School of Business Administration *Turība*

Scientific Papers

Acta Prosperitatis

Nr. 2

ISSN 1691-6077

Turība
BIZNESA AUGSTSKOLA

Rīga, 2011

School of Business Administration *Turība*
Scientific Papers
Acta Prosperitatis Nr. 2

When quoted the reference to the issue is mandatory

Publisher School of Business Administration *Turība*, Ltd.
Head of Publishing House Daiga Rugāja
Literary editor Sundar Vaidesvaran

CONTENT

INTRODUCTION

This publication is the first issue of the scientific articles devoted to trends of the improvement of legal system of the Republic of Latvia, and the second issue of the scientific journal *Acta Prosperitatis* published by the School of Business Administration *Turība*.

Jānis Bramanis, the doctoral student of the School of Business Administration *Turība* in his article "Position and role of Building Rights Within the Legal System" has set the main goal to study the characteristic elements of building rights that help to reveal the concept of building rights as such. As it is established in the theory of rights, the rights are the system of behavioral norms that are binding for every individual or the specific groups of individuals. The rights of *the European Union* are seen as one of the most important sources of building rights. In *Europe* these building rights place a special emphasis on importance of public involvement and taking decisions related with environment. The author does his best to study it in *Latvia* within the scope of this subject.

The article of Dr. phil. Jānis Broks "Legal Nihilism in the Society of After-Modernity" is devoted to the problem of nihilism concept developed by European philosophy tradition on legal issues by monitoring the identification practised in the public sphere with the aim of ascertaining the fundamental origin and nature of the phenomenon that is so topical in publications. Special attention has been paid to fact that this topic which has been the focus of attention of western intellectuals has emerged in modern day culture and society, in particular, in the unique Latvian context.

Prof. Dr. iur. Holger Buck, in his very important for the law development article "EU's Enhancement of Passengers' and Tourists' Rights: A Challenge to the Tourism Sector" states, that for decades the consumer protection has been a major concern in the conception of the EU legislation. The tourism industry is affected intensely by the strong consumer protection law in the field of package travel (Council Directive 90/314/EEC). This article focuses on the legal challenges the tourism sector is exposed to. The consumer protection and the strengthening of passengers' rights (including social issues) are crucial factors in the legal environment of the tourism industry.

Kristīne Dārzniece, the doctoral student of the School of Business Administration *Turība* in her article "Case Law Place in the System of Sources of Law" outlines that the study of case law as a source of law is topical and necessary for Latvia for the purpose of consolidation of traditions of a law-based state and falling within the legal environment of the European Union. The paper offers an opinion that the case law is an independent source of law, which serves as a regulator of legal relationships and cannot be applied as a tool of interpretation of principles of law.

Oskars Garkajs, the doctoral student of the School of Business Administration *Turība* in his article investigates "The Legal Framework of the National Referendum in the Constitution of the Republic of Latvia – the Satversme". It includes an analysis of

types and history of the national referendum, the issue of quorum, as well as assessment of strengths and disadvantages of the current regulation.

"International Civil Aviation Organization and its Role in the Creation of Standards and Practices for the World Civil Aviation" is scientific investigation made by Dr. iur. Izabela Kraśnicka. The author presents the International Civil Aviation Organization (ICAO) that is the specific institution empowered with several unique competences aimed to promote and develop safe air travel and transportation. In the introductory part, a historical note is included describing the origin of the ICAO establishment. Further, the structure of the organization is shortly recalled with a special emphasis on the competences of the Council and Assembly. In the further part, the paper focuses on the international standards and recommended practices set by the ICAO and explains their role in the functioning of the international civil aviation.

The evaluation of the economically most advantageous tender in the public procurement is the theme offered by Dr. iur. Jānis Načisčionis and mag. iur. Una Skrastiņa. In the article "The Evaluation of an Economically Most Advantageous Tender in the Public Procurement" the basic principles for the evaluation of the tender are investigated, because the criterion of the economically most advantageous tender is regulated only in general by the Public Procurement Law. Such evaluation factors as the price, technical solutions are under discussion, as well as the importance of their specific weight. Also, those factors are discussed which cannot be evaluated as a tender selection criteria. Those algorithms which, when applied, contribute to the optimisation of the tender or, on the contrary, does not allow it, are analysed. Finally, the necessity of the justification for the procurements commission decision is discussed. Since the evaluation of the tenders is often complex and voluminous, the applicants or commission itself find that there are mistakes in the evaluation, frequently already after the notification of the results.

The doctoral student of the School of Business Administration *Turība* Una Skrastiņa in her scientific research paper "The Historical Development of the Public Procurement in Latvia" analyses the historical development of the public procurement in Latvia. The author highlights the procurement as one of the fields where the state meets the activity of private entrepreneurs. The objective of an efficiently functioning law is to entail a beneficial public law environment for entrepreneurs in order they would be able to plan their activities better considering a predictable state procedure. The notion of the state procurement in Latvia has a long-standing history – already during the time of the first Republic of Latvia in 1927 the Law on Works and Supply for the State Needs was passed. Within time a regulation of public procurement developed and many of the problems disappeared, but some of them remained the same. By tracking the historical development of the public procurement we can learn from mistakes of the past and improve the present regulation.

All these articles are great contribution for the improvement of the legal system in our country, especially after joining the European Union.

POSITION AND ROLE OF BUILDING RIGHTS WITHIN THE LEGAL SYSTEM

Mg. iur., **Jānis Bramanis**
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Legal science experts are still divided among the thoughts and opinions about what is right. As one of the preconditions of the judicial state implementation is the requirement to subject the executive and judicial power to the law. The State's economic, social, cultural and ecological functions has a positive content, they are directed to solve positive tasks and achieve positive goals. The construction is related to State economic factors and overall to the economy as such. Construction as a practical activity function is focused to enhance the population welfare in the country. Construction Rights in various studies has different content or even it is being mentioned without awareness of this concept. Looking at the various opinions expressed, the author concludes that with the Construction rights is one of the state administration system elements, which is responsible for certain functions – construction. By studying the regulation of the Construction law, Construction rights as substantive law governs the construction of subjects mutual relations, the rights to land development, the rights and obligations of the construction process, as well as regulates state and municipalities competence in the construction field. In its turn the Construction rights of the procedural law aspect governs the process of submitting an application to the government institution until building permit application, building commissioning and building use.

Keywords: Rights of the European Union, Building Concept, Public and Private Rights

1. Introduction

The author has chosen to write about this subject because until now there are no publications, studying the issue of position and role of building rights within the legal system available in *Latvia*. Although it is not possible to examine all legal aspects in this paper that need to be considered within the scope of this subject, the author has based it on studies of a concept of building rights in context with the established order of other European countries.

The topicality of the subject is determined by a problem that the issues of building rights have been studied in a limited way in legal literature in *Latvia*, so the author has taken some examples from other European countries to compare[1] the

[1] In the analysis of comparative rights, one has to take into account the functional context. It follows from essential judicial, social, political, historical and systemic differences of legal systems of different states. However, for solution of the particular legal issue, functionally resembling legal regulations of other states can be indirectly applied, e.g. as an indicator of a guideline or solution of a particular problem by bearing in mind potentially different context.// Judgment in Case No. 2007-01-01 of June 8, 2007 by the Constitutional Court of the Republic of Latvia, section 24.1.

conception of issues studied by the author with that of the other European countries and to borrow some good verities and implement them in *Latvia*.

The author has set the main goal to study the characteristic elements of building rights that help to reveal the concept of building rights as such. As it is established in the theory of rights, the rights are the system of behavioral norms that are binding for every individual or the specific groups of individuals.

Although it has been a while since *Latvia* joined *the European Union*, the legal system of *Latvia* in general, especially after joining *the European Union*, can no longer be compared with a small but flyable plane, according to *E. Levits*. At present it rather resembles "*a Boing*"[2].

The rights of *the European Union* are seen as one of the most important sources of building rights. In *Europe* these building rights place a special emphasis on importance of public involvement and taking decisions related with environment. The author will do his best to study it in *Latvia* within the scope of this subject.

2. Concept of Building Rights

The building rights are such rights that establish the general building procedure in a country, including the legal relations between the building parties or building subjects and the imposed restrictions for builders by the state authorities, following the public benefit.

According to legal literature, the sector of building rights is traditionally considered as a complicated legal discipline because it contains volumes of laws and regulations of various types, the consequences of this variety are the large number of disputes in practice. In *Latvia* unlike in *Germany* the public building rights have not developed into an independent sub-sector of special administrative rights with a solid doctrine of rights as a basis of it.

According to the author, it is explainable by a phenomenon that the very building process and its undisturbed and legally correct procedure as the keystone of society and economy are still not viewed as an important element of this sector. Similarly to rights in general[3], the building rights also exist both in objective and subjective sense. The building regulations are building rights in the objective sense, but the conferred rights for a building subject are building rights in the subjective sense that are conferred on the grounds of objective building rights and possessed by a definite person. The objective side of building rights is directed towards the basic legal[4] principles for building of plots, whereas the subjective side – when the

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[2] http://www.politika.lv/temas/cilvektiesibas/5757/ .

[3] [...] civil rights also exist both in the objective and subjective sense. In the objective sense civil rights are the regulations of civil rights, but in the subjective sense civil rights are the legal power that is possessed by a certain person on the grounds of the objective civil rights.// Balodis K., Ievads civiltiesībās.//p. 20.

[4] It is believed that the origination of construction rights is the prima origin of "the road of rights" in building rights. The development of building rights should be linked to

building subjects perform the said construction works. The unauthorized construction works are one of the still urgent problems, concerning following the principle for rule of law both in *Latvia* and in other countries of *the European Union* in this relation. The unauthorized construction works are practiced on a larger scale in the building segment of detached houses in *Latvia*.

When studying the true meaning of the concept of "*building rights*", the author applies a method of grammatical interpretation. In order to come to a correct conclusion, the concept of building rights includes two conceptions – "*building*" and "*rights*".

The "building" concept can be analyzed both from the practical and theoretical side. From the practical side, building is a process that includes building of premises and other construction works that by all accounts have an effect on contemporary culture in the society, development of infrastructure, putting the environment in order and improving the household conditions in the course of it.

