis) waren die Bekanntesten unter ihnen. Die juristische Konstruktion, die mit der Entstehung des neuen Staates verbunden war, wurde von qualifizierten Juristen vorbereitet. So stand unter der ersten Deklaration des Volksrates die Unterschrift des stellvertretenden Vorsitzenden Gustavs Zemgals. Zum Präsidenten des Volksrates wurde mit Jānis Čakste ein anderer bekannter lettischer Jurist gewählt.[26] (Ähnliche Prozesse gab es auch bei der Erneuerung der Lettischer Republik.) Der Vorsitzende der Verfassungsversammlung und die ersten Präsidenten der Lettischen Republik waren Juristen. Der lettische Staat wurde von der Juristengeneration mitgestaltet, die größtenteils Universitäten in Russland besucht hatte.

Im Bewusstsein, dass jeder Staat eine nationale Rechtswissenschaft braucht, errichteten die Begründer der Republik Lettland am 28. September 1919 auch die Universität Lettlands.[27] Eine besondere Rolle spielte dabei der spätere erste Staatspräsident, Universitätsprofessor Jānis Čakste.[28] Ein Nationalstaat ist nicht vorstellbar ohne die Möglichkeit, die Ausbildung aller Stufen in der Sprache des Nationalstaates zu erwerben. Deshalb war eine der ersten Leistungen der Republik Lettlands die Gründung einer nationalen klassischen Universität. Wichtige Grundlagen für den Aufbau und die Entwicklung des Staates liefern die Rechtswissenschaft und die Wirtschaftswissenschaft; deshalb entstand bereits bei der Gründung der Universität die Fakultät für Volkswirtschaft und Rechtswissenschaften.

Es ist von zentraler Bedeutung, wer an der Fakultät für Volkswirtschaft und Rechtswissenschaften der Universität Lettlands die ersten Juristen ausbildete und wie diese ausbildet wurden: Denn gerade die Universität Lettlands wurde zur Quelle der nationalen Rechtswissenschaft und Rechtskultur. Ein Teil der Professoren arbeitete an der Universität und wirkte gleichzeitig in hohen Ämtern der Staatsführung. Sie entwickelten den Staat durch ihre Arbeit in den Staatsämtern und durch die Ausbildung neuer Juristengenerationen. Ganz sicher kann man behaupten, dass die Republik Lettland ein multinationaler und multikultureller Nationalstaat war. Daran gibt es keinen Zweifel, denn multinational waren sowie die Studentenschaft als auch die Professoren. Es studierten Letten, Deutsche, Russen, Juden und Angehörige anderer ethnischer Gruppen. Das beweisen die Untersuchungen der Autorin. Die ersten Absolventen der Universität Lettlands kann man durch das Buch "Latvijas Universitātes absolventi – juristi 1919.-1944. Dzīves un darba gaitas" kennenlernen.[29] Auf den gleichen Bänken saßen nebeneinander und studierten Recht Mozus Abramson, Jānis Akmentiņš, Igor Tschinnov, Wolfgang Schilling.[30] Ebenso multinational war auch der Lehrkörper. Professor Jānis Čakste war Lette, der in Moskau Recht studiert hatte. Er war der erste Professor für internationales öffentliches Recht an der Universität Lettlands. Selbstverständlich hielt er seine Vorlesungen auf Lettisch.[31] Neben ihm wirkte seit der Gründung der Universität ein anderer bedeutender Jurist, Professor August Loeber (1865-1948), ein Deutscher, an der Fakultät. Schon im ersten Studienjahr 1919/1920 lehrte Professor Loeber die Einführung in die Rechtswissenschaft. Professor Loeber, Mitglied des Senats Lettlands, war Absolvent der Universität Dorpat. Er gehörte zu den ersten nichtlettischen Professoren, der Anfang

der zwanziger Jahre seine Vorlesungen lettischer Sprache zu halten begann, bis dahin hielt er seine Vorlesungen auf Deutsch. In der damaligen Presse ist ein Artikel zu finden, wo geschrieben wird, dass Dr. iur. August Loeber eines Tages in den Seminarraum gekommen sei und gesagt habe, dass er heute und auch in Zukunft seine Vorlesungen in der Staatssprache, also Lettisch halten werde; nach der Vorlesung sei Beifall erklungen, aber ein Teil der Studenten – Nichtletten– hätten den Raum verlassen.[32]

Paul Minz (1868-1941), Professor für Strafrecht, arbeitete die Grundlagen für das lettische Strafrecht aus. Die Studenten lernten nach seinem Buch "Kriminăltiesību kurss". Zunächst war das Buch auf Russisch erschienen, aber 1934 wurde auch die lettische Übersetzung veröffentlicht.[33] Leider wurde Minz 1940, als Vorsitzender der Nationalen Assoziation jüdischer Juristen, während der Okkupation Lettlands durch die UdSSR verhaftet und in ein Internierungsslager gebracht, wo er 1941 starb.[34]

Die schon erwähnten Professoren waren in Lettland geboren und wuchsen dort auf, während andere berühmte Professoren der Rechtswissenschaften an der Universität Lettlands wie Wasilij Sinaiskij (1876-1949) und Alexander Kruglevski (1886 – 1964) in Russland geboren waren. Nach Lettland kamen sie infolge der Flucht aus dem sowjetischen Russland. Wasilij Sinaiskij arbeitete schon im Jahre 1922 an der Universität Lettlands und unterrichtete Bürgerliches Recht, Rechtsmethodologie, römische Rechtsgeschichte. Wie auch andere Professoren beherrschte Sinaiskij mehrere Sprachen. Er veröffentlichte seine Werke in Russisch, Lettisch, Französisch und Deutsch und beherrschte auch alte Sprachen wie Latein, Griechisch und Hebräisch.[35] Besondere Aufmerksamkeit schenkte er den Weckselwirkungen in Recht, Sprache und Kultur.[36] Die Professorin Līna Birziņa (1910-2007), die die Geschichte der Juristischen Fakultät der Universität Lettlands erforschte, war Studentin dieser Professoren gewesen und schrieb besonders herzlich über den Professoren Sinaiskij. Seine Vorlesungen hielt er ausschlieβlich in korekter lettischer Sprache.[37] Dies muss hervorgehoben werden, weil er erst am Anfang der 20er Jahre nach Lettland gekommen war.

Wichtig für die Entwicklung war die die hohe Moral, die den Studenten von den Professoren demonstriert wurde. So erzählt Professorin Līna Birziņa in ihren Erinnerungen: "Wasilij Sinaiskij begann seine Vorlesung in römischen Rechtsgeschichte mit der Frage "Wer ist Jurist?" und antwortete selbst darauf: "Oh, ein Jurist ist ein Mensch (sui generis), ein besonderer Mensch. Ein Jurist ist gerecht (iustus), gutmütig, unbestechlich. Ein Jurist hat Rechtswissenschaften studiert. Das Recht ist ius. Ein Jurist kennt die Gesetze. Das Gesetz ist lex, im Plural – leges. Ein Jurist steht für das Recht und die Gerechtigkeit. Die Gerechtigkeit ist Iustitia. Das Recht ist ein der höchsten Kulturgüter der Menschheit."[38]

Professor Kruglevski hielt anfänglich wie auch Professor Sinaiskij seine Vorlesung in Russisch, aber in den 30er Jahren beherrschte er so gut Lettisch, dass er seine Vorlesungen in Lettisch halten konnte. Es war nichts Außerordentliches, weil die ausländischen Gastprofessoren ihren Unterricht in Russisch oder Deutsch hielten. In Russisch hielten ihre Vorlesungen Wladimir Kosinski, Wjatscheslav Gribivski, Anatolij Ugrumov und andere.[39]

Viele bedeutende Juristen, die in dieser Zeit zur Entwicklung der nationalen Rechtswissenschaft beigetragen haben, wurden noch nicht erwähnt, aber die Tendenz wird nach Meinung der Autorin bereits klar: Die neue nationale Rechtswissenschaft wurde von einem multinationalen Kollektiv geschaffen, das durch die Ehre dem lettischen Staat gegenüber und durch den Wunsch, seine Entwicklung zu fördern, zum Kollektiv geworden war. Die Vorlesungen wurden auf Lettisch, Russisch und Deutsch gehalten; erst in der zweiten Hälfte der 30er Jahre folgte der Übergang zum Studium in lettischer

Sprache, den die Professoren förderten, indem sie freiwillig zu Vorlesungen auf Lettisch übergingen.

Auch die juristische Literatur, die nach der Gründung der Fakultät im Studienprozess verwendet wurde, war meist in russischer, deutscher und französischer Sprache abgefasst. Erst später wurden die Lehrbücher in lettischer Sprache geschrieben und veröffentlicht. Dabei ist der Beitrag des lettischen Professors Kārlis Dišlers, der als Gründer der nationalen Staats- und Rechtstheorie und des Staats- und Verwaltungsrechts gilt, nicht zu unterrschätzen.[40] Bei der Schaffung der nationalen verfassungsrechtlichen Theorie stützte er sich auf die Werke der bedeutendsten europäischen Wissenschaftler seinerer Zeit und auf die Erfahrung anderer Staaten. Die Werke Dišlers beziehen sich auf H. Kelsen, H. Rehm, H. Berthalemy, A. Toynbee, M. Pohlenz, L. Duguit, A. Menzel und viele andere Juristen. So ist er, wie auch andere Professoren der Rechtswissenschaft dieser Zeit, ein Vertreter der europäischen Rechtskultur, der aus der Kenntnis der Entwicklungstendenzen in der gesamteuropäischen kontinentalen Rechtswissenschaft die nationale lettische Rechtswissenschaft synthesierte. Die Autorin vertritt die Meinung, dass zwei Theorien einen großen Einfluss auf die lettische Rechtswissenschaft dieser Zeitperiode hinterlassen haben:

1. der Solidarismus von L. Duguit, der in die Verfassung von 1922 eingearbeitet wurde, und für die Verleihung der ersten staatlichen Auszeichnung – des Dreisternenordens - ausschlasggebend ist;
2. die psychologische Rechtsschule von L. Petrazicki, weil viele Hochschullehrer der Universität Lettlands Schüler und Nachfolger von Petrazicki waren. Unter ihnen sind die schon erwähnten Kruglevski und Dišlers, deren Lehre auf den Ideen von Petrazicki basierte.

Das nationale Recht entstand nach der Gründung des lettischen Staates in einem verhältnismäßig langsamen Prozess. Vom Russischen Reich wurden der Rechtspartikularismus, die Standesgesellschaft und Privilegien der Gutbesitzer geerbt. In verschiedenen Gebieten Lettlands galten unterschiedliche Regelungen, aber ein Gebiet – Latgalien – war schon historisch bedingt von den anderen Gebieten (Kurland und Vidzeme) rechtlich abgegrenzt. Für die Ordnung und Unifikation der Rechte waren fast zwanzig Jahre notwendig.[41] Die Autorin ist der Meinung, dass die Tätigkeit der Universität Lettlands, an der die Studentenzahl in dieser Zeitperiode stark anstieg (von 555 Studierenden 1923/24 auf 1374 – 1934/35)[42], die Veröffentlichungen der Professoren zur Rechtswissenschaft und zur Kultur insgesamt sowie ihre Tätigkeit in staatlichen Ämtern und Organen zur Entwicklung einer Rechtskultur beitrugen, die der Verabschiedung materieller und prozessueller Normen vorausging. Die Universitätsprofessoren nahmen auch an der Ausarbeitung neuer Gesetze teil, was die Qualität der verabschiedeten Rechtsnormen positiv beeinflusste, wie sich am Beispiel des Bürgerlichen Gesetzbuches und des Strafgesetzbuches zeigte.[43].

Im Ergebnis dieser Untersuchung kann man feststellen, dass sich das lettische Rechtsdenken nach der Gründung des Staates selbständig aber im Einklang mit der Gesamtentwicklung des europäischen Rechts entwickelte. Die internationale Tätigkeit der lettischen Juristen brachte einerseits die neusten Tendenzen der Rechtsentwicklung nach Lettland, aber andererseits wurden auch die lettischen Erfahrungen an ausländische Kollegen weitergegeben. So pflegte Professor Sinaiskij eine gute Zusammenarbeit mit italienischen, holländischen, belgischen und französischen Wissenschaftlern. Es ist für die Rechtsentwicklung von großer Bedeutung, dass auch die Juristen unserer Generation die lettische Rechtswissenschaft als unentbehrlichen Teil der Rechtskultur Kontinentaleuropas unter ihren ausländischen Kollegen bekannt machen und fortschrittliche Ideen ihrer Kollegen übernehmen werden.

Diese Tendenzen bilden die Grundlage für die heutige lettische Rechtswissenschaft als unentbehrlichen Teil der Rechtswissenschaft Kontinentaleuropas

unter ihren ausländischen Kollegen popularisieren und fortschritliche Ideen der Kollegen übernehmen werden!

Zusammenfassung

1. Die lettische Rechtswissenschaft entstand auf der Basis der Traditionen, wobei sie auch durch die neuesten Strömungen im europäischen Rechtsdenken am Anfang des 20. Jahrhunderts beeinflusst wurde. Bei der Betrachtung der juristischen Wurzeln Lettlands, wie sie zum Jahr 1918 bestanden, kann man daher feststellen, dass das lettische nationale Recht stark vom deutschen, schwedischen, russischen und über Russland auch vom französischen Rechtsdenken geprägt war.
2. Im frühen zwanzigsten Jahrhundert war in der Entwicklung der lettischen Rechtswissenschaft eine schon früher klare Tendenz zu bemerken: Es gab sehr wenig ausgebildete lettische Juristen, weil die juristische Ausbildung in lettischer Sprache nicht zugänglich war. Die Letten, die Recht studierten, taten dies in deutscher oder russischer Sprache. Der größte Teil der Juristen war deutscher, russischer oder auch polnischer Herkunft. Die Letten, die Recht studiert hatten, hatten auf Deutsch oder Russisch studiert. An der Gründung der Lettischen Republik nahmen diese Juristen teil.
3. Ein Nationalstaat ist nicht vorstellbar ohne die Möglichkeit, die Ausbildung in allen Stufen in der Sprache des Nationalstaates zu erwerben. Deshalb war eine der ersten Leistungen der Republik Lettlands die Gründung einer nationalen klassischen Universität - der Universität Lettlands.
4. Die Universität Lettlands wurde zur Quelle der nationalen Rechtswissenschaft und Rechtskultur. Ein Teil der Professoren arbeitete an der Universität und wirkte gleichzeitig in hohen Ämtern der Staatsführung. Sie entwickelten den Staat durch ihre Arbeit in den Staatsämtern und durch die Ausbildung neuer Juristengenerationen. Ganz sicher kann man behaupten, dass die Republik Lettland ein multinationaler und multikultureller Nationalstaat war. Die neue nationale Rechtswissenschaft wurde von einem multinationalen Kollektiv geschaffen, das durch die Ehrverpflichtung der Republik Lettland gegenüber und durch den Wunsch, ihre Entwicklung zu fördern, zum Kollektiv geworden war.
5. Die Tätigkeit der Universität Lettlands, an der die Studentenzahl in dieser Zeitperiode stark anstieg, die Veröffentlichungen der Professoren zur Rechtswissenschaft und zur Kultur insgesamt sowie ihre Tätigkeit in staatlichen Ämtern und Organen trugen zur Entwicklung einer Rechtskultur bei, die der Verabschiedung materieller und prozessueller Normen vorausging. Die Universitätsprofessoren nahmen auch an der Ausarbeitung neuer Gesetze teil, was die Qualität der verabschiedeten Rechtsnormen positiv beeinflusste.

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Fußnoten und Anmerkungen

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Summary

The publication addresses the formation of a Latvian national jurisprudence after the founding of a nation state on November 18, 1918. The essay will evaluate the processes that formed the judicial cultu re and legal system in the territory of Latvia up to the formation of the state. The main attention of the essay is on the jurists who made the legal system of the Republic of Latvia and who participated in the education of law students at the newly formed University of Latvia.

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The Concept and Content of Property Rights in Latvian Law

Īpašuma tiesību jēdziens un saturs Latvijas tiesībās

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The purpose of this essay is to examine the peculiarities of Latvian law against a general background of findings. Taking into account the finding of the greatest thinker of the 20th century Hermando de Soto, that a clear definition of property is the basis for the successful development of a capitalist society, [2] the need to clarify the concept of property is obvious. However, taking into account the short history of the development of property law in Latvia, it is understandable that it its too early to expect precise results. Taking into account the degree to which the problem at hand has been researched, this essay will examine the following aspects of the issue: The place of property in the Latvian system of property law, sources and methodological problems, property and possession, property and interests, terminology, tangible and intangible property as a object of property law, the content of property law, restrictions on property.

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The place of property in the Latvian system of property law, sources and methodological problems

To understand the concept of property law it is essential to understand its place in the Latvian legal system. At the same time, one will learn little more of the significance of this legal category by establishing that property is one form of rights *in rem*. First, the concept of rights *in rem* itself needs explanation. Secondly, historically, rights *in rem* may include more or less forms of rights, but the system itself does not change. In addition, property always takes a central place.

Therefore, to point out a membership in the group of rights *in rem* contributes little to explaining the concept of property. Thus, for example, knowing that things can be tangible or intangible (The Civil Law, hereafter CL, - Article 841) and knowing that property can be held in all that is not definitely removed from general circulation by law (CL, Article 929), we can conclude that property rights can exist in intangible things. However, not everyone regards this assertion as correct. Therefore, such a conclusion is not self-evident from what was said before, even if we know the content of the relevant norms of the CL.

It would be even less possible to draw any conclusions about the concept and content of property if the content of these norms was indeterminate. However, taking into account that the composition of rights *in rem* in various legal systems can vary, that therefore, it has no special, unchanging internal structure, the assumption that the concept and content of property is dependent on its place in the system of rights *in rem* and its structure, it should not be given a particular methodological meaning.

Comparing the development of this chapter here in Latvia, we can establish that in 1937, its content had not significantly changed. In the CL, we do not find, as in its predecessor, the Compilation of Local Laws (CLL), inheritable leases. Various forms of acquisition of rights, such as immemorial dominion with regard to acquiring property, adverse possession with regard to servitudes. In contrast to Roman law, neither the CLL nor the CL has any other form of *ius in re aliena* – the right to build (*superficius*).

Even the description of the group of rights *in rem* demands additional explanation. In addition, it is not accepted by all and it is not logically unassailable from all points of view. In a purely grammatical interpretation, the words rights *in rem* appear to point to the rights of things in themselves. This is not a self-evident concept, such as human rights or copyrights, but demands an additional explanation or context. Therefore, to point to property as one form of rights *in rem* creates many ambiguities and does not solve any problems.

Also, the mutual relationships of the concepts comprising rights *in rem* do not give particularly clarity. It would be logical to assume that the broader concept within rights *in rem*, those, such as things, possession, property and entitlement to a thing belonging to another are equally ordered, belonging to one and the same species of "rights *in rem*". However, this is not so. Some of these pertain to rights (property, rights to things belonging to another); others (things) are nothing more than the objects of such rights. Still others (possession) are characterized both as rights and as facts. Therefore, instead of a logically equally ordered system of concepts, we rather find essentially different concepts which have in common that they happen to be contained in Chapter 3 of the CL.

The development of these norms and the system, historically, can be explained rather demonstratively. The classification of things mainly characterizes the objects of property by characteristics derived from circulation within the civil law. It is not hard to establish that they were created at different times. For example, the division of things into tangible and intangible applies to relatively recent developments in the law, because only in medieval times such concepts developed as the separation of rights, that is, the possession of intangible rights, from a debtor, that is, the possibility to alienate a claim by cession, not by a procedural power of attorney under so-called classical Roman law, which also applied to later periods of development. The division between real property and chattels had no special meaning before a register of property (title or cadastral) system was founded, thereby, at best, in the late Middle Ages. At the same time, the description of real property in the CL does not point to this important differentiating

feature – the register, but preserves the characterization provided by early Roman law (things are movable/chattels or real/immovable according to whether they could or could not be moved from one place to another without outward damage – CL Article 842). Only a remark in CL Article 842 with reference to the railroad indicates some changes over time. For instance, the destruction of fungible goods does not end the obligation, the object of which is the delivery of such goods. The rule that stolen goods (*res furviva*) may not be gained by adverse possession applies only to unique things. The concept of aggregation of property determines the fate of individual things within the aggregation in cases of unclear terms of contract, etc. This division is found in full in classic Roman law. In other words, the sequence of the classification of things is by no means chronological nor formed by a method of formal logic. Since things are still classified in two opposing groups, then this classification is easily formed as a hierarchical structure. The latter has, undeniably, formed already as a result of pandectic law, which expresses a proclivity toward academic classification.

The mutual relationships of other concepts in the section on property rights have formed completely differently. Property, since the start of time, has been seen as a self-evident concept much as a god in any religious teaching. The most essential is not defined and anyone trying to do so is to be seen as a heretic. Therefore, the definition of property has been left to various critics of a society built on private property, starting with Proudhon's famous "property is theft" [3] and ending with the "triad" (possession, use and disposition rights) under the Soviet legal system, or as *ius utendi et abutendi* (the right to use and destroy).

Property and possession

Possession originally developed as an *ad hoc* form of protection of a status in fact in the interests of social order and security[4]. When the social order changed, this form of protection was "lost". As a result, the fact of the existence of possession as a legal institution loses any explanation and justification. But as it has traditionally preserved its place in "the system", the temptation arises to "utilize" it for other purposes, for example, as a substitute for property, even when it can be clearly seen that this institution, which is outside the chapter on property rights, has nothing in common with property. This is confirmed by the well-known saying of Roman lawyers, that possession and property have nothing in common (*nihil commune habet possessio cum proprietatis*). The "utilization" of possession is one of the most interesting novelties of Latvian law. One of these novelties is the use of possession in good faith to replace the concept of the beneficiary in good faith that is missing from the CL. So, for example: " Taking into account that …G.L. is not a beneficiary in good faith (CL, Article 910) (emphasis by the author – J.R.), her rights may not be defended by reference to an entry in the Land Register. [5]" It suffices to examine Article 910 of the CL as cited by the Senate to establish that the phrase "beneficiary in good faith" cannot be found there. It cannot be found it the CL. However, the kind of possession (good faith, bad faith, legal, illegal) does not and cannot have any effect on the property title. Therefore it may not, at least within the system of concepts of the CL, serve as an instrument in discussing the legal force of an entry in the Land Register.

Another novelty, the introduction of the concept of illegal possession, which also does not occur in the CL: "Illegal possession is not protected by law." [6] It is clear that in this case, something else was meant. From where did the Senate adopt the concepts of good faith beneficiary and illegal possession? By examining legislation in force, we find the concept of good faith beneficiary only in the law on Denationalization of Housing

Property in the Republic of Latvia and the law On the Return of Buildings to Their Legal Owners. However, in context it can be understood that in these laws, adopted before the renewal of the CL, this concept was incorporated from Article 154 of the LSSR Civil Code[7]. The concept of illegal possession, also not found in the CL, was adopted from Article 153 of the LSSR Civil Code[8]. From the aforementioned source, as well as from the system of socialist law as a whole, it unmistakably follows that the term "possession" is used in a completely different meaning, firstly because the LSSR Civil Code does not foresee the institution of possession and the protection of possession, secondly, possession in this act as in the Soviet system of civil law in general, can only be understood as part of the aforementioned "triad", that is, one of the subjective rights of the owner. Thereby, "reading" into the CL a phrase that is not even there, the Senate has not merely "erred", but put into this rather original use of the concept of possession a completely different meaning, alien to the CL. In the first "novelty" – pointing to the illegal nature of the possession as an obstacle to using a claim for property (Article 154 of the LSSR Civil Code has an analog to the restrictions on claims on property of Article 1065 of the CL, that is taken from Swiss law), one expresses the *Hand muss Hand wahren* (one hand protects the other) principle. In other words, one cannot reclaim a thing from a person to whom the owner has willingly given it. To regain property, one must claim either on contract or on wrongful self-enrichment. The defendant has neither property nor possession, which, according to the CL, is "possession of property is actual control over property conforming to ownership rights" (Article 876), but – as understood in the CL – only mere holding (Article 909, CL). It is clear that the defendant in the case described objects to the demand for property not because his possession is "legal" or "illegal" but on the basis that the plaintiff, who has willingly given the object to the defendant, has no right to demand ownership, even though he, possibly, retains property rights.

The second "novelty" – in complete contradiction of the principle set forth in the CL: "Every possession (that is, regardless of whether the possession is legal or illegal – J.R.) shall be protected by law" (Article 912), in addition, not only "reading into" the CL an organically alien term, but also turning it from an independent institute to an attribute of property laws, the Senate has also drawn a conclusion that in no way results from the context and sense of the law. In the decision that is cited in civil case SKC-1 the dispute is not about possession, but about rights, therefore reference to norms concerning possession are completely out of place and in contradiction to the basic postulates of the CL: "From possession arises the right to protect existing possession and to renew possession that has been taken away. These rights are associated with every possession independently of whether it is legal or illegal, in good faith or in bad faith" (Article 911, CL).

The third novelty – expanding the mechanism of protecting property rights, granting protection also to non-owners in cases when courts see considerations of justice, which it is not possible to base on claims for ownership taken separately. In this case, too, the Senate has "complemented" the arsenal of claims to property, using, in the Senate's view, a "multifunctional" concept of possession as a helping instrument: " In accordance with Articles 911 and 912 of the CL, it follows from possession a right to the protection of existing possession and to the renewal of divested possession. These rights are associated with every possession independently of whether it is legal or illegal, in good faith or in bad faith. Every possession shall be protected by law. It is on this basis that the claim is made. Therefore the appellant's reference that property can be reclaimed only by a claim for property is baseless." [9]

In the aforementioned three decisions we can establish not only the "expansion" of the traditional understanding, but at the same time, also the losses caused by this kind of improvised interpretation – it is not hard to determine that in the second decision, the generalization is not only in contradiction with the CL, but also, at the same time, completely opposite to the generalization that the Senate made in the third aforementioned decision.

Currently it is premature to say whether this significantly modified understanding of the content of property law will have any lasting significance. But to disregard the described manner of decision would not be especially far-sighted. Here we have to deal with a trend, not a particular exception. At the same time, one cannot avoid seeing that this interpretation of the law was achieved ignoring clear and unambiguous prescripts of the law. If "No ownership action shall be accepted from a person who has taken away possession by force, so long as the person dispossessed has not been restored thereto and not received compensation for all losses and expenditures" (Article 923 of the CL) – an unambiguous reference to the fact that the CL incorporates the principle of Roman law that *nihil commune habet possessio cum proprietatis*, how is it possible that a claim for property is filed based on norms that foresee the protection of possession, in addition, as in the case at hand, by a person who has never been the owner of the object to be reclaimed?

However, one may not ignore several self-evident things. First, possession as an independent institute does not enjoy the protection of the courts. Second, not all claims can be fitted into the "Procrustean bed" of the archaic norms of property claims under the CL. Third, the important concept of a beneficiary's good faith is lacking in the CL. Fourth, the concept of possession is impermissibly ambiguous, because in addition to possession "as a fact" there is "legal possession", as well as the right of an owner to possess (Article 1038 of the CL). Fifth, the relationship has not been clearly defined between possession as a protected condition (Articles 875-926) and possession as a prerequisite to acquiring property (Articles 998 – 1031 of the CL), in addition one has not evaluated the need for the existence of the institution of adverse possession in context with a presumption of property rights, that follows from registration of property in the Land Register (Article 993 of the CL).

The relationship between ownership and possession: the historical aspect

The historical explanation, although it "puts in place" otherwise incomprehensible concepts, will be a weak help in a modern explanation of the application of these norms. Therefore several methodological approaches appear – the historical-dogmatic and the positivist-pragmatic. Each of these methods has its advantages and defects, and each can surely lead to differing results.

In order to understand the norms of the CL historically, it is necessary to "spend great effort learning Roman law as treated by their pandects, in addition to these, Old German medieval law…"[10]. In addition… the principles of Old German and Roman (pandect) law exclude each other…can a small country afford such a luxury? [11]"

V. Sinaiskis pointed out the archaic character of the norms of the CLL: " For quite a few years Latvia heroically uses the legislation created in Rome for Rome, which is now outlived by all nationalities and which, amended and held together with hoops, continues to live only in Latvia and Estonia" [12]. Since the quoted essay, Latvia has lived "quite a few years" in the Soviet system and now, as the only one, returns to this

same system held together with hoops. Both then, when V. Sinaiskis, asking to reform the law, published the quoted essay, and at the beginning of the 90s, when Soviet civil law had to be replaced by the law of private property, there was the possibility to chose something simpler.

There were several reasons for restoring the previous system of norms.

First, this organically fit into the spirit of the times and perfectly matched the idea of uninterrupted *de jure* Latvian independence, even though uninterrupted statehood is not in any way connected to the existence of a normative act.

Second, an important factor was the prevailing normativism, that is, positivism at its most extreme expression, inherited from socialist law. Law was seen as an independent value (legal fundamentalism). The belief that from "appropriate" laws would be "formed" such legal relationships as were "needed" was consistently dominant. Therefore one must "repeal" a law that "does not regulate" private property and "implement" a law that "foresees" it. The idea that laws are an organic part of a nation's life and that they cannot be "implemented" with equal success in any society regardless of its degree of civilization and developmental history[13] would have been the last thing to come to mind, at the time, in the midst of great social change, including the conversion of property.

Third, with very narrow limits on time and intellectual resources, it was logical to grab whatever was nearest "at hand". The CL was the only known codified source that successfully worked in the appropriate environment.

The reference to the recent origin of this act, which, at the time of its renewal gave the right to consider the Latvian CL of 1937 to be one of the newest, and, therefore, self-evidently, most modern codes, in the passage of time proved to be misleading. Only with the passage of time did problems with the interpretation and application of this act appear. Together with the almost unaltered copying of the predecessor of this law, the CLL, its problems were inherited. The necessity to review, in court practice, the obsolete system created additional tension in connection with the necessity to correctly understand a system whose content, due to differing historical influences, is not easily understood. Soon enough the same problems with the application of this law made themselves felt, which were already intensively discussed, when discussing the necessity to modernize the CLL.

Ownership and interest

Ever since the well known German academic Jhering[14] turned his attention to this phenomenon, the issue of whether the concept of property encompasses or does not encompass an interest, is the subject of dispute in jurisprudence. Depending on the answer to this question, whether the owner uses property rights in one's own interest or not, the content of property changes. So, for example, one of the prerogatives of an owner – the right to destroy a thing belonging to him (*ius abutendi*), can come into contradiction with his own or society's interests, and the solution depends on how we understand these interests. In the understanding as used in the CL, the relationship of property to the owner' s and to a greater extent, society's interests – nowhere appears. Where there is a possible conflict, the CL stands for unrestricted use of property rights, disregarding any other kinds of considerations. "Owners may possess property belonging to them, acquire the fruits thereof, use it at their discretion for the increase of their property and, generally, use it in any manner whatsoever, even if losses are caused thereby to other persons" (Article 1038 of the CL).

With the amendments to the Constitution adopted on October 23, 1998, a new context appeared for understanding property. Article 105 of the Constitution declares: "Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation."

As the Constitutional Court has pointed out "the intention of the legislature was to achieve mutual harmony between the human rights norms contained in the Constitution and international human rights norms (see, for example, the decision of the Constitutional Court of June 27, 2003 in case No. 2003–04–01, point 1 of the conclusive part and the decision of January 17, 2005 in case No. 2004–10–01 point 7, subpoint 1). In interpreting the Constitution and Latvia's international obligations, a solution must be found that ensures their harmony, not contrast (see the decision of the Constitutional Court of May 13, 2005 in case No. 2004-18-0106, point 5)." [15]

The Constitutional Court has recognized that the content of Article 105 of the Constitution is similar to the content of Article 1 of the First Protocol of the ECHR (see the decision of the Constitutional Court of May 20, 2002 in case No. 2002-01-03, the conclusions). [16]

The European Convention on Human Rights (hereafter ECHR), Article 1 of Protocol 1 states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

It is not hard to establish that the differences in both aforementioned normative acts are sufficiently fundamental and that the formulation used in Article 105 of the Constitution of the Republic of Latvia is significantly broader. However, to evaluate these differences and the consequences thereof is not the purpose of this essay. But it is important also in this instance to keep in mind that there are significant differences in the concept of property and factors limiting it in two different normative documents within one and the same legal system. So far, no one has thought of discussing the issue of the conformity of some norms of the CL to Article 105 of the Constitution. However, the conflict is sufficiently dramatic.

Thanks to the not especially successful paraphrasing of Article 1, paragraph 2 of the First Protocol of the European Convention on Human Rights in Article 105 of the Constitution of the Republic of Latvia, the rights of the state to restrict the use of property rights subordinate this principle not to the will of the legislature, but to the views of the court.

Terminology

The terms "property" in Latvian academic jurisprudence and practice can, at the same time, refer to the rights to property and the object of ownership. Property refers to rights in Articles 927, 928 of the CL, but to a thing physically belonging to a person in Article 993, part 3. In the last case, it would be more correct to use, in place of the term "property", "the object of ownership". V. Bukovsky[17] points to this peculiarity. Of an

opposite opinion are those authors in whose view "the term 'property' in the CL denotes only the right to property, nowhere is this term used to describe the object of this right (an immovable thing)" [18]. The object of ownership can also be described by the term "belongings", but that is also used to describe an aggregation of rights, therefore it is more ambiguous than "property" [19].

A real problem probably cannot be solved by refusing to see it. The very fact that in place of compound words used in other languages (*immobilia, ņedvižimostj*), we use the word group "immovable property", forcing us to use the word "property" to describe not only the rights, but the object of ownership. Because of its ambiguity, the term is already sufficiently misleading with regard to real estate (immovable property), but to a greater degree, this thesis can be applied to intangibles. The term "intellectual property" in its first meaning almost always associates not with rights, but with the object, the author's work, a brand and the like. Only a patent applies primarily and mainly to rights. Apparently there lacks a separate designation for "that which is encompassed by my rights" as opposed to "that which I own." This leads to the dual understanding of property.

In and of itself, this phenomenon is not unique to Latvian law. Rather it is a peculiarity characteristic of the legal systems of Continental Europe as opposed to the Anglo-Saxon legal system. In contrast to the latter, a description like the Anglo-Saxon *estate*, to be understood as the aggregate of rights to land, not the land itself[20], is alien to the European legal system. This peculiarity also does not seem to be associated with any far reaching practical consequences. Rather it could seem to be imagined, a problem of scholastic "hair splitting". But this is not the case. The harmful side effect is not caused by the fact that one and the same word is used to describe two different concepts, but rather, that the term "property" first associates with the object, whereas property as a subjective law, that is, as a measure of possible or permissible behavior, has a secondary meaning. For the latter reason, norms that do not apply to tangible, spatial things work poorly in the Latvian legal environment, first, in academic jurisprudence, second, in practice. In academic jurisprudence – to the point that some academics refuse to acknowledge that objects of property can be intangible things (a narrowed understanding of objects of property). In practice – all those instances in which intangible things are involved in civil legal matters. And such transactions encompass not only, for example, intellectual property, or the imagined parts of a commonly held property, but also liabilities. At first glance, it sees there is no connection between the two phenomena – the dual understanding of property, on the one hand, and the narrow understanding of the object of property, on the other hand. However, such a connection undoubtedly exists. As mentioned before, the concept of property is explained in the CL as "dominion over a thing."

Tangible and intangible things as objects of property law

As said before, the dual understanding of property – not only the peculiarity of Latvian law, that to some extent, can follow from the aforementioned terminological ambiguity, lead to the next, in this case, peculiar only to Latvia – to that, that the law, judicial practice, and academic jurisprudence lean toward considering only tangible things as the object of ownership. [21] This view is based on a single reference in the law, the limitation in Article 1050 of the CL, which prescribes that a claim for property can only be raised to recover a tangible thing, that is, a norm that in and of itself has no connection to determining the object of ownership, greatly narrows the range of objects of ownership, categorically excluding from it intangible things. [22] This acknowledgment has

gained expression both in academic jurisprudence and in judicial practice. In academic jurisprudence – by declaring that property rights are rights only to tangible things[23], in judicial practice – by denying the application of the norms of property law to individual objects of intellectual property[24] or even to claims[25], to aggregates of things, including companies. As Konradi and Valters pointed out, "…a shop, that is, not only a collection of tangible things (*universitas rerum* in the narrow meaning), but a collection of tangible and intangible (rights) things, may not be the object of vindication, as is directly and clearly determined by Article 906 of the Civil Law" (in the cited text, there is reference to a norm of the Collection of Local Laws. It conforms to Article 1050 of the CL – J. R.) [26].

To some extent, the causes of such a narrowed interpretation of the object of ownership apparently have their roots in the history of the development of Latvian law. The term "intellectual property" is not very old. It was mentioned for the first time in court practice and literature around the middle of the 19th century, that is, shortly before Bunge finished the work of codification[27]. It is no wonder that for this reason, it does not appear in the Compilation of Local Laws. The changes in correction with the coming into force of the 1937 CL affected property law very little. It is worthy of admiration that this archaic understanding proved so tenacious, especially in view of the rapid development of this content that could be observed in the last third of the past century, after this term was implemented and widely used, which is connected to the founding of the World Intellectual Property Organization (WIPO) [28] in the middle of the 20th century, more precisely, in 1967. In Latvian academic jurisprudence and practice, this term is still put in quotation marks, thereby demonstrating an attitude toward it as some kind of surrogate for property rights. Such a view is not only in contradiction of modern legal knowledge and practice. The narrow understanding of property rights inevitably leads to a narrow understanding of the subjective rights of individual owners. One should take into account that such concepts as piracy have been brought over from the concept of intellectual property. Disregarding the disputed issues, which mainly are linked to the content and extent of the term "intellectual property", [29] this category of the law, as a right to intangible things has taken stable root in both theory[30] and in the latest legislation of other countries[31], as well as in court practice. The European Court of Human Rights has also pointed out that violations of intellectual property rights are to be qualified as violations of Protocol 1, paragraph 1, part one of the European Convention on Human Rights, and claims with regard to such violations may be heard by this court. [32] A reference to intellectual property in the CL is necessary.

In contrast to the skeptical attitude of the proponents of the narrower understanding of the object of ownership regarding intellectual property as "property", which, as mentioned, can be explained by the recent origins of this institution, a similar attitude toward liabilities as property is rather explained by the strong influence of Roman law. In this case, the narrowed view of the object of ownership is brought in by the relics of Roman law in the CL, which are tellingly manifested in the norms regarding guaranty and the cession of claims. It is the narrower view of the object of ownership that is the reason why court practice, initially, did not perceive bank guarantees, that is, abstract liabilities, which, in essence, are not linked to the primary debtor's liability differently than an ordinary guaranty liability[33]. It is also debatable whether it is necessary to preserve the limitation in Article 1050 of the CL that excludes the possibility that intangibles can be the object of a claim of ownership. This principle, by the way, is in contradiction with court practice that, by equating claims of inheritance[34] to claims of ownership, and so-called claims for reform of ownership, [35] has significantly expanded the boundaries for

interpreting and applying these norms. Therefore, firstly, one is not particularly convinced by reference to Article 1050 as a basis for the narrowed understanding of the object of ownership, secondly, one must examine how much principle significance the restriction on the object of a claim for ownership in Article 1050 has, and whether the latter is not a concession to ritual traditions of ancient Roman law, where form undoubtedly dominated content. [36]

By contrast with earlier problems arising from internal contradictions in the law, the problem discussed in this subsection to a greater degree arises from various possibilities for interpreting the law and, therefore must be regarded as largely theoretical. However, at the same time, this problem, as the ones before, is the product of the ambiguous construction of the law and the system.

The content of property rights

Traditionally the content of property rights includes the right to possess, use and dispose of, as well as the undisturbed enjoyment of the property. Pertaining to this famous "trio", most peculiarities in Latvian law are related to the first – the concept of possession. Possession can be understood as a fact or as rights.

The first way of understanding can be reduced to the ancient Roman law principle *nihil commune habet posesio cum proprietatis*, from which is derived the institution of the protection of possession as an independent legal status, the second –from an unequivocal understanding of subjective rights, culminating in the formulation in the First Protocol, Article 1, part 1 of the European Convention on Human Rights. The problem with Latvian laws is that it, confronted with this modern understanding, where possession dominates as a form of realizing property rights, forces the elimination from the Latvian legal environment of the interpretation, taken directly from Roman law, of possession as a fact. Paradoxically, therefore, possession, which "has nothing in common" with ownership, continues to exist as a form of realizing ownership, even though in the CL, the ancient institution of possession as a fact and the institution of a conglomerate of rights, taken from Roman law, continues to live on, Latvian judicial practice consistently "does not see" possession as an independent institution, but rather as an appendage or surrogate.

Ownership, therefore, is only mentioned, in some normative acts, in a different context. The question arises – is it necessary to explain in the law what exactly is contained in the owner's rights. Taking into account the "positivist – normative" traditions of our jurisprudence, this would be easier. But, on the other hand, taking into account that the content of property is still in a phase of dynamic development, the question arises whether, by hastily creating formulations, we may lose something essential.

The CL defines ownership just in such a classical fetishist spirit: "Ownership is the full right of control over property" (Article 927 of the CL). This is, this, the only "handwriting" in this definition. The aforementioned norm cannot be considered even an incomplete definition, because it does not contain the elements characteristic of a logical definition – not only does it not point to ownership as a concept included in a wider concept with significant differentiating characteristics, but also does not indicate how one should understand the different descriptions of the particular characteristic described in this definition –control- as opposed to different kinds of "control", stating only that this is "the most complete" control.

What are the other, not so complete forms of "control"? Possession is "actual control conforming with rights" (Article 875 of the CL). But it turns out that possession of

a thing is "actual control over property conforming to ownership rights" (Article 876 of the CL). Hence, ownership is the "most complete" control, but possession "actual" control "over property", which, additionally, is control "conforming" to ownership rights. Turning the pages of the CL some 100 articles further, we find that owners "Owners may possess property belonging to them" (Article 1038). Therefore, they may realize "control over property conforming to ownership rights" over property that they own. Thus, evaluating the only description of property in the CL, we do not get much understanding of the concept of property. We get no further than tautological conclusions.

Therefore, in order to explain the concept of property, we have at our disposal a rather complicated source, from which the conceptual content of property can be derived only indirectly, extrapolating the greater or lesser efforts of practicing judges in understanding this complicated act in accordance with, for us, completely alien legal systems. But the first that comes to mind is exactly that system, which we want to mention the least, never mind incorporate or apply, so we have a complete lack of definition.

Taking into account overall evolution, a trend can be seen in recent codification to forego not only the archaic, fetishistic understanding of property under rights *in rem* but, in doing so, to forgo the very concept of rights *in rem.* Usually such changes take place in a "natural" way, that is, in a concentrated way, they reflect the findings of academic research in a codified normative act, for example, in a code. In the situation in which we are forced to work, that is, preserving the conservative normative act, changes make themselves felt in any case, but these changes are of a spontaneous nature. So, for example, one can forego an institutional system in the code, including the institution of rights *in rem*, by academically criticizing the concept of rights *in rem*. Or by simply replacing one system with another. In the first case, there will be a greater role for doctrine in explaining ambiguous legal norms. In the second case, the role of doctrine will be secondary for the reason alone, that, in contrast to the first case, it will lack the role of "Demiurge" that "law-creating" academic jurisprudence assigns itself.

With one change in a system others usually follow, for example, in modern codes, the replacement of the "rights *in rem*" accent of the law of pledges with one of contract law, as a result of which the institution of the law of pledges is moved to the section on contract law, for example, because, by replacing the title of the section on rights *in rem* with the more easily understood title of property law, the law of pledges no longer "fits", because it is no longer a matter of "rights to the property of another" but has simply become a way of ensuring a contract. This is only one example of how changes in the system lead to conceptual changes and vice versa. Therefore, when touching upon the concept of property, one must inevitably touch on issues of the system of laws.

In the course of this overall evolution, the concept of possession tends to "diminish in scope", reducing itself from an autonomous category of the law to a concept subordinate to and serving the wide category of property. As a subordinate category, possession is reduced to one of the subjective rights in the aforementioned "triad of property", and preserves a relatively independent meaning as a prerequisite for gaining ownership by adverse possession. In addition, in the course of normal evolution, with the state switching from the so-called system of titles to the so-called cadastral system, adverse possession loses its meaning as a way of gaining real estate. For example, one forecasts such a result with the coming into force of an appropriate law in England, where, until the adoption of the law, each year around 15 000 claims were heard, and, in most cases, satisfied. [37] Nothing similar can be seen in Latvia, where fifteen years after the coming into force of the Land Register Law, the appropriate norms have not only retained their force, but also are cited and applied in judicial practice. [38]

Therefore, even if the aforementioned general trends do not go unnoticed in Latvia, their effect on the existing legal system is indirect and peculiar: by preserving the old, "held together by hoops" form from Roman law, at the same time, submitting to the influence of the newest trends, these new trends have entered Latvian law not by reforming the law but rather – by ignoring it. This kind of progress can be explained by a lack of intellectual resources.

This, in researching a legal institution as complicated as property, one must specify every time whether one is talking about general development or the local, much slower evolution of Latvian law. Will the research confine itself to a formal analysis and explanation of a dogmatic legal norm, or will it also touch upon the aspects of the application of the norm? In addition, depending on the initial set-up, the object of the research will be completely different. Thus, for example, in analyzing the norms of the CL and determining their meaning, the task of the research will be to turn to its "Roman-Old German" genesis. However, in examining judicial practice, a series of newer layers may be found that can completely change the understanding and application of the applicable norm.

Thus, analyzing any category in law, including the concept of property in Latvia, the researcher must always look to oneself so as not to forget to specify whether, in this case, the "concept" to be examined is just the existing formulation of the law "held together with hoops" or does it have some connection to real practice, or is it a conglomerate formed under the influence of these rather different gravities. This situation inevitably leads to the ambiguity of terms used in legislation, academic jurisprudence and practice, which forms a fruitful ground for academic discussions, but does not foster a uniform understanding of the law and predictable judicial decisions. One of these historically programmed peculiarities pertains to the very conceptual content of property and its use.

There are multifaceted expressions of this attitude: as a categorical disinclination to allow protection of illegal possession, ignoring totally, in this regard, definite and unambiguous prescriptions of the law, as the unification of legal claims for possession and ownership in one court case – in contradiction to the unambiguous prescription of the law that categorically forbids such unification, as the satisfaction of a claim for ownership based on the norms for the protection of possession, ignoring the unambiguous prescriptions of the law, that limit such protection, allowing it only in very specific cases and in very strictly determined limitations. Partly such disregard for the prescriptions of the law is explained by contradictions in the law itself. Thus, for example, the legal rule that "the court promptly restores possession" has been turned into a legal parody, because the Latvian legal system does not have an appropriate procedural form for the prompt restoration of possession. However, in contradiction of the principle of *nihil commune habet posesio cum proprietatis* that is contained in the law, is the premise of the principle of absolute vindication, that is, Latvian law lacks the concept of a beneficiary in good faith and, in awareness of this deficiency, in judicial practice one seeks to "derive" this principle, rather unsuccessfully using the principle of a good faith possessor. [39] The greatest evil, however, is not allowing the possibility of such an interpretation, but the indeterminate and unpredictable character of this interpretation, which, thus, in various cases has been used for the protection of possession in good faith, but, on the other hand, in other cases, does not recognize the good faith of the beneficiary as an obstacle for turning the claim for ownership against him. [40]

Possession is traditionally examined in the context of rights *in rem*. But the analysis of the concept of possession leads to the philosophical question of whether it can be

considered a form of rights at all. Reference to disputes over the legal nature of possession or about the nature of legal possession (in the context of this essay, "possession" and "legal possession" are used as synonyms, that its, ignoring the separation or even opposition of these two concepts in legal literature), [41] which reach into the distant past, [42] could cause confusion, if only, paradoxically, the twists and turns of judicial practice in recent years did not lead to this question, because it is just the judicial practice in recent years that has brought to the forefront not only the question of whether possession is to be understood as a fact or a right, but also – whether it deserves any attention as an independent category of law, or is to be regarded as not more that one of the subjective rights in the "triad" of property rights (possession, use and disposal rights)

Conclusions

1. The concept of property that is derived from the place of property in the Latvian civil law system is difficult to understand without the context of the structure of property law. In turn, Part Three of the CL, "Property Law" consists of elements incorporated at various times that are not logically derived one from the other and are better explained historically than methodologically.

2. The CL Property Law section and the ownership law section therein has changed little when one compares the compilation of local laws and the 1937 edition of the CL. As in the previous period, that is, up until 1937, this section contains elements of Roman and German law, therefore, in order to understand the individual norms of this section, knowledge is necessary of Roman law in its pandect interpretation as well as German law. A lack of such knowledge can be the cause of an incorrect interpretation of individual norms of the CL or even of institutions. One example of this kind of interpretation is the interpretation of possession. Possession is an independent institution in the CL, which has nothing in common with ownership. In Latvian judicial practice possession and the norms in this subchapter are interpreted as one of the elements of property law. This kind of interpretation is more characteristic of the legislation that was in force before the CL was renewed in 1993. In turn, the functioning of some norms is not logically justified in the context of the public Land Register system.

3. It is possible to explain the relationship between ownership and possession historically, however, taking into account that the legislation currently in force lacks several important attributes, for example, a special mechanism for protecting possession, the existence of possession as an independent institution is disputable.

4. One of the most debatable issues that are connected to the concept of ownership is the relationship between property and interests. In this aspect, the norms of the CL, which describe property, are in sharp dissonance with Article 105 of the Constitution that was added as a result of the amendments of the Constitution in 1998, as well as the Chapter 1, part 1 of the First Protocol of the European Convention on Human Rights, which is a distant prototype for Article 105 of the Constitution. In addition, certain problems may be caused by the fact that Article 105 of the Constitution, as is the view in the practice of the Constitutional Court, to a large extent reflects the aforementioned Chapter 1, part 1 of the First Protocol of the European Convention on Human Rights, but significantly differs from the latter.

5. Problems of terminology are also characteristic of Latvian legislation, namely, the word "property" at the same time can describe property rights as well as the object of ownership to which these rights apply, and each time the word is used, its content cannot be understood without context.

6. A disputable issue in Latvian academic jurisprudence is the issue of intangibles as objects of property rights. Against generally accepted practice and against the sense of the CL, some authors do not recognize intangibles as full-fledged objects of property rights. To some extent this conclusion is derived from the fact that the CL does not point to the existence of the category of intellectual property.

7. The terminology and system of the CL, which is characterized by repetition of concepts and different characterizations of one and the same concept, does not give sufficiently comprehensive material for forming a contemporary definition of property.

8. The aforementioned conclusions are material for serious thought about the necessity to reform the Property Law section of the CL. Unfortunately, at present, the intellectual resources and academic bases for this task are lacking.

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[6] Senāta 2001. gada spriedums civillietā Nr. SKC-1 – LR Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2001. Rīga : Latvijas Tiesnešu mācību centrs, 2002, 425. lpp.
[7] The full text of this article: "If a property is obtained for remuneration from a person who had no right to alienate it, of which the buyer did not know and did not have to know (good faith purchaser), the owner is entitled to recover this property

from the purchaser only if this property was lost by the owner himself or a person, to whom the owner had given possession of the property…"

[8] The full text of this article: "An owner has the right to reclaim his property from outside illegal possession."

[9] Decision of the Senate in 2001 in case no. SKC-435/2001 – LR Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2001. Rīga : Latvijas Tiesnešu mācību centrs, 2002, 167.–168. lpp.

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[11] Ibid.

[12] Sinaiskis,V. Civillikumu revizija vai Latvijas civilkodekss. *Jurists*, Nr. 3 (37), March 1932, p. 66.

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[19] Ibid.

[20] Bernhardt, R. *Real Property in a Nut Shell. Second edition*. West publishing company, 1981, p. 29.

[21] Grūtups, A., Kalniņš E. *Civillikuma komentāri*. P. 20.

[22] Grūtups, A., Kalniņš E. *Civillikuma komentāri*. P. 18. The author categorically disassociates himself from a reference in the earlier cited location, which leads one to suppose that J. Rozenfelds agrees with this narrower understanding of the object of ownership.

[23] Decision of the Chamber of Civil Case of the Supreme Court of Latvia on October 29, 2003 in case no. No. PAC – 861 SIA „Aqua Teks Baltija" vs SIA „Jūras vējš" regarding termination of the illegal use of a trade mark and annulment of a domain name registration. The decision, among other things, points to as a ground that, in the view of the court, the right to a domain name is not to be recognized as a property right. In contrast to the decision of the Senate of the Supreme Court of the Republic of Latvia of June 4, 2003 in case No. SKC – 224 regarding a claim for violation of trademark in connection with the grounds for the refusal and prevention of registration of a domain name (unpublished) which points to the plaintiff as the owner of the trademark for which the claim was filed.

[24] Decision of the Constitutional Court of the Republic of Latvia of April 20, 1999 in case No. 04-01 (99). „On the Cabinet of Ministers rules No. 187 of May 20, 1997 "Procedure for payment of compensation monies in amortizing compensation certificates granted for land formerly owned in rural areas" section 29 conformity to Articles 105 and 109 of the Constitution of the Republic of Latvia, the law on "Privatization of land in rural areas" Article 1, part 2 and Article 12, part 2, section 3, and the law "On determining the status of a repressed person for those suffering under the Communist and Nazi regimes" Article 9." In this decision, the Constitutional Court, in finding the aforementioned norms to be unconstitutional and satisfying the petition, at the same time in point 3 of the rulings pointed out that "the petitioner' s assertion, that the legal norm in question does not conform to Articles 105 and 91 of the Constitution …the Constitutional Court is of the view that the law "(..)" in the cases foreseen, recognizing property rights to land, the former owners of the land or their heirs are entitled to receive property compensation certificates, but in accordance with Article 12, part 2, only as additional privileges for certain categories of former landowners or heirs, including the category of politically repressed persons, who are give the right to amortize land ownership compensation certificate in cash.", that is, it follows from the thesis of this decision that the Constitutional Court does not recognize as well founded and a form of rights in the petitioner's claim for a possibility to amortize land ownership compensation certificates in cash.

[25] Konradi, F., Walter A. *Lietu tiesības. Baltijas vietējo likumu kopojuma trešās daļas skaidrojumi*. Rīga, 1935, p. 173.

[26] The earliest use of the term "intellectual property" appears to be an October 1845 Massachusetts Circuit Court ruling in the patent case, in which Justice Charles L. Woodbury wrote that "only in this way can we protect intellectual property, the labors of the mind, productions and interests as much a man's own...as the wheat he cultivates, or the flocks he rears." (1 Woodb. & M. 53, 3 West. L. J. 151, 7 F.Cas. 197, No. 3662, 2 Robb. Pat. Cas. 303, Merw. Pat. Inv. 414). But the statement that "discoveries are...property" goes back earlier. Section 1 of the French law of 1791 stated "All new discoveries are the property of the author; to assure the inventor the property and temporary enjoyment of his discovery, there shall be delivered to him a patent for five, ten or fifteen years". In Europe, French author A. Nion mentioned "propriété intellectuelle" in his Droits civils des auteurs, artistes et inventeurs, published in 1846.

[27] The term's widespread popularity is a much more modern phenomenon. It was very uncommon until the 1967 establishment of the World Intellectual Property Organization, which actively tried to promote the term. Still, it was rarely used without scare quotes until about the time of the passage of the Bayh-Dole Act in 1980.[2]

[28] Geneva Declaration on the Future of the World Intellectual Property Organization (as of March 4, 2005).

[29] Jeremy, Phillips, Alison, Firth Introduction to Intellectual Property Law 2001, p. 4.

[30] Гражданский кодекс Российской Федерации. Статья 769.

[31] The European Court of Human Rights, CASE OF ANHEUSER-BUSCH INC. V. PORTUGAL (Application no. 73049/01), JUDGMENT, STRASBOURG, 11 January 2007, section 46.

[32] Lieta SKC-197, 1998 – Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi. 1998. Rīga, 1999, p. 288.

[33] Par mantojuma prasības un īpašuma prasības savstarpējo saistību. Augstākās tiesas Senāta spriedums, lieta Nr. SKC–531.Published: *Jurista Vārds*, 28.01.2003, Nr. 4 (271).

[34] On this issue, one can also find decisions that make completely opposite conclusions: claims related to property reforms cannot be recognized as claims for ownership as understood in Articles 1044 – 1066 of the Civil Law – SKC-565, Latvijas Republikas Augstākās tiesas senāta Civillietu departamenta spriedumi un lēmumi 2001, p. 181.

[35] not only did both litigants have to be present, but also the object of the dispute had to be present before the praetor. If it was a cumbersome and large object, then one had to bring or transport at least a piece of it, for example " from real estate – sod" (*ex jundo globa*), "from a building – a brick" (*ex aedibus tegula*) etc. At first, the complainant (plaintiff) took the thing itself and said: *hunc ego hominem ex iure Quiritium meum ess ajo; sicut dixi, ecce tibi vindictam impossui...*" Kalniņš, V. *Romiešu civiltiesību pamati* R., 1977., p. 199–200.

[36] Jourdan, S. Adverse Possession, 2003, Preface, p. V, Definitions and overview, p. 3–4.

[37] Par īpašuma iegūšanu ar ieilgumu (On gaining ownership by adverse possession)-.Decision of the Senate of the Supreme Court of the Republic of Latvia of October 6, 2004 in case No. SKC – 501.

[38] „Par Civillikuma 1041. un 1044. panta piemērošanu labticīgam ieguvējam" (On the application of Articles 1041 and 1044 to good faith beneficiaries) – Case no SKC – 47. Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi. 2005, Rīga, 2006, p. 89.

[39] SKC-47/2005 – "Civillikuma 1041. panta jēga izpaužas nosacījumā, ka īpašnieka tiesība atprasīt lietu no jebkura trešā valdītāja ir primāra, un tā piešķir prasītājam Ernestam Birkhanam prasīt sava prettiesiski zaudētā valdījuma atjaunošanu, un tam par šķērsli nevar būt apstāklis, ka atbildētāja ir labticīga ieguvēja." "The meaning of Article 1041 of the Civil Law is expressed in the condition that the right of an owner to reclaim a thing from a third party possessor is primary and it grants the plaintiff, Ernests Birkhans the right to claim renewal of illegally lost possession, and it may not be an obstacle that the defendant is a beneficiary in good faith."

[40] Vīnzarājs, N. Lietu tiesība, Valdījuma sastāvs, Ieilguma nozīme civiltiesību sistēmā Civiltiesību problēmas. Raksti (1932–1939). 2000, p. 43–94; Cvingmans, O. Valdīšana šo laiku tiesībās. *Tieslietu Ministrijas Vēstnesis*, 1926, Nr. 7, p. 160–187, Nr. 8, p. 257–274.

[41] Savigny, F. C. "Das Recht des Besitzes" (1803); Ihering "Der Besitzwille" (1889); Besitz in the Handworterbuch der Staatswissenschaften (1891).