There are dissonant opinions on the definition of right in the theory of rights, where it should be admitted that there are still different understandings of what the right is. According to *I. Kant*, the right is "the whole of the conditions under which the voluntary actions of any one person can be harmonized in reality with the voluntary actions of every other person, according to a universal law of freedom". (Broks, 2004, 119) On the whole, the rights can become the stabilizing, adjusting factor of the public life if they include the incessant, independent from everything, lasting personal values in its content. They include justice, right, truth, humanism, fairness, honesty, and honor. (Jakubaņecs, 2002, 65)

Proceeding with further studies of the concept of "*building rights*", the legal will of a lawmaker itself should be taken into account, where it is determined to accept it in the way as it is set by the lawmaker. If a lawmaker assigns a legal definition of *prima facie* to any concept, it can be assumed that this legal definition is applicable to this concept in all possible legal relations. However, a different solution is possible, if various laws and regulations include different legal definitions or also if the legal definition is *exspressis verbis* limited by regulation of specific legal situations. At the same time, if the lawmaker has found it necessary to provide an interpretation of some specific concepts instead of leaving it for the courts, such an authentic interpretation would have a very convincing power and it would be possible to deviate from it only as a result of the most convincing legal arguments. (Paparinskis, 2006, 8)

Herewith, considering the concept of "*building*" included in the norms[5] of *the Construction Law*, the lawmaker has defined that construction is designing of all types of structures and construction work. Another conclusion follows it that the

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the development of society in general, gradual complication of public relations, urban development, and effect of various cultures. Krampuža I., Trešo personu tiesisko interešu aizstāvība būvniecības procesā. Vēsturiskais aspekts.//Jurista Vārds, 7.10.2008, No. 38, p. 9.

[5] Construction Law, paragraph 12 of section 1.

concept of "*construction*" also includes the process[6]. Inter alia also the court has concluded that construction is a single, consecutive process, where every following decision depends on the previously taken decision[7].

However, if we analyze the expressed legal will of the lawmaker, it comes to light that another concept of "*construction work*" is included in construction and it requires clarification. The legal definition of "*construction work*" is also included in the *Construction Law*[8] and it is part of the construction process, work carried out on a construction site or in a structure, including demolition. Hence, we may conclude that construction work is a much wider concept and construction work is just one phase (Čepāne, Statkus, 2005, 304) of building.

If all construction works are applied to construction in *Latvia*, there is a different view in other European countries. Analyzing the practice of building rights in other European countries, there is a distinction between the civil engineering works and construction operations in *France*.

France has divided the constructions into those free of permit, building notice constructions and constructions that have to obtain a building permit by a normal procedure.

In *France* building works are works with the aim of constructing or modifying buildings raised above the ground, inside which people are to be mobile, and which offer at least partial protection against the aggression of external natural elements. It is the opinion of the author that this definition is more acceptable because it emphasizes the significance of building rights in the human life and the value of the constructed buildings.

In their turn civil engineering works are works that do not fall within the above definition of building works. According to a circular from 1979 issued by *the Ministry of Equipment of France*, civil engineering works include industrial civil engineering such as power plants, bridges and tunnels. (Building Regulations in Europe, 2002, 71)

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[6] The construction process is controlled pursuant to section 3 of the Cabinet Regulation No. 112 "General Construction Regulations". Preparation of Building Design Work, where the further norms specify the procedure for initiation of construction, building of engineering communications, rights and liabilities of a client, rights and duties of governmental and municipal authorities, terms of environmental protection and the procedure of construction works.

[7] Judgment of January 10, 2007 in Case No. A42308005 by the Administrative District Court

[8] Construction Law, paragraph 6 of section 1.

3. Dissociation of Building Rights from Private Rights

The author agrees with the expressed opinion that principles are the basis of everything that determine the motives of our action in various everyday situations and let us achieve the set goals. The concept of "*principle of rights*" is also understood as the leading ideas of legal norms that describe the essence of rights and their specific characteristics. The principles of rights are also described as the determinative ideas that form the moral and organizational bases of origin, development and functioning of rights.

In that way the establishment of legal procedure of building is directed not only to regulate the development of concrete plots and to set norms for safety of building objects, in the same way it is related with the necessity to observe and protect rights of other people and public interests.

Therefore, in the author's opinion, one of the preconditions for separation of various legal issues is the necessity of separation of rights.

The author believes that there is a great theoretical and practical meaning to dissociate public and private rights in the building rights. The following reasons show the importance of it: 1) disputes concerning the private rights are settled in the respective court within the competence of these issues; 2) liability for damages caused by action of state authorities; 3) *the Administrative Procedure Law* applies only to activities of authorities in the sector of public rights; 4) the administrative execution usually is possible only to implement demands and liability of public rights; 5) determination of scope of competence for legislation.

So that the applier of laws and regulations can understand the dissociation of two rights, as specified by theoreticians, from the vast number of dissociation theories only three of them have survived: 1) theory of interests; 2) subordination theory; 3) theory of jurisdiction. The subordination theory is one of the most widespread theories for dissociation of rights[9].

The basis of civil rights or private rights establish relationship among the subjects of civil rights that mainly find expression in concluding contracts of civil liability regulated by the provisions of *the Civil Law*. Unlike the civil rights, the public rights regulate subordinations or relationship of subordination between the state or a subject who was delegated the state authority and an individual. For example, section 31 of *the Construction Law* states that "*if a structure is fully or partially dilapidated or is in a condition that the use thereof is dangerous or it spoils the landscape, the owner in accordance with a decision of the relevant local government shall put it in order or demolish it in accordance with the provisions of Section 1084 of the Civil Law*".

The phenomenon that the building rights are in dissociation of a problem is indicated in the article by *the Senator of the Supreme Court of the Republic of Latvia Torgāns K.* that "*interaction of public legal and private legal provisions make building into such*

[9] The subordination theory is one of the most widespread theories for dissociation of rights.//Balodis K., Ievads Civiltiesībās//p. 21.

an institute of civil rights where any subject of civil rights cannot be involved in it and where it is necessary to have several documents that can be obtained in the administratively legal way – mandatory preconditions for signing a contract and starting of building". The author finds it an issue of discussion whether building can be regarded as an institute of civil rights or rather building fits into the sector of public rights.

In order to establish where building rights belong among other rights, it is necessary to establish the set of characteristics that describe these rights. As it is established in legal literature, every legal discipline and sub-discipline has its independent set of characteristics that are characteristic for every discipline or sub-discipline alone. According to *Broks J.*, rights determine characteristics that are typical for the right as such, videlicet: 1) the source (the personality that expressed the will); 2) the subjects (people and things, it is applied to); 3) the scope (universality of its use); 4) the methods (various techniques, it is used for subjects, actions and circumstances). (Broks, 2004, 244)

4. Material and Procedural Rights of Building Rights

When studying the position and role of building rights within the legal system, it is clearly important to study the norms these rights consist from. The same as all other rights, the building rights are also the set of norms of material and procedural rights.

As the material rights, building rights regulate the mutual relationship of building subjects, their rights to build up the lot, rights and obligations during the construction process, as well as regulate the competence of the state and municipality in the building sector.

But from the procedural rights, building rights regulate the procedure from submitting an application in the authority up to issuing of a building permit[10], putting the building into operation and the use of the building.

Studying the national legal literature, including the foreign literature, the material basis of building rights is both the territorial planning and construction standards. (Vīduša, 2004, 254)

Bearing in mind that a significant effect on the nature of building rights is in *France*, the author has taken a certain part from the studied material on the building procedure in *France* that can be applied to the issue of studies. The building and housing Code (*Code de la Construction et de l`Habitation*) and the urban planning Code (*Code de l`Urbanisme*) are the most important ones for building in *France.* (Building Regulations in Europe, 2002, 79)

[10] The explanation is provided in paragraph 2 of section 1 of the Construction Law, "construction permit – a document issued in accordance with the procedures provided for by the General Construction Regulations certifying the right to carry out construction work of an object".

As it is specified in other countries, for instance, there is a peculiarity in *Belgium* that there is currently no elaborate system of building regulations for either the country as a whole or the various provinces. The Belgian system of building regulations and control differs widely from those in other European countries. It can be explained by a phenomenon that the legal basis of the regulating system, being quite similar to that in *France*, the basis of both systems being *the Code Civil* which stems from the *Napoleonic* era. (Building Regulations in Europe, 2002, 18)

Bearing in mind that building consists from the technically practical side, constructing buildings and structures; the normative regulation is directed to the technical specifications in building. It is established in the theory of rights that until the 20th century the contact of technical specifications with the area of legal norms was only episodic. A new model of society came to existence in the middle of the last century, which is nowadays referred to as the information society. (Plotnieks, 2009, 28) In large scale it occurs by legislative acts adopted for the specific reason, assigning a form of the legal norm to the technical specifications which control a certain form of commercial activity or an execution of professional duties. One of the most striking legislative acts is *the Cabinet of the Republic of Latvia Regulation* of April 1, 1997 No 112 "*General Construction Regulations*". (Plotnieks, 2009, 29)

5. Sources of Building Rights

The form and type revealing the content of rights are understood as the sources of rights. In the broader sense, a source of rights is every factor that has an effect on the formation of objective rights. In the narrower sense, a source of rights is an applicable directive – a fundamental law in its broadest sense that is applicable to the adopter of rights when settling legal disputes. (Neimanis, 2004, 65–66)

Every national country has its own characteristic understanding of sources of rights. In every national country the understanding of sources of rights is effected by: 1) belonging of legal system to a certain family of laws; 2) the dominating understanding of rights in the society; 3) the historical development of the legal system. (Neimanis, 2004, 34)

The historical affiliation with the respective legal system had an effect not only on the legal system of *Latvia*, but also on building rights. Many experts of law sciences are of opinion that until the incorporation of *Latvia* in *the USSR*, the theory of sources of rights developed in parallel with the legal doctrines of other European countries, but this development stopped when *Latvia* was part of *the USSR*.

Satversme or *the Constitution* can be regarded as the source of building rights with the highest legal power. Looking at it in general, *the Constitution of the Republic of Latvia* embodies general provisions on organization of the state administration.

The adjudications of *the Constitutional Court of the Republic of Latvia*, that is a source for filling in any gaps in the building rights, play an important role both in development of rights and building rights. The second role according to its importance for the adjudications of *the Constitutional Court of the Republic of Latvia* is that they activate urgent legal issues for public and enrich and review not only

insights of constitutional rights (Pleps, 2005), but also consider a much wider circle of legal issues.

Regarding a constitution as a document of the highest legal power, for the greater part it does not regulate the administrative legal relations directly, but it formulates the basic principles for administrative rights, defines the most significant institutes of administrative rights.