Kopsavilkums

Šī raksta mērķis ir aplūkot Latvijas tiesiskās īpatnības uz vispārējo atziņu fona. Ņemot vērā XX gs. ievērojamākā domātāja Hermando de Soto atziņu, ka īpašuma skaidra definīcija ir kapitālistiskās sabiedrības sekmīgas attīstības pamats[1], nepieciešamība noskaidrot īpašuma jēdzienu ir acīmredzama. Savukārt, ņemot vērā īpašuma tiesību attīstības negaro vēsturi Latvijā, ir saprotams, ka ir pāragri sagaidīt precīzus rezultātus. Ņemot vērā apskatāmās problēmas pašreizējo izpētītības pakāpi, šajā rakstā aplūkoti šādi problēmas aspekti: Īpašuma vieta Latvijas lietu tiesību sistēmā, avoti un metodoloģiskās problēmas; īpašums un valdījums; īpašums un interese; terminoloģija; ķermeniska un bezķermeniska lieta kā īpašuma tiesību objekts; īpašuma tiesību saturs; īpašuma ierobežojumi.

Atslēgvārdi: īpašums un valdījums, īpašums un interese, īpašuma tiesību saturs, īpašuma ierobežojumi.

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37.-58. lpp.

The Constitution of the European Union and Its Prospects*

Eiropas Savienības konstitūcija un tās nākotne

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Introduction

On October 29, 2004, in Rome, the member states of the European Union solemnly signed the *Treaty establishing a Constitution for Europe*.[1] This treaty stands for the deepest reform in 50 years of European integration. It will replace the unintelligible heterogeneous mixture of founding, amending, and complementing treaties with a unified and more transparent textual basis. It will redesign the European Union, realizing many new or revised concepts. It will also be the first European treaty which labels itself as

a constitution. This invites us to have a closer look at it. However, the Treaty's destiny is uncertain since in spring 2005 the French and the Dutch people have rejected it in national referenda. Two years later, the process of coping with this crisis is still at its beginning. This leads me to focus my contribution less on the well-discussed innovations than on the *significance and prospects* of this treaty *as the first European constitution*.

1. Why a European Constitution?

For decades, dedicated supporters of European integration have fought for a European constitution. In the present era of business thinking and pragmatism, the importance of that aim is not any more evident. Is it more than a struggle about words? Is it not sufficient to have constitutions of the member states? We do not need a European constitution to complete the internal market or to facilitate the free movement of goods, services, and capital.

To answer these legitimate questions, we have to go deeply into constitutional theory and general theory of state.[2] First of all we must keep in mind that we are talking about a constitution in the sense of the *legal institution of the constitution*, as it has been developed in North America and France at the end of the 18th century and as it is in use in the so-called constitutional states. The European constitutional debate is not about simple constituting law as we can find it in Britain. It is about something at the European level which the British are proud of *not* to have and not to need at home.

1) Can There be a European Constitution?

From the beginning, scholars of community law like Carl Friedrich OPHÜLS[3] and Hans Peter IPSEN[4] have drawn a line from the founding treaties to the notion of constitution because they were fascinated by some amazing parallels. The founding treaties are just international treaties but they have similar functions within the European legal order as the national constitutions have within the legal orders of the states. Furthermore, they enjoy primacy over secondary law as the constitutions enjoy primacy over ordinary law in the states. In addition, they contain the fundamental norms concerning the objectives, the organisation, and the functioning of the organisation of integration; therefore, IPSEN described them as the "materielle Verfassung" ["material" or "substantive" constitution] of the Communities.

In the eighties and nineties, more and more specialists in Community Law followed the approach of Roland BIEBER and Jürgen SCHWARZE[5] and others[6] and qualified the founding treaties as a constitution but demanded at the same time the establishment of a better one in a formal constituting act. A vast majority of the constitutionalists, however, including prominent colleagues like Josef ISENSEE[7], Luis María DÍEZ-PICAZO[8] , and the constitutional judges Paul KIRCHHOF[9] and Dieter GRIMM[10], rejected this idea.[11] For them, the concept of the constitution was reserved to states (in the sense of public international law), and the European organisation of integration was not - and still is not - a state. Some even argued that only a European people[12] or a European nation[13] could be the basis for a European constitution.

With the generation change among the constitutionalists the prevailing opinion also changed. Today, the existing founding treaties are still not considered a constitution, but the possibility of a European constitution is widely accepted. It is true that the institution of the constitution has been developed for sovereign states and cannot be applied to international organisations without being altered and distorted. For the UN, the WTO,

or the NATO no constitution is conceivable. However, the European Union is different. It represents a new form of organisation which it is appropriate to call a *supranational union*.[14] It has a high degree of organisation and far-reaching competences, it exercises extensively an own public power, reflects a general (political) union and draws upon a close community of responsibility and solidarity which resembles the community of common destiny ["Schicksalsgemeinschaft"] evident in the state. For such a *non-state but state-like* governing entity, we can recognize *constitutional capacity* as it has been recognized before for the federated states in a federal state which also do not enjoy the status of a state in the sense of public international law.[15]

2) European Constitution or the Constitution of the European Union?

The common term "European constitution", however, is imprecise. As a consequence of the historical development of the constitution as a legal institution for individual states, each constitution is necessarily related to one specific organisation. It is not related to a geographic, economic or cultural space, and it is restricted to one organisation in any case [Verbandsspezifität]. This means that there *cannot be a "European constitution" as such* but only the constitution of the European Union (or another state-like European organisation). Only in this sense is it appropriate to use the term "European constitution". By the way, any law from outside the Union, as, for example, the European Convention on Human Rights, cannot be part of it.

3) The Necessity of a Constitution for the European Union

The main reason to demand a European constitution has always been political. There is *no urgent practical need* because the existing treaties already enjoy primacy over secondary union law and even a constitutional treaty cannot enjoy real primacy (within the meaning of a hierarchy of norms) over the law of the sovereign member states. Of course, there is a practical need for reforms, but these can be achieved within the framework of ordinary international treaties.

From the perspective of the general theory of states, however, a European constitution appears necessary to cope with an unavoidable consequence of supranational integration: Within the European states there are supranational forces at play which are not submitted to the national constitutions. Therefore these constitutions function less effectively as a guiding framework than they have done before. Furthermore, due to the primacy of union law - even if it is only fictional - their authority over those subject to their jurisdiction has been weakened by directives from another legal order which deviate from their own norms. Thereby the *significance of the national constitutions* is *considerably reduced*. This phenomenon is obvious in the areas of fundamental rights and material constitutional principles, and can be detected even in respect of national particularities which are not themselves related to the Union's fields of activity. It *impairs* the ability of the national constitutions to perform their *integrative function*, an essential function of a constitution which has been very significant for constitutional states in the second half of the twentieth century. If the new political system of which the Union is part is to be able to ensure what, in the member states, was once a given, these *functional deficiencies of the national constitutions must be balanced by a counterpart at the Union level*. The current technocratic founding treaties completely fail to meet this objective.

2. The long struggle for the European constitution

1) Demands and Proposals for a European Constitution

Numerous demands[16] and proposals[17] for a constitution have been presented by politicians, institutions, and experts. In 1984, the *European Parliament* adopted a *Draft Treaty Establishing the European Union*[18] which was widely supported by the scholars in the field of community law.[19] Some years later, the Prime Minister of Baden-Württemberg, Lothar SPÄTH, even demanded the making of a constitution for a European federal state until the year of 1999.[20] In 1994, the European Parliament presented a *Draft Constitution of the European Union*[21] which had remarkable academic, but no political resonance.[22] Among the proposals from experts I would like to highlight those of Franz CROMME (1987)[23] and the so-called EUROPEAN CONSTITUTIONAL GROUP (1993)[24]. All these initiatives have been intensively discussed at the universities, but none of them has led to the creation of a constitution.

2) The Still Missing European Constitution

After 50 years of integration, that constitution is still missing. The treaties are sometimes described as a "material constitution", but this description is misleading. A real constitution must be a constitution in the material *and* formal sense. One necessary formal characteristic, however, is still absent today: The *self-identification as a constitution*. A constitution does not hide but proclaim its constitutional character. The founding documents of the Union, however, nowhere even acknowledge it. They call themselves "treaties" and not "constitution" or "constitutional treaty", do not speak of a "constitutional order", do not contain "constitutional rights", and do not establish a "constitutional court". This is no coincidence.[25] The wording of the treaties reflects the *strict refusal of the member states* as the "masters of the treaties" to grant a constitution to their organisation of integration and to accept the political upgrade which would accompany such a step. Legal science must respect this clear political decision. Otherwise, it would give up the scientific approach and turn into politics.

3) The Attempt to "create" a European Constitution by Means of Interpretation

Despite of the clear decision of the member states, since the eighties, many specialists in community law pretend that the European constitution is already there, pointing out to the parallels between the existing treaties and a constitution, in particular the primacy, the similar functions, and the similar types of contents.[26] The European Court of Justice has backed the constitutional interpretation in its decision *Les Verts* (1986)[27] and its first opinion on the *European Economic Area* (1991)[28], but has not given relevant reasons.[29] Since the middle of the nineties, Ingolf PERNICE, Christian CALLIESS, and others have developed a *doctrine of a European constitutional compound ["Europäischer Verfassungsverbund"]*. They hold that the founding treaties of the Union and the constitutions of the member states are forming an integrated whole in the sense of a monistic "multilevel constitutionalism",[30] in which the national constitutional law has lost part of its autonomy[31]. The idea of a constitutional compound is incompatible with the relatedness of each constitution to a single, specific governing entity [Verbandsspezifität] and the individuality of each constitution which follows from that. Even in a federal state, the constitutions of the federation and the federated states are not merged to a

compound. Furthermore, the theory ignores the fact that the sovereignty of the member states and consequently the national pouvoir constituant and the independence of the national constitutions remain unaffected in the process of supranational integration.[32] By the way, how can there be a constitutional compound if there is not even a constitutional treaty on the European side?

In the end, all these efforts aim to overcome the refusal by the member states and to achieve the establishment of a European constitution by means of legal interpretation. The law-interpreters are doing that what the law-makers have been failing to do. This approach is dangerous - not only because it is obviously political and as such undermines the trust in the integrity of legal science, but also because it obscures one's view on the essential problem: After 50 years of integration, in an enlarged Union of 27 member states, we urgently need a European constitution - but it is still missing! We must open our eyes and not lay back playing intellectual games!

4) The Elaboration of a European Constitution by the European Convention

The first real chance for a European constitution arose in 2001, when the European Council at Laeken (Belgium) instituted the Convention on the Future of Europe (European Convention).[33] This *pluralistic body* was composed of representatives of the national and European institutions, including representatives of today's new member states, and had the task to prepare a thorough reform of the founding treaties.[34] Under the direction of Valéry Giscard D'estaing, it elaborated and finally adopted in 2003 in consensus the draft of the present Constitutional Treaty.[35] Its work was accompanied by an intensive *union-wide transnational constitutional discourse*. The result was more elaborated, balanced, and coherent than the result of an intergovernmental conference could be. For this reason, the draft was accepted by the member states with minor modifications in an intergovernmental conference in 2004. Due to quarrels with two member states which wanted to preserve privileges, two intergovernmental conferences were necessary. However, the decision that the new treaty should be a constitutional treaty seemed to be natural and was not seriously questioned during the whole process.

3. The Treaty Establishing a Constitution for Europe as Aconstitution

1) Basic Innovations and Concepts

The Treaty establishing a Constitution for Europe displays many aspects which are worth to be and which have been the subject of scientific analysis and discussion.[36] In my present contribution I can only recall some basic innovations and concepts:

First of all, the *institutions* of the European Union are *redesigned, restructured, and united* within a single, coherent framework. A *new Union* is established which replaces both the old Union and the dissolved European Community (see art. IV-38 sect. 1). New institutions like the President of the European Council (Art. I-22) and the Union Minister of Foreign Affairs (art. I-28) are created. The Court of Justice and the Court of First Instance (now named "General Court") are complemented by specialised courts (art. I-29, III-359). The system of the Union's competences and the system of the legal acts are thoroughly redesigned (art. I-11 et seq. I-33 et seq.) and provided with a new terminology. The Common Foreign and Security Policy are intensified. The solidarity among

the member states is stressed in a *solidarity clause* (art. I-43), according to which "the Union and its member states shall act jointly in a spirit of solidarity if a member state is the object of a terrorist attack or the victim of a natural or man-made disaster".

The *clause on the common fundamental values* of the Union and its member states (up to now: art. 6 sect. 1 EU Treaty) is replaced by a new one which emphasizes expressively human dignity and obliges the member states to encourage a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail (art. I-2). The *Charter of Fundamental Rights* is slightly revised and integrated as *binding constitutional law* (see art. I-9 sect. 1) into the Treaty (part II, art. II-61 et seq.). This will force the European Court of Justice to improve its protection of fundamental rights. The Charter preamble is integrated, too, but not as preamble of the whole constitution. This is regrettable, because the preamble expresses more clearly than any other part of the Treaty the commitment to the common European values. According to it, "the *Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law*". By the way, by stressing human dignity and solidarity [= "Sozialstaatlichkeit"/"fraternité"] the preamble demonstrates the difference between the European and North American fundamental values. Its claim of "universal values" is not even true for the Western world.

The principle of the open market economy with free competition does not represent a fundamental value or idea, but just an ordinary special principle for a special field of activities, the economic and monetary policy. To make that clear, the relevant norm (up to now: art. 4 EC Treaty) has been transferred to a less prominent part of the Treaty (part III, chapter II), while the important clause about the Union's objectives (art. I-3) stresses the commitment to the "social market economy". A thorough information about these facts might have reduced the resistance against the Constitutional Treaty in France and the Netherlands which to a great extend fed on the fear of a constitutionalised ultra-neoliberalism.

The many interesting improvements and innovations cannot disguise that the Treaty *basically follows the old functionalistic concept*. Part III is packed with extremely detailed regulations on the policies and institutions of the Union which are typical of technocratic international agreements, but must not be included into a constitution. Many of them have been transferred with minor modifications from the EC Treaty. Furthermore, the intransparent chaos of protocols and declarations has been upheld. So the whole document has almost 500 pages. Ordinary citizens, including lawyers who are not specialised in the field of union law, cannot really understand it. This affects its ability to perform the integrative function of a constitution which otherwise, with regard to part I and II, could be strong. Furthermore, it contradicts the *framework character [Rahmencharakter] of a constitution*: A constitution only constitutes the *basic* legal order. It must establish institutions, but not design them in detail. It must bind their activities to fundamental values and a few constitutional principles, but not try to predetermine them. It must leave room for the institutions to choose and realize their own policies - and to change them in the continuing democratic process.

In particular, the many provisions in part III title III, which dictate the objectives of certain policies, oblige to a high level of protection of certain interests[37] or one-sidedly accentuate free market and competition and deny the framework character of a constitution. New political majorities in the Union or the member states which support different political concepts might not be able to realize them any more and thereby be driven to refuse the Treaty or even the Union in total. This was an important aspect in

the pre-referenda discourse in France. Many considered the Treaty less a political [= constitutional] than a technocratic [= administrative] document.

2) The Constitutional Character of the Constitutional Treaty and its Consequences

Despite these deficiencies, this Treaty represents a constitution. It forms the basic legal order of a state-like organisation with constitutional capacity and meets all formal and material criteria of a constitution[38]. In particular, it clearly self-identifies as a constitution in its title, its first article ("this Constitution establishes...") and numerous other provisions.[39] The disregard of the framework character of a constitution does not call into question its character, but its good quality as a constitution.

The Treaty will be a *union constitution*, not a state constitution. It will keep the legal nature of an international treaty. The direct consequences of its constitutional character are limited, since the primacy of the primary law existed before. Firstly, we can transfer the theory of the *unwritten limits to constitutional amendments,* which has been developed in the twenties of the 20th century by Carl Bilfinger, Carl Schmitt, and others.[40] According to it, every constitution has an unchangeable core; its fundamental values and ideas cannot be changed by the procedure of constitutional amendment. This will apply to the fundamental values in art. I-II, and also to the fundamental idea that the Union is not a state. Under this Constitutional Treaty, the European Union cannot be transformed into a European state.

Secondly, there must be a *change in the methods of interpretation*. Founding treaties of international organisations can be handled with a certain "creativity" which might lead to a strong dynamism. The institution of the constitution, however, stands for the strive for stability, for a sustainable development on a consolidated dogmatic basis. So under a European constitution, methods, concepts, and legal figures known from the field of international law must lose their influence while those from the field of constitutional law must become more and more dominant. To take a constitution seriously means to interpret it like a constitution. Hence the golden era of the magic bullet of the "effet utile" is finished. Comparative constitutional law, however, might become even more important than it has been in the past.

Thirdly, the Constitutional Treaty will enjoy *more political and moral authority* than its predecessors, even if its rank within the hierarchy of norms does not change. The symbolic significance of the shift to a constitution should not be underestimated. In member states with a strong constitutionalist tradition, most lawyers would be loyal to their national constitutional law in case of a severe conflict with union law because a constitution has a higher legitimacy. If there is a constitution on the other side too, this might change.

3) The Insufficient Democratic Legitimation of the Constitutional Treaty

Yet, the described increase in authority will be limited because of an insufficient democratic legitimation of the Treaty as a constitution. According to constitutional theory, a democratic constitution must be based on the "pouvoir constituant" of the people. For the constitution of the European Union this is impossible. It will necessarily have the legal nature of an international treaty and the treaty-making power is reserved to the states. Not peoples, but states conclude international treaties. They can do it without or even against the will of their peoples. This does not a priori exclude the

possibility of a democratic European constitution, given that it will be the constitution of a supranational union and not of a state. However, its legitimacy will have to approximate that of a constitution based on popular constituent power as closely as possible. Therefore, the decisive *political decision* must be made *directly by the people* because the decision of the people has a higher legitimacy than that of its representatives. The concept of representative democracy is appropriate for daily political life, but inappropriate for fundamental decisions. It must be made by the people of the constituted organisation, which means by the Community of the Union citizens in a *union-wide referendum*. This community is most directly concerned, depends the most on a vast acceptance of the decision, and will suffer most in case of a wrong decision. Not in an ethnographical sense, but from the perspective of democratic constitutional theory we can qualify it as a *European people*.[41] The peoples of the member states must legitimize the constitution, in addition, because it has a strong impact on the status of their states. The best way is a *double referendum,* which combines the vote on the European and national level in one action. Such a procedure has to be organized carefully. Solutions must be prepared for the case that the Treaty is rejected in a small minority of states. Therefore, a *preparatory treaty* on the adoption modalities of a constitution is recommendable.[42]

The standard procedure which has been chosen for the ratification of the Constitutional Treaty (see art. IV-447, sect. 1) obviously does not meet these requirements. Therefore this treaty, should it come into force by the way of this procedure, might be assessed as conventionally democratically legitimised (like any other international treaty), but not as a democratic constitution in the sense of democratic constitutional theory. In face of the experiences of the referenda in France and the Netherlands, we must assume that in a number of states where no referenda took place the Treaty has been ratified against the will of the people. Can we still uphold the fiction of democratic legitimation by representation under these circumstances?

4. The Prospects of the European Constitution After the Referenda in France and the Netherlands

Without a preparatory treaty which provides solutions in case of ratification problems, the prospects of the European constitution have become uncertain. For two years agony prevailed. During the German Council Presidency in 2007, informal talks have started, but their results are open. The Declaration on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome from March 25, 2007 ("Berlin Declaration")[43] is cautious: "We are united in our aim of placing the European Union on a renewed common basis before the European Parliament elections in 2009." The European Council will deal with the subject in summer 2007, but the result – and, in particular, the implementation of any possible political decision – is uncertain.

There is no golden way out of the crisis. According to its art. IV-447, to art. 48, EU Treaty and, as a consequence of its character as an international treaty, the Treaty establishing a Constitution for Europe can only come into force if it is ratified by *all* member states. Despite the proposals of some authors who want to push the Treaty through at any price,[44] it is not legal to apply parts of it in advance. So the *vote of the French and the Dutch people cannot be ignored*. In some states with a strong tradition of representativism, politicians would wait some years and then override the decision of the people by their own decision in an act of parliament. But even if such manoeuvre should not violate domestic constitutional law, in France and the Netherlands with their strong democratic traditions, it is practically inconceivable. Therefore, some member states stopped their own ratification process after the refer-

enda in 2005. Others completed it, thereby expressing their commitment to the constitution in times of crisis.[45]

In a democratic state it is not excluded to submit a question for a second time to the vote of the people after a decent interval. Changing circumstances, new political developments, and new leading politicians might make the citizens change their mind. A *second referendum* in France and the Netherlands about the same treaty would still be part of the running ratification process and allow saving the progress which has already been made. However, strong – and new – arguments would be needed. A second rejection could discredit the whole project forever.

Another approach is that of a *limited revision of the Treaty* which takes into account the objections raised in the French and Dutch public. The new version of the Treaty can be close to the old one. At present, it is neither possible nor appropriate to *elaborate a completely new treaty.* However, the French and Dutch objections must be taken into account seriously because these peoples will have to decide again and they will be suspicious. It might be necessary to put more weight on solidarity ("fraternité") and less weight on open market and free competition to strengthen the role of the Parliament, to delete some details in the provisions on the individual policies, and to redefine the preconditions for future enlargements.

So far, there are no signs that this will happen. Following the French referendum, the Presidents of the Commission, the Council, and the European Parliament issued a Joint Declaration[46] which was so ignorant and arrogant that it probably supported the objectors in the following Dutch referendum. On the other hand, with the prospect of new negotiations, Pandora's Box has been opened and other member states such as Poland are making new demands. They are taking advantage of the fact that any revised document has to be signed as a new Treaty and that the ratification process has to be restarted. Without a preparatory treaty which takes precautions, the problems of the first run will show up in the second run again: Every single member state can block the whole project. In the end, with this approach there is a high risk that the Constitutional Treaty, should it eventually come into force, will be crippled.

The damage will be even worse if the member states try to *implement key concepts via one or several "mini treaties"* in an ordinary amendment procedure. It is a dangerous temptation to by-pass the people(s) because the lack of legitimacy will be evident. In addition, the conceptions about the "key concepts" are quite different. It is not at all evident that the result of the haggling of 27 national governments, some of them ready to sabotage the reform process in order to push through particular national interests, will be worth to be ratified. There have already been demands to remove the Charter of Fundamental Rights from the Treaty![47]

5. Closing Remarks

The project of the first European constitution is suffering a serious crisis, but has not yet failed. With a high degree of political discipline, the European integration partners *could* overcome the crisis within a year. They could proceed to a *fast revision* of the Treaty which is strictly limited to selected aspects from the French and Dutch discussion. They could limit their negotiations to a couple of months and arrange an *accelerated ratification procedure* with a *union-wide referendum on a fixed day within a short delay*. However, a strong political will, a developed sense of geo-regional responsibility and a deep dedication to integration would be needed for that. Will the European nation-states develop it?

Endnotes

[*] Contribution to the Conference "Challenges for the European Union and the German Presidency 2007" at the University of Tartu, 25 May 2007. The author is Lecturer of the German Academic Exchange Service (DAAD) at the University of Latvia in Rīga, www.lanet.lv/~tschmit1.

[1] Official Journal of the European Union C 2004/310/01.

[2] For a more thorough presentation of the theoretical backgrounds see *Schmitz*, Integration in der Supranationalen Union, 2001, p. 361 ff. (English summary at http://lehrstuhl.jura.uni-goettingen.de/tschmitz/ SupranUnion/SupranUnion_de.htm).

[3] *Ophüls*, in: Kaiser (ed.), Planung I. Recht und Politik der Planung in Wirtschaft und Gesellschaft, 1965, p. 229 ff.

[4] *Ipsen*, Europäisches Gemeinschaftsrecht, 1972, p. 64.

[5] *Bieber/Schwarze*, Verfassungsentwicklung in der Europäischen Gemeinschaft, 1984; *Bieber/Schwarze*, Eine Verfassung für Europa. Von der Europäischen Gemeinschaft zur Europäischen Union, 1984, p. 15 ff., 49 ff.

[6] See the references at *Schmitz* (note 2), p. 364 f.

[7] *Isensee*, in: Isensee/Kirchhof (ed.), Handbuch des Staatsrechts, Vol. 1, 2nd edition 1995, § 13, no. 1, 26 ff.; *Isensee*, Integrationsziel Europastaat? in: Due/Lutter/Schwarze (ed.), Festschrift für Ulrich Everling, Vol. 1, 1995, p. 567 (580 ff.).

[8] *Díez-Picazo*, Reflexiones sobre la idea de Constitucíon europea, Revista de instituciones europeas 93, p. 533 (548 ff.).

[9] *Kirchhof*, in: Isensee/Kirchhof (ed.), Handbuch des Staatsrechts, Vol. 1, 2nd edition 1995, § 19 no. 18; Vol. 7, 1992, § 183 no. 33 ff.

[10] *Grimm*, in: Juristenzeitung 1995, p. 581 ff.; *Grimm*, in: Staatswissenschaften und Staatspraxis 1995, p. 509 ff.; *Grimm*, in: Die Zeit vom 18.03.1999, p. 4 f.

[11] See more references at *Schmitz* (note 2), p. 369 ff. and *Aust*, in: Studentische Zeitschrift für Rechtswissenschaft 1 (2004), p. 195 (200 ff.); for the oppposite viewpoint *Kaufmann*, Europäische Integration und Demokratieprinzip, 1997, p. 92 f.

[12] See *Grimm*, in: Juristenzeitung 1995, p. 581 (586 ff.); *Grimm*, in: Staatswissenschaften und Staatspraxis, 1995, 509 (516 ff.); *Gouaud*, Le projet de Constitution européenne, in: Revue française de droit constitutionnel 22 (1995), p. 287 (294 f.).

[13] See *Kirchhof*, in: Isensee/Kirchhof (ed.), Handbuch des Staatsrechts, Vol. 7, § 183 no. 24 ff.

[14] See *von Bogdandy*, in: von Bogdandy (ed.), Die europäische Option, 1993, p. 97 (119 f.); *von Bogdandy*, Supranationale Union als neuer Herrschaftsrgärer: Entstaatlichung und Vergemeinschaftung in staatstheoretischer Perspektive, in: Integration 1993, p. 210 ff.; *Schmitz* (note 2), p. 163 ff. The German Federal Constitutional Court and a part of the doctrine prefer the term „Staatenverbund" [„association of states"/"compound of states"], see in particular the Maastricht decision of the German Federal Constitutional Court from 1993, BVerfGE 89, 155 (188).

[15] See for more details *Schmitz* (note 2), p. 382 ff.

[16] See the references at *Schmitz* (note 2), p. 364, 366.

[17] See the presentation of *Schmidt-König*, Entwürfe für eine Verfassung Europas, last update 2006, www.uni-trier.de/uni/fb5/ievr/www/eu_verfassungen/entwurf.htm.

[18] European Parliament, Draft Treaty Establishing the European Union, adopted on February 14, 1984, Official Journal of the European Communities 1984, C 77/33. The draft had been elaborated by the Parliament's institutional committee under Alberto SPINELLI.

[19] See in particular the contributions to *Bieber/Schwarze* (ed.), Eine Verfassung für Europa - von den Europäischen Gemeinschaften zur Europäischen Union, 1984 and the references at *Rengeling/Jakobs*, Europäische Verfassung. Bemerkungen zum gegenwärtigen Diskussionsstand, Deutsches Verwaltungsblatt 1984, p. 773 ff.

[20] *Späth*, 1992. Der Traum von Europa, 1989, p. 362 ff.

[21] See the resolution of the European Parliament from February 10, 1994 and the attached Draft Constitution of the European Union elaborated by the Parliament's institutional committee.

[22] See for the academic discussion the references at *Schmitz* (note 2), p. 366.

[23] *Cromme*, Der Verfassungsvertrag der Gemeinschaft der Vereinigten Europäischen Staaten - ein realistischer Entwurf, 1987.

[24] *European Constitutional Group*, A proposal for a European Constitution, 1993.

[25] Italy had demanded in vain the elaboration of a constitutional treaty at the Amsterdam intergovernmental conference; see the synopsis of the positions of the member states at *Meinert*, in: Weidenfeld (ed.), Amsterdam in der Analyse. Strategien für Europa, 1998, on the CD-ROM.

[26] See the references at *Schmitz* (note 2), p. 365 f.
[27] ECJ, case 294/83, Les Verts, no. 23 („basic constitutional charter" / „Verfassungsurkunde der Gemeinschaft").
[28] ECJ, opinion 1/91, European Economic Area I, no. 21 („constitutional charter of a Community based on the rule of law" / „Verfassungsurkunde einer Rechtsgemeinschaft").
[29] The Court emphasized that the treaties had created an autonomous legal order and described the essential characteristics of this legal order but did not explain why the treaties therefore should be understood as a constitution.
[30] *Pernice*, in: Bieber/Widmer (ed.), L'espace constitutionnel européen. Der europäische Verfassungsraum. The European Ceonstitutional Aarea, 1995, p. 225 (261 ff.); *Pernice*, in: Europarecht 1996, p. 27 (30 f.); *Pernice*, in: Common Market Law Review 1999, p. 703 (707 ff.); *Pernice*, WHI-Paper 1/2001; *Pernice*, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 60 (2001), p. 148 (163 ff.); *Calliess*, in: Calliess/Ruffert (ed.), EUV/EGV, 2nd edition 2002, art. 1 EUV no. 24 ff.; *Calliess*, in: Calliess/Isak (ed.), Der Konventsentwurf für eine EU-Verfassung im Kontext der Erweiterung, 2004, p. 9 (14 ff.); *Calliess*/*Ruffert*, in: Europäische Grundrechte-Zeitschrift 2004, p. 541 (544 ff.); *Peters*, Elemente einer Theorie der Verfassung Europas, 2001, p. 207 ff.; *Kingreen*, in: Armin von Bogdandy (ed.), Europäisches Verfassungsrecht, p. 631 (650 ff.); *Aust* (note 11), p. 195 (209 f., 220 f.); see also the critical remarks of *Kirchhof*, in: Armin von Bogdandy (note 30), p. 893 (904).
[31] *Calliess*, in: Juristenzeitung 2004, p. 1033 (1041).
[32] See *Schmitz* (note 2), p. 244 ff.
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Footnote

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Summary

Raksts veltīts Eiropas Savienības konstitūcijas problēmjautājumiem.

Atslēgvārdi: Eiropas konstitūcija; European constitution.

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The Functional Meaning of General Principles of Law in the Application of Written Legal Norms

Vispārējo tiesību principu funkcionālā nozīme rakstīto tiesību normu piemērošanā

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The article is devoted to the analysis of the mechanism of the influence by the general principles of law to the application of the written legal norms. It analyses also the role of the general principles of law in the interpretation of the written legal norms as well as in the process of the further development of law. The article contains the thesis that in the legal arrangement of the democratic and based on the rule of law state the general principles of law prevail over the written legal norms including the constitution in formal sense.

Keywords: application of legal norms, general principles of law

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Introduction

The functional mechanism of the general principles of law appears in two ways. First, the general principle of law can, itself, be the applicable legal norm. One should note that it is very rarely the case not only in Latvian judicial and administrative practice, but also in the judicial practice of developed Western countries that a specific decision is based only on general principles of law (generally, a written legal norm is applied which reveals a general principle of law. In Latvia's case it is Article 1 of the Constitution, which embodies the principle of the rule of a law-governed state). This is connected to certain insecurity in those applying the legal norms, because the work in applying general principles of law demands great intellectual effort and practical competence.

The functional mechanisms by which general principles of law work in the application of written legal norms are expressed by their effect both on the understanding of the content and meaning of these legal norms, as well as on solving conflicts of laws and preparing decisions.

I. Collisions of norms and validity

In cases that can be decided based on a written legal norm, general legal principles, nonetheless, have great significance; they accompany the application of all legal norms. The main issue to be clarified in this essay is how the functional effect of general legal principles is expressed in the application of some other written legal norm, and, if the general principles of law are determinants of the content of written norms and a criterion of legitimacy[1], then their role must be determinative of both the validity of written legal norms and of their content, as well as in the development of acts applying legal norms.

In speaking of the functional effect of general principles of law, one should not fail to mention the issue of their legal force and place with respect to normative legal acts, and one must speak of conflicts arising between general principles of law and written legal norms, as well as of the problem of resolving such conflicts.

Little attention has hitherto been paid to the hierarchy of sources of law in Latvia; however, this issue is quite topical in connection with the role and meaning of general principles of law in the legal system. One need not prove that independent sources of law prevail over auxiliary sources.[2] This is determined by independent sources of law having a generally binding nature, while auxiliary sources do not, that is, the auxiliary sources of law do not consist of legal norms. The question is what, is the hierarchy of generally binding sources of law – of independent sources of law. To put it more precisely in the context of this essay, what are the hierarchical relations between general principles of law and normative legal acts, leaving untouched the issue of the place of customary law in the hierarchy of independent sources of law, which could be significantly dependent on the specific area of the law.[3]

Speaking of the hierarchy of sources of law in other Western nations, Alexander Peczeniks' listing of the hierarchy of sources of law in Sweden is of interest.[4] Sources of law in Sweden are ranked in three basic groups:

1) compulsory sources of law that must be applied, or *must-sources*;
2) recommended sources of law that should be applied, or *should-sources*;
3) admissible sources of law that may be applied, or *may-sources*.

This hierarchy is based on the significance of a source of law as a criterion, which determines that some sources of law are generally binding, but others are not. These generally binding sources of law, such as normative legal acts, customary law, contracts, are *must-sources*, while the rest are sources of law which could be used, such as legal literature (doctrine), draft laws – *may sources.* However, besides generally binding sources of law, there are in a legal arrangement also such sources of law as enjoy a certain authority that is no less than the authority of the generally binding sources of law. These are the sources that guide legal practice, for instance, precedents and the materials of legislative process, one should use them – *should sources.*[5]

The basis of hierarchical links is the criterion of legal force. That is, the element having the greater legal force prevails over another. Legal force is determined by two factors:

1) the source of the object and
2) the procedure by which the specific object is adopted (amended).[6]

Taking as a basis natural law or a functional understanding of the law,[7] the general principles of law arise from natural law, which exists independently and prior to the legislature and serves as a superior criterion of legitimacy for written legal norms, that is, for the activities of the legislature. This leads to the conclusion that general principles of law are prior to or prevail over the normative legal acts created by the legislature, including the formal constitution.[8]

The issue of whether general principles of law have a superior force, a constitutional force in the hierarchy of legal norms, whether they have the force of law, depends on the prevailing understanding of the law of the respective legal arrangement and practice that has developed in the application of general principles of law as well as from positive legal regulation.

The aforementioned thesis is most visibly illustrated by practice in France.[9] Until the adoption of the 1958 constitution, it was generally accepted that the hierarchy of general principles of law was found at the level of laws. They were binding on the administration as unwritten laws. Certainly, the legislature could make null and void the general principles of law the same way it could change or repeal laws adopted earlier. But this was not especially presumed. The Council of State was so positively inclined toward particular general principles of law that, in order to preserve them, it refused to review, as being against general principles of law, laws whose meaning and force created no doubts.

In France the view is widely held that general principles of law are not based directly on the rules in the preamble of the constitution or on the *Universal Declaration of Human Rights*[10]. The Council of State regards the preamble and Declaration merely as an agreement to the general principles of law and not as their source. The Council of State refers to sources that are broader (for example, the laws) and more indeterminate (for example, the traditions of the Republic).

When the 1958 Constitution came into force, the Council of State had a new problem. If the general principles of law are nothing else but a synthesis of legal acts, and their legal force was equal to the force of law, it becomes apparent that these general principles of law are not mandatory for the administration in those areas where the administration can work independently of the law. This position would significantly weaken the role of judicial review of "autonomous regulations," because those could only be reviewed in terms of competence and form, but the content of such regulations could only be reviewed by the administrative court if it violates the preamble of the constitution or legal acts to which it refers.

However, some general principles of law are not fixed in the preamble or the acts mentioned in it. Therefore, the Council of State can guarantee a more rigorous judicial review of "autonomous regulations" if it recognizes that the general principles of law have a higher force than the laws or a constitutional legal force. In that case, the administration can be subject to general principles of law also on those questions that are not regulated by laws. The Council of State chose just this approach in determining the legal force of general principles of law in the legal arrangement of France.

It remains to be clarified how, theoretically, one can substantiate the overriding legal force of general principles of law. Undeniably, a part of them is formulated in the preamble to the constitution, or at least in those legal acts, to which the preamble makes reference. The conclusion regarding the overriding legal force of other principles

of general law is based on the *existence of constitutional custom,* which is formulated when adopting relevant legal acts that are based on the legislature's conviction that constitutional principles oblige one to make such decisions.[11] This analysis is supported by French legal doctrine.

This essay defends the thesis that general principles of law have not only a formal constitutional rank, but also, that in the legal arrangements of contemporary rule of law-governed states, they must be seen as supra-legal prescripts,[12] that is, such prescripts as prevail over the formal constitution. That means that all written legal norms, as created by the legislature, are subject to the test of general principles of law. Theoretically, it is fully possible that the parliament works into the constitution such written legal norms as are not in conformity with the nation's recognized general principles of law. In such a case, there should be a mechanism that would find these norms to be null and void.

This essay defends the thesis that in all cases where there has been a conflict of general principles of law and written legal norms, general principles of law take priority over those conflicting written norms, because general principles of law are the basis of the whole legal arrangement, they reflect the spirit of the arrangement and determine its content. The task of the legislature is to find these objective norms, which are found in the respective legal arrangement and which regulate the actual cases within the arrangement. If a particular written legal norm, by failure of the legislature, is in contradiction to these principles, then it is clearly in contradiction to the whole legal arrangement – this norm goes outside the specific legal arrangement and, in such a case, should be found to be null and void. Finding such written legal norms to be null and void should be the task of constitutional courts, that is, the constitutional court should review not only the conformity of written legal norms with the constitution, but also the conformity of written legal norms in the constitution with general principles of law.

II. Interpretation

All interpretation of legal norms – both the basis of the necessity for interpretation and the process of applying specific interpretative methods or criteria, is based on and determined by general principles of law.[13] Even if the legislature had not included, in the texts of normative legal acts, the possibility of using interpretation in the process of application of legal norms and interpretative methods or criteria, no norm could be applied in the rule of law based legal arrangement if it is not interpreted, based on unwritten principles of interpretation.

In any case, when a general principle of law or several principles are applicable with regarding to the object of regulation by specific written legal norms, the norm should be interpreted in a way that is most in conformity with this principle or principles.[14]

The task of interpreting legal norms is divided between court practice and legal doctrine in the sense that court practice encounters the problem of interpretation deciding a specific case and suggesting solutions for the problem, which are always examined from the viewpoint of legal doctrine. While a judge's interpretation of one legal norm or another is motivated by a specific case from life, the interpretation must be made such that it can be applied not only in the specific case to be decided, but also in similar cases. If one or another legal norm is interpreted differently with regard to similar cases, it contradicts the principle of justice, legal consistency as well as the principle of equality.

Certainly, the court is not bound by previous, generally accepted interpretations of a legal norm. The court may digress; indeed, it has the obligation to digress from the previous interpretation if it has a well-founded reason for a new interpretation. On the other hand, such cases should be relatively rare, in view of the principle of legal consistency. The continuity of court practice, which creates trust in the adjudication of the court in the sense that all cases will be decided in accordance with principles applied hitherto, is a value in itself. On the other hand, the interpreter may not ignore a general change in the orientation of values, especially if this change is reflected in the newer laws.[15]

The functionality of general principles of law is most essentially expressed in two interpretive methods: the systemic and the teleological method.

1. The systemic method of interpreting legal norms

The purpose of this method of interpretation is to determine which of the several meanings of specific words or sentences in a written legal norm, as determined by the use of language and application of grammatical interpretation, is to be taken into consideration in the specific case. Usually this is determined in accordance with the contexts in which the particular word or sentence is used. The aforementioned contexts determine both the understanding of specific words and sentences, taking into account their place in the legal system. [16]

Therefore, systemic interpretation is understood as:

1) the use of a legal norm with the purpose of interpreting another legal norm;
2) an interpretation that is dependent on the systemic structure of a normative legal act – when interpreting the legal norm, one must take into account:
   a) the title of the norm;
   b) the place of the norm to be interpreted in a definite part of the legal system, in a definite normative legal act and in a specific part of this normative act.
3) an interpretation that is linked to all other kinds of sources of law in the relevant legal arrangement. [17]

As a result of application of this method of interpretation, the true content and sense of the thinking in a written legal norm is determined in connection with the general principles of law of the legal arrangement. This is determined by the first and third aspect of the method for systemic interpretation. [18]

2. The teleological method of interpreting legal norms

Each legal regulation is aimed at reaching a certain specific goal. These goals can be directly expressed in the legal norm or indirectly derived from the content of the legal regulation.

Regardless of the specific aims of the legal regulation, in each case one must take into account the overall goals of the legal system as a whole. In this context, one generally speaks of utility, proportionality and justice as an ultimate ideal.[19]

The teleological interpretation method can be divided into: 1) criteria that are based on regulated structures of relations that the legislature may not change and that the legislature must take into account and 2) criteria that are based on the foundation of legal regulation in the existing general principles of law, which are linked to specific legal ideas.

Here, a central role is played by the idea of justice, where one of the principles is that of equality – to have an equal attitude toward equal matters in accordance with the general judgments of the legal arrangement. The differential judgment of equal legal content leads to contradictory judgments that are inconsistent with the idea of justice. To mitigate or prevent such inconsistencies is not only the task of the legislature, but also of the one applying legal norms. The latter must interpret the legal norm so as to, if possible, mitigate or avoid such inconsistencies in judgment, using general principles of law in one's arguments (for instance, the principle of legal certainty, the principle of the protection of trust, the principle of good faith, the principle of virtuous action, etc.).[20]

III. Further development of law

A prerequisite for further development of law is the existence of such imperfection in the law (in a broader sense, in a normative legal act) or a gap that one must remedy, for in such cases the court (judge) cannot refuse to adjudicate the case with the excuse that a legal norm cannot be found in the law that is directly applicable to the case under judgment.[21] Only such an imperfection that is against the initial plans of the legislature or the teleology of the law can be considered a gap.

Further development of law is closely linked to the contradiction between the concepts "law" and "rules", which are not identical. On the one hand, the law is the same thing as positive rules, but, on the other hand, law is not exhausted only by the concept of rules[22] (in addition, making "rules" and "law" equivalent is not in accordance with the idea of the rule of a law-governed state[23]), that is, the rules do not determine all law (any rule is, objectively, imperfect) and next to them, as a source of law, are, among other things, the general principles of law.[24] Even if it is impossible to avoid the existence of gaps in the law, the legal system itself can be considered as one without gaps,[25] because the concept of so-called gaps in the law cannot co-exist with the understanding of the legal system as "open".[26] A legal system that is an objective unit and consists of both written and unwritten legal norms has all of the body of prescriptions that are necessary to adjudicate cases that, in fact, arise. However, the legislature has not been able to express all of these prescriptions positively – to find, identify and include them in normative legal acts. Further development of law helps those applying the legal norms to correct the imperfections and mistakes of the legislature, finding and deriving legal norms of the existing legal system.

Further development of law, meaning analogy (and less frequently, teleological reduction is mentioned) is allowed under both private and public law.

The possibility of using analogy in the Latvian legal arrangement is defined both in private and public law normative acts. For example, Article 4 of the Civil Law[27] states: "The provisions of the Law shall be interpreted firstly in accordance with their direct meaning; where necessary, they may also be interpreted in accordance with the structure, basis and purpose of the law; and, finally, they may also be interpreted **through analogy**"; Article 11, part 3 of the Civil Procedure Law[28] says: "If there is no law that governs the relationship in dispute, the court shall apply **the law that regulates similar relationships**, but if no such law exists – the court shall follow the general principles and sense of the laws of the Republic of Latvia"; Article 17, part 2 of the *Administrative Procedure Law*[29] states: "If an institution or a court finds a gap in the system of law, it may rectify it by using the **method of analogy**, that is, by a systematic analysis of the legal regulation of similar cases and by applying the principles of law determined as a result of this analysis to the particular case. Such administrative acts as infringe on human rights of an addressee may not be based on analogy".

Analogy in the legal meaning is the "carryover" of the legal consequences prescribed by law for one or several similar legal matters for "similar" legal matters that are not regulated by law. This carryover is based on the similarity of the legal matters, which means that they, in accordance with the principle of justice, must be judged equally. Therefore, analogy is a way of remedying imperfections in the law, as a result of which, to a factual matter not directly regulated, are applied: 1) the legal consequences of norm applicable to the similar set of facts (analogy of rule) or 2) a general principle derived from legal norms governing several similar sets of facts that encompasses both the sets of facts regulated by law and those that are not directly regulated (analogy of law).[30]

In the case of analogy, it is not a matter of drawing conclusions from the particular to the particular (from the individual to the individual) but rather, from the particular (individual) to the general. So it is not a matter of analogy in its proper sense, but rather, induction.

Also in the case of analogy of rule, a direct conclusion is not drawn from the particular to the particular, but by finding a commonality between the legal matter foreseen by legal norm and the facts of the real life matter to be adjudicated, which, by way of evaluation, is found to be decisive. However, in this analogy, a general principle is not derived that is applicable to an unlimited number of similar cases, but instead a prescription is found for certain limited sets of facts.[31]

In the case of analogy of law, the derivation of general principles of law is based on the combined *ratio legis* of all separate norms encompassing not only cases regulated by law, but also applies to all real life cases, which have all necessary general preconditions. Therefore the analogy of law is closer to an inductive derivation of the general principle than the analogy of rule.

In the case of analogy of law, the decisive factor is the common *ratio legis* of several specific norms and its generalization. However, it is always necessary to carefully check how far the purpose of such a law can be generalized and whether the peculiarities of certain groups of cases do not demand a different evaluation.[32] To derive a general principle of law, it usually suffices to ascertain the *ratio legis* of a particular norm, recognizing that this *ratio legis* also applies to a wider circle of real-life case that are not directly mentioned in the law.

However, since the derivation of general principles of law is hardly an easy, but rather, a complicated process demanding close attention, it is possible to have cases where the one applying legal norms makes a mistake in the derivation of the principle.

> So, for example, in adjudicating a case of dividing real property into capital shares, the court, after five years of legal proceedings deciding, that refusing to divide the property was an illegal act against the plaintiff and, during this time, a malicious stewardship had been established over the property in dispute. The court also affirmed the plaintiff's property rights to these real properties, but the judgment did not state the time at which the property rights were to be recognized. Meanwhile, in the court case to recover lost benefit from the malicious steward, the court ruled that the plaintiff had gained property rights not from the moment when those rights were violated, nor from the moment the plaintiff filed suit to defend his rights, but only from the moment when the judgment came into force granting the plaintiff property rights.[33] However, no normative legal acts contain a norm that prescribes such a regulation. Therefore, the Senate (Supreme Court) has based its decision on derived legal principle that could be called the principle of minimal protection of rights,[34] which, however, is in contradiction with the positive

norms of private law as well as Articles 92 and 105 of the Latvian Constitution and the general principles of law.[35] What should an individual do in this case, when rights have been violated by the court applying an incorrectly derived principle? It is logical that in the rule of a law-governed state, there should be a mechanism to review the legitimacy of the derived principle. In this case, all levels of courts in the legal system, up to the Court of Cassation, in reviewing the legitimacy of the principle did not conclude that it had been derived incorrectly. The next step in protecting individual rights is the Constitutional Court, which was used in this case. The authority of the Constitutional Court is defined by the Constitutional Court Law[36] Article 16: "The Constitutional Court shall review cases regarding: 1) compliance of laws with the Constitution; 2) compliance with the Constitution of international agreements signed or entered into by Latvia (even before the Saeima has confirmed the agreement); 3) compliance of other normative acts or their parts with the legal norms (acts) of higher legal force; 4) compliance of other acts (with an exception of administrative acts) by the Saeima, the Cabinet of Ministers, the President, the Chairperson of the Saeima and the Prime Minister with the law; 5) compliance of Regulations by which the minister, authorized by the Cabinet of Ministers, has rescinded binding regulations issued by the *Dome* (Council) of a municipality with the law; 6) compliance of the national legal norms of Latvia with the international agreements entered into by Latvia, which are not contrary to the Constitution." In this list, the legislature has not directly included the review of the legality and legitimacy of legal norms resulting from further development of law, even though these are real legal norms that the legislature was unable to formulate in a normative legal act. Therefore, one must criticize the view of the Constitutional Court in deciding to refuse the case that "..the authority of the Constitutional Court encompasses only the review of generally binding legal norms. The pleadings and attached materials show that the plaintiff disputes a legal norm stated by the Senate of the Supreme Court. This norm has been derived by the Senate of the Supreme Court by interpreting the content of another legal norm. The legal norms stated (derived) by the court **are not generally binding**, therefore their review is not within the authority of the Constitutional Court .."[37]

The unwritten form of general principles of law does not remove their normative nature – based on this, all similar future cases are decided – it is generally binding, applicable to an unrestricted group of persons (also to persons involved in similar cases) and the state (court) ensures their application by compulsory means.

What legal solution is there for this case? In this specific case, the principle derived by the judges is not legitimate, even if it has created legal consequences for individuals. A rule of a law-governed state must prevent the consequences of an illegitimate norm. Is it the role of the Constitutional Court to review only the constitutionality of the legal norms created by the legislature, or the coherence of the entire legal arrangement, including the constitutionality of unwritten generally binding prescriptions found by other enforcers of legal norms? If the authority of the Constitutional Court includes the review of generally binding legal norms, then, obviously, this authority applies also to legal norms created by further development of law. In addition, it cannot be permitted that a legal system contains normative prescriptions, the constitutionality of which may not be disputed, reviewed and, should they be found inadequate, these prescriptions must be declared null and void.[38] Therefore, we must conclude that Article 16 of the Constitutional Court of Law must be amended, creating the possibility for the Constitutional Court

to review the constitutionality of all generally binding legal norms, including unwritten ones.

An analogy to the detriment of the accused (the defendant) is excluded by general principle from the criminal law (*nulla poena sine lege*). However, the principle of a ban of analogy in the public law of the legal family of continental Europe has developed in such a manner that the practice of applying legal norms points to the fact that, based on the principle of justice and the derived principle of "equality before the law" or "substantially similar human activity must be regulated similarly", one takes into account ethical evaluations and substantially similar results of activities by persons.[39]

The practice of developed democratic countries proves that in so-called **hard cases**, one uses evaluative subsumption. Other cases are treated in a similar way, where the results of actions by persons are substantially the same as those results, which by legal norms are defined as such, which if caused, result in liability, regardless of whether possibilities for interpretation are exhausted by the broadest and narrowest understanding of the words used in the written legal norm. For example, the written legal norm states there is criminal responsibility for illegally spending funds left in stewardship. A person, examining one's account, finds that money to which the person is not entitled has been deposited and, knowing this, the person nonetheless spends these funds. Certainly, one cannot speak of stewardship in its common meaning, but a court in Sweden ruled by analogy. Or another example. Two persons left radioactive materials unattended at their workplace. They were tried under an article of the criminal law that determined liability for creating general endangerment in connection with the distribution of a poison or similar substance, that is, leaving a substance unattended was analogous to spreading it.[40]

In this regard, the attitude of the Latvian legislature toward illegal cutting of trees is of interest. The Latvian Criminal Code (LCC), Article 161 prescribed liability for the illegal cutting of trees. Here, without further determining the plan and teleology of the law, it is apparent that the legislature intended to punish anyone who, without permission, destroys a tree, not thinking that cutting is the only means of destroying a tree that should be punished. In 1997, the decision of the Plenum of the Latvian Supreme Court on "Application of the law in criminal cases for illegal cutting of trees, destroying or damaging the forest" further developed what was determined by the legislature, envisaging that "the illegal (arbitrary) cutting of trees under Article 161 of the LCC should be understood as the separation from the soil of growing or dead trees in nature by any means (sawing, chopping, breaking, uprooting, etc.) without the appropriate permit." Apparently, the Plenum of the Supreme Court compiled the further development of law made by courts (in a truly positive manner in this case), because the purpose of the illegal action is one and the same – regardless of how the tree is destroyed, it ceases to exist. It is also clear that if a tree were doused with poison, which definitely is not cutting in the widest meaning of the word, and was destroyed as a result, then taking into account the principle of justice and equality before the law, as well as moral considerations, the same liability should arise. Another matter is of importance, which points to the legislature being unwilling or unable to take into account case law and the results of the further development of law, namely, the new Criminal Law[41], Article 109, in the first part again prescribes criminal liability only for cutting trees. But the second part of Article 109 prescribes liability "For .. arbitrarily cutting, destroying or damaging trees .., in a .. site under special protection of the State ..", which, using methods of interpretation, clearly indicates that with the first part, the legislature intended to limit liability, envisaging it only for a specific way of destroying trees: cutting.

The conclusion we can draw from the aforementioned is: analogy is permissible in public law, based on considerations of morality and justice, if the result of a person's actions is substantially similar to the result for which the law envisages liability.

IV. Decision drafting

As mentioned previously, the general principles of law belong to the group of independent sources on which a decision can be based. That does not mean, however, that the arguments for a decision may not also use sources of law of a generally binding character. On the contrary, both written legal norms and, to a greater extent, the general principles of law are an inseparable part of the arguments for a suitably drafted legal decision.

> For example, the Constitutional Court in arguments for its decisions has used both general principles of law and written legal norms.[42] So, for example, a decision of May 7, 1997, argues that "in accordance with **general principles of law**, a normative act is null and void in the following cases: 1) if the deadline or condition limiting the force of the act in time has occurred; 2) if the normative act is revoked or 3) if another normative act has come into force with the same or higher legal force regulating the same matters; [43] in a decision of March 11, 1998: "At the time the joint explanation was published, **Article 1 of the Constitution** was in force, which states that Latvia is an independent, democratic republic. On July 6, 1993, the Constitution came fully into force. In accordance with **Article 64 of the Constitution**, the legislative power of the Republic of Latvia belongs to the Saeima, as well as to the people to the extent and methods envisaged by the Constitution."[44]
>
> The Senate of the Supreme Court wrote in the arguments for a decision of January 8, 2003: "..the Senate is of the view that the decision cannot be considered legal also because the court, in adjudicating the case, did not examine the conformity of the disputed decision of the State Commission of Physicians for Health and Work Capacity Examination with **the generally accepted principle of the continental European legal system of individual legal expectations and proportionality** .."[45]
>
> The Riga Zemgale district court in its arguments for a decision of September 14, 2001 wrote; ".. thereby the action of the State Revenue Service in adopting the disputed decision, **was not proportional** to the established conditions .. Ltd. **in good faith** relied upon the correctness of the indicated information, because the normative acts do not envisage a duty to check the correctness of the indicated information."[46]

Of great practical significance for the courts starting to refer to general principles of law in their decisions is the doctrinal research, where general principles of law, based on normative legal acts, cases, historical and social facts, are filtered and systematized. To refer to doctrine in the arguments for rulings is one of the most realistic ways in which courts could start the practice of applying general principles of law in their rulings and decisions.

Worth considering and instructive is the practice of the pre-war Latvian Senate with regard to the application of general principles of law, where arguments for decisions made reference not only to academic jurisprudence[47] (therefore, indirectly to general principles of law) but also directly, to the general principles of law.[48]

> For example, the Civil Cassation department of the Latvian Senate, decision of December 8, 1921, in the case no. 188 of the insurance company

> "Rossija": ".. Latvija as a rule of law-governed state may only acknowledge as legal and binding those directives of a foreign state that are consistent **with the generally accepted principles of a rule of law-governed system**, which are not compatible with the liquidation of all insurance companies .."
>
> or the decision no. 120 of September 24, 1924 in the Rata case: ".. **academic jurisprudence and court practice** definitely separates a prescription period from a preclusive term as a time limitation on the existence of legal rights. Positive legislation, on the contrary, in terms of its system and terminology does not emphasise the aforementioned difference, and, in speaking in detail of prescription, does not envisage *ex professo* special conditions for preclusive terms, although essentially, also for positive law, the concept and meaning of a preclusive term is not alien ..",

or the decision of October 27, 1921 in case no. 118 of the Liepaja credit-savings bank regarding the Dreyersdorf estate: ".. if, as in this case, the equivalent of the bond (currency) truly passed to the debtor's estate, then the circumstance alone that the debtor had no capacity to act, is of no consequence and the appropriate loan agreement came into force (Article 3651, part two of the Private Law part and the second sentence of Article 3652). This condition arises from **the general in *rem versio* principle** .." [49]

This practice of the Senate proves that the concept of general principles of law was not alien to the Latvian legal arrangement and courts referred to general principles of law in their rulings and decisions (even to those principles of law, which definitely were not defined in normative legal acts).

The Greek philosopher Aristotle, as one of the first seeking legitimacy and conditions of argument, pointed out that in an argumentation, one could only use such arguments that participants in a dialog and others will accept. These are phrases that "to all, to the most part, or to the wise shall seem true".[50]

The argumentation is additionally embraced by procedural law. In a just procedure process, it is definitely necessary that each side to the procedure be heard, that there be rights to representation, time limits, and a presentation of grounds.

The general principles of law are expressed in an especially important way in the basis for the content of a decision,[51] and when the application of law is viewed dynamically and taking into account its creative aspect, the principles have a decisive role in the arguments for the decision.[52] The result is accordingly and sufficiently argued when 1) the reasons are clearly shown from which; 2) one can clearly conclude what the starting basic principles are taken as a basis and 3) when the thought process arising from these principles and leading to the goal can be clearly demonstrated. If the aforementioned reasons lead every rational person to the same result, then the decision is accordingly argued.[53]

In accordance with the theory of argumentation, all arguments used in decisions fall into two basic types: legal and non-legal arguments. Legal arguments are those giving a legal basis for a judge's decision and give the argumentation legal meaning. The arguments unrelated to jurisprudence, those based on experience or practical considerations, are called non-legal or general arguments. The general principles of law, together with written legal norms, court practice and other sources of law comprise the group of legal arguments – they are arguments characteristic only of legal science, which must be included in the arguments for each decision.[54]

Legal arguments must show the general principles of law, from which: 1) the results are derived; 2) the relevant facts of the case are evaluated; 3) the important trains of thought leading to the result are shown. The decision must show the most significant

arguments that emphasize the necessary evaluations. These requirements apply to both decisions and other rulings in legal practice (for instance, administrative acts), as well as academic legal works.[55]

Legal argumentation must formally show a train of thought.[56] In addition, one may not permit any logical contradictions; otherwise it is in contradiction with the principle that forbids arbitrariness and thereby in contradiction with the principle of equality before the law.[57]

However, formally logical precision of argumentation is not sufficient for a complete foundation of a decision. One must especially emphasize the evaluations on which the decision is based, and these evaluations must be in accordance with legal norms in force. These evaluations can be found: 1) in written legal norms, applicable to the specific case as well as 2) in general principles of law.[58]

The development of a judgment can be divided into five parts: determination of facts, explanation of specific facts, understanding and comprehending, interpretation, evaluation according to written legal norms and evaluation according to general principles of law.

First, there is work with legal norms. The case is subsumed in accordance with these norms. The moral and legal evaluation can only arise when a social and legal object is made in accordance with an ethical legal measure. This is a value system, goals, action, activity, opinions, tendencies and activities controlled by will. From abstract laws one develops meanings, a content of character and values, which serves as an example and measure for each object. The objective working of the law and a guarantee of values, the general good of society, justice, legality and moral virtue must be founded, explained and the question resolved of whether the subjective values of individuals conform to objective collective values? In a logical conclusion, one may not alter this sequence of thought. From it one can conclude that ethical and legal internal necessities are closely linked. Judgments are value judgments.[59]

In the fourth phase of the development of a decision, the one applying legal norms answers questions with regard to which of several legal norms should be applied, an evaluation of the abstraction of the law, then the use of a specific constitutional norm and the resulting security for the case at hand. This all must conform to general principles of law (the 5th stage).

Now it is revealed that particular norms, particular national laws are by no means goals in and of themselves for the expression of power, but only a means to realize the general good of society and the basic legal law of justice.