The wide circle of constitutional issues heard by *the Constitutional Court* regarding construction includes one to determine whether the principle of protection of legal expectations and certainty[11] pursuant to section 1 is not breached. *The Court of Justice of the European Communities* has also defined the principle of protection of legitimate expectations in the sector of jurisprudence of *the European Community* – it is one of the key principles in the legal system of *the European Communities* and is closely related with the principle of certainty. At the same time *the Court of Justice of the European Communities* has established that the principle of protection of legitimate expectations functions only then and in such a scope, as the situation and conditions that can rouse the legitimate expectations are created for an individual in advance.

Laws contain general provisions related with construction that are characterized in details in the legislative acts dependent on the laws. (Statkus, 2008, 6)

The main legal act that establishes the construction procedure in the country is *the Construction Law* adopted by *Saeima* in 1995. Although it has been a while since the law was adopted, nevertheless the current law has provided for building procedure in the country.

Bearing in mind that the *French* system of building regulations is highly complex and consists of many kinds of laws and a large collection of official and semi-official documents, the principle documents are the laws (*Lois*), decrees (*Décrets*) and implementing orders (*Arrětés*) and many ministerial rulings that can function as regulations. The rulings and regulations for a given topic are combined in *the Codes*. (Building Regulations in Europe, 2002, 79)

Construction norms – the legislation which regulates construction. The construction norms are an aggregate of norms and regulations binding on all persons participating in construction that regulate construction and the operation of structures, as well as explain construction terminology.

The existing *Construction Law* of 1995 was drafted when *Latvia* had not joined *the European Union* yet, so no harmonization of national legislation with the legislation of *the EU* was necessary.

The European Union rights, that put a special emphasis on significance of the public involvement and taking decisions related with the environment, are an important source of building rights. The principle of public involvement emerges from the principle of society and it clearly exerts influence on the Community's secondary

[11] Judgment in Case No. 2005-12-0103 of December 16, 2005 in the Name of the Republic of Latvia.

rights. One of the key purposes of the involvement principle is to eliminate or reduce risk that the solution of development is achieved at the expense of environmental protection interests. (Statkus, 2008, 6)

Ensuring of *the European Union* rights in *the Republic of Latvia* is regulated by the Cabinet Regulation of February 3, 2009 No. 96 "*Procedure for Development, Harmonization, Ratification and Actualization of National Position of the Republic of Latvia on Issues of the European Union*", the Cabinet Instruction of February 3, 2009 No. 4 "*National Position of the Republic of Latvia on Issues of the European Union and Procedure of Drafting the Respective Instructions and Circulation of Information*", the Cabinet Instruction of April 13, 2007 No. 6 "*Procedure of Evaluation, Harmonization and Correction of Mistakes in Translations of the European Union Documents*" and in other normative acts.

The interaction of national legal provisions and international legal provisions of human rights is regulated pursuant to section 89 of *Satversme* that states that "*the State shall recognize and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia*". It can be seen from this section that the aim of the lawmaker is to achieve the mutual harmony of human rights included in *the Constitution* and the international human rights. Such an interpretation indicates a necessity of ensuring a harmonious interpretation of national and international rights. (Statkus, 2008)

One of the sources, that establish the public involvement process in the construction sector, is recommendations by *the Committee of Ministers of the European Council*. For instance, *the Recommendation* No. R (87)16 "*On Administrative Procedures Affecting a Large Number of Persons*". (Statkus, 2008, 6)

The current normative regulation of building products is developed in accordance with the provisions of *the Council Directive* 89/106/EEC of December 21, 1988 "*On the Approximation of Laws, Regulations and Administrative Provisions of the Member States Relating to Construction Products*" (hereinafter – *the Construction Directive*), but a draft regulation on the united requirements for circulation of building products, that will replace *the Construction Directive*, are in the process of adoption.

But in *France* the Construction Products Directive and Eurocodes "*Construction Products Directive*" and the *French* regulatory system are implemented through the *European* standards. It is found that this is a slow process, especially when the European standards are lower than the *French* standards. (Building Regulations in Europe, 2002, 94)

The regulation for development of a building project according to *the Cabinet Regulation* No. 112 "*General Construction Regulations*" [12] establishes the enclosure of *the European Union* regulation in this process. Application of national standards and technical requirements of building regulations of the member states of *the European Union* to buildings, their sections, building structures and engineering communications that are not regulated by building norms or standards of *the*

[12] Section 58[1] of General Construction Regulations.

European Standards Organization, permits, as it is provided in the contract of construction design.

The Cabinet Regulation No. 112 "*General Construction Regulations*" sets the application of national standard and technical requirements of building norms of the member states of *the European Union*, harmonizing them with the municipal building authority. It is not permissible to apply the national standards or building norms of several member states of *the European Union* simultaneously in the design of a constructive element or a single system of engineering communication in the construction project of one object.

The process of public involvement in territorial planning and construction is regulated by the laws and the Cabinet regulations. However, some individual norms can also be included in the binding regulations of local municipalities that similarly to the Cabinet regulations are the legal acts dependant on the laws. Pursuant to paragraph two of section 41 on the law "*On Municipalities*" the binding regulations of the local municipalities should comply with *Satversme*, the laws, and the Cabinet regulations. (Statkus, 2008, 7)

In order to set the general principles of operation and establish a certain procedure for performance of certain activities in its administrative territory, the council of the local authority may issue the binding regulations in its administrative territory.

The scope of the concept of "*judicature*" is still subject to discussion in legal literature. *E. Levits* "*describe it as a set of the court adjudications that came into effect and include legal insights of abstract nature that can be used by the court in specific cases as an argumentation of their decision*".

Regarding the control of the courts, *the Constitutional Court* has concluded – "the basic task of the court in administrative process, following the principle of objective investigation, is to provide for effective control of the court over the rule of law and expediency of activities (inactivity) of the executive power. In the broader sense during the administrative process the task of the court is to perform the control of the rule of law (expediency) of authority assigned for the executive power. (Pleps, 2005)

Conclusions and Proposals

In order to hasten the process of implementation of the harmonized building regulations with the legislation of *the European Union* and to resign from the application of technical norms of the *Soviet* time in construction, the following measures should be taken: 1) *The Construction Law* and *General Construction Regulations* are amended, stating that in the fields not regulated by the building norms of *Latvia* and the *European* standards, it is permissible to apply the national standards of other *European* countries; 2) In order to make the transition easier, use the technical assistance of member states of *the European Union* for alignment of legislation during the joining process and save the financial resources of the responsible authority, it is necessary to entrust a research on exploration of building practices of other countries to the responsible authority.

Deep researches should be carried out in order to determine the position of building rights that would contribute to disclosure of the concept of building rights and its position in the legal system, taking the traditions of building rights of other countries as an example.

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LEGAL NIHILISM IN THE SOCIETY OF AFTER–MODERNITY

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The expression 'legal nihilism' nowadays is most often found in publications highlighting the shadow side of public life. Usually it is pointed out as one of the last causes explaining the delinquent behaviour of certain individuals critically evaluating the legal structures of the state, its normative procedures, institutional structure and in particular the state policies implemented using legal measures. The expression 'legal nihilism' plays the role of a rhetoric figure especially well, however if the nature of this phenomenon is not conceptually studied very few would be able to assist in understanding the root causes of the problems created and prevent the negations created. The aim of the paper is to project the nihilism concept developed by European philosophy tradition on legal issues by monitoring the identification practised in the public sphere with the aim of ascertaining the fundamental origin and nature of the phenomenon that is so topical in publications. Special attention has been paid to fact that this topic which has been the focus of attention of western intellectuals has emerged in modern day culture and society, in particular, in the unique Latvian context.

Keywords: nihilism, values, modernity, after modernity, legal positivism

1. The origins of Nihilism

The understanding of nihilism in the public opinion is oriented towards nihilism as an absolute evil which also corresponds to its traditional explanation in common dictionaries: "Nihilism – the negation of commonly accepted moral norms, principles, moral values as well as social lifestyle." (Svešvārdu vārdnīca, 1999, 518)

A variety of explanations of nihilism can be found in special dictionaries. The expression nihilism is associated with non-classical European culture universe of the 19th century as well as with postmodernism in philosophy in the second half of the 20th century and is closely related to phenomena that are results of intellectual activity in streams of orthodox culture inspired by the publishing of Byzantine Christian canons in Russia as well as fundamental stances of vision of the world in Hinduism and Buddhism. (Гриницанов, Румянцева, 2001, 689) If all these nihilism versions are somehow connected to its philosophical interpretation one cannot ignore nihilism as a form of self identification and self conscience in the various mass consciousness structures. Browsing modern information technology offered resources on nihilism one can access vast amount of references testifying to the wide and varied use of this expression in the context of all kinds of protest forms, movements, opinions etc. (Nihilisms. com) It is not difficult to see that this expression is not just associated with something absolutely negative and

unacceptable. Nihilism can be articulated as a distinct attribute of human existence that expresses protesting radical aspects. Of course one can classify it as something abnormal and unacceptable, but it does not really correspond to modern day perception of recognition of otherness and the various forms of direct democracy. Therefore it can be stated at the empirical level that nihilism is perceived on a really broader scale than its interpretation in the traditional conceptual scheme. Today French dictionaries point out three different meanings of the expression 'nihilisms':

1) philosophical doctrine according to which nothing is absolute;
2) ideology that negates any kind of social compulsion;
3) feeling characterising pessimism and moral disillusion, e.g. punk pessimism. (Le Petit Robert, 2001, 1152)

The Latin roots and derivation of the expression "nihilism" stem from the indefinite pronoun *nihil* – nothing. Ancient thinking since the *Parmenides* era considers it logically impossible to be *nothing* and therefore no more etymological roots on this subject can be found from this perspective. German researchers have found the first mentions in the new era as an expression in the texts of the 18th century author *F. L. Goetzius* in relation to theology and philosophy as well as its possible interpretations in other branches of science – law, medicine etc. (Müller-Lauter, 1984, 846) In France the expression became popular during the Great French revolution but more in the practical rather than the conceptual context. One of the Jacobin club leaders *Anacharsis Cloots* stated in 1793 that a republic is neither deistic nor atheistic but "it is nihilistic", in other words separate from any, even a negative association with the Supreme Being. (Glucksmann, 2002, 88) Proof of any in depth research on the understanding of the phenomenon during these times is not be found and probably such did not exist at all.