Therefore, a decision is always connected to general principles of law. Thereby the final steps are taken to the fifth stage – evaluation according to the general principles of law. This is the final and highest goal of a legal decision, which gives it an internal foundation, a deeper, greater meaning and an ethical undertone. This was mentioned in the four earlier stages. From one stage to another it gets more sharply, clearly and substantially illustrated. Nonetheless, there is a goal, a real, unreachably distant goal, a regulative idea. It is not only for the creative life and activities, but for the research of unclear facts and circumstances.[60]

These are the final and most important points in a decision. They arise from organic adjudication that is useful in life. Appliers of legal norms deduce by that the methods they must be guided by in order to work successfully, with achievements, to be active and thereby to realize the very law itself.

Summary

1. Taking as a basis natural law or a functional understanding of the law, the general principles of law arise from natural law, which exists independently and prior to the legislature and serves as a superior criterion of legitimacy for written legal norms, that is, for the activities of the legislature. This leads to the conclusion that general principles of law are prior to or prevail over the normative legal acts created by the legislature, including the formal constitution.
2. In all cases where there has been a conflict of general principles of law and written legal norms, general principles of law take priority over those conflicting written norms, because general principles of law are the basis of the whole legal arrangement, they reflect the spirit of the arrangement and determine its content.
3. All interpretation of legal norms – both the basis of the necessity for interpretation and the process of applying specific interpretative methods or criteria, is based on and determined by general principles of law. The functionality of general principles of law is most essentially expressed in two interpretive methods: the systemic and the teleological method.
4. In the case of analogy of law, the derivation of general principles of law is based on the combined *ratio legis* of all separate norms encompassing not only cases regulated by law, but also applies to all real life cases, which have all necessary general preconditions. Therefore the analogy of law is closer to an inductive derivation of the general principle that the analogy of rule.
5. The general principles of law are expressed in an especially important way in the basis for the content of a decision, and when the application of law is viewed dynamically and taking into account its creative aspect, the principles have a decisive role in the arguments for the decision.

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[2] Regarding the division of sources of law, taking into account the generally binding nature of sources of law, see: Jelāgins, J. Tiesību pamatavoti. *Grām.: Mūsdienu tiesību teorijas atziņas*. Rīga: TNA, 1999.
[3] So, for instance, the significance of customary law could differ in commercial law and criminal law, where in the first case, the role of customary law is incomparably greater than in the second. But, as mentioned, this is not an issue to be resolved in this essay.
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Kopsavilkums

Publikācija veltīta vispārējo tiesību principu iedarbības uz rakstīto tiesību normu piemērošanu funkcionālā mehāmisma analīzei. Rakstā analizēta arī vispārējo tiesību principu nozīme gan rakstīto tiesību normu interpretācijā, gan tiesību tālākveidošanas procesā. Rakstā izvirzīta tēze, ka vispārējie tiesību principi demokrātiskas un tiesiskas valsts tiesiskajā sistēmā prevalē pār rakstītajām tiesību normām, to skaitā arī pār formālo konstitūciju.

Atslēgvārdi: tiesību normu piemērošana, vispārējie tiesību principi.

76.-90. lpp.

Die Entstehung und Entwicklung des Eherechts in Lettland

Laulības tiesību pirmsākumi un attīstība Latvijā

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Atslēgvārdi: Eherecht, Ehe, Verlöbnis, marriage law, laulību tiesības

Inhaltsverzeichnis:

Einleitung

Die Ehe bildet die Voraussetzung für die Entstehung von rechtlich anerkannter Familie, die Familie ist ihrerseits unentbehrlich für das Bestehen und die Entwicklung des Staates. Obwohl das Eherecht zum Privatrecht gehört, hat man im Laufe der Jahrhunderte die Eheschließung durch Elemente des öffentlichen Rechts ergänzt, um staatliche Stabilität zu erreichen. Der Staat und / oder die Kirche, in der vorstaatlichen Gesellschaft die Sippe, übernahmen eine gewisse Verantwortung für die Eheschließung und –scheidung, indem diese Tatsache an öffentlicher Glaubwürdigkeit gewann.

Das Ziel dieser Veröffentlichung ist die rechtshistorische Analyse der Eheschließungsformen, der Rechtstraditionen und der Eheverbotsgründe. Historisch kann man bei der Entwicklung des Eherechts in Lettland fünf Etappen entscheiden:

1. Heidnische Eheschließungstraditionen (bis zum XIII. Jh.).
2. Livländisches Eherecht (XIII.–XVI. Jh.).
3. Das Eherecht während der polnisch–schwedischen Herrschaft und der kolonialen Verwaltung des zaristischen Russlands (XVI.–Anfang des XX. Jh.).
4. Das Eherecht in der Republik Lettland (1918–1940).
5. Das Eherecht in der sowjetischen Okkupationszeit (in der klassischen Sowjetzeit) (1940–1990).

1. Heidnische Eheschließungstraditionen

Bei den Balten und Liven war die Eheschließung kein sakraler Akt. Historisch sind zwei Eheschließungsformen bekannt:

1. gewaltsame Eheschließung – die ältere Eheschließungsform;
2. vertragliche Eheschließung – die neuere Eheschließungsform.[1]

Voldemārs Kalniņš bezeichnet die gewaltsame Eheschließung mit dem Begriff „Eheschließung durch Diebstahl oder Raub“[2]. Es ist nicht zu bezweifeln, dass sich die äußere Form der gewaltsamen Frauennahme einem Diebstahl (ohne Widerstand der Verwandten) oder einem Raub (im Falle, wenn die Verwandten der Frau Widerstand leisten) ähnelt. Wenn es juristisch ausgelegt wird, ist zu schließen, dass man durch den Diebstahl oder Raub nur eine Sache wegnehmen kann. Hatten die baltischen und die livischen Frauen rechtlich einen dinglichen Status? Es ist anzunehmen, dass dies nicht der Fall war. Die Töchter hatten das Recht auf die Mitgift, wobei die Mägde und Sklavinnen dieses Recht nicht hatten; die Tochter, die keinen Bruder hatte, hatte sogar das Recht, den Hof des Vaters zu erben usw. Eindeutig folgt daraus, dass in der baltischen und livischen Gesellschaft die Frau als Rechtssubjekt anerkannt wurde. Deshalb wäre es angemessen, über gewaltsame Eheschließung oder Zwangsehe zu sprechen.

Die gewaltsame Eheschließung ist als die älteste Eheschließungsform zu betrachten. Vasilijs Sinaiskis verbindet die Eheschließung dieser Art mit der Entführung u.a.[3] Gewöhnlich wurden die Frauen in der Zeit der Sommersonnenwende, während des Festes *Līgo*, entführt. Nach alter Tradition war das die günstigste Zeit für die Befruchtung; der Mond verstärkte sein Licht so, dass das erzeugte Kind dann geboren wurde, wenn die Sonne im Frühling wieder zurückkam.[4] Während der Festzeit waren die Frauen manchmal nicht mehr so vorsichtig und verließen, singend und Blumen pflückend, den Hof oder die Burg; dann wurden sie auch von Entführern erblickt. Den Begriff „Entführer“ erläutert Voldemārs Kalniņš auch anders, indem er erwähnt, dass die Entführung auch mit der vertraglichen Eheschließung verbunden ist, wenn die Frau in das neue Haus geführt wurde.[5] Dem kann man nur teilweise zustimmen, weil die Frau bei beiden Eheschließungsformen, der gewaltsamen und der vertraglichen, in das neue Haus geführt wurde – egal, ob sie *genommen* oder gekauft worden war. Das Wort „nehmen“ verweist eindeutig auf die ursprünglich gewaltsame Form der Eheschließung.

Ein Zeugnis über das *Nehmen* der Frau ist in den Kodifikationen des Bauernrechts enthalten, die erst im XIII. Jh. aufgeschrieben wurden. So kann man im § 27 Kurenbauernrecht lesen: „Se enn Mann enn Wife nembt ...“, oder im §10 des Bauernrecht des Rigaer Erzbishtums: „Item ein Mann der ein Wif nimmbt“.[6]

Solche Fremden – die Entführer – stellten sich als Kaufleute vor. Da man nicht immer Geld hatte, sollte man Ware gegen Ware tauschen. Deshalb nannte man die Leute,

die den Warentausch organisierten, „*precinieki*“ („*prece*“ – die Ware). Erst nach gewisser Zeit, als man die echte Absicht dieser Leute erkannt hatte, bekam das Wort eine andere Bedeutung, und mit dem Begriff „*precinieks*“ wurde ein Mensch, der nach einer Braut sucht, bezeichnet.

Wenn man die gewaltsame Eheschließung genauer beschreiben will, muss man erwähnen, dass die Frauen nicht nur während der Festzeit, sondern auch während der Kriege „genommen“ wurden. Man wurde nicht nur um dingliches Vermögen reicher sondern entführte auch die Frauen. Diese Eheschließungsform ist bei vielen Völkern bekannt, die Balten und die Liven bilden keine Ausnahme. Diese Meinung vertritt V. Sinaiskis. Er sieht im baltischen Wort „*bāliņš*“ (*Bruder*) eine besondere Charakteristik der Familie als der Form der Lebensgemeinschaft, die entsteht, wenn *bāliņš* ein Mädchen anderer Sippe entführt. Deshalb galt die Frau als Fremde im Vergleich zu der Braut – *līgava* (*līgava – ledige Frau eigener Sippe. – J.L.*) Diese Form der Eheschließung durch die Entführung der Frauen fremder Völker zeigt, dass *bāliņš* ein bewaffneter Mann oder Soldat war.[7]

Auch die Römer hatten unter Romulus die Tradition des Frauenraubes: ".. und nach einem Zeichen laufen römische Jünglinge in verschiedene Richtungen, Jungfern zu rauben ... Sie werden doch zu Ehefrauen".[8] Daraus folgt, dass die entführte Frau unter die Gewalt des Mannes kam und zu einer Ehefrau wurde. Mit der Zeit entwickelte sich das rechtliche Denken, und die Römer konnten diese Situation rechtlich darlegen: „Durch die Verjährung ging die Frau in die Gewalt des Mannes, wenn sie ein Jahr ohne Unterbrechung seine Frau war ...“.[9] In diesem Falle wird ein dinglich rechtliches Institut – die Verjährung als eine Art des Eigentumserwerbs – im Eherecht angewandt, d.h. die Frau wird rechtlich als bewegliche Sache betrachtet (die Verjährung im Sinne von Ersitzung).

Ähnlich wie bei den Römern wurde bei den Balten und den Liven zu einer späteren Eheschließungsform der Kauf der Braut, ursprünglich echt, später nur symbolisch, d.h. nur formell.[10]

Gleich wie im Falle der vertraglichen Eheschließung war es sehr wichtig, dass die Frau aus einer fremden Sippe oder dem Volk stammte.[11] Dies ist ein Hinweis auf den exogamen Charakter der baltischen und livischen Ehe. Das kann man auch in Texten der Volkslieder lesen:

Visas meit[as] ņemt varēju,
Māsas ņemt nevarēju.
Alle Frauen kann ich nehmen,
nur die Schwestern, die nehm´ nicht.[12]

Die vertragliche Eheschließungsform ist als eine neuere anzusehen. Ihrer rechtlichen Natur nach war die vertragliche Eheschließung ein bürgerlich-rechtliches Geschäft. Die Parteien dieses Vertrags wurden *līgava* und *līgavainis* genannt (līgums – der Vertrag). Für die Eheschließung war ein bestimmtes Verfahren vorgesehen. Alles fing mit der Einigung an, d.h. mit den Verhandlungen über den Umfang der Mitgift und der Gegenleistung (*kriena nauda*). Arveds Švābe verbindet den Begriff *kriena nauda* (kriens – slawisch der Kauf, der Preis) mit dem Frauenkauf. Da als Kaufgegenstand nur eine Ware (*prece*) gilt, nennt man solche Form der Eheschließung *precības*.[13] Wenn eine Einigung erzielt wurde, galt es als Verlöbnis, und die Parteien versprachen gegenseitig, dass die Ehe vor den Hochzeitsgästen geschlossen werden wird.[14] Dieser Meinung kann ich nur teilweise zustimmen, weil sonst die Schlussfolgerung gezogen werden könnte,

dass die baltischen und livischen Frauen als Sachen galten. Die Töchter der unfreien Leute betrachtete man gewiss als Sache, aber der Status der freien Frauen war ein anderer. Deshalb wurde das *kriena nauda* vermutlich für freie Frauen nur symbolisch oder als Entschädigung für den Verlust der Arbeitskraft der Sippe bzw. Familie gegeben.

Es gibt auch andere Überlegungen zu diesem Thema, die A. Švābe erwähnt: Die Eheschließung hatte keinen rein privatrechtlichen Charakter, wie es heutzutage ist.[15] Sie war eine Vereinigung zwischen zwei fremden Sippen. An der Eheschließung nahmen auch „die Entführer" und „die Verfolger" teil, und es zeigt, dass sich an der Zeremonie nicht nur die Braut und der Bräutigam, sondern eine große Zahl anderer Menschen beteiligte (*kāzinieki*). Auch die Vormundschaft für die verheiratete Schwester blieb gemeinsam, weil die Verwandten der Ehefrau das Recht behielten das weitere Leben der verheirateten Tochter in ihrer neuen Familie zu steuern. Beleidigten der Ehemann oder seine Verwandten die Ehefrau, wurde ihre Schande von ihren Verwandten durch einen „Reinigungseid" oder Zweikampf „abgewaschen". Umgekehrt hatten die Verwandten der Ehefrau ihrerseits das Recht, ihre „Schwester" für etwaiges Fehlverhalten zu bestrafen. In lettischen Volksliedern finden wir folgendes:

„*Tev, bāliņi, liela vara, redzi mani tautiņās*,"-
„*Lai sargās tās tautiņas, kas māsiņu niecināja*."

Groß deine Macht, mein Bruder,
Siehst du meine Ehejahre.

Wehe dem Ehemann,
der die Schwester hat beleidigt.[16]

Aus den Rechtsquellen ist bekannt, dass schon in der vorchristlichen Zeit Eheverbote bestanden. Verbotsgründe waren:

1. nahe Verwandschaft;
2. das Nichterreichen eines Mindestalters.

Alle Verwandten wurden traditionell eingeteilt in „echte" (*īstenieki*), d.h. nahe Verwandte, unter denen die Ehe verboten war, und "abgezweigte" (*nozariemi*), d.h. ferne Verwandte, unter denen in gewissen Fällen, wann die Verwandschft nicht wirklich, sondern nur scheinbar war, die Ehe erlaubt war.[17] Diese Verwandten lebten abseits der anderen Sippe oder schon außerhalb der Sippenländer. So kann man auch über eine gewisse Endogamie in den baltischen und livischen Traditionen sprechen.[18]

Das sakrale Recht zeigt, dass die Göttin *Laima* die Kinder in den Stand der Jungfern und Jünglinge setzte. Wurde ein bestimmtes Alter erreicht, wurden sie zu Frauen und Männern.[19] Es zeigt, dass das Eherecht nur für volljährige Personen galt.

Andere Eheverbote sind nicht bekannt. Höchstwahrscheinlich war auch die Polygamie zulässig.[20]

2. Livländisches Eherecht

Bis zum Jahre 1522, als in Livland das Recht der evangelisch-lutherischen Kirche anerkannt wurde, galten als Quelle des Eherechts das kanonische Recht und das Standesrecht.[21]

Einen Auszug aus dem kanonischen Recht für Livland arbeitete 1428 der Rigaer Erzbischof Henning Scharfenberg aus.[22] Nach der Satzung galt als rechtliche Ehe nur eine solche, die die Parteien ohne Zwang und durch freien Willen geschlossen

hatten. Das bedeutete, dass die gewaltsame Eheschließung verboten war; aber auch eine nicht durch eine religiöse Zeremonie geschlossene Ehe wurde von der Rechtsordnung anerkannt. Das kann man in einer Rechtsquelle aus dem XVI. Jh. sehen – der Rezess vom Landtag[23] bestimmt:"[...] entführt jemand eine Jungfrau ohne Erlaubnis ihrer Freunde, soll der am Hals bestraft werden; wurde es durch den Willen (der Verwandten) gemacht (*ein Fall der vertraglichen Eheschließung – J.L.*), sollen beide getraut werden." Bis 1563 war auch in Deutschland die nicht-religiöse Eheschließung für die Vertreter der unteren Stände zulässig.[24]

Es lässt sich schließlich behaupten, dass in dem Livländischen Bündnis zwei rechtliche Eheschließungsformen bestanden:

1. kirchliche Trauung;
2. ziwilvertragliche Eheschließung.

Traditionell begann die Eheschließung mit einem Verlöbnis. Obwohl das Institut des Verlöbnisses einige Elemente des Schuldrechts aufweist, z. B. die Vereinbarung über die Mitgift und andere Bedingungen, war es durch das kanonische Recht verboten, eine Geldstrafe dafür aufzulegen, dass eine Partei später auf die Eheschließung verzichtete.

Um eine Ehe zu schließen, brauchte man die Einwilligung der Eltern und im Falle, dass sie gestorben waren, die Einwilligung des Vormunds und den Segen eines Priesters sowie die dreimalige Proklamation.[25]

Durch das Stadtrecht war es strengstens verboten, ein Doppelverlöbnis einzugehen (die Doppelehe galt als Straftat). Willenseinschränkungen waren zulässig, wenn jemand eine Jungfrau verführt hatte. Der Verführer hatte die Jungfrau zu heiraten. Diese Bestimmung galt nicht, wenn die Jungfrau einem höheren Stand angehörte als der Verführer. Adlige Jungfrauen und Witwen, die eine Person niedrigeren Standes heirateten, verloren ihren Stand und ihr Erbrecht. Nach dem Landrecht wurde verkündet, dass solche Eheleute ihre Ehre verloren hatten. Ähnliche Regelungen betrafen die Angehörigen der städtischen Gilden und Innungen. Nach der Untersuchung von Friedrich Georg von Bunge „erniedrigten" sich die Kaufleute und Handwerker, die eine Nicht-Deutsche heirateten, und verloren ihre Stelle in der Gilde oder Innung.[26]

Es gab auch Eheverbote, die eine Ehe nichtig machten.Verbotsgründe waren:

1. *Minderjährigkeit:* In den XII–XIII Jh. lebten noch in der katholischen europäischen Gesellschaft die Vorstellungen aus dem Römischen Reich über das Mindestalter der Brautleute.[27] Die Rechtsprechung des klassischen Römischen Reiches und das Recht aus der Zeit der imperatorischen Gesetzgebung sahen vor, dass die Männer mit der Erreichung des 14. Lebensjahres und die Frauen mit der Erreichung des 12. Lebensjahres ehemündig waren.[28] Im mittelalterlichen Europa spielten auch die örtlichen Traditionen eine große Rolle. Deshalb wurde auf dieses Mindestalter bis zum XI. Jh. verzichtet, und die Eltern schlossen die Ehe ihrer Kinder, die noch in der Wiege lagen. Zur Eheschließung für Säuglinge verweisen die Rechtshistoriker F. Pollock und W. F. Maitland darauf, dass „[...] sogar die Kirche nur gesagt hat, dass die Ehe für die Säuglinge nicht geschlossen werden soll, es sei nur in Notfällen zulässig, z. B. wenn der Frieden dadurch geschlossen werden kann".[29] Normalerweise verlangte die Gesellschaft, dass die Brautleute wenigsten ein solches Alter erreicht hatten, dass sie Kinder zeugen und die Bedeutung der Eheschließung verstehen konnten.[30] Im späteren Mittelalter kehrte man zu der römischen Ansicht zurück, die das Mindestalter der Ehemündigkeit auf 12–14 Jahre bestimmte.[31]

2. *Zu hohes Alter:* Diese Altersgrenze wurde nicht bei einem bestimmten Alter fixiert, sondern bezeichnete den physischen Zustand des menschlichen Leibes.
3. *Eine bestehende Ehe*.
4. *Zu nahe Verwandschaft oder Verschwägerung*.
5. *Vormundschaftsbeziehungen:* Dieses Eherecht galt bis zum Zusammenbruch Livlands (1561). Obwohl sich am Anfang des XVI. Jh. der Protestantismus im Baltikum verbreitete, beschloss 1532 der Landtag „ [...] *bis zum nächsten Christlichen Concilium die bei der „gemeinen Christenheit und im heiligen Römischen Reiche" üblich gewesenen Bestimmungen beizubehalten*".[32]

3. Das Eherecht während der polnisch-schwedischen Herrschaft (XVI.–XVIII. Jh.)

Unter der Herrschaft Polens und Schwedens wurde nicht nur das heutige Territorium Lettlands zersplittert, sondern auch die christliche Kirche. Seit der Jahrhundertwende vom XVI. zum XVII. Jh. kann man deshalb schon über die konfessionellen Unterschiede in der christlichen Kirche und dadurch auch über unterschiedliche Trauungstraditionen sprechen.

Im schwedischen Livland wurde die evangelisch-lutherische Kirche zur staatlich anerkannten christlichen Kirche. Diesen Stand fixierte ein Gesetz von 1634, Konsistorial- und Visitations-Ordnung.[33] 1636 wurde seinem Charakter nach ein ähnlicher normativer Rechtsakt verabschiedet, der die Arbeit der Unterkonsistorien regelte, und 1686 schließlich wurde die Satzung der evangelisch-lutherischen Kirche verabschiedet; diese trat in Livland 1694 in Kraft.[34] Dadurch wurde auf das kanonische Recht verzichtet. Nach dem kanonischen Recht gilt die Ehe als Sakrament, aber die Juristen der protestantischen Kirche betrachteten die Ehe nur als einen zivilrechtlichen Vertrag (*contractus civilis*). Das erleichterte in den protestantischen Ländern der weltlichen Macht die Einmischung in das evangelisch-lutherische Kirchenrecht durch die Gesetzgebung.[35]

Auch im Herzogtum Kurland (*Ducatus Curlandiae et Semigallae*) war die evangelisch-lutherische Kirche die offizielle Landeskirche. Der polnische König Stephan Batory gewährleistete durch einen besonderen Rechtsakt die Glaubensfreiheit:" ..wie die Ordnung und der Stand da war, freie Ausübung der Religion und Gotteskultus".[36] Gleiche Normen enthält auch die Verfassung des Herzogtums Kurland (*Formula Regiminis in Ducata Curlandae et Semigalliae*[37]; §§ XLIV, XLV).[38] Aber die Glaubensfreiheit von damals entsprach nicht dem heutigen Verständnis von diesem Begriff, weil man in der Zeitperiode bis zum XVIII. Jh. nur über religiöse Toleranz den nicht offiziell staatlichen Religionen gegenüber sprechen kann.[39] Die in der Zeit der Aufklärung entstandene und weiterentwickelte Auffassung, dass die Ehe ein zivilrechtlicher Vertrag mit bestimmten öffentlich-rechtlichen Merkmalen sei, führte zu der Anschauung, dass es möglich sei, eine zivilrechtliche Ehe mit dem Staat in der Vermittlerrolle zu schließen. In Lettland bildete sich eine solche Auffassung erst nach dem Ersten Weltkrieg aus.

In Latgalien erfolgte die katholische Restitution. Man kann die Schlussfolgerung ziehen, dass in der polnisch-schwedischen Zeit die Eheschließung nach den Vorschriften mehrerer christlicher Konfessionen möglich war. Die führenden sind:

1. die evangelisch-lutherische Kirche (die verbreitetste christliche Kirche);
2. die römisch-katholische Kirche (besonders in Latgalien).

4. Die Zeit der kolonialen Verwaltung des zaristischen Russlands (XVIII.–Anfangs des XX. Jh.)

Im XVIII. Jh. wurden die Gebiete des heutigen Lettlands zum Bestandteil des Russischen Reiches. Dadurch verstärkte sich die Bedeutung der orthodoxen Kirche im Baltikum. Die Veränderungen in den gesellschaftlich politischen Verhältnissen zeigen sich deutlich in den §§ 1–3 des Baltischen örtlichen Gesetzbuches, Bd. III von 1864 (*das bürgerliche Gesetzbuch von Bunge – der Verfasser*).[40] Zu den größten Konfessionen, die das Eheschließungsrecht hatten, gehörten:

1. die evangelisch-lutherische Kirche;
2. die orthodoxe Kirche.

Das Gesetz erlaubte auch die Eheschließung der Angehörigen von anderen Konfessionen durch die Geistlichen ihrer Konfessionen. Das Gesetz bestimmte den Begriff der anderen christlichen Konfessionen nicht näher. Das Russische Bürgerliche Gesetzbuch[41] (*Свод законов гражданских*) sah im § 61 vor, dass die Geistlichen aller christlichen Konfessionen das Recht hatten, Glieder ihrer Gemeinden ohne besondere Genehmigung zu trauen, wenn die Trauung dem staatlich anerkannten Recht dieser Konfession entsprach. Auch die Ehen der Nichtchristen und Heiden wurden in Russland anerkannt, wenn sie nach dem Recht des entsprechenden Volkes oder Stammes geschlossen worden waren (§ 90 Russisches Bürgerliches Gesetzbuch).

Die Rolle der orthodoxen Kirche als Staatskirche war besonders bei den Mischehen ausgeprägt, in denen nur ein Ehepartner orthodox war. Die Kinder, die in dieser Ehe geboren wurden, waren unbedingt in der orthodoxen Kirche zu taufen und im orthodoxen Sinne zu erziehen[42] (§ 67 Russisches Bürgerliches Gesetzbuch). Eine ähnliche Ordnung wurde in Livland und in Kurland in der evangelisch-lutherischen Kirche vorgesehen (§ 328 Verordnung der evangelisch-lutherischen Kirche)[43]. Wenn ein Mitglied der evangelisch-lutherischen Kirche einen Muslim oder Juden heiraten wollte, sollten die Kinder, die in der Ehe erzeugt werden, zum evangelisch-lutherischen oder orthodoxen Glauben gehören.

Auch unter der russischen Kolonialverwaltung konnte man die Eheschließung in zwei Teile gliedern – die Institute Verlöbnis und Ehe. Das Verlöbnis war eine zwingende Voraussetzung für die Eheschließung. Obwohl durch das Verlöbnis keine rechtliche Verpflichtung entstand, später die Ehe zu schließen, konnte die unschuldige, verletzte Partei Schadensersatz verlangen, wenn dem Verlöbnis keine Ehe folgte. Es war auch die dreimalige Proklamation in der Kirche drei Sonntage nacheinander notwendig, um die für die Kirche unbekannten, aber möglichen Eheverbotsgründe zu ermitteln. Gehörten die Personen zu verschiedenen christlichen Konfessionen oder wollte ein Christ eine Nichtchristin heiraten, brauchte man eine Bestätigung von dem Geistlichen, der das Paar nicht traute, dass keine Eheverbotsgründe bestanden. (Gewöhnlich wurden die Heiratsanträge auch in der Gemeinde proklamiert, zu der einer der Eheleute gehörte, in der aber die Trauung nicht stattfand).

Um eine Ehe zu schließen, war es notwendig, eine bestimmte Altersgrenze zu erreichen. Die orthodoxe Kirche und die evangelisch-lutherische Kirche bestimmten als Grenze der Ehemündigkeit für die Männer – das Alter von 18, für die Frauen das Alter von 16 Jahren (§ 3 Russisches Bürgerliches Gesetzbuch; § 317 Verordnung der evangelisch-lutherischen Kirche).

Die orthodoxe Kirche sah auch die höchste Altersgrenze für die Eheschließung vor – 80 Jahre[44]; nach dem Erreichen dieser Altersgrenze war es verboten, eine Familie zu gründen. Eine zwingende Voraussetzung für die Eheschließung war in der orthodoxen Kirche die Einwilligung der Eltern (wenn der Vater am Leben war, dann galt die

Einwilligung vom Vater) oder der Vormunde, wenn die Eltern verstorben, vermisst oder selbst Mündel waren (§§ 4, 6 Russisches Bürgerliches Gesetzbuch). Auch in anderen christlichen Konfessionen brauchte man traditionell die Einwilligung der Eltern. So verlangte zum Beispiel die evangelisch-lutherische Kirche die Einwilligung der Eltern bis zur Altersgrenze von 21 Jahren. Aber auch erwachsenen Kindern gegenüber konnten die Eltern ihre Einwilligung verweigern. Zu solchen Fällen gehörten: 1) dass der Sohn oder die Tochter eine Person heiraten wollte, die durch den teilweisen oder vollständigen Verlust ihres Standesrechts bestraft worden war; 2) dass bewiesen wurde, dass diese Person Alkohol missbrauchte, eine unanständige Lebensweise führte, ein Verschwender war oder andere Untugenden aufwies; 3) dass diese Person unheilbar an ansteckenden Krankheiten erkrankt war; 4) dass diese Person durch Beschimpfung oder in anderer ihrem Stand nicht angemessener Art ihre Eltern oder Großeltern oder die Eltern oder Großeltern der anderen Partei verletzt hatte und dies nicht verziehen worden war; 5) dass die Kinder ohne Einwilligung der Eltern einander geheim die Ehe versprochen hatten oder mit Gewalt versucht hatten die Einwilligung zu erhalten; 6) dass die andere Partei geschieden war und an der Ehescheidung schuld war; 7) dass die Partner einen erheblichen Alters-, Erziehungs- oder Ausbildungsunterschied aufwiesen (§§ 319, 321 Verordnung der evangelisch-lutherischen Kirche).

Die Eheschließung war auch wegen naher Verwandschaft oder Verschwägerung verboten; ebenso für das Adoptivkind mit dem Adoptivelternteil oder das Mündel mit dem Vormund, solange diese Beziehung bestand. Die Personen, die Zivil- oder Militärdienst leisteten, brauchten auch die Genehmigung ihrer Vorgesetzten. Konfessionell konnten noch andere Eheverbotsgründe bestehen.

Zum Beispiel verbot die orthodoxe Kirche, ohne erheblichen Grund mehr als drei Mal Ehe zu schließen (§§ 2, 21 Russisches Bürgerliches Gesetzbuch[45]). Die Angehörigen der evangelisch-lutherischen Kirche brauchten für die Ehe mit Muslimen oder Juden die Genehmigung des Konsistoriums. Die Evangelischen durften nicht Heiden heiraten (§§ 328, 329 Verordnung der evangelisch-lutherischen Kirche).

Daraus folgt, dass in der Zeitperiode von der zweiten Hälfte des XVI. Jh. bis zum Anfang des XX. Jh. in Lettland solche Ehen rechtlich anerkannt wurden, die durch eine kirchliche Trauung geschlossen worden waren.

5. Das Eherecht in der Republik Lettland (1918–1940)

Nach dem Ersten Weltkrieg änderte sich die Situation. Die Verfassungsversammlung der Republik Lettland bestimmte mit dem Gesetz vom 1. Februar 1921 die Freiheit der Ehe.[46] Seit dem Jahr 1921 war es möglich, die Ehe auf zwei verschiedene Arten zu schließen:

1. kirchlich;
2. nicht-kirchlich.

§ 24 Ehegesetz sah vor, dass „die Ehe im Standesamt oder von einem Geistlichen beliebiger Konfession nach dem Wunsch der Eheleute geschlossen werden kann“. Auch die in der Sowjetzeit geschlossenen Ehen wurden vom lettischen Staat anerkannt, wenn sie in den sowjetischen Behörden geschlossen und beim Standesamt registriert worden waren. Aber diese Ehen sollten nach der Eröffnung vom Standesamt wiederholt eingetragen werden. In dem Falle, dass die Eheschließung nicht durch eine Urkunde zu beweisen war oder die Beweise zweifelhaft waren, sollte die Geltung der Ehe vor dem Gericht bewiesen werden.

Dem Gesetz nach war die Ehe für die Männer bis zum Erreichen des 18. Lebensjahres verboten, für die Frauen bis zum 16. Lebensjahr (§ 2). Als andere Eheverbotsgründe galten nahe Verwandschaft oder Verschwägerung, die Minderjährigen sollten die Einwilligung der Eltern und im Falle, dass ihre Eltern verstorben waren, die Einwilligung ihrer Vormunde haben (§§ 3, 5, 8). Die Ehe war für die Geisteskranken und für die ansteckend an Geschlechtskrankheiten Erkrankten verboten (§ 4). Aber die früher von den geistlichen Gerichten anerkannten Eheverbotsgründe wurden nicht mehr als solche angesehen (§ 10).

Vor der Eheschließung wurde vom Gesetz eine Proklamation verlangt. Die Proklamation sollte im Wohnort beider Proklamierten durch eine Anzeige im Standesamt zwei Wochen vor der Eheschließung erfolgen (§ 15).

Bis zur sowjetischen Okkupation bestimmte das Zivilgesetzbuch Lettlands (*Latvijas Civillikums*)[47] vom 28. Januar 1937, das am 1. Januar 1938 in Kraft trat, die weitere Entwicklung des Eherechts. Das Zivilgesetzbuch Lettlands legte erstmals in der lettischen Geschichte die Konfessionen fest, die ohne besondere Genehmigung die Einwohner Lettlands trauen konnten. Zu diesen gehörten die evangelisch-lutherische, die römisch-katholische, die orthodoxe (griechisch-katholische), die bischoflich-methodische Kirche, die Reformaten-, Altgläubiger-, Anglikaner- und Baptistenkirche und die Geistlichen des Moses-Glaubens, die eine Erlaubnis entsprechender Konfession hatten (§ 51). Das Zivilgesetzbuch Lettlands erneuerte auf der Ebene des positiven Rechts das Verlöbnisinstitut, das nicht mehr im Ehegesetz vorgesehen war. Bei den Eheverbotsgründen folgte das Zivilgesetzbuch Lettlands der Tradition des Ehegesetzes.

6. Das Eherecht in der sowjetischen Okkupationszeit (in der klassischen Sowjetzeit) (1940–1990)

In den Jahren der sowjetischen Okkupation war ein bestimmter Regress des Eherechts zu beobachten. Der wuchs aus dem verfassungsrechtlichen Grundsatz über die Trennung der Kirche vom Staat.[48] So wurde vom Ehe-, Familien- und Vormundschaftsgesetzbuch der Russischen Sowjetischen Föderativen Sozialistischen Republik[49], das vom 26. November 1940[50] bis zum 1. Oktober 1969 (§§ 1, 2) in Lettland in Kraft war, und vom Ehe- und Familiengesetzbuch der Lettischen Sowjetischen Sozialistischen Republik[51] (§ 12) bestimmt, dass der Staat nur eine beim Standesamt geschlossene Ehe als gültig anerkannte.

Der Begriff der nichteingetragenen oder wirklichen Ehe bestand in Lettland vom 26. November 1940[52] bis zum 8. Juli 1944[53], als ein Dekret des Präsidiums des Obersten Rates der UdSSR in Kraft trat, dass nur durch die Ehe die Rechte und Pflichten der Ehegatten entstehen.[54] Das bedeutete, dass die bis zu diesem Zeitpunkt nicht eingetragenen Ehen legalisiert werden sollten, damit die durch diese Tatsache vom Gesetz bestimmten Rechtsfolgen eintreten,[55] z. B. die Erbfolge, Kinderunterhaltspflicht usw. War es wegen des Todes von einem der Ehegatten nicht mehr möglich, sollte die Tatsache der Ehe vom Gericht festgestellt werden. Nach dem 8. Juli 1944 wurde die faktische Ehe im sowjetischen Staat nicht mehr als legitime Eheform anerkannt. Auβerdem „[i]m [...] Familienrecht gilt der Grundsatz strikter Gleichberechtigung von Mann un Frau.“[56]

Nach dem sowjetischen Recht konnten volljährige Personen, d.h. die Personen, die das 18. Lebensjahr erreicht hatten, Ehe schließen. Es bestanden aber auch Ausnahmen. Eine Besonderheit des russischen Ehe-, Familien- und Vormundschaftsgesetzbuches war die Möglichkeit für Frauen, auch mit der Erreichung des 17. Lebensjahres die Ehe zu schließen (Bemerkung zum § 5). Auch das lettische Ehe- und Familiengesetzbuch von

1969 ließ im Ausnahmefall mit der Genehmigung des Exekutivkomitees der Volksdeputierten die Eheschließung von minderjährigen Personen zu – für die Frauen mit dem Erreichen des 16. Lebensjahres, für die Männer mit dem Erreichen des 17. Lebensjahres (§ 15).[57] Die sowjetische Gesetzgebung bestimmte keine Gründe für die Verminderung der Ehemündigkeitsgrenze. In der Praxis wurde die Ehemündigkeitsgrenze heruntergesetzt, wenn die Frau ein Kind geboren hatte oder ein Kind erwartete, um das reale Zusammenleben zu legalisieren.[58]

Außer der Altersgrenze bestanden im Sowjetlettland auch andere Eheverbotsgründe. Als solche galten (§ 16):

1. eine oder beide Personen hatten schon eine Ehe geschlossen (*in der Zeitperiode vom 26. November 1940 bis zum 8. Juli 1944 die wirkliche Ehe – J.L.*);
2. eine Person war nach dem Gesetz als geisteskrank anerkannt worden;
3. Verwandte der geraden Linie oder echte oder unechte Geschwister wollten die Ehe schliesen.

Anfang der 90er Jahre, nach der *De-facto*-Unabhängigkeit der Republik Lettland, wurde auch das sowjetische Eherecht außer Kraft gesetzt, und das Zivilgesetzbuch Lettlands von 1937 trat wieder in Kraft.[59] Nach einem halben Jahrhundert kehrte Lettland wieder in den europäischen Rechtsraum zurück.

Zusammenfassung

Für die Balten und die Liven, wie auch für andere vorchristliche Völker, war die Eheschließung kein sakraler Akt. Auch nach der Christianisierung wurde rechtlich bis zum Zusammenbruch des Livländischen Bündnisses nicht nur die nach der katholischen Tradition geschlossene Ehe, sondern auch die nicht-kirchlich geschlossene Ehe der Personen unterer Stände anerkannt, wenn die Ehe nicht aufgezwungen war, d.h. wenn der Grundsatz des freien Willens verwirklicht war. Das bedeutet, dass bis zu der zweiten Hälfte des XVI. Jh. die katholische Kirche nur die aufgezwungenen Ehen bekämpfte. Die Situation änderte sich nach dem Zusammenbruch Livlands. Von der zweiten Hälfte des XVI. Jh. bis zum 1. Februar 1921, als das Ehegesetz der Republik Lettland verabschiedet wurde, wurde staatlich nur eine in der religiösen Zeremonie geschlossene Ehe anerkannt.

Der größte Teil der Einwohner Lettlands war nach dem Zusammenbruch Livlands evangelisch, mit der Ausnahme von Latgalien, wo die Restitution der katholischen Kirche folgte. Deshalb kann man über konfessionell unterschiedliche Trauungstraditionen im XVI.–XVII. Jh. sprechen. Nach dem Übergang der lettischen Gebiete an Russland wurde die orthodoxe Kirche zu der allgemein anerkannten christlichen Konfession im Baltikum. Das Gesetz über die Ehe von 1921 erneurte das Recht, nichtkirchlich Ehe zu schließen. 1937 fixierte seinerseits das Zivilgesetzbuch Lettlands alle Konfessionen, die berechtigt waren, ohne besondere Genehmigung ihre Angehörigen zu trauen. Ein gewisser Rückschnitt des Eherechts folgte nach der sowjetischen Okkupation, als nur eine beim Standesamt geschlossene Ehe staatlich anerkannt wurde. So wurde der Umfang des Eherechts erheblich enger. Gleich nach der Erneuerung der Unabhängigkeit Lettlands wurde auf das sowjetische Eherecht verzichtet.

Historisch ist die Eheschließung (mit Ausnahme der Sowjetzeit) in zwei Teile zu gliedern – das Verlöbnisinstitut und das Institut der Ehe. Das Verlöbnis verpflichtete traditionell die Parteien nicht, später eine Ehe zu schließen, obwohl die unschuldige und verletzte Partei das Recht hatte, einen materiellen Schadensersatz zu verlangen.

Zu den klassischen Eheverbotsgründen wurden in Lettland folgende Gründe: die Eheunmündigkeit, nahe Verwandschaft und Verschwägerung. Auch die Ehe zwischen dem Mündel und dem Vormund während des Vormundschaftsverhältnisses, die Ehe mit einer geisteskranken Person und die Doppelehe waren verboten.

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Normative Akte

1. Valdības formula Kurzemes un Zemgales hercogistē: Kurzemes hercogistes likums, spēkā neesošs. *Grām.: Latvijas tiesību avoti. Teksti un komentāri. 2. sējums*. Rīga: Juridiskā koledža, 2006. – 210.–220. lpp.
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Summary

The publication concerns the genesis and evolution of marriage law in Latvia from the 10th to 13th century AD to the 1980s, that is, the time of Soviet law.

The essay addresses the thesis that the evolution of marriage law was closely linked to processes in Europe as a whole and to the peculiar geopolitical status of the Baltic. Therefore, from the start of modern times, one can speak of inter-confessional tolerance in the Baltic, but from the post-World War I period (from 1918), also of the peaceful coexistence of religious and atheist views on matters of marriage law.

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Problematic Aspects of Positioning Criminalistics in the System of Scientific Knowledge

Problemātiskie aspekti, nosakot kriminālistikas vietu zinātnisku zināšanu sistēmā

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The article deals with different levels of knowledge on criminalistics. The methodological and logical aspects of positioning criminalistics in different systems of knowledge and of practical activities are also analyzed in the article. It is concluded that the historical tendencies of the development of criminalistic knowledge allows discerning two main directions of the development of today's criminalistics.
Keywords: Criminalistics; science of criminalistics; systematical methodological science.

Table of contents

Introduction

In accordance with the values of a democratic society, the most optimal way to investigate a crime is by using scientific means and methods. This necessity caused the origin and development of criminalistic science**.**

What is criminalistics? Everybody could give the answer to this question. Nearly all the answers will be different, and each of them will be right in some respect.

More than a 100 years ago, H.Gross (Hans Gross, 1847-1915) introduced the term "criminalistics". The concept indicated by the term was a subject of interest and curiosity for a wide range of population through many generations during these years. The representatives of applied criminalistic knowledge were perceived as persons of outstanding competency.

Levels of understanding of criminalistics

Historically criminalistics as a concept have developed in four levels (meanings). The well-noted content of the concept "criminalistics" on each level (in each meaning) was generated by Gnostic task; it not only created this meaning of the concept, but also positioned it in the conceptual system of thinking of a particular person.

On the first level of knowledge, the concept "criminalistics" appears in the so-called 'household conception'. This conception is held mainly by the persons without special education and persons who are not involved in investigation of criminal offences on a professional level. Their opinion is based on their own impression from being victims or witnesses of a criminal offence or giving evidence in an investigation of criminal offence or relying on the impressions of other people. The content of such conception about criminalistics is filled mainly by rumours, guesses, etc. Pretty often the stories about knowledge in criminalistics for these people begin with: "I was told by an investigator (detective)…", etc.

On the second level of knowledge on criminalistics, the concept "criminalistics" appears as it is formed by the representatives of different branches of arts (detective stories, novels, sometimes, the reminiscences of former policemen and prosecutors, detective movies, etc.). The main subject of arts is the opposition between the criminals and the police or prosecutors or private detectives, similar to opposition between good and evil. It should be noted that positioning heroes of detective movies or novels as crime investigators is the means for solving primarily artistic issues, but it does not disclose the scientific basis for investigation of criminal offences. As the most popular representatives of the detective genre in literature, A.Connan Doil, G.Simenon, J.L.Fleming, brothers Vainer, A.Marinina, A.Bels, and others should be mentioned. The characteristic feature of this level of knowledge on criminalistics is that there are no borders between the impossible and reality; fiction substitutes the reflection of objective reality. This level of knowledge about criminalistics gratifies people's desire for insubstantial perception of their surroundings.

The third level of knowledge on criminalistics is based on information represented in popular science publications. The characteristic feature of these editions is their simplified scientific nature, fuzzy terminology, and clearness and evidence of an observable effect when applying this kind of knowledge. The main goal of such popular scientific publications is to popularize the application of scientific knowledge in the field of investigation of criminal offences, as well as to enhance trust in the results obtained by using scientific methods in criminalistics, for example, the publications by J. Torvald, the TV series "Forensic Science", "Forensic Detectives", "Crime Night", "Material Witness", etc. These sources are accessible for people with different education levels and they outline the essence of some scientific ways and means used during the investigation of criminal offences.

Finally, the concept "criminalistics" can be understood as a logically organized system of scientific knowledge which describes and in a definite way explains the process of investigation of criminal offences. Such a system normally is called the science[1] of criminalistics. Other meanings of the concept "criminalistics", for example, criminalistic activity, complex of recommendations, etc., are derived from the meaning of "science of criminalistics".

The possibility that many meanings of some concepts could appear was formulated by the American philosopher F. Frank (Filipp Frank, 1884-1966). He wrote that every youngster during his education obtains some understanding of world apprehensible for the everyday common sense. The understanding of world obtained during childhood

and teenage days remains too often the basis for everyday common sense also for the grown-up scientist in all the areas in which he is not a "specialist".[2]

The origin of criminalistics

Criminalistics came into being from the depths of criminal proceedings in the middle of the 19th century. Its main task at that time was to provide the criminal procedure with information, on the basis of which it was possible to judge objectively about the circumstances of an event. Later it allowed allocating the right qualification of an event according to the legal provisions of criminal law.

At the end of the 19th century, the investigation experience was summarized. The result of summarizing was the publication of the Austrian criminalist H.Gross (Hans Gross, 1847-1915), "Handbook for Court Investigators as the System of Criminalistics" (Handbuch für Untersuchungsrichter als System der Kriminalistik). This book was the result of summarizing the experience of Austrian court investigators and is considered to be the beginning of the development of criminalistics. The title of the book explicitly shows the nature of the included information and the peculiarity of exercising it. The content of the H. Gross' book, as well as the content of other publications of that kind, mainly was practical knowledge and recommendations necessary for the work of investigators and experts during the investigation procedure of criminal offences.

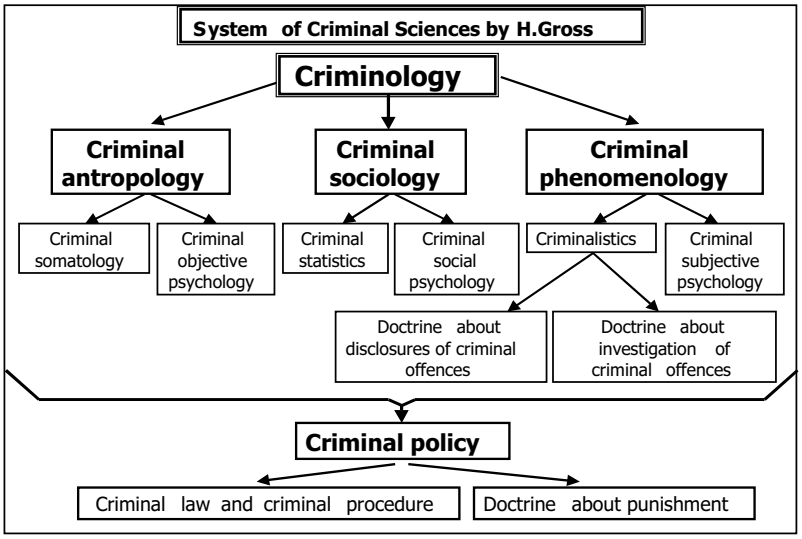
Later special units (institutes, laboratories, resource rooms, etc.) were established by the executive power (Ministry of the Internal Affairs, prosecutor's offices, etc.) with the aim to summarize intensively the experience of the practical application of criminalistic knowledge. The main task of these units was summarizing the practical experience during the investigation of criminal offences and developing practical recommendations aimed at the optimization of the investigation procedure of criminal offences. The results of this work of the Ministry of the Internal Affairs and prosecutor's office's institutes, laboratories, and resource rooms resulted in training aids, bulletins, guidelines, instructions, etc.

In this way, criminalistics was used for practical activities and professional education for a long time. This fact makes it clear why criminalistics was not and is not included in the educational programs of many universities of Western Europe and the USA – for the reason that until now criminalistics is not developed enough as a scientific theory, and it is common knowledge that academic approach employs theoretical knowledge.

Different approaches to the positioning of criminalistic knowledge

The practical attitude of people to the exterior world is a definite value and has a systemic nature, therefore the results of individuals' cognition have to have certain unity and entirety.[3] This puts on the development of criminalistics orientation taking into consideration of which provide for criminalistics to develop as the system. This system, in turn, has to pass for a more general system. This could be achieved by making theoretical knowledge absolute and using deductive methods to ground on this knowledge.[4]

The positioning of criminalistics in the system of scientific knowledge was started by H. Gross, and it is still going on. H. Gross positioned criminalistics in the system of criminology and represented it as the system consisting of two sub-systems: The doctrine about the disclosure of criminal offences and the doctrine about the investigation of criminal offences.[5]



During more than a hundred of years, the development clarifying the basic elements (the object of cognition, the topic of cognition, the subjects of cognition, the methods of cognition, etc.) of criminalistic cognition process has taken place. It is reflected in the positions of scientists from different states on the system of criminalistics, as well as on the system of knowledge including criminalistics. Due to different circumstances (notions about the world, political, social circumstances, etc.), contemporary conception about the science of criminalistics varies in many states. This fact is determined by the multifactor dependence of scientific cognition on all the social environment in which a scientist lives and works.[6] The historically individual development of Europe during the 20th century is reflected in the situation that today there are two substantially different opinions about the system of knowledge criminalistics has to be included in.

Seeking for an optimal classification of today's scientific knowledge about the investigation of criminal offences has lead scientists to two essentially different attitudes. The first attitude is based on the opinion that criminalistics has to be included in the system of scientific knowledge as a scientific theory. It means that criminalistics has to be part of scientific system, id est, has to be totality credible, logically consistent knowledge about a definite sphere of reality.

In the former Soviet Union, the efforts to give criminalistics an academic, id est, a strong scientific nature, were carried out at the beginning of the 50s of the last century. The first essential task was the task to investigate the nature of criminalistics in order to position it right in the system of scientific knowledge. During this process, 3 basic hypotheses were put forward:

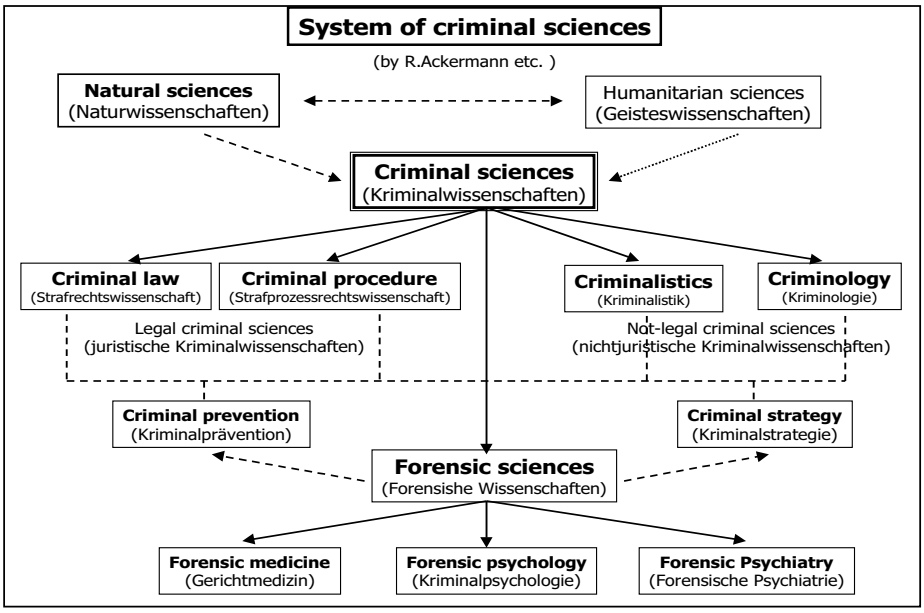
1) Criminalistics is a technical science. This opinion was expressed by the Russian criminalists G. Manns, J. Zicer, M. Strogovich, M. Chelcov, and others. Many Western European scientists agree to that. It explains the fact that criminalistics is not included as a subject in the universities' curricula, but is only a subject in educational establishments of police force.
2) Criminalistics is a dualistic (technical – law) science. The idea that criminalistics has a double nature (natural sciences and criminal law) was developed during the 50s of the last century. The main representatives of this theory were P. Tarasov-Radionov, N. Polansky, N. Vidrja, M. Ljubarsky, N. Dzhangeldin, A.Shljahov, and others.[7]

3) Criminalistics is a law science. Some Russian scientists developed this idea at the beginning of the 50s of the last century. Thanks to S. Mitrichov, A. Vinberg, G. Karnovich, V. Tanasevich, and others, the basic idea was formulated in 1952.[8] In later years, much attention to support this opinion was paid by N. Selivanov, V. Koldin, N. Jablokov, V. Obrazcov, A.Eksarhopulo, and R. Belkin. Today the points of view of some researchers who construct their opinion mainly on the "observation" formulated by R. Belkin[9] do not have a steady foundation.

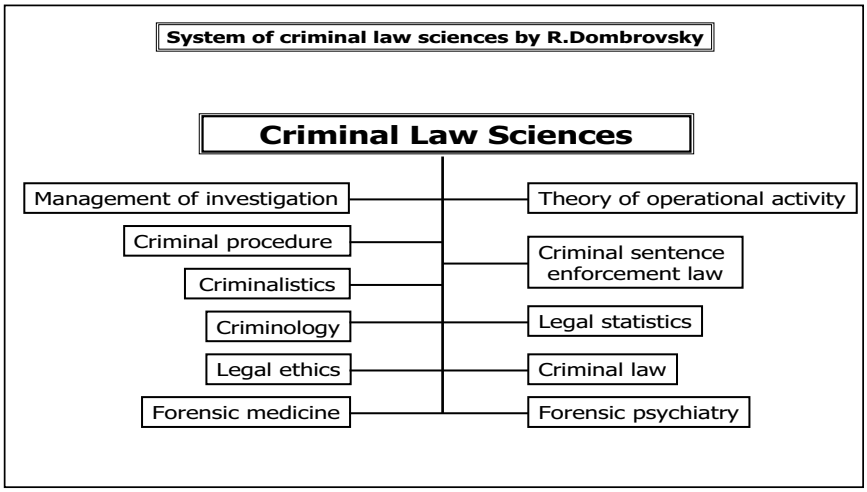
Each of the three viewpoints about the nature of criminalistics had the rights to exist and they appeared during a specific historical period; each of them in its essence defended the view of criminalistics as science during a definite period of time. The insufficient argumentation of the supporters of each viewpoint is due to lack of positioning criminalistics in one or another system of sciences.

Other, substantially different, approach to positioning criminalistics in the system of scientific knowledge is is concerned with establishing more substantial links with other sciences; these links become apparent during the process of investigation of criminal offences. "Observation" of the practical activity of the investigation of criminal offences was established as the basis for this approach. As a result of this approach, many versions of building up scientific knowledge systems in which criminalistics has its own place are coming into being.

In a process of prolonged discussions, researchers from Germany R. Ackermann, C. Koristka, R. Leonhardt, R. Nisse, and I. Wirth have come to the conclusion that criminalistics has to be included in the so-called criminal sciences branch.[10] The presumption about system of sciences, knowledge of which is used during combating crime, formed the basis for the conclusion about the existence of the above mentioned branch, as well as about its relations with other scientific branches. However, the dichotomic division (law and non-law) of criminal sciences proposed by the German colleagues does not clarify the scientific nature of criminalistics enough.



R. Dombrovsky, speaking about criminalistics as a kind of practical activity, also speaks about the existence of the so-called system of criminal law sciences. In his opinion, the system of criminal law sciences consists of criminal law science, legal ethics, criminal procedure science, criminalistics, the theory of operational activities, criminology, legal statistics, forensic medicine, forensic psychology, forensic psychiatry, sentence enforcement law science, and science of the management of investigation.[11]



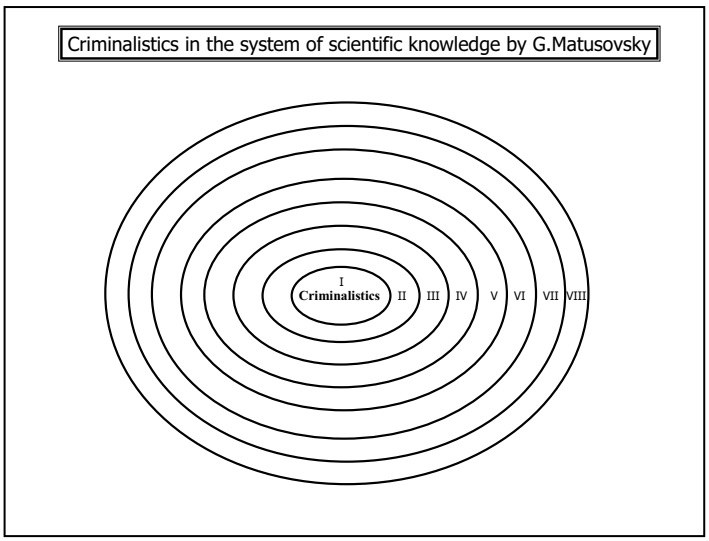
The basis for such system of scientific knowledge, in R. Dombrovsky opinion, is the form of realization of criminal-judicial relations. In its turn, criminal-judicial relations are established by way of practical activities, for example, criminal-procedural, criminalistic, operational, sentence enforcement, psychological activities, etc.[12]

There are also other different opinions on the nature of criminalistics and it's positioning in the system of scientific knowledge. For example, Russian criminalist M. Kaminsky has come to a conclusion that criminalistics is a legal branch of administration science; its field of research is the regularities of reflection-information processes achieving its goal (administration) during the interaction of criminal activity and the activity to solve and investigate crimes. Thus, according to the author, the system of criminalistics is a reincident system.[13] This opinion is innovative and therefore is not being widely referred to.

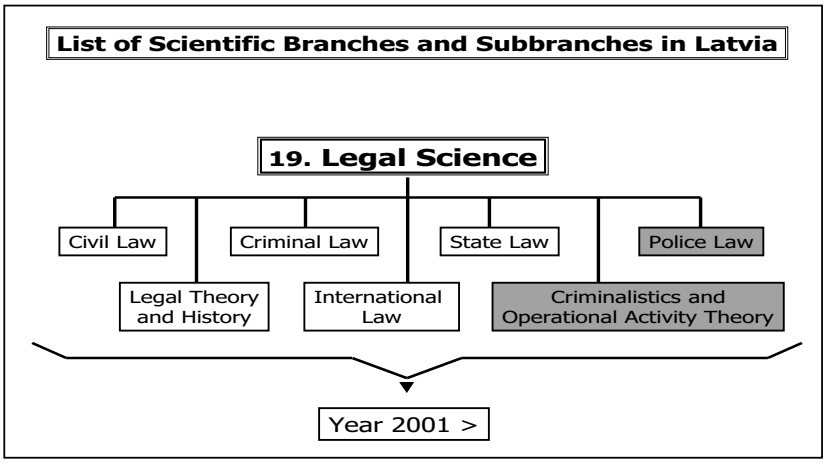
Positioning criminalistics in the system of scientific knowledge, an inductive position is taken by Ukrainian criminalist G. Matusovsky. In his opinion, system of scientific knowledge could be characterised as a geocentric system, in the center of which criminalistics is positioned. When explaining the essence and necessity of such a structure of the scientific knowledge system, G. Matusovsky has pointed out that the given system reflects a many-sided interscientific interaction, in the center of which should be a separate branch of science, concerning which the scheme is built.[14]

Dividing the "area of sciences" into sectors, G. Matusovsky has given the following comments for each sector:

I – criminal law sciences;
II – general theoretical and other legal sciences;
III – VI – sciences serving the legal sphere;
VII – legal sciences;
VIII – sciences about political and legal superstructure.[15]



The positioning of criminalistics is also affected by the existent classification of sciences in a particular national scientific community. At the beginning of 2001 in Latvia scientific community a crucial event took place. By the decision of Latvian Council of Science No.2-3-1 (March 13, 2001) "About the formation of new subsections in the legal sciences branch", a subsection of legal sciences "Criminalistics and operational activity" was fixed de jure.