Its philosophical meaning was discussed starting from the classical German philosophy era although not in the works of recognised representatives of the intellectual streams of that time but in the commentaries of their contemporaries. *F. H. Jacobi* in his letter to *J. G. Fichte* in 1799 uses the expression in the philosophical traditions of Kant, wherein he also complements *Fichte's* interpretation.

The work *Der Einzige und sein Eigentum* (1844) of German philosopher *Max Stirner* played a significant role in the development and popularisation of nihilistic world opinion. Although the expression is not expressly used in the work the ideas that are expressed therein are undeniably closer to nihilism: each individual is fully free from any obligations towards the society and other separate individuals. Furthermore it is not only related to obligations applied by the generally accepted norms of the society but also the free promises made by the individual himself that were made due to any reasons convenient for oneself. Stirner's work was doomed to silence in the intellectual environment of his era but the notions expressed in them slowly but surely infiltrated into the socially significant consciousness.

Russia in the mid 19th century was considered to be the homeland of nihilism as a widely known social phenomenon mainly due to the "real critic" activities of publicists Nikolai Dobrolubov and Dimitri Pisarev. The greatest merit should be accorded to two Russian literature classicists Ivan Turgenev and Fyodor

Dostoevsky for the development of subject of nihilism in the literary form. The main hero of the Turgenev's novel "Fathers and sons" was portrayed as a nihilist as he denied transcendental reality and all its holiness (morality) as simple prejudice. That fully corresponds to positivism that was gaining popularity during those times both as philosophical teaching as well as relevant world opinion that did not acknowledge any other reality apart from that gained, touched and observed through sensory experience. All other traditional world opinion topics were also offered through the same perspective and facts which did not stand such verification were supposed to be dismissed. What happens to human existence when one attempts to relate to the world in a positivistic manner is clearly shown by Dostoevsky. A lot of scenarios discussed in his literary works can be considered experiments of nihilistic thinking. Nihilism continued to play a significant role all through the end of 19th century in the Russian public life and social political life.

2. Nihilism as characterisation of European humanity

Fridrich Wilhelm Nietzsche the German philosopher further developed the philosophical form of nihilism in the 80's of the 19th century in Western Europe. He did not further the discussions of his compatriots of the beginning of the century but rather referred to emergence of human existence form in Russian literature and gave it a fundamental dimension. It is a fact that *Nietzsche's* thoughts were considered more as a poetic aesthetic project and not as an intellectual concept by the wider audience for several decades. Academic canons of *Nietzsche's* philosophy that play a very significant role in the subject of nihilism became the topic of discussion of the intellectuals only thanks to the research of *Martin Heidegger* in the mid 20th century. *Heidegger's* two tom studies and commentaries in the second tom dedicated to entire *Nietzsche's* philosophy deliberate the problems of nihilism. Nihilistic scenarios played significant role also in the Nietzchean second half of the 20th century (e.g. *Gilles Deleuze*) following the footsteps of *Heidegger*.

Everything that is written nowadays about nihilism in some way or the other take into account this example because as already mentioned nihilism is not a easily understood topic, fact or phenomenon but a conceptual model for the under-standding of culture and civilization processes. These canons lay a monumental foundation and any other version or interpretation of what really is nihilism should start with the remembrance of these basic guidelines.

The main stances of *Nietzsche's* interpretation of nihilism that should in particular be taken into account while understanding the nature of legal nihilism is:

1) nihilism is related to processes in the sphere of values. This relates not to existence itself or to some or other physical existence but from the aspect of existence of values;
2) *nietzsche* often points out the diverse nature, ambivalence of nihilism. It could be "A. Nihilism as a sign of *morally elevated greatness*: *active* nihilism. B. Nihilism as *fall and regress of moral greatness: passive* nihilism." (Nietzsche, 1988, 350, 351) Nihilism is that which is beyond good and evil. Both one and the other can be found on this path and not even for a moment can

the path be really accorded to one or the other Nihilism as an evil in the primary expression is that which is not worthy of being elevated to the level of the "higher value". And vice versa: even nihilism becomes sacred with the illusory demystification of higher values through scorn;

3) in order that the description of ontological nature of nihilism does not seem too subjective one has to clearly understand that one is talking about nihilism as a state of existence and not just subjective psychological attitude. The reference of the supreme value as cosmological in some way indicates that. (Heidegger, 1961, 55) Cosmology should not be understood in the astronomical sense. This expression consolidates the ontology of values. Values emerge, are approved, rejected or transformed as a result of the subject's attitude. However it is subjectivity as a special form of existence and not the expression of subjectivity as lawlessness. At this point *Nietzsche's* concept differs mostly from the usual interpretation that nihilism is inadequate attitude towards values including legal values of a few certain individuals. Understanding the objective meaning of nihilism, it should be sought for in all expressions of human existence and not mainly in those where the opinions of certain individuals are expressed. Even that which is expressed as an opinion should clearly be based on the objective disposition of the expresser in an existential situation;

4) nihilism is described as a European phenomenon. Therefore its statement is not a complaint against all humans, but only that variant that arose in the ancient world and was inherited by the Christian cultural traditions. Furthermore indications towards European nihilism separate the phenomenon described in this conception from the general, even everyday use of the word 'nihilism'. In this case one can even assume that legal nihilism is rather more closely linked to everyday nihilism and its interpretation does not require any allusions to concepts of *Nietzsche*, *Heidegger* and other philosophers. It should be acknowledged that more often such is the case in allusions to legal nihilism. However the European nihilism discourse developed in philosophy cannot be just interpreted as a philosophical issue. European nihilism encompasses all European life including its legal aspects;

5) nihilism is not interpreted as a permanent condition of human existence but as a process. This process started already in the ancient culture and through the course of several stages was already felt during the times of *Nietzsche*. *Heidegger* diagnosed his era as a fully nihilism era which according to him and opinions of other thinkers of the mid 20th century had to be overcome in the near perspective.

Summarising it all *Heidegger* points out: "Therefore *Nietzsche's* nihilism is in no case a "represented" view and is also not any widespread historical "ability" found among many others. Nihilism is rather an event that continues and where the truth regarding the existing changes and tends towards its definite end." (Heidegger 1961. 35) These features do not necessarily cover the whole nature of nihilism but

it is necessary to keep it in mind while thinking about the nature of legal nihilism both in the general as well as specific modalistic understanding of nihilism.

3. Law as a value in classical and after-modernity society

Issues concerning legal nihilism are not issues about the fairness of one or the other legal decisions or enactments. It is not and cannot be the competence of philosophy of law. Its competence however is to discuss criteria on which decisions and laws are approved. It includes also deliberations concerning which criteria should be applied to evaluate law as adequate or inadequate. These criteria and parameters themselves can and should be evaluated concerning its adequacy or inadequacy. Issues of values become topical whenever we talk about evaluation scenarios.

Highest values in classical culture are first and foremost associated with Plato's kalokagathic principles: the unity of good, beautiful and truth as a right understanding of guidelines of human life orientation and efforts. Among the three higher values good has a special status which especially higher than the beautiful and truth. Here one should remember that in classical culture good (gr. *agaton*, lat. *bonum*) does not mean all benefits, utility benefits but the absolute happy condition of human existence which is more spiritual than materialistic although it does not exclude the latter. The Christian culture transformed it into the holy, blissful perspective.

A particularly complex clear definition of justice as one of the higher public life values ushered cardinal changes in the European type of civilization at the end of the 20th century. Initially it was manifested in art (architecture, literature) forms as postmodernism. Very soon understanding the changes in the modelling of the aesthetic world and the life style in general people started talking about post-modernism as a new era in human history that had changed (or was changing) the new era known since the 17th century or modernity culture and civilization type. The author of the article believes that cardinal changes are occurring but does not agree to the rush in terminology to call it by the still emerging term – postmodernism. This term alludes to something emerging, definite, though modernity cultural transition processes are still taking place and a variety of features are being expressed in it and nothing can be known of postmodernism as an artistic style and philosophical generalisations that stem under its influence. For example changes taking place concerning information technology over the recent years are yet to be fully emphasised in postmodernism. Therefore for the term "after modernity society" would be appropriate in understanding the situation to some extent. The identifications and generalisations provided by postmodernism theoreticians are acceptable for its description but they could not be considered full and comprehensive as the transition from modernity to a post modernity society is still not over and the existence of all new humans in new circumstances in contrast to earlier have not yet been expressed to the full extent.

One of the significant post modernity characterisers – French philosopher *Jean-François Lyotard*, points out the incredulity of meta narratives as a significant characterisation of the new situation including grand narratives, basic concepts of traditional metaphysics. Efficiency and performance become important instead.

Lyotard's analyses are mainly dedicated to changes in attitude towards knowledge. However such pressures can be felt by other traditional European universalisms as well. Optimisation and efficiency criteria also become determinative in justice as well similar to that in truth. These actualise the issues regarding nihilism threats acknowledging these criteria as dominant in the evaluation and orientation of human existence on the whole. "The operativity criterion is technological; it has no relevance for judging what is true or just." (Lyotard, 1979, xxv)

Along with the discredition of truth and justice as significant orienteers, the value orientation of human existence also comes under doubt. A lot is spoken about values and their significance in the post modernity society, however it has devalued as cultural lifestyle guidelines of certain corporate entities and private individuals. "Social subjectivity is becoming ever more amorphic but individual subjectivity is gaining a socially significant character. Value vocalularies are still socially significant, but now they are not in harmony with the social but also in the fundēti personal experience." (Докучаев, 2009, 71) Can we still call them values or more precisely they should be referred to as diminutive values?

Despite the amorphous character of value orientation and ever more expressed subjectivity of social life is being introduced also in post modernity. Paradoxically it is indeed law that although ever more definitely losing its fundamental values is fulfilling a unique "grand narrative" function when traditional narratives have been forgotten.

All these changes which are ever the more deeper and wider actualise issues regarding what is law in relation to values? Law cannot be considered a value by itself as it has existence but gives the essence in the form of values. In the classical axiological system (*H. Rickert, M. Scheler*) law and relevant values do not occupy an especially good place. The desire to relate law to values is rather clearly discernable in several conceptions of the understanding of the law.

Justice is acknowledged to be one of the higher values in classical culture as an aspect of human being's public life. The theme of higher values modified as justice principles has become one of the central issues of classical law philosophy.