The originator of the proposal, A. Kavalieris, has formulated his position as follows: "Criminalistics and theory of operational activity studies the regularities of the formation of criminals, exposing evidence and information necessary to find them, and on the basis of cognition of them these theories develop new, European level methods and means for finding, fixing, examining, apprising, and using in proving this evidence and information". Here one can see that a voluntary takedown of the borders between criminalistics as a science and operational activity has taken place. The necessity of such approach is based by A. Kavalieris on the usual practice of European states.[16]

(latviešu valodā – "ar **it kā** Eiropas valstu praksi", jo faktiski jau tādas prakses zinātņu grupēšanā Eiropā nav)

Operational activity is a practical activity, and the nature of operational activity is determined by political operational activity (Russian – *политический сыск*). The history of political operational activity coming into being is directly connected with the history of rising one or other kind of power (power of strength, power of governor, state power, etc). Course of scientific development along the name theory of operational activity violates historically established principles of science as social phenomena. Similarly, the formation of a subsection of legal sciences "Criminalistics and theory of operational activity" could be defined as an obstruction in the development of criminalistics. It is doubtful whether the basic traditional means of operational activity cognition – slyness, occurence, and money[17] – are scientific means. Analyzing the content of operational activity, Russian criminalist R. Belkin has mentioned that ""technolization" of operational activity does not mean refusal of the traditional means and ways of the realization of operational activity: Making use of police dogs, covert surveillance applied by officials of operational police (informants of operational (criminal) police), the usage of covert informants from the circles of criminals and other persons."[18] The main methods of operational activities could be defined in their essence as bugging, covert surveillance, provocation of people, etc. Such methods of scientific cognition the history of science has not developed and it is doubtful that it will. These methods in their content and form are not in line, first and foremost, with human rights defined by the basic principles of any democratic society.

Conclusions

The above mentioned circumstances lead us to conclude that the establishment of a new subsection in legal sciences system, "Criminalistics and theory of operational activity", means and methods of cognition of which are slyness, money, and occurrence, bugging and covert surveillance, provocation of people, etc, is a failure with domino effect for the legal science in Latvia.

Finally, it should be emphasized that the historical tendencies of the formation of criminalistic knowledge lead us to formulate the two main directions in the development of criminalistics: 1) Purposeful summarizing of the investigation experience of criminal offences by scientific methods and means with the aim to create more effective means and ways for a contemporary criminal offences investigation, id est, a direction to a utilitarian attitude to scientific knowledge. Following this direction of development of criminalistics, disclosure of different traditions and opinions about specific features when using separate means and ways, as well as on criminal offences investigation overall, is possible; 2) A direction of a purposeful work on the development of the theory of criminalistics, which will be carried out in the future in order to describe and explain the sphere of reality related to criminal offences investigation. This direction of the development of criminalistics is a guideline to the perfection of knowledge in the area of applying criminal-legal regulations.

Summary

Historically criminalistics as a concept have developed in four levels (meanings). The well-noted content of the concept "criminalistics" on each level (in each meaning) was generated by Gnostic task; it not only created this meaning of the concept, but also positioned it in the conceptual system of thinking of a particular person. Due to different circumstances (notions about the world,

political, social circumstances, etc.), contemporary conception about the science of criminalistics varies in many states.

Seeking for an optimal classification of today's scientific knowledge about the investigation of criminal offences has lead scientists to two essentially different attitudes. The first attitude is based on the opinion that criminalistics has to be included in the system of scientific knowledge as a scientific theory. It means that criminalistics has to be part of scientific system, id est, has to be totality credible, logically consistent knowledge about a definite sphere of reality. Other, substantially different, approach to positioning criminalistics in the system of scientific knowledge is is concerned with establishing more substantial links with other sciences; these links become apparent during the process of investigation of criminal offences. The positioning of criminalistics is also affected by the existent classification of sciences in a particular national scientific community.

It should be emphasized that the historical tendencies of the formation of criminalistic knowledge lead us to formulate the two main directions in the development of criminalistics: 1) Purposeful summarizing of the investigation experience of criminal offences by scientific methods and means with the aim to create more effective means and ways for a contemporary criminal offences investigation, id est, a direction to a utilitarian attitude to scientific knowledge. Following this direction of development of criminalistics, disclosure of different traditions and opinions about specific features when using separate means and ways, as well as on criminal offences investigation overall, is possible; 2) A direction of a purposeful work on the development of the theory of criminalistics, which will be carried out in the future in order to describe and explain the sphere of reality related to criminal offences investigation. This direction of the development of criminalistics is a guideline to the perfection of knowledge in the area of applying criminal-legal regulations.

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Kopsavilkums

Rakstā aprakstīti dažādi zināšanu līmeņi par kriminālistiku. Autori analizējuši arī kriminālistikas vietas noteikšanas loģiski metodoloģiskos aspektus dažādās zināšanu un praktiskās darbības sistēmās. Rakstā secināts, ka vēsturiskās kriminālistisko zināšanu veidošanās tendences ļauj formulēt divus galvenos kriminālistikas attīstības virzienus mūsdienās.

Резюме

В статье рассмотрено проявление криминалистики как понятия четырех уровней. Авторы также анализируют логико-методологические аспекты олределения криминалистики в системе научного знания. В статье отмечено, что исторические тенденции формирования криминалистических знаний позволяют выделить два основных направления развития криминалистики.

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Dissenting Opinion and Other Subsidiary Sources af Law as Creators of Legal Idea in the Period of the Legal System Collapse

Tiesnešu atsevišķās domas un citi tiesību palīgavoti – tiesiskās domas veidotāji tiesību sistēmas lūzuma periodā

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The publication is devoted to the study of the dissenting opinion and other subsidiary sources as a subsidiary legal source. The author of the article has come to the conclusion that the dissenting opinion of judges forms an independent runaway among the subsidiary legal sources. It adjusts legislation and takes the form of the indicator of the change in court practice (case-law) by offering a constructive criticism to the majority opinion and that of initiator by significantly influencing further practice. Furthermore, the dissenting opinion of judges interactively influences the law theory and practice as a constituent part of the development of the judge made law.

Keywords: law theory, court practice, judicature, doctrine, dissenting opinion.

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Introduction

The subsidiary legal sources (or secondary legal sources) are as follows:

court practice (judicature), law science (doctrine), materials for designing laws and regulations [1].

In the report it must be found out what the role of the individual (dissenting) opinion of judges is as well as its connection and place among the subsidiary legal sources.

The legal culture is to be percieved as a reflection of mental and material social useful values in the legal life and way of thinking ... (as a part of general culture) one of the expressions of which is the professional legal culture [2].

Besides the legislator perceives the spirit of its age through the legal consciousness and reflects it in the legal acts.

The legal consciousness relates to the legislation, surrounding events, law-enforcement institutions, self-assessment and value orientation in a gnostic, evaluating and regulative way. Furthermore, in the legal consciousness widely binding conclusions and their comments are stored.

The author fully shares the opinion of the judge of the European Court of Human Rights Boštjan M. Zupančič that for the purpose of the transparency of law enforcement the publishing of individual opinions plays a significant role: "Moreover, as a result of publishing individual (also affirmative) opinions attention is paid to the flaws in the considerations of the majority of judges that have been included in the court judgement" [3].

Genuinely useful conclusions are stored in the theoretical legal consciousness that represents a source for making laws (as it has been indicated by Hegel – nothing is as practical as good theory) as well as in the professional legal consciousness (*the ability to apply the acquired knowledge and enforce* a legal norm).

Both expressions of legal consciousness simultaneously influence and store the analysis and criticism of judgements. This facilitates the improvement of the judgment quality and the formation of a unified judicature.

The doctrine interpretation may also be included in individual opinions (*the Election case* of the Constitutional Court) [5], as well as in judicature (the majority opinion in the *Election case*) and as the prevailing opinion strongly influence all three previously mentioned subsidiary sources.

This mutual interaction has feedbacks that allow the individual opinions of judges approach the status of the subsidiary legal sources.

Besides the legal system maintains the link with the reality through the legal culture which deals with the assessment of the disagreements among the individual opinions of judges, for example, the discussion on the ethics in the human rights dimension in the individual and majority opinion in the *Election case*.

European Court of Human Rights and Dissenting Opinions

When considering selectively the dissenting opinions of the judgments of the European Court of Human Rights as the alterators of the court practice direction in the future it must be concluded that the predicting of the result in a similar case is becoming less certain in comparison with the previous trends in judicature.

For example, in the case *Airey v. Ireland* (Judgment of 9 October 1979) the majority opinion states that the applicant was not provided with effective rights to appeal to the Supreme Court to maintain the legal separation claim. Ireland had been obliged to safeguard effectively the family and private life in this situation. In the constructively critical dissenting opinions (one of the thesis: *the European Convention on Human Rights and Fundamental Freedoms*, hereinafter Convention, does not provide for free-of-charge legal aid in a civil case) where, for example, judge O'Donoghue states that the breachs of Articles 6, 8, 14 and 13 have not taken place in the particular case and indicates that the reference to the "vagrancy" case is not in place as in the case the court inactivity has not been found and the court has been accessible. The case circumstances are said to

differ from the Golder case as Mrs Airey has not been placed any obstacles or other bans regarding ensuring the legal representation in a civil case and coverage of expenses.

Also the opinion of judge Tor Williamson regarding whether the government has to provide financial assistance in connection with the breach of the respective articles of the Convention is renunciative in relation to the applicant. The judge indicates that in the argumentation of the application the reference to the case *Klass and others* would suit better and the breach of articles 6, 8, 14 and 13 of the Convention has not taken place in the particular case.

Concerning the same case judge Evrigenis considers that in relation to the analysis of rights provided for by article 8 of the Convention it is not possible to detect a breach and the case materials indicate that the case is not to be related to this article in substance.

The dissenting opinions of judges in this case largely explain the application of the Convention provisions and interpretation in connection with the potential change of judicature in the future relating this to the case *Golders vs the United Kingdom* where the court has judged that the rights to apply to the court are not absolute and can be restricted only as far as they are not deprived in their substance.

The dissenting opinion of the judge Valtikos in the case *Kokkinakis v. Greece* (judgment on 19 April 1993) regarding the propagation of one's faith and the substance of article 9 of the Convention and the assessment of the case state of affairs states that the freedom to devote oneself to one's faith or beliefs both in solitude as well as together with others … does not represent an attempt to continuously fight and change the faith of others, influence their minds with active and often not motivated propaganda. It is meant to ensure religious peace and tolerance rather than allow religious fights and even wars because particularly in the time when many sects manage to tempt simple and naïve souls with dubious means. He adds that even if the Chamber considers this not to be the goal, in any case it represents the direction where the majority opinion can lead. (The majority expressed the opinion that the sentencing of the applicant has not been socially necessary and the action of the state is not to be considered commensurate for achieving the legitimate aim and the breach of article 9 of the Convention has taken place).

This represents a very serious criticism of the majority opinion implying that the court judgment gives rein to proselitism – with the only condition that it is said not to be unacceptable. The judge questions whether the Convention may allow this kind of intervention in the human belief even if the intervention does not take place by force.

The combined dissenting opinion of the judges Foighel and Loizou that … the efforts of some fanatics to convert others to their belief by using unacceptable psychological methods that in fact lead to coercion to our mind cannot be subsumed under the natural framework of the notion propagation in part 1, article 9 and deny that the breach of article 9 of the Convention has taken place [6].

It is possible that these dissenting opinions of the judges to a large extent influenced the direction of the judgement in the case Valsamis v. Greece; (judgment of 18 December 1996**)** in relation to the interpretation of the notion "religious freedom" and the limits of the state responsibility *(Substance of the case: exclusion from school for one day for not participating in a parade due the religious beliefs of the pupil and her parents)* [7].

Mutual influences can be observed in dissenting opinions in cases (in relation to serious debates on choosing the precedents for the case argumentation; ECHR judgment of 8 July 2003) *Hatton and others v. United Kingdom,* Hethrow night flight case, article

13 of the Convention (judges Kosta, Turmen, Zupančič) as well as *Ezeh and Connors v. United Kingdom* regarding prison disciplinary procedures (ECHR 9 October 2003), judges Pellonpaa, Zupančič, Maruste and others regarding the attributability of disciplinary procedure to article 6 of the Convention [8].

Thus, for example, as the researcher of the Faculty of Law of the West Indian University Margaret De Merieux indicates that namely the dissenting opinions in the *Balmer- Schafroth* case outlined the ways in the area of alieniation of new rights in connection with the application of the environment law principles – how rights become subjective rights.

In the minority dissenting opinion in the *Balmer - Schafroth* case the instructions were presented how the international environment law principles (sustainable development, environment protection, good management etc.) with the court mediation as a continuous international creation of legal norms can be used in promoting the ECHR interpretation as well as further development of the rights [9].

The Convention does not envisage these rights, however in the above-mentioned case the authors of the dissenting opinions progressively used the international principles of environment law for the alienation of the subjective human rights and the interpretation of the contents of articles 6 and 8 of the Convention.

Consequently we can state that the ECHR interpretation of the Convention depends on the willingness of judges to oppose the previouws trends in judicature. The prevailing opinion is gradually developing from sufficiently persuasive minority opinions and is becoming a subsidiary source for further argumentation. Genuinely well argumented individual opinions help interpret legal norms and derive new rights (further development of rights).

Constitutional Court of Latvia and Dissenting Opinion of its Judges

There are not very many dissenting opinions in the judicature of the Constitutional Court of Latvia. However, from 1997 up to now individual thoughts in six cases have been published. Chronologically listed they are the individual thoughts of judges Aivars Endzins, Juris Jelagins and Anita Usacka in case no. 2000-03-01 "On the Compliance of points 5 and 6, section 5 of the Law on Parliamentary Election and points 5 and 6, section 9 with the articles 89 and 101 of the Constitution of Latvia, article 14 of the European Convention on Human Rights and Protection of Fundamental Freedoms and article 25 of the International Pact on Civil and Political Rights", where the opinion is expressed that one of the proportionality components of a legitimate goal is a social necessity that according to the judges has not been assessed in the judgment. In their dissenting opinions the judges indicate that in their opinion the proportionality of the applied levers and the goal (the kinds of threat to the democratic state system, national security and territorial integrity). In the dissenting opinions references to the ECHR judicature in the Dadgeon case (1981), Handyside case (1976), (legitimate goal of the restriction proportionality), Barthold case (1985) in relation to the notion "pending social necessity" are extensively used.

The reference to the particular judgment is mentioned as arguments (from the minority opinion) in the speech of the deputy Agesin regarding the amendment to section 17 of the Law on the Storing and Use of the former KGB documents and finding the fact of the collaboration with the KGB" (the deputy believes that the aim of the legal norm is connected with unproportional restriction to run for the election) [10].

"However, in adopting the Law on the Election of the European Parliament the legislator has been led by the conclusions of the judgement in the Election case of the Constitutional Court of Latvia and has not envisaged the restriction of the passive election rights to the persons who have collaborated with the KGB" [11].

This is how the interaction between the judgement and dissenting opinions might influence also the creation conditions and documents of another legal norm.

The author believes that in case of the Election Law the argumentation of the majority opinion regarding the above-mentioned restriction of election is strengthened by the court substantiation announced in Podkolzina's case (Judgement of 9 April 2002 "I. Podkolzina v. Latvia") that regarding section 3, Protocol 1 any election law is always to be assessed in the light of the state political evolution as unacceptable regulations in one system may justify themselves in another system. This manoeuvre possibility that is recognized in relation to the state, however, is restricted by the duty to follow the core principle of article 3, i.e. "free expression of the people's opinion, in choosing the legislature" (see the judgement in the case Mathieu-Mohin and Clerfayt, 54th paragraph) [12].

In *the State Secret case* [13] judge Anita Usacka in her individual opinion motivates why the words of the legal norm "probationary materials" do not comply with the rights envisaged by article 92 of the Constitution of Latvia to a fair court. In the same case judge A. Lepse motivates in his dissenting opinion that words of section 11 "the decision of which is final and not to be reversible" does not comply with the rights guaranteed by article 92 of the Constitution of Latvia to a fair court.

In two cases [14] judge A. Lepse motivates his dissenting opinion with the unacceptability of the *action popularis* idea in the development of the judicature of the Constitutional Court of Latvia.

The expression of the legal culture and simultaneously a significant contribution to judicature and law science, persuasively motivated as interpretation of the legal norms of the Law on Constitutional Court is the dissenting opinion of judge Juris Jelagins in case "On the Compliance of Section 114.2 of the Code of Administrative Breaches to the Convention on Facilitation of International Maritime Traffic" of 9 April 1965. In his dissenting opinion the judge has deeply analyzed the place of the particular international agreement in the hierarchy of legal norms and indicates that the challenged legal norm and the Convention have equal legal force and, consequently, the assessment of the compliance of the legal norm to the Convention does not fall in the competence of the Constitutional Court of Latvia. The opinion is motivated by the German Law Doctrine (Lutz Treder) and the judicature of the Constitutional Court of Lithuania (judgment of 25 April 2002).

From the study of the aspects of the dissenting opinions of the judges and judicature expression the author concludes that these dissenting opinions to a large extent influence the application of the legal norms and represent an orienting medium in rights, they contain conclusions of abstract character connected with a rather high standing court institutions as well as with the reputation of the judge among law scholars and practitioners.

Pilot Judgement of the European Court of Human Rights and Subsidiary Sources

The introduction of the pilot judgement institution of the European Court of Human Rights provides a new classification possibility in connection with the significance of the secondary sources in the conditions of the transformation of higher level systems.

(Protocol 14. European Constitution, alternation of the terms for receiving an application (criterion – big losses) and future visions of priorities – the issue of law or an individual [15]. Since 2004 the European Court of Human Rights has assumed in its practice the so-called pilot judgement procedure that started with the case *Broniowski v. Poland* [16] which indicated that the state has serious problems regarding the system and several tens of thousand similar applications might be expected regarding the dysfunction of the system of the housing policy and the state was free to choose the way it was going to fulfil its obligations.

Also the case Hutten - *Czapska v. Poland* [17] suggested that other applications had to be put aside and the Court had to wait for the position of the state programme and the defendant state has to provide for the mechanism in its own legal procedure that in line with the principles of property right protection envisaged in the Convention would maintain a just balance between the interests of the land owners, their rights to gain profit from their property and the general interests of the public, including sufficient availability of housing for the poor.

Here we must also mention the judgement in the case *Lukenda v. Slovenia*[18], which was the first to find the problem of the system regarding the duration of the court proceedings in Slovenia when five hundred similar cases were still to be examined.

In connection with finding a flaw of the system and the existence of a uniform structural cause the reaction of the executive power followed – the reaction of the Committee of Ministers of the European Council of 12 May, 2004 (DH Res.2004/3) that required the Court to specify how to execute the judgement.

The above-mentioned type of the judgement can be classified as pilot case law(judicature) as it arises from the "pilot case", although it has been created based on the procedural need, and assigns a task to the national state (Legislature, executive power) to eliminate the flaws of the system so that in future it could provide an answer to a gathered issue of law. However, the Author believes that it would be better to keep its initial title - the pilot judgement as it possesses a dual nature (simultaneously it also possesses the quality of an independent source). Moreover, the idea of the pilot judgement is answering a positioned constitutional problem rather than an individual issue of law. That might possibly add to the classification in the law science.

The Turning Point of the Legal System, Dissenting Opinions of Judges and Other Subsidiary Sources

Can the transformation processes of the legal system in Latvia from 2004 to 2007 be considered the expression of the crisis of the legal system and a turning point?

The Judge of the European Court of Human Rights Egils Levits stresses two turning points among nine upsets in the history of Latvian law (when the material law changes, however the essence of the legal system does not):

1)1940-1941, and repeatedly in 1944-1945 and
2) 1990 and the accession of Latvia to the European Union in 2004 when the essence and succession of the legal system changes [19].

The period when the created regulation prevail over their application and when there are regulations in force with the echo of various periods (the problems of value identification) and when the regulations have short-term goals and not always have proceeded through smooth legislative harmonisation process when it is often difficult to interrupt the practice of the previous system, the state administration provisions aspire prevalence over the legal regulations, however the Constitutional regulations are hardly

considered a useful tool – such a period indeed cannot be called easy for the transformation of the legal system.

The author believes that the period from 1990 to the accession moment in the EU in 2004 and after it is to be considered a lasting crisis of the legal system when the transformational changes are taking place that mark a serious period of upset. However, simultaneously some stabilizing trends can be seen in the process. For example:

1) 1997-1998 the beginning of the operation of the Constitutional Court and its first practice, the introduction of the section on the fundamental human rights in the Constitution;
2) the provision for the individual's right to the constitutional complaint included in the Law on the Constitutional Court in July, 2001 and the growth of the decisions of the Panel of the Constitutional Court in connection with the understanding of the provisions constituting the contents of the constitutional complaints [20]the coming into force of the Law on the Administrative Procedure and the beginning of the operation of administrative courts;
3) activities in the introduction of the ombud institution.

The expressions of the application skill of legal provisions are lagging behind. In this area invaluable contribution is provided by the judgements of the Constitutional Court that use subsidiary sources in their argumentation and consequently the Senate of the Supreme Court and the newly established courts of the administrative jurisdiction are influenced by them.

Over last year the legal thought is strongly influenced by the pilot judgements of the European Court of Human Rights and the interaction of the case law (judicature) of different levels with other subsidiary sources of human rights.

This is the time for reassessing values on different levels – also on the institutional and mental. The legal thought gain influence from the mutual interaction of the secondary sources – particularly regarding the provision of balance of freedoms and duties. Latvia can advise the legal thought of Europe, its security and stability regarding the provision of the balance between the protection of the fundamental values of democracy and fundamental rights of an individual (see the previously mentioned Election case 2000-03-01) by specifying that the use of the human rights must not be aimed against democracy as such and a democratic state order must be protected against the people who in ethical terms are not qualified to become the representatives of a democratic state in the political or state administration level and who have proved with their work that they have not been loyal against a democratic state order. The above-mentioned idea has also been developed further in the majority opinion in the case 2005-13-0106 (the second Election case). These conclusions on the referring to the values of democracy for the prevention of their use against the ideals and values of the democratic society itself have been transported to the already mentioned judgement of the Big Chamber in the case "Zdanoka vs. Latvia". In Europe other marginal issues have become topical as well when the minority questions the fundamental values of democracy (events in France) where the practice of the Constitutional Court of Latvia would be useful.

Latvia has already provided an answer to a complicated legal issue – the event of manifesting social rights (Professor age census in case no. 2002-21-01) [21], where the positions have been expressed suggesting that the legislature can use other ways less infringing on the fundamental rights and esteem for achieving the provision of the area of education and science with young specialists. It is possible that the persons who have achieved a certain age could be elected for a shorter term for the positions of the contested provisions. The main criterion for the persons to run for the election to the academic

and administrative positions must be the persons' abilities and qualification as it is envisaged by article 106 of the Constitution of Latvia rather than their age.

The author believes that the above mentioned cases are to be considered a particularly significant contribution and daring in the judicature of Latvia. They serve as an outstanding example for Europe in response to similar topical legal issues.

In terms of the application methodology of legal provisions the interaction of the individual opinions of judges with other subsidiary sources is particularly significant.

In the conditions of the transformation of the legal system the individual opinion simultaneously promotes the harmonisation of the science of law, judicature and the materials for the creation of legal provisions with the Western sources of legal conclusions as well as the operational ability and rebirth of the legal order of Latvia.

This is the way where the fractality phenomenon of the subsidiary sources finds its expression. The dictionary of foreign terms defines the word "fractalis" as an irregular object or surface that can be acquired by implementing repeated division into smaller parts according to certain rules 98 [22]. Fractality is connected with dynamic and mutually interactive movements in nature. This kind of mutual connection among systems creates the phenomenon when a stimulation in one part of the Universe causes a reaction in a different one. This phenomenon can also be referred to the interaction of the existing legal systems with the interplay of the subsidiary sources. Every legal system is relatively closed; it comes in contact with others and changes along with them. The fractality that can be seen in the interplay of subsidiary sources suggests dynamic processes that allow for faster rebirth and development of the legal system and for new conclusions adding to the legal thought of Latvia.

Along with that the essence and succession of the legal system has not been destroyed over the last three years to the extent that can be considered a turning point, however it can be regarded a relative shock.

Summary

1. Individual opinions of judges:
   a) break an independent bed among the subsidiary legal sources;
   b) persuasively present themselves as a corrector of legislation (or law policy);
   c) serves as the indicator (by constructive criticism of the majority opinion) and initiator (by significant influence on further practice) of the court practice change;
   d) leaves traces in the science and pratice (case law) as an integral part of the evolution in the judge made law.

Consequently the individual opinions of judges can qualify for the status of an independent subsidiary source.

It would also be useful to introduce individual opinions in the practice of the Senate of the Supreme Court as it would represent a significant contribution to the development of the judge made law.

2. The critical individual opinion of judges strengthen the importance of the subsidiary sources in all levels of the legal system thus promoting the understanding about the fundamental principles of a democratic and legal state system and searching for an answer to recurring solutions of legal problems over time and borders.

3. The pilot judgement of the European Court of Human Rights can be classified in the group of subsidiary sources as a special kind of case law(judicature) – pilot judgement that simultaneously possesses the qualities of an independent and subsidiary source that in a particular way makes the national state bring the flaws of system in order.
4. The increasing of the significance of the decision of the Constitutional Court Panel on terminating or instituting court proceedings (in connection with the understanding of the contents of the constitutional complaint) and the status in some cases can rank these decisions among the subsidiary sources if they contain abstract conclusions when interpreting the provisions and are published.
5. The above mentioned interaction aspects created the fractality phenomenon in law when the answer to the law issue is provided with the help of subsidiary sources on national and European levels which often provides for faster and more efficient persuasion and addition to the political will than the regulatory political will.
6. Over last three years the essence and succession of the legal system has not been destroyed as far as to be considered a turning point of the system; rather it represents just a shock in lasting multilevel transformations.
7. The addition to the list of the subsidiary sources and the influence of the on the development of the legal thought in Latvia is a natural and dynamic phenomenon in the changing world that cannot be considered a challenge to the creators of the legal thought – scholars and practitioners. That is the order of things – to think one's own thoughts and to change along with the changing world.

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[1] Iljanova, D. Summary of the Promotional Paper. Riga, Methodology Office of the Faculty of Law, University of Latvia, p. 19.
[2] Lazarev, V.V., General Doctrine and States. // Moscow, Jurist,, 1997, pp. 197-199 (in Russian)
[3] Boštjan, M. Zupančič. Interpretation of the Precedents and Judgments of the European Court of Human Rights. // Law and Rights, Volume 4, 2004, p. 102 (in Latvian).
[4] Lazarev, V.V. General Doctrine and States. // Moscow, Jurist,, 1997, p. 197 (in Russian).
[5] http://www.satv.tiesas.gov.lv, case no. 2000-03-01
[6] European Court of Human Rights. Selected Judgments. Riga, " Latvijas Vestnesis", 2003, pp. 152-226 (in Latvian).
[7] http:// www.humanrights.lv: The Court considered that it was not the breach of the pacifistic world view of the applicants to the extent determined by article 1 of the Convention Protocol 1. This kind of mentioning of international events serves both the aims of the pacifists as well as the general interests of society. The presence of the representatives of military orhganizations in these parades does not change their character. Furthermore, the requirement to participate in the parade does not prevent the child's parents from teaching and giving advice to their child as well as carrying out their regular parental functions in educating their child and promoting their children in the direction of the religious and philosophical beliefs of their parents. The court does not have to determine the usefulness of the education methods, which according to the applicants would be more appropriate by perpetuating historic memories in the new generation, however it did not deny that the punishment might have had a psychological impact on the pupil. Finally the Court judged that the breach of article 2, Protocol 1 has not taken place. Initially the Court pointed out that Victoria Valsamis had been freed from religion classes and orthodox church services. Participation in the parade did not abuse the religious belief of her parents. Consequently the applied punishment had not been a voiolation of her freedom of religion. Thus the breach of article 9 of the Convention has not taken place.

[8] http://www.echr.coe.int
[9] De Merieux, Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms, Oxford Journal of Legal Studies, Vol.21, No.3 (2001), pp.521-561, 556.
[10] http://www.saeima.gov.lv, transcript of the 6th meeting of the Parliament of Latvia spring session on 19 May 2004, additional information: Law "Amendments in the Law on the Storing and Using of the Documents of former KGB and Establishment of the Collaboration Fact with the KGB" adopted by the Parliament of Latvia on 19 May 2004. Returned for revision on 21 May 2004 and has not been revised yet. However, on 27 May 2004 the Parliament adopted other amendments in the above-mentioned law, which prolong the period when the collaboration fact with the KGB may be used in legal relations (restrictions of position, election rights etc.) for 10 years (all together 20 years). However, at the same time, taking into account the considerations given in the motivation statement by the State President, the Parliament has assigned the Cabinet of Ministers by section 7 of the Transition regulations to evaluate the need and grounds of the restrictions envisaged by the laws till 1 June 2005.
The Presidium of the Parliament suggests giving over the draft law submitted by the Cabinet of Ministers **"Amendments in the Law on the Election of the Council of Town, Amalgamated Municipality and Parish"** to the Legal Committee and the State Administration and Municipality Committee and determine that the State Administration and Municipality Committee is the responsible Committee; passed to the Committees on 02.09.2004, also the Constitutional Court case no. 2004-13-01-06.
[11] http://www.satv.tiesa. gov. lv, case no. 2004-13-0106 (pp. 17-18 in conclusions)
[12] http://www.humanrights.lv:"…The court reminds that article 3 of Protocol 1 indirectly envisages subjective rights: the rights to elect and be elected. However important they may be, they are not absolute. As article 3 of Protocol 1 recognizes the right without specific conditions and does not define the rights there are "indirectly indicated restrictions" possible. The states that have acceded to the Convention in their respective legal systems include the rights to elect and be elected in the conditions article 3 does not lay any obstacles to. These countries have a complete freedom of action in the above-mentioned issues, however the task of the last instance court is to decide on following the provisions of Protocol 1; it has to make sure that the conditions do not reduce the rights discussed so that they could be enjoyed in their full substance; so that it was possible to enforce the rights; the conditions had legal aims and the methods used would not turn out to be unproportionate (see judgment of 2 March 1987 in the case *Mathieu-Mohin and Clerfayt v. Belgium*, series A, No.113., p. 23, paragraph 52; decision of 1 July 1997 *Gitonas and others v. Greece*, *Recueil des arrots et decisions* 1997-IV, p. 233, paragraph 39; decision of 2 September 1998 *Ahmed and others against the United Kingdom*, *Recueil 1998 – VI,* paragraph 75 and *Labita v. Italy (GC),* No. 26772/95, paragraph 201, *CEDH 2000-IV).*
Especially states dispose of large freedom of action to determine the laws in their constitutional system attributed to the status of the parliamentarian, including the criteria for the persons who cannot be elected. Although these criteria are also aimed at one common concern – to guarantee the independence of the representatives as well as the freedom of electors, they change *depending on the specific historic and political factors of each state; the diversity of situations envisaged in the constitutions and election laws of the member states of the European Council proves the diversity of the possible choice in the issue".*
[13] http://www.satv.tiesas.gov.lv, case no. 2002-20-0103
[14] http://www.satv.tiesas.gov.lv, case no. 2003-04-01 and case no. 2003-05-01
[15] For mor see J.Rudevskis, Likums un Tiesības, February, 2005, no.66,pp.34-45, March, no.67, pp.72-85.
[16] Case no. 31443/96, 22 June, 2004, para 186 and 192, http:www.worldlii.org/eu/cases/ECHR/2004/274.html{examined 23.01.07)
[17] Case no. 35014/97, 19 June, 2006, *para .139, 157, 225, http:www.bailii.org/eu/cases/ECHR/2006/628.html{examined 23.01.07)*
[18] Case no. *23032/02,06/01/2006*), *http:www.worldlii.org/eu/cases/ECHR/2005/682.html{examined 23.01.07)*
[19] See: Latvijas tiesību vēsture (1914-2000), Fonds Latvijas Vēsture, Rīga 2000,. D.A.Lēbera redakcijā, p.481 (in Latvian History of Law of Latvia, Riga, compiled by prof. Dr.iur. D.A.Leber; Foundation Latvijas Vesture, Riga 2000; p.481)

[20]See more: Decision of the Constitutional Court of the Republic of Latvia of 28 February, 2007 on the termination of court proceedings in the case http://www.satv.tiesa.gov.lv/(examined 11.06.07.). When adopting this decision the Constitutional Court stated that when interpreting the contested provisions, they comply with the Constitution of Latvia and they do not forbid the institution and apply the proportionality principle and consequently the continuation of the proceedings in the case is impossible. The decision also takes into account the conclusions and opinions of the Senate, Parliament, Administrative courts, pp Ombudsperson D.Smite and scholar of law J. Neimanis on the respective issue. In the conclusion there are references to the conclusions of judicature and doctrine.

[21]http://www.satv.tiesas.gov.lv, case no. 2002-21-01

[22]Dictionary of Foreign Terms. 1999. Riga: Jumava, p.237; Dictionary of Foreign Terms. 2005. Riga: Avots, p. 238, also from the word 'fractalis', Latin stem fractus, which was created as a common name by Benua Mandelbrot in his paper "Geometry of Nature Fractali" in 1975 where he indicated that it is also a phenomenon encountered in nature, art, architecture and visualized computer science that represents live systems with a high degree of adaptation ability that are able to change both as a result of external influence as well as internal dynamic processes. The basic feature of fractals is autosimilarity of resembling themselves (the same elements of the structure repeat themselves on different scale) as a guarantor of the symmetry and harmony of the Universe structure. See [Internet resource] Available at: http//en.Wikipedia.org/wiki/Fractal, (also Mandelbrot B.B. The Fractal Geometry of Nature.-New York, 1983.).

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Legal Liability for Non-pecuniary Loss in Civil Laws of Different Countries[1]

Juridiskā atbildība par nemantisku kaitējumu dažādu valstu civiltiesībās

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Atslēgvārdi: non-pecuniary loss, personal rights, damages

Contents:

Introduction

Civil law, in addition to property relations, also regulates non-property relations among persons. It is impossible to completely avert the harm done from an infringement of rights if it is not possible to effectively protect a person's non-material rights and assets in addition to property rights. One of the most effective means to protect the non-pecuniary assets of a person is by civil liability for non-pecuniary or moral injury. In a civilized society, the protection of the person and the person's rights is one of the duties of a law-governed society.

Non-pecuniary loss, non-patrimonial loss, moral damage, immaterial damage, (*dommage extra-patrimonial*, *le dommage morale* – in French, *Immaterieller Schaden, Nichtvermögensschaden* – in German, *моральный ущерб* – in Russian) is an institution widely applied in foreign, especially European law and judicial practice. In order to find what is of value in this area and should be adapted by us, it is necessary to examine the experience of other nations with regard to the treatment of non-pecuniary damages.

1. The Concept and Essence of Non-pecuniary Damages

It is essential to determine the meaning of non-pecuniary damages in order to understand the legal nature of this institution. Regardless of different terms and descriptions, non-pecuniary damages are explained in a rather similar way in foreign legal texts. By non-pecuniary damage, one understands loss (damage or diminishment) not of a person's property (chattels or real estate), possessions or income, that can be determined in any objective manner with reference to the market[2], but instead other kinds of value. The object of the threat created by a infringement of rights is not property or a thing, but a persona and related non-material values such as life, freedom, honor and reputation, personal inviolability etc.. By non-pecuniary damage one also understands moral or physical suffering that is caused by action or inaction that affects values accruing to a person by birth or law (such as life, health, honor and dignity, commercial reputation, the inviolability of personal life, personal and family secrets and the like) or which affects personal non-pecuniary rights (the rights to the use of one's name, authorship and other non-pecuniary rights in connection with the protection of intellectual property and the like)[3]. Therefore non-pecuniary harm (loss) is the opposite of material harm (loss) because of the different object of threat. However, there are also states where it is possible to gain relief for moral injury also in connection with things, such as **Austria**, and, in part, **France**.[4]

It should be noted that in Latvia, there is no legal definition of the concept of non-pecuniary loss. There is a similar state of affairs in many countries, also in Europe, for example, in **Belgium** and **Great Britain**. However, there we find the concept of non-pecuniary loss as defined by courts. In Latvia, one only has the definition of non-pecuniary (moral) loss in legal literature, which has not gained the full recognition of the courts. Latvian courts, together with legal scholars should develop a definition recognized but the courts that could be used in future legal practice.

In compiling contemporary legislative acts and court practices, one could make the following definition of non-pecuniary damages: "**Non-pecuniary loss is the non-material result of the infringement of a person or it's non-pecuniary rights, values or legal interests**."

This non-material result can be divided into two large groups:

- the first includes non-material consequences that result from physical harm to the body, that is, personal injury resulting in crippling and disfigurement, physical and psychological pain, suffering, as well as doubt, concern, anxiety, mourning, sadness, emotional shock and other moral suffering; mental trauma, fright (for example, fear of death); changes in the psychological condition of a person in connection with the loss of a relative or spouse, the loss of daily comfort and joy and the like;
- the second includes non-material consequences that result from a infringement of personal rights, for example, the illegal infringement of personal liberty, that is, the right to do whatever is not forbidden by law, by violating

> a person's reputation (honor and dignity), infringement of personality rights such as a person's name, image, brand name, copyright as well as other basic human rights by, for example, allowing discrimination, breaching one's sexual or gender inviolability, violating privacy and other feelings, rights and interests, as well as other actions that cause a loss of moral and psychological well-being (the so-called "pure" moral injury, that are not connected to physical action or physical pain, for instance, libel or slander).[5]

Non-pecuniary loss is not visible; it cannot be directly expressed in material value, for example, in money. It is presumed, that is, it is assumed that a specific infringement can cause a particular person to suffer with cause, for instance, the ordeal of being disfigured.

2. The Application of the General Principle of Liability To Non-Pecuniary Loss

In connection with non-pecuniary loss, one of the basic questions both in legal theory, but more in judicial practice is whether, with regard to non-pecuniary loss, the general principle of liability applies[6] or each case is treated separately?

It should be pointed out that there are great differences in this regard in Europe. For example, the general principle of liability applies in **Belgium**, **France** and **Spain**. The courts of **France** recognize that the concept of damage (*dommage*) in the Civil Code, Article 1382, applies to non-pecuniary loss. In addition, since the beginning of the 19th century, courts have determined that there shall be no discrimination between material and non-material damage (loss) – each of these losses is compensable if it is proven, personal and legitimate[7]. A French appeals court in Article 1832 supported the view that the difficulty of determining non-pecuniary loss is not sufficient reason not to award compensation for non-pecuniary loss[8]. However, this does not mean that any infringement of rights in France creates an unlimited opportunity to demand compensation for non-pecuniary loss. A similar view is taken in Belgium, where there are not different rules for preventing material and non-material loss[9].

In the second group, one can count such countries as **Austria**, **Germany**, **Greece**, the **Netherlands** and **Poland**, where courts can determine compensation for non-pecuniary loss only if allowed by law or if the law directly states such a possibility[10]. For instance, the German BGB § 253 states that material compensation for non-pecuniary loss may be requested on in specific cases set forth in the law. BGB § 823, which regulates the general principle of liability states that are person who, by intent or negligence violates another person's life, body, freedom, property or other rights must compensate (reimburse) the damage done to the other person. This legal norm is regarded at the basis for compensation of damage[11].

In the interests of clarity, it should be noted that the German Federal Court of Justice in 1954 interpreted the term "other rights" (*Sonstige Rechte*) as used in BGB 823 § 1.d. as granting the possibility to receive compensation for moral harm in all case where a significant and objectively serious infringement of the plaintiff's personal (absolute) rights has occurred[12].

In **Austria**, there is the view that the general principle of liability must be applied if the violator has acted with gross negligence or with malicious intent[13]. There are countries where the legislature has set a wide range of torts that are the basis for receiving compensation for non-pecuniary loss. For example, in **Greece**, such rights exist in cases of tort and infringement of personal rights, as well as in all cases where there is a bodily infringement (harm to health)[14].

The situation is different in **Italy** and **Great Britain**. In Italy non-pecuniary loss is compensable when a person's health is violated and in cases of "pure" moral injury, as well as in cases where a crime is committed[15]. In Great Britain, the right to compensation of non-pecuniary loss is foreseen for personal injury, as well as cases of infringement of personal rights and personal freedom[16]. It should be pointed out that courts in Great Britain recognize the rights of a plaintiff to compensation for non-pecuniary loss if material damage (detriment) has been done, except for breach of contract, where compensation is possible only for contracts that have been drafted to directly protect non-material interests.

In compiling the experience of Europe and other developed countries, one must conclude that, despite rather great differences in the application of the general principle of liability to non-pecuniary loss, persons in these countries are guaranteed far wider opportunities to gain civil remedies for non-pecuniary loss that in Latvia.

Foreign jurisprudence and judicial practice recognize as non-pecuniary loss such as pain and suffering[17], emotional shock, also for such persons who are not direct witnesses to the infringement, as well as the moral harm of loss of social ties of the death of a loved one and the like.

3. Possibilities for Compensation of Non-Pecuniary Loss in Latvia

It is no secret that Latvia is significantly behind the countries of the developed world in this regard. The reasons cited are the lack of a normative base, the non-existence of judicial practice, as well as an insufficient theoretical basis. Today we must revise the view of limited legal compensation for non-pecuniary loss under Latvian civil law[18].

In judicial practice in this area we can discern two phases. The first phase was marked by the decision of the Republic of Latvia Supreme Court Presidium in its decision of 13.03.1995 in the case No. 2k-12-95[19]. It rules that (1) " *...Article 1635 of the Civil Law is a general legal norm that does not foresee specific rights for the compensation of moral injury"* and (2) " *Chapter 19 of the Civil Law, subchapter one specifies the cases and persons who may claim compensation for moral injury."* The second phase was started with the plenum of the Republic of Latvia Supreme court with its ruling No. 1 of 26.02.1999 "On the application of Article 1635 of the Civil Law in claims for moral injury"[20]. This ruling explained:

(1) "*that Article 1635 of the Civil Law foresees recovery of* ***material losses*** *by a plaintiff for persons responsible for the infringement of rights*", therefore this Article is interpreted narrowly and does not apply to non-pecuniary (moral) loss;

(2) "*the basis for compensation for moral injury is set forth* ***only*** *in Chapter 19, subchapter 1, part II of the Civil Law "Right to Compensation for Offenses Against Personal Freedom, Reputation, Dignity and Chastity of Women""* therefore compensation for non-pecuniary (moral) loss does not apply to personal injury; a wider compensation of non-pecuniary loss (moral injury) will be possible only when such pain and suffering damages are institutionalized by law.

(3) (4) The Constitutional Court by its decision in case no. 2002-06-01 found that Article 49, part two of the Law on Judicial Power (the text that as in force until December 3, 2002) as inconsistent with Articles 1 and 83 of the Constitution of the Republic of Latvia and that the explanation of the applicability of the law adopted at the plenum was not binding. In this regard, the

interpretation of Article 1635 of the Civil Law presently is not binding on the courts, therefore our courts at a crossroads. The question of the interpretation of Article 1635 is therefore open.

Looking at foreign practice in this area, the question arises as to how substantiated is the narrow interpretation of CL Article 1635 with regard to the possible material compensation of immaterial injury. Is the only possibility the amendment of CL Article 1635 or the adoption of a law on "*the institute of pain and suffering damages in criminal and civil legislation"*?

An unsubstantiated narrow interpretation of CL Article 1635 and waiting for the legislation is not permissible or justifiable in terms of justice, because, as a result, persons in Latvia have a far more restricted choice of civil remedies than in other European countries. This kind of judicial practice in Latvia will contradict any number of fundamental Latvian normative acts, such as a person's right to court protection against threats to his or her life, health, personal freedom, honor, reputation, and property guaranteed by Article 3, part on of the Law on Judicial Power and the protection of rights guaranteed by Articles 92 – 100 of the Constitution, especially the right to **commensurate** (adequate) compensation guaranteed by Article 92 in case of a unjustified infringement of rights, also by Chapter 6, part one of the European Convention on Human Rights and Fundamental Freedoms and Chapter 8 of the Universal Declaration of Human Rights, which states that a victim has the right to an effective restoration of the aforementioned rights in a national court.

If the courts hold to a narrow interpretation of CL Article 1635, this will seriously threaten the right to defend in court one's infringed or disputed civil rights or interests protected by law as guaranteed by the Article 1 of Civil Procedure Law. Currently there is no doubt that it is just to receive material compensation for non-material harm. The task of the court, as pointed out by the Constitutional Court on its decision of 04.02.2003 in case no. 2002-06-01 is to find a true and just solution of the case. Since the work of a court is a judicial decision, it must, without doubt, be a "just decision".

As a negative example can be mention the Senate decision of 08.05.2002 in the civil case No. SKC – 297[21], where the court, in finding the fact of discrimination of a woman and the infringement of the plaintiff's dignity and honor, but rejected the lawsuit, because the infringement of dignity and honor did not occur by the spreading of falsehood information and therefore CL Article 2352a was not applicable. The court in its ruling said that recognizing the fact of discrimination was in and of itself sufficient atonement, therefore material compensation for immaterial harm was not required.

The compliance of Latvian court practice with the European understanding of protection of persons against non-pecuniary loss will be affirmed, on can assume, by a case brought before the European Court of Human Rights because a court denied the possibility to receive compensation for moral harm suffered in connection with the death of a child in a road accident due to gross negligence of a driver. This could be a painful but well-grounded lesson for the Latvian court system and existing judicial practice.

Presently, Latvia must evaluate which path to take – that of France, Germany, or perhaps Austria with regard to the material compensation of non-pecuniary loss,

The simplest would be the French way. In this case, the court (Senate) would have to take the position that CL Article 1635 is to be interpreted "non-narrowly", that is, ruling that "harm" and "relief" are equally applicable to both material and non-pecuniary loss. But as in France, this would not mean unlimited possibilities to seek material compensation for any infringement.

In taking the German path, the court would have to determine that a person has the right to receive compensation for non-pecuniary (moral) loss, beside the cases directly foreseen by law, also in all cases when there has been a substantial infringement of the plaintiff's personal, that is, absolute rights, thereby ensuring that the basic purpose of civil liability – *restitutio in integrum* (the full restoration of the prior status) – is achieved.

One can also adopt Germany's experience, in view of the closeness of our CL to the BGB, and make such a broader interpretation of this CL Article 1635 that would foresee the right of a person, beside the cases set forth by law, to receive compensation for non-pecuniary loss when the infringement of the plaintiff's personal rights is substantial (significant) or objectively important, such as long term psychological or physical violence by a parent against a child.

In carefully examining the legal literature of pre-war Latvia, one must conclude that an unfounded view exists in Latvia that compensation of non-pecuniary loss is applicable only in exceptional cases. It should be noted that the view of eminent Latvian academics (V. Sinaiskis[22] and K. Čakste[23]) regarding the non-recognition and non-mentioning of moral harm was one of regret and criticism rather than support. Three substantial issues were baselessly forgotten. First, our civil law is basically created according to the pandect legal system, which looks at civil law as property law. Secondly, after the adoption of the CL, many improvements and amendments wee made to the CL with regard to the possibility of compensation non-pecuniary loss (moral harm), for example, CL Article 2532, CL Article 2352[a] and others. Thirdly, it would be foolish to ignore the development of legal thought that has occurred in the world and especially in Europe. Currently, we are behind Germany in this regard by exactly 50 years.

Therefore, in interpreting and applying the CL, one must use the contemporary doctrine regarding non-pecuniary loss and protective measures under the civil law.

Certainly, one could make amendments to CL Article 1635, adding to it parts 2 and 3 as follows: *The person suffering harm shall have the right to demand compensation, including material compensation (damages) for non-pecuniary (moral) injury in cases as prescribed by law as well as for the infringement of personal rights or other (human) rights under Article 8 of the Constitution of the Republic of Latvia or international treaties binding on the Republic of Latvia.*

The court may award damages also in other cases if the infringement occurred with extraordinary malice or through especially condemnable actions."

4. Principles for Determining Damages for Non-Pecuniary Loss

The material compensation of non-pecuniary (moral) loss or damages for immaterial harm (German – *Schmerzensgeld,* French – *dommage moral*.) is widespread both in Europe and other Western democracies as a remedy in civil law for various infringements of the person. Most often this is used in cases when reimbursement of loss or other civil law remedies are not able to restore the person's infringed rights, as well as in case where there is no other way to alleviate the injustice that has been done, for example, by the infringement of dignity and honor.

It should be of value to determine, what are the criteria for setting the material compensation of non-pecuniary loss (moral injury[24]). The extent of damages is dependent on the nature of the infringement, its intensity and the seriousness of the threat in creates, as well as the degree of severity of the infringement and its duration. In Europe, there are several theories of the tasks and functions of material compensation of non-pecuniary loss.

The theoretical basis for setting damages:

1. The objective reduction of the victim's enjoyment of life, without regard to what the victim may do with the money that is awarded;
2. the individual's personal sufferings and ordeal;
3. the functional approach, which allows the victim to buy and alternative comfort to that which has been lost;
4. full compensation for all forms of pain;
5. restoration of the prior condition – *restitutio in integrum*
6. the function of satisfaction[25], similar to that in duels resulting from infringements, a settlement agreement;
7. the punitive function;
8. the preventive function.

It should be noted that in this regard, there are different approaches among the European countries, but in judicial practice, the sums of money awarded differ substantially from the sums awarded by Latvian courts. In order to understand what path Latvian judicial practice should take, it is necessary to examine the experience of other European nations in this regard.

In **Austria** damages are set as compensation for all forms of pain, taking into account the duration and intensity of the pain, the severity of the infringement, the physical or psychological limitations, emotional harm, for instance, disfigurement or crippling[26]. In **France**, they also have a punitive and functional nature[27]. However, in **the Netherlands** it is pointed out that material compensation for non-pecuniary loss must have compensatory and satisfaction functions[28]. In **Greece**[29], damages have a pure satisfaction function, but in **Belgium**, one must restore the condition before the infringement – *restitutio in integrum*[30]. In **Germany**, the purpose of compensation is to prevent the loss of enjoyment of life[31], that is, the purchase of alternative comfort. The second purpose of damages is to fulfill the function of satisfaction (*satisfactio*). In addition, the amount of damages for pain and suffering is set in a single sum[32]. In **Great Britain**, one takes into account "the objective diminution of value", but subjective suffering is also taken into account. In the case of harm to heath, two elements are evaluated, pain and suffering, as well as the loss of comfort[33]. One can also see the functional approach – the amount of money is set with the purpose of being able to obtain alternative sources for satisfaction, but the satisfaction element is equated to the compensatory function[34]. Other authors especially note that the purpose of the amount of compensation is not to restore the status of the victim before the infringement, but to compensate for the infringement[35]. Certainly, one must not forget that Anglo-Saxon law also recognizes the punitive function (*punitive damages*). In **Italy**, damages have a purely functional character[36], although there are authors who point out that compensation has a distinct satisfaction – punitive function[37].

Latvia, in evaluation material compensation for non-pecuniary loss, should take into account several grounds – the satisfaction function, that is, full compensation for the victim's pain and suffering. One should also discuss using the functional purpose for determining the size of damages, but in such cases the amount of damages will partly overlap with losses. In addition, damages should ensure a preventive – punitive function. The court should make sure that the damages awarded (the sum), will reflect the value of the infringed right and, at the same time, deter the defendant and other persons from committing a similar infringement in the future. The issue should also be discussed of whether in all cases one should limit oneself to achieving just a few functions. However, determining some basic functions that should be evaluated in examining cases on the compensation of non-pecuniary loss would bring greater clarity to judicial practice.

Conclusion

The European countries, like Latvia, are characterized by codified civil law, the roots of which are found in Roman law. It cannot be denied that, compared to ancient Rome, contemporary law awards damages far more broadly than the protection mechanisms of private law.

Even if many civil codes or civil laws and older than Latvia's Civil Law, one concludes after examining the sources of European civil law, that by no means have all civil law systems been substantially improved by the legislature in the area of compensation of non-pecuniary loss. One must conclude that there is no basis for asserting that, for example, the drafters of the German or France civil codes have been more progressive in their views or more precise in their formulations. However, courts can ensure the application of the tools of civil law to provide qualified satisfaction under civil law to victims in connection with the non-pecuniary loss they have suffered, if the courts' interpretation of the law does not rely only on a grammatical interpretation and follows the trends of modern jurisprudence.

Also, reference to the fact that Latvian judicial practice hitherto has established the exception of the material compensation of non-pecuniary loss from the principle of general liability, cannot serve as justification for the present situation. The principle of general liability exists only in some European countries with regard to protection against moral harm, for example, in Belgium, France and Spain. More often is found the regulation that damages are awarded in cases prescribed by law, for example, in Austria, Germany and Greece, or there is specific regulation, as in England and Italy. However, disregarding the existence of such regulation, persons are ensured far wider possibilities to get satisfaction under civil law for non-pecuniary loss.

In this regard, Latvia should seriously consider which country's experience to choose – that of France or Germany. I think precedence should be given to the French model, because its implementation, both theoretically and in practice would be comparatively easier. The concept "infringement" in CL Article 1635 should not be interpreted narrowly, applying it only to material harm. It should be worth considering whether the term "compensation" should not be interpreted broadly – as an amount of money set by the court that must be paid for harm done – both material loss and non-pecuniary.

Certainly, this will require both courage by the court to change existing judicial practice, as well as additional strength and knowledge to, using the above-mentioned criteria, in an avalanche of complaints, to clearly and unerringly ensure a full protection under civil law against those infringements that result in non-pecuniary loss.

Also the experience of Germany, with regard to the similarity of our CL to the BGB, compels us not to artificially narrow the interpretation of Article 1635, allowing a victim the right to material compensation for a non-pecuniary loss suffered when the plaintiff's personal rights are infringed as well as in those cases, when other rights are infringed with special malice or by a reprehensible action, such as a deliberate crime.

To protect the non-material rights of a person, one need not wait for amendments by the legislature; rather, there is a possibility to have legal protection within the framework of the existing normative regulation, certainly, if the courts apply not only the grammatical, but also the teleological interpretation and other methods. This is clearly shown by the experience of European countries and the Constitutional court.

Naturally, it is necessary for Latvian courts to substantially change their attitude toward determining the extent and basis for setting damages.

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Endnotes

[1] Theses on International Scientific Conference Harmonization of Law in the Baltic Sea Region in the Turn of the 20th and 21st Centuries on 29 and 30 January 2004.

[2] Damages for Non-Pecuniary Loss in a Comparative Perspective, Horton W.V. (ed.), Tort and Insurance Law Vol.2, Wien: Springer-Verlag, 2001 – p.246

[3] Autoru kolektīvs, Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. Rīga : Mans Īpašums, 2000 – p. 625.

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[5] Unification of Tort Law: Damages. Magnus U. (ed.). European Centre of Tort and Insurance Law Vol. 5, Hague : Kluwer Law International, 2001 – p. 11, 17, 31, 34, 61, 65, 81, 83, 95 - 96, 98 – 99, 111 – 112, 124 – 125, 128 – 129, 148 – 149, 151; Damages for Non-Pecuniary Loss in a Comparative Perspective, Horton W.V. (ed.), Tort and Insurance Law Vol.2, Wien: Springer-Verlag, 2001 – p. 2 - 5, 16 – 21, 28 – 33, 48 – 51, 54 – 57, 73 – 79, 87 – 89, 102 – 106, 109 – 111, 120 – 123, 129 – 130, 138 – 139, 150 – 151, 155 – 156, 168 – 170, 173 – 174, 183 – 189, 192 – 195, 202, 220 – 232.

[6] It should be noted that there is not a unified terminology in this field, because the two concepts, “the general principle of delict (tort)” and “the general principle of liability” are confused. The general principle of delict (tort) is characteristic of European countries, where there is a general understanding of delict (tort). The general principle of delict manifests itself in the general rule that any infringement committed against a person as the result of illegal action must be compensated. This means that civil liability applies to any violation or infringement outside the area

of contract, regardless of its form or expression. See: French Civil Code Article 1382., German BGB Article 823, Austrian ABGB Article 1295, Russia Civil Code Article 444. See: Hausmaninger H. The Austrian Legal System, Wien: Kluwer Law International, 2000 – p.266 – 268, Ebke W., Finkin M. Introduction to German Law. The Hague, London, Boston: Kluwer Law International, 1996 – p.197 – 199, Horn N., Kötz H., Leser H. German private and commercial law: an introduction. Oxford: Clarendon Press, 1982 – p.146 – 147. Our CL is based on this principle, for example, CL Article 1635, or CL Article 1775 and Article 1779. However, the recognition of the general delict does not mean the application of general liability, that is, the application of uniform means of protection under civil law in the case of any delict. By contrast, the Anglo-Saxon system of laws does not recognize the general delict, because liability for non-contract infringements is based on a system of defined, individual delicts (torts) that has been formed by long judicial practice. See: Geoffrey S. Law of Obligations and Legal remedies, London: Cavendish Publishing Limited, 2001, p.433 - 438, Abbott K.R., Pendlebury N. Business Law. 6th edition, London: DP Publications Ltd., 1993 – p. 113, Rogers W.V.H., Winfield and Jolowicz on Tort, London: Sweet&Maxwell, 1984 – p.50 – 51, Mullis A., Oliphant K. Torts, London: MacMillan Press Ltd. 1997, p.3 – 5. There is a view that general delict is characteristic of France, while the Anglo-Saxon legal system is one of individual delicts or torts. Germany and Switzerland are mentioned as examples of the mixed delict system, that is, systems comprising both the general as well as the individual delict. See: Гражданское и торговое право капиталистических государств, Москва: Международные отношения, 1993 – pp.429 – 439.

[7] Damages for Non-Pecuniary Loss in a Comparative Perspective. Horton W.V. (ed.), Tort and Insurance Law Vol.2. Wien : Springer-Verlag, 2001 – p. 87, 246

[8] Ibid. – p. 87

[9] Ibid. – p. 28

[10] Ibid. – p. 246. Though in **Germany** the principle of general liability in connection with non-pecuniary loss operates in terms of "restitution in kind" (*Naturallherstellung*). See: Ibid. – p. 109

[11] See: Švarcs F., Rimša S. Saistību tiesības. Sevišķā daļa. Rīga : LU, 2001 – p.141.

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[24] It should be pointed out that the term damages for pain and suffering has not gained currency in legal terminology. Possibly, there should be a discussion of the necessity of implementing this term in (Latvian) legal circles. As in Germany, it should not be interpreted purely as compensation for paid. For example, in the Latvian language, "damages for pain and suffering (sāpju nauda) is understood as

compensation for a violation or infringement. See: Laua A., Ezeriņa A., Veinberga S., Latviešu frazeoloģiskā vārdnīca. Rīga : Avots, 2000 – 813.lpp.

[25] *Satisfacation* – English*, satisfactio* – Latin. – Satisfaction.

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