We will just look at two important principles related to our theme. At the end of the era of antique culture *Aureli Augustini* (345–430) pointed out that only well grounded higher values can serve as an excuse for coercion practised in mutual relationships between humans: "Where there is no justice there is no state but a gang of robbers for a gang of robbers is also nothing but a miniature state." (Sancti Aureli Augustini, 1877, 150) On the other hand 20th century German law philosopher *Gustav Radbruch*, working on the concept of law based on values points out: "Law is reality, the essence of which is to serve justice". (Radbruch, 1973, 123) Justice is the basic landmark that the state and its legal mechanism should be oriented towards to acknowledge it to be in accordance with its concept, i.e. a really legal state.

However the implementation and verification of this principle is not as simple as it may seem. First of all, the state and law no matter how fair they may be are not the same as justice. Justice as a value refers to both the state and the law as well as to

purely private – morally regulated sphere of human relations. Consequently one cannot just speak about the implementation of a greater or lesser justice principle in the public sphere which will never be the same in the moral sense and therefore the former can always be possibly denoted as lower, less complete. Law as moral minimums etc. can be mentioned in this connection. Secondly if justice is looked upon as higher legal and ineligible discerning criteria, then the requirements for clarity and unambiguity of the criterion is justified. The situation is as much complex as in the case of necessary distinction of justice in the ethical–private and legal-public sphere.

Law concept traditions in other main doctrines either totally deny the value nature of law (positivist law understanding) or acknowledge only as one of the features, types of argumentation or some sort of more basic (interests, imperative-attributive emotions) expressions as can be found in realistic law interpretations and analytical law research versions that stem from it. Each of these positions has nihilistic elements. Natural law traditions in particular its extreme expressions (e.g. anarchism) in fact laid the grounds for nihilism and were the original nihilism. On the other hand though positivist tradition representatives do not allude to higher values, they in fact tend to elevate it to the status of state, legislator and legal order. Consequently the competences of values traditionally deemed to be higher are quite openly denied in the socio-political and legal sphere. Realistic law interpretations also follow the same direction on the whole but there seems to be a potential for the new validation of values.

4. Legal attributive nihilism

The possibility of legal nihilism is already present in the essence of law. As a coercive force law already deny the autonomous existence of an individual. However law in this case is the lesser and necessary evil that is needed to prevent a larger intolerable evil that could arise and constantly arises from the individual's inability to use his freedom correctly. It was clearly shown by *Immanuel Kant*. If an individual was truly free , he would live according to relevant basic moral laws – categorical imperatives: "Act according to a maxim which can at the same time be valid as a universal law." (Kant, 1788, 140) However, even though an individual can mentally understand the rightful principles of one's actions, his good will is not strong enough to adhere to them absolutely and sometimes his egoistic expression dominates. "From such crooked wood as that which man is made of, nothing straight can be fashioned." (Kant, 1784, 41) Therefore he needs an external regulator who by coercive means can force him to implement the categorical imperative of law: "So act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law". (Kant, 1797, 338)

In the ideal case law is achieving moral goals with the aid of amoral means which in itself is denial of morality. Such a nihilistic aspect of the understanding of the law will decrease with the increase in moral level of the society to such an extent when law enforcement would not be necessary. Any activity oriented against public morality is nihilistic. If it is furthermore considered punishable and unacceptable by law then such an action is also legally nihilistic. The society prevents the

expression of legal nihilism by the use of legal means against illegal actions as well as suppresses the desire that leads to it. Although it does not make the coercion non nihilistic it is still regarded better than what is possible or as *Kant* says: "God's most sacred thing on earth". (Kant, 1795, 207)

However as the norms and institutions of legal regulations are human made the "distortions" of human character can and do appear in them. It could happen with the legislators as well as law enforcement authorities foreseen by the law without their full understanding that each specific case corresponds to category imperative requirements, as well as more or less consciously applying the enforcement tools for the organisation of social life for the realisation of their own egoistical tendencies. Usually both these motives (let's call them: stupidity and villainy) go hand in hand. One can talk about legal nihilism in that aspect. Of course, often it is difficult to distinguish how legal loopholes are entwined with ignorance and wickedness of legal servants; how the negligence, neglect of one person is connected with the greed and egoism of another.

From the point of view of understanding of legal doctrines how justice is understood and how the question of what is justice is answered can be considered a relatively sure indicator of nihilism. Summarising the human search for an answer over thousands of years, law is behavioural norms enforced by external coercive means that are considered to be just by that particular society.

Although in accordance with this interpretation justice only appears in the end, it has to be the basis both while defining the norms as prescriptions as well as while ensuring their enforcement. However justice alone based on social order is not yet legal. Guidelines where any existing normative enactments are acknowledged to be in accordance with the concept of justice are even less legal. Legal doctrines based on just norms as prescriptions (Judicial positivism) are nihilistic in their orientation and have often resulted in catastrophic expressions of legal and social nihilism. *G. Radbruch*, analysing the causes of Nazcist "legitimate injustice" indicates that "it is legal positivism which strips one of the power and ability to counteract the legal wrongdoings of Nazis". (Radbruch, 1973, 347)

A similar opinion of social order prevalent in the USSR was expressed by Aleksander Zinovjev: the communist society was unjust. Not withstanding the fact that the society as well as life of each and every individual was regulated by normative enactments to a larger extent than in any other social political mechanism, it did not correspond to general law principles. "The norms regulating human behaviour did not operate within the framework of legal principles but rather within a state goal oriented framework". (Зиновев, 2003, 311) However the greatest injustice can be attributed to these norms by the fact that parallel to officially declared norms which in words could conform to generally accepted justice principles there existed an unwritten or publicly undeclared norms which determined how the norms would be applied officially. The main emphasis in them was the ideological, political views and definite notions of the representatives of the leading elite in particular those of the leaders.

Aristotle had indicated such essential expressions of justice as the honest application of laws. "Any law is something general, but particulars cannot be

defined precisely and correctly in the general formulation … It is the nature of honesty – specify and correct the law" (Aristotele, *Ethiká Nikomácheia,* 1137b, 14, 27.) The idea here is about the inevitable correction of the law during its application with regards to each separate case. Various realistic and sociological law concepts worked out over the last few centuries point out that how the law is applied should be considered the real interpretation of the word law (real law). (Broks, 2008, 266–267) Official legal enactments that are in force from this point of view are only sources of law and not the law in itself and become real only during their application process. This understanding of law is in contrast to the narrow understanding in the various positivist versions as well as the fascination of natural law traditions with contemplation of ideal aspects of law ignoring legal enactments as the implementation of these ideals and also forms of judicial practice.

Therefore positivistic as well as concepts of doctrines emphasising natural justice principles can be considered nihilistic. The latter although usually in a conceptually undeveloped manner is expressed and defended by various extremist political groups and movements. Anarchists and radical socialists who considered the state and its legal mechanism fully incompatible with the human nature and therefore to be destroyed by any means called themselves nihilists in the 19th century. Nowadays similar opinions are expressed religious fanatics and international terrorist groups. *André Glucksmann* has written the following about terrorists: "They consider themselves to be the more normal norm than norms of the normal man". (Glucksmann, 2002, 103)

The understanding of culture and nature and origins of humanity has cardinally changed in after modernity philosophy. The Nietzschean tradition has played a significant role in this change. It brightly appears in the usual modern anthropological scene in the form of violence and the theme of sacrifice and victims connected to it. Sacrifice as the renunciation of life for a cause that is immeasurably above the life of the individual is widely known in archaic cultures but has remained and continued to perform its cultivist function as an archetypical basis even in cultures considering themselves to be modern. The affirmative role of existence of sacred violence is acknowledged in cultural anthropology and philosophy. However, just by obtaining a sacred character, violence by itself does not become less violent for its victims. The sacred victim also perceived in an altogether different form in archaic cultures. Vivid evidence of euphoric elation that may accompany the sacrifice for transcendental (divine, ideological) causes can be found in terrorism which is widespread in the modern-day world.

Civilisation that tends to place itself beyond and secure itself from terror has to be involved in this discussion inevitably and understand the nature and grounds for this violence practised in a civilised manner. And that reveals us a complex and unequivocal interpretation. German thinker of the first half of the 20th century *Walter Benjamin* explained law as the multilevel combination of various types of violence. Taking into account the experience of understanding of human existence starting from early *Hegel's* texts of existential nature and the further reconfiguration of humanity and culture in the post-Hegel intellectual tradition he views the initial law and justice as to be derived from rather Nietzschean concepts.

Describing the coercive nature of law, *Benjamin* mentions two types of violence which he calls mythical and divine. Mythical violence is the initial formulation of existence, establishment of power which further creates law as an attribute of order under the power. However, order in mythical syncretism is expressed without the rearrangement of leaders. Only personifying in the form of the gods power becomes the enforcer of order. It adopted and transformed itself into the original mystical violence and created the impression that only the personification is able to maintain all the order. Introducing the transcendent of order structure even axiological motives of divine violence on the one hand become purer and nobler but on the other hand further exposing violence degrades to some extent the mythically established initial law order as it is not able to maintain it in a non personified manner without its axiological justification. "Justice is the principle of all divine end making, power the principle of all law making. The mythical manifestation of immediate violence shows itself fundamentally identical with all legal violence, and turns suspicion concerning the latter into certainty of the perniciousness of its historical function". (Benjamin, 1977, 199) Viewing law from this perspective its justification falls under existence which according to Nietzsche power is described as "beyond good and evil". The traditional opposition of good and evil loses its certainty and legal coercion its justification although it does not therefore become denial of law. Everything now has to be justified and grounded without hiding behind mythical formulas and unidentified patterns.

However, even the doctrinal interpretation of legal nihilism with its thousand time repeated allegation, that law is just legal norms, a set of laws and that legal nihilism is just "expressly negative attitude towards laws, failure to see or denial of its values" (Meļķīsis, 1998, 171), finally leads us to the understanding that everything else that does not only correspond to the law is "just" ethics and one cannot speak about it in a legal discourse.

5. Legal nihilism in Latvia

The problem of legal nihilism is a rather topical in Latvia. It stems from history how the current Latvian judicial system has evolved to a large extent. On the one hand the judicial system of Latvia as an EU member state conforms to the highest standards of European type civilisation. It however is only so good if seen only from the positive law (word of law) perspective. It is no less important that two other elements are present in the evaluation criteria for judicial systems: judicial practice and judicial culture with its dominant ideals and values.

The latter factor is certainly important in the legal nihilism issue. In Latvia's case to expect something excellent is difficult not the least because the legal culture and its elements cannot just appear by merely declaring them.

Although it is 20 years since the regaining of independence , it is historically a short period of time to expect vast changes in the overall and especially legal culture of the society. The situation in Latvia and also other post socialist Eastern European countries is even more complex because of the ambiguity and multidimensionality of the changes that have occurred. Regaining independence Latvia returned to the

political and judicial structure that was established during the period of its first independence in the 20's and the 30's. It however did not mean the complete renunciation of the so called Soviet Latvian heritage. Several Soviet laws continued to be in force several more years till new laws were drafted and even more important institutions and courts continued to function without changing their names or personnel.

The understanding of positivist state and law can still be found among lawyers, which is specifically expressed also in the interpretations of legal nihilism. It leads us to the idea that "a totalitarian state by way of sanctions deny people the opportunity to not abide by the law or express a negative attitude towards it and therefore can oppose" (Osipova, Roze, 2007, 56) more successfully legal nihilism than a democratic state. Viewing the Soviet state and the social order maintained by force from the legal positivist perspective one has the impression that it was relatively successful in maintaining law as a value. The fact that the essence of coercive order maintained by a totalitarian state is "legally unjust" is completely ignored.

Such important legal institutes as the renewal of property law definitely arose due to the inadequacies of this doctrine. On the one hand there was adequate denationalisation to some extent by returning property to former owners. However the privatisation of property that was acquired during the Soviet times was sometimes unclear and at times illogical. The privatisation certificates issued for state institutions were politically manipulated several times as a result of which those belonging or closer to the political ranks got the real benefit. All of it led to the disillusion in the perception of the state as an enforcer of just legal order for the whole society and strengthened the belief of legal order as an instrument serving the interests of several political and economic groups.

It is justified to call such understanding and belief as social and legal nihilism, though one cannot just limit oneself with just the detection of nihilism as a symptom in the value system dominant in the society. Such an attitude towards the state and the judicial structure has been formed by the nihilistic (denial of common social values) attitude and actions of the state and judicial powers. It is even more strengthened by the no correspondence of actions to the ideals proclaimed as it shows that ideals are nothing but words without significance. Therefore the stamp of nihilism was put on any ideals and stances expressed in words even if they were true. Only continued and adequate actions that correspond not just compulsorily loudly proclaimed values and ideals change bring about change.

Only with the passage of time shall officially proclaimed general human rights principles that are the basic criteria for legal justice be revived in the conscience of the lawyers and the majority of the society and become the basic motives of their thinking, attitude and actions. It is however not just a moral process that could be promoted just by continuously reminding one of such ideals and values. Development of successful legal culture can only be furthered in a situation when the moral ideals are validated though legal practice. Unfortunately in this context almost everyday there is some news or other that members of the society have acted in a manner that there is no legal or moral orientation in their actions.

The Latvian society was concerned by a number of illegal acts in the first few months of 2011 carried out by individuals whose professional duties were connected with the maintenance and enforcement of law and order. One policeman was killed and several were injured after firearms were used by robbers against police officials during a chase after an armed robbery carried out by several State police personnel who were on a holiday. A professional lawyer who had written a doctoral thesis on legalisation of firearms shot another individual who had reproved him for his behaviour disturbing other cinema audience. The head of the Judicial committee of the Saeima announced that one of the current Constitutional judges who during her term as Member of parliament and head of the Judicial committee of the Saeima during her previous parliamentary term had allegedly forged signatures in the minutes of the committee sittings.

The common thing among three incidents is not only the fact that the professional duties, mission of those accused was supposed to have been against such infringements of the law that they themselves carried out but also their defence strategy as well as the reaction of experts and the society towards it. In the first case a lot was said about the low salaries of police personnel that forced the law enforcers to earn the necessary living almost in any manner possible. In the second case a lot was said about the emotional and health problems of the shooter after the incident. Experts explained what psychological mechanisms had led to such an action. In the third case first of the political interest, even revenge motive of the person making the accusation was pointed out and the fact of forgery was connected to some kind of mysticism. Nothing at all was mentioned about the attitude of the accused persons towards such values as human life in the first two cases and legal mechanism in the third case.

Any infringement certainly has concrete situational causes, but they all just create the possibility for the infringements. The majority of the Latvian society is facing economic difficulties today and are depressed by stress etc. However only a few who have access to firearms or state resources decide to carry out the above mentioned or similar activities.

Why does such a thing occur was explained by Plato. Friends of Socrates offered him the opportunity to flee from Athens and thereby avoid the death sentence which after all could be considered unjust. Although the elderly Socrates till had the power in his legs to flee from the death sentence, he did not consider the physical condition of his body as justification for his actions ".. stating as if it were the cause of everything I do .. it would be completely reckless. It would mean not distinguishing the real cause without which the cause would not be a cause." (Plato, Phaedo, 99.a-b.) The true final factor determining an individual's actions is his value orientation: perception of good, truth, justice. And Socrates decided to accept the penalty. "If Athenians have thought fit to condemn me, and accordingly I have thought it better and more right to remain here and undergo my sentence." (Ibid. 98.e.)

Attempts to explain human actions on by material preconditions or psychological mechanisms is doctrinal nihilism, denial of values rooted in human existence. This

in fact forms the basis for nihilistic attitude of certain individuals towards values and the nihilism that arises out of it incl. legal nihilistic actions.

The situation is even more confounded by the abovementioned after modernity situation. The old European legal structure and its corresponding culture have evolved over time and have been maintained in an era when a relatively stable traditional value system still existed. It could even be said that at a time when the erosion of classical values took place and the clearly visible in the everyday life, the state and the legal structure still continued to function as a value based system and consequently to some extent fulfilled and continues to fulfil the functional but not the substantial maintenance of values.

In Latvia's case due to the just abovementioned reasons the state does not carry out its functions to that extent and the state itself needs the support of states with much longer history of legal state in the sphere of values. However what the after modernity culture has to offer in this context is not enough. A lot is said seriously in political science and philosophy of the state as it had evolved in the classical modernity culture, culminated in the mid 20th century and then declined. Nowadays the state "will soon no longer be either willing or able to control and protect the political, military, economic, social, and cultural lives of the citizens to the extent that they used to". (Creveld, 1973, vii) Serious discussions are underway on the development of forms of political organisations in the new society. It has already developed in the form of various cross border structures as well as various forms of self organisation of individuals that have developed and exist parallel to states, legally or illegally without taking into consideration borders and frameworks determined by the state. The partial emigration of citizens is widespread in Latvia's case where inhabitants do not fully break their legal ties with Latvia but relocate to other countries (hoping that it is temporary) to work and live or to resolve other problems (e.g. insolvency). The opportunity to redress to the European human rights court is being used ever more increasingly to overcome the shortcomings of the state's legal structure.

Two very difficultly compatible tasks have to be carried by the Latvian society on the whole for the transformation of its legal existence in accordance with modern world realities. First of all the European modernity type political and legal culture standards have to be renewed. Although it secondly has to be carried out in an era when these standards have undergone a cardinal change during transition to the after modernity form. It is especially difficult because as after modernity culture though it is considered to be the denial of earlier human existence it still retains imaginary ties with it. Successful after modernity is possible only the basis of modernity values though they maybe be devalued or denied. Otherwise objective factors of social entropy could prove to be more powerful than subjective desires of humans.

Conclusions

Legal nihilism is an ambivalent phenomenon that is expressed as denial as well as validation simultaneously. There are grounds for its existence even in the most just legal structures. Life, actual human relations sooner or later move ahead of normative enactments of even the most progressive social structures and have to be sooner or later amended on the whole or in parts. Until such a situation emerges there is a conflict between the existing legal structure and the actual life style and is expressed as legal nihilism. The attitude of newly develop forms of lifestyle is nihilistic with regards to the existing law and the laws in force are in conflict with the transforming human existence. Nihilism from the legal perspective is most often expressed by the interpretation of rights in doctrine as the maintenance of order (with coercion) in any country. However it could be expressed by unrestricted value claims that have become increasingly labile and subjective in the after-modernity culture. The adequate evaluation of this unequivocal process is possible only taking into account that nihilism is not just a Latin word used to rhetorically to brighten up legal journalism but also one of the basic concepts for understanding the process of historical formation and transformation of European humanity.

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EU'S ENHANCEMENT OF PASSENGERS' AND TOURISTS' RIGTS: A CHALLENGE TO THE TOURISM SECTOR

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For decades consumer protection has been a major concern in the conception of EU legislation. The tourism industry is affected intensely by strong consumer protection law in the field of package travel (Council Directive 90/314/EEC). As the development of the internet and the emergence of low-cost air carriers have revolutionized the way in which consumers organize their holidays, and as for that reason more and more tourists arrange their holiday travels themselves, fewer EU tourists are protected under the directive dating back to 1990 (EU Commission, 2011a). Thus, the EU Commission is currently reviewing the law so that it better meets today's consumers' needs and new business models. In recent years the EU has strengthened passengers' rights after becoming aware of the fact that with booming international mobility the quality of the services and the protection of national and international passengers' rights remain inadequate. Consumer protection and the strengthening of passengers' rights (including social issues) are crucial factors in the legal environment of the tourism industry. This article focuses on the legal challenges the tourism sector is exposed to.

Keywords: EU law, legal environment of tourism, consumer protection, passenger's rights, evaluation of status quo of EU tourism law, liberalization of international transportation

1. EU law targets consumer protection and tourism

"*Before you play the game learn the rules! .. All marketers should be aware of the major regulations that affect their activities*". (Boone and Kurtz, 2006, 48) This marketing scholars' advice acknowledges the advice given by lawyers which is so often ignored: knowing the legal environment of the sector in which one operates is indi-spensable for any successful entrepreneur.

As EU law[1] has become an integral source of the law of any Member State, and as therefore any Member State has two legal systems with which to contend

[1] Taking effect 1 December 2009 the Treaty of Lisbon merged the EU with the EC as art. 1(3)(3) of the Treaty on European Union states: "*The Union shall replace and succeed the European Community*" (the Treaty is published in the Official Journal of the EU

(Davies, 2007, 75), today's EU business people must not only have knowledge of the national law but should as well be aware of all the legal provisions of the EU which touch their business actions even if they only penetrate a national market[2] and not the EU's internal market.

Apart from the Treaties (so-called primary source of law, forming "constitutional law") EU law mainly consists of two distinct tools, i.e. regulations and directives (secondary source of law/secondary legislation). A *regulation* is fully effective throughout the EU, takes effect automatically in each Member State and achieves uniformity of law within all EU Member States[3]. In contrast, a *directive* is not directly applicable, has to be transposed into national law by the appropriate national legislator and in the end leads to a (minimum, partial or full) harmonization/ approximation of the law of the Member States in the respective field[4].

On the policy of consumer protection the EU enjoys shared legislative competence alongside the Member States. (Art. 4(2)(f) Treaty on the Functioning of the European Union). The goal of the EU's ample consumer protection policy from 1985[5], and since 1990 including package travel contracts[6], is "*a high level of*

[OJ] C 83, 30/03/2010 p. 13-45; best online access to EU law is provided by the official website EUR-Lex, *http://eur-lex.europa.eu/en/index.htm*). The naming of former EC law remains unchanged in use (e.g. Regulation (EC) No 392/2009 of the European Parliament and the Council of 23 April 2009 on …[OJ L 131, 28/05/2009, p. 24-46]).

[2] It should be pointed out expressly, that for example the legal provisions of EU law regarding air carriers' liability and regarding air passenger's rights apply to national air transportation, e.g. to intra-German flights (and of course to crossborder flights).

[3] Davies (2007) p. 49; according to the clear wording of art. 288(2) Treaty on the Functioning of the European Union (OJ C 83, 30/03/2010, p. 47-199) a regulation "… *shall have general application. It shall be binding in its entirety and directly applicable in all Member States*".

[4] Davies (2007) p. 50; art. 288(3) Treaty on the Functioning of the European Union provides that a directive "… *shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*".

[5] The development started in 1985 with the provisions regarding *product liability* (Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products), which has been particularly followed by the *doorstep selling* Directive of 1985 (85/577/EC), the *consumer credit* Directive of 1987 (87/102/EC, replaced by Directive 2008/48/ EC), the Directive on *unfair terms in consumer contracts* of 1993 (93/13/EEC), the *distance selling* Directive of 1997 (97/7/EC), the Directive on *sale of consumer goods* of 1997 (99/44/EC), the Directive on *electronic commerce* of 2000 (2000/31/EC), the *Services* Directive (2006/123/EC) and the Directive concerning *unfair business-to-consumer-commercial practices* (2005/20/EC).

[6] By means of the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23/06/1990, p. 59-64).

protection". (Art. 114(3) and art. 169 Treaty on the Functioning of the European Union) All the legal provisions of course apply to the tourism industry and affect daily business, if relevant.

Tourism is an important factor of the EU's economy. Hence it is not surprising that the EU legislator regulates that branch of trade. Since 2009, for the first time, the tourism sector has competence explicitly mentioned in primary EU law (art. 6(d) and art 195 Treaty on the Functioning of the European Union)[7]. Therefore, the European Commission is pursuing the goal to create a "*competitive, modern, sustainable and responsible [tourism] industry*". (EU Commission, 2010b, 14)

2. Status quo of tourism and travel related EU law

The legal environment of tourism and travel provided by EU law poses a real challenge to the EU's tourism industry. The stakeholders should not underestimate its impact on strategic decisions, operational business and daily work. Those responsible individuals within the industry are not yet completely aware of the fact that current EU legislation and legislative projects encompass the tourism and travel sector to a great extent and that EU law is still growing. In recent years several important legal projects have been finalized by the EU. At the moment specific tourism law is in force as follows:

- national legal provisions on *package travel contracts* implementing Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23/06/1990, 59-64);
- national legal provisions on *time share contracts, long-term holiday product, resale and exchange contracts* implementing firstly Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis

[7] Art. 195(1) provides:
"*1. The Union shall complement the action of the Member States in the tourism sector, in particular by promoting the competitiveness of Union undertakings in that sector.*
To that end, Union action shall be aimed at:
(a) encouraging the creation of a favourable environment for the development of undertakings in this sector;
(b) promoting cooperation between the Member States, particularly by the exchange of good practice.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish specific measures to complement actions within the Member States to achieve the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States.". The former Treaty of Rome (of 1957, as amended) did not mention such a competence (cf. McDonald et. al. (2003), p. 23f).

(OJ L 280, 29/10/1994, 83-87) and secondly Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contract (OJ L 33, 03/02/2009, 10-30);

- Regulation (EC) No 2027/1997 of the European Parliament and of the Council of 9 October 1997 on *air carrier liability in respect of the carriage of passengers and their baggage by air* (consolidated version of 2002)[8], incorporating the Montreal Convention of 1999[9] into EU law;
- Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing *common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights* .. (OJ L 46, 17/02/2004, 1-8);
- Regulation (EC) No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the *establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier* .. (consolidated version of 2009)[10];
- Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning *the rights of disabled persons and persons with reduced mobility when travelling by air* (OJ L 204, 26/07/2006, 1-9);
- Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on *rail passengers' rights and obligations* (OJ L 315, 03/12/2007, 14-41), in force since 3 December 2009 and
- Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on *common rules for the operation of air services in the Communit* (OJ L 293, 1/10/2008, 3-20), inter alia imposing the duty to communicate the final price of air fares (art. 23(1)) and fighting against price discrimination based on the nationality or the place of residence of the customer (art. 23(2)).

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[8] OJ L 285, 17/10/1997, p. 1-3, amended by Council Regulation (EC) No 889/2002 (consolidated version online: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R2027: 20020530:EN:HTML*).

[9] Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999 (accessible online e.g.: *http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do?uri=OJ:L:2001:194:0039:0049:EN:PDF*); cf. Grant and Mason (2007) p. 403ff.

[10] OJ L 344, 27/12/2005, p.15-22, amended by Regulation (EC) No 596/2009 (the consolidated version can be found online: *http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do?uri=CONSLEG:2005R2111: 20090807:DE:PDF*).

3. EU regulations soon coming into force

There are important legal projects which have already passed legislation but are not yet in force. Nevertheless, such law should be immediately taken into account by the stakeholders for future planning. Most recent EU legislation embraces:

- Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on *the liability of carriers of passengers by sea in the event of accidents* OJ L 131, 28/05/2009, 24-46), being based on the Athens Convention of 2002[11] and entering into force no later than 31 December 2012;
- Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning *the rights of passengers when travelling by sea and inland waterway* .. (OJ L 334, 17/12/2010, 1-16), entering into force on 18 December 2012;
- Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning *the rights of passengers in bus and coach transport* ... (OJ L 55, 28/02/2011, 1-12), covering long distance services (of more than 250 km) and entering into force on 1 March 2013.

4. Completion of passengers' rights and their enforcement

A legal development that started some 10 years ago to complete the *internal market* and to protect passengers has come to a first end: all carriage of passengers by air, train, bus and coaches or by sea within the internal market (intra-EU) or where the place of departure or destination is in a Member State (EU-outbound or -inbound) provided by EU enterprises is subject to a very similar set of rules on:

- enumerated *passengers' rights* e.g. in the event of cancellation or long delay, including (partial) reimbursement/compensation and assistance (e.g. accom-modation for stranded passengers);

For example: an air passenger.

- the assistance to meet the particular needs of *disabled passengers* or *passengers with reduced mobility* without additional charge and on the protection of these persons[12];

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[11] Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 as amended by the Protocol of 2002 (consolidated version online: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:074E:0567:0583:EN:PDF*).

[12] Regarding the persons concerned traveling by air, the legislator has set up a specific regulation (Regulation (EC) No 1107/2006) whereas in the recent legal documents on passengers' rights provisions the respective provisions are already included (art. 19-25 Regulation (EC) 1371/2007; art. 7-15 Regulation (EU) No 1177/2010 and art. 9-18 Regulation (EU) No 181/2011).

- a *civil liability scheme* in the event of an accident (death, personal injury, loss or damage of luggage); the legal provisions regularly provide that the liability of the carrier is limited[13];
- *non-discrimination*;
- the obligation to provide appropriate and comprehensive *information* in due time regarding the passengers' rights, the final price of the fare including VAT and all taxes and fees and regarding other information about the booked journey.

As stakeholders frequently do not comply with these duties (e.g. not indicating the final price or not at all or not sufficiently paying compensation due to cancellations) the legal provisions have become heavily litigated in the courts of the Member States and in the Court of Justice of the European Union and have resulted in a large bundle of judgments mostly safeguarding the passengers' legislative rights and claims[14]. A good example how airlines try to escape their duties is the following case: the airline "defined" a cancellation of a flight of day 1 (which leads to a compensation) to be a delay of 24 hours (which only leads to assistance but not to a compensation); however the airline operated only one flight on day 2 being the regularly scheduled flight of day 2. The courts ruled that this situation has to be regarded as a cancellation and granted the compensation to the passenger[15].

Without a clear basis in the wording of Regulation (EC) No 261/2007 the Court of Justice of the European Union even extended the compensation for the event of a cancelled flight to a flight being delayed more than three hours[16]!

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[13] E.g. limit of liability in case of destruction, loss, damage or delay of baggage according to art. 3(1) Regulation (EC) No 2027/1997 as amended; such a limitation is valid EU law (Court of Justice of the European Union, judgment of 6 May 2010, C-63/09 – *Walz*).

[14] Grant and Mason (2007) p. 422-424, Karsten (2010) p. 206-207 and Führich (2011) p. 869 provide an overview; the judgment of the European Court of Justice of the European Union of 9 July 2009, case C-204/08 - *Rehder*, should be added.

[15] Bundesgerichtshof [Federal Court of Justice of Germany], decision of 17 July 2007 (request of a preliminary ruling), X ZR 95/06 (accessible online: *http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=cc8d63c5f3095e871e29894c271e415e&nr=41081&pos=18&anz=25*); followed by the judgment of the Court of Justice of the European Union, cf. footnote 32.

[16] Cases C-402/07- *Sturgeon* and C-432/07 - *Böck*; cf. Karsten (2010) p. 215; Bundesgerichtshof followed that preliminary ruling: judgment of 18 February 2010, Xa ZR 95/06 (accessible online: *http://juris. bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=f5367ea0d3b5c3b1664ded 356 e1cbfc8&nr= 51293&pos=0&anz=1*).

5. Complexity of tourist's claims and remedies

In some fields of the respective law, EU law supersedes national law whereas in other fields national law remains valid. Thus the industry faces a coexistence of claims and remedies difficult to cope with. This is particularly the case when air transportation is part of a *package tour* – for example: a flight from Riga to Madrid which is included in a two-week round trip to Spain is overbooked. In this situation the tourist can sue both the EU airline and the tour operator based on two different foundations of claim, each leading to different remedies[17]. If international or EU law limits the liability of a service provider in the matter of a damage arising from the non-performance or improper performance involved in package travel a Member State may allow compensation payable by the tour operator to be limited as well[18]. Tour operators and service providers should be aware of this complexity.

6. Current deficits within consumer and tourist protection

The legislative *acquis* is incoherent and complex and today's massive multi-layer consumer law within the EU and the Member States makes not only business people struggle but lawyers and courts as well. (Schulte-Nökel, 2010, 131f; Karsten, 2010, 214f.) As the evaluation of the timeshare market has shown several gaps in protection and as the industry has found ways to undermine the law and to develop similar products not covered by the law. (EU Commission, 2008) the EU legislator has strengthened the protection of buyers very recently. Deficits found in EU law regarding package tours/package contracts and regarding passengers' rights, changing consumer behaviour (e.g. use of dynamic packaging (London Economics,2009, 13ff) or internet booking) as well as changing market structure, appearance and strategies all require a current review of the law. (EU Commission, 2011a; Milieu, 2010). In order to improve the situation with regard to consumer protection in 2008 the EU Commission proposed an all-embracing Directive on Consumer Rights which is too complex to be presented here in detail and the impact of which on national law is heavily criticized. (EU Commission, 2011b; critics e.g. by Schulte-Nökel, 2010,134-137)

7. Further liberalization of international traffic benefits tourists

Recent liberalizations in the transport sector may create new opportunities for the tourism industry. The groundbreaking EU-US Open Skies Agreement (first stage agreement) which has been in effect since 30 March 2008 (EU Commission,

[17] According to art. 3(6) Regulation (EG) 261/2004; cf. Führich (2011) p. 197ff.
[18] Art. 5(2) package travel Directive; Germany used that option (§ 651(2) BGB [German Civil Code]).

2010a) introduced both new commercial freedoms in transatlantic aviation and access of EU operators to domestic US air transportation. Regulation (EC) No. 1073/2009[19] eases the existing legal regime on transborder coach and bus services within the EU and on national coach and bus services within a Member State operated by non-resident carriers. That liberalization and a recent German judgment fighting against the very strict German law on road passenger transport[20] will very soon pave the way for many more scheduled coach and bus services within the EU. At the same time these new legal frameworks benefit EU citizens by granting them more and enhanced modes of travel and by helping to lower fares.

8. Conclusion

EU citizens travel around the globe extensively. The EU is world's No 1 tourist destination. In 2009 e.g. Germany recorded 57 billion € of expenditure on international travel and the UK in second rank 35 billion €. Tourism generated in all European states in 2010 receipts of 296 billion € (of which 266 billion € within the EU). The result is that the tourism industry indirectly contributes to over 10% of the EU's GDP[21].

For good reason EU law immensely regulates the tourism industry. The above listed achievements showing the creation of a same basic standard of treatment plus further legislative tools such as protection against a tour operator's insolvency[22], a Code of Conduct for CRS (computerised reservation systems), which amongst others fights against discrimination of air carriers[23], and the harmonization of private international law regards travel contracts[24] aim at securing a transparent and social level playing field within the EU and among its competitors and at establishing consumer confidence. With that the legal provisions stimulate the tourism sector and the competition within that industry at the same time. Still tourism and consumer protection law is law in progress.

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[19] OJ L 300, 14/11/2009, p. 88-105, coming into force on 4 December 2011.

[20] Bundesverwaltungsgericht [Federal Administrative Court of Germany], judgment of 24 June 2010, 3 C 14/09 (accessible online: http://www.bverwg.de/pdf/981.pdf).

[21] Figures according to Eurostat (2011), UNWTO (World Tourism Organization. (2010) p. 6 and EU Commission (2010b) p. 3.

[22] Art. 7 package travel Directive.

[23] Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of conduct for computerised reservation systems … (OJ L 35, 04/02/2009, p 47-55).

[24] Art. 5(2) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 04/07/2008, p. 6-16); Nielson (2009) p. 107 questions to what extent the legal provision on party autonomy (art. 5(2)) protects the passenger.

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CASE LAW'S PLACE IN THE SYSTEM OF SOURCES OF LAW

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The study of case law as a source of law is topical and necessary for Latvia for the purpose of consolidation of traditions of a law-based state and falling within the legal environment of the European Union. The significance of case law is growing increasingly in the resolution of legal conflicts and it is important to define its notion, content and place both in the improvement of legal theory and in practice of law appliers as well. The Paper contains the analysis of the place and role of case law in the entirety of sources of law. The relevance of the topic is also definitely impacted by the inclusion of the term "case law" into Latvian legislation, specifying that its wording varies in different branches of law. Law appliers face a serious challenge to find inferences in the existing particular adjudications, which correspond to the term "case law". It can be described as the formation of a classified community of applicable inferences of case law. The objective of the Paper refers to the determination of a place of case law in the system of sources of law, elucidating the theoretical foundation of this institution and the problems of practical application, researching the conceptual understanding of sources of law and analysing the correlation of sources of law. The Paper delivers an opinion that case law is an independent source of law, which serves as a regulator of legal relationships and cannot be applied as a tool of interpretation of principles of law.

Keywords: Source of law, Case law, legislative acts, general principles of law, legal doctrine

Preamble

In Latvia till now in the course of reform of the legal system the preference was given to the change of preceding laws and to the formation of laws relevant to modern life and its requirements, but now the gravity point should be carried over to the application of law, i.e., to the application of legal methods and techniques in compliance with the requirements of a legal framework of the European Union member states. the real and putative gaps in laws, the changes in the content of legal concepts and appearance of new concepts, contradictions between individual legal provisions, regulations of the European Council and recommendations of the Cabinet of Ministers of the European Council, as well as implementation of common legal principles in theory and in practice and the rational and correct application of court practice in judgements of court could be considered as typical difficulties encountered by appliers of legal rules.

Even the best and the most demanded law per se will not by itself transform into realities of legal life. Legal provisions defined in law must be applied subject to a

real life situation, particular cases. Application of law provisions embodies various degrees of complexity. Conflicts of legal nature or resolution of disputes can be considered as the highest one. It requires the understanding of legal methods and techniques and the skill to apply thereof. As outlined by law experts of the European Union, teaching of legal methods and law application techniques in the European Union member states have become one of the keystones of legal education, which contributes to the formation of a single legal environment.

The issue of sources of law has risen as one of the most topical theory and also the most demanded for Latvian court practices. It is important for law appliers that the grounds for the made decisions be fair and legal.

The Paper renders the analysis and assessment of scientific papers and opinions of recognized legal authors and practitioners, as well as the study of topical discourses of law experts on the importance and place of case law. Concurrently the author analyzes the international and national court decisions. Hence, in the Paper the author will try to provide her own theoretical justification of the place of case law in the system of sources of law.

1. Conceptual understanding of case law as a source of law

A generally accepted understanding of sources of law does not exist. Legal experts understand sources of law, mainly, to mean a form of law from which information on rules of conduct is obtained. The sources of law fulfil a very important function – serving as the grounds for legal case settlement in order to attain the making of a fair decision. J. Jelāgins referring to an opinion of German legal experts of the 19th century, who emphasized the significance of sources of law, educed that "the law shell is the core of case law". Below factors refer to legal factors, which determine the understanding of sources of law:

1) belonging of a national legal system to a definite law family;
2) law conception prevailing in a particular society;
3) the historical stage of development of a corresponding legal system. (Jelāgins, 1999, 60)

In fact, in every national legal system , there is a comparatively large variety of sources of law. The understanding of sources of law implies that the conceptions on their types and significance in a legal system of a particular society can be different depending on the historical stage of the development of the national legal system and peculiarities thereof. Usually not all types of sources of law are invested with regulative functions of equal significance. Either law or a court practice can prevail in a particular legal system, or legal traditions and differences in the hierarchy of sources of law can be represented within the framework of one and the same law family. In order to implement or apply rules of law correctly there is a necessity for understanding of the types of sources of law existing in a corresponding country.

Currently in Latvia (as well as in other Post-Socialist countries of Eastern Europe) the doctrine of sources of law has become one of the outstanding issues of legal theory. It is beyond any doubt that jurisprudence abdicates the dominating for so many years legal positivism doctrine pursuant to which "law" used to be recognized as the only one source of law (in a more comprehensive sense – regulatory legal acts).

The author fully assents to the opinion of *Slazdits Ch., Germain C. M. Guide to Foreign Legal* and Daiga Iljanova, S. J. D (Iljanova, 2005, 52), that it is not very easy to describe the Romano-Germanic theory of the family of sources of law, because, firstly, in every national legal system this issue is complicated and often entails discussions; secondly, the way, in which this issue is resolved, may vary subject to the field of law and depend to a certain extent on the mentality of the individual legal expert and personal opinions, and thirdly, as previously mentioned, the legal theory changes historically, because it is connected with philosophical trends prevailing at the material time. For example, officially French laws are fully written laws created solely by a legislator rather than by a judge. Rules of law can be found only in constitution, laws, and regulations. Judges interpret rules of law, but do not create them. Judgement actions are strictly limited by a particular matter, in which it has been taken. But in reality the system of said sources of law is a fiction. Even law per se charges a judge to make a decision even when the law is obscure, insufficient and imperfect, thereby forcing the judge to act for a legislator. Finally, it is well known that if court and specifically supreme court advisedly, over a long term and uniformly creates and apply any rule, then it determines the court practice and, unless in a formal legal sense, then, however, it becomes binding virtually. So, a significant part of French civil law is created by a judge, setting aside administrative law, where even the most significant rules do not have any other origin. But Article 1 of Swiss Civil Code contains even a direct indication that, in the absence of law and traditions, a judge must make a decision reposing on the same provision, which he would make if he were a legislator following traditions and court practice. (Tiesību spogulis, 1999, 46)

In the European continental legal system a precedent refers to any preceding judgement, which presumably corresponds to a particular adjudicated case. (Sniedzīte, 2005; Alexy, Dreier, 1997, 23) Hence, a precedent is a decision in a particular case taken as the grounds for the settlement of a similar case, endowing it with a regulatory force. Consequently, in order to talk about a precedent it is necessary to identify a particular decidable life event for the settlement of which the decisions with similar actual facts should be sought. In order to create a precedent it is not necessary for the court, which makes a corresponding decision, to word it so that to manage or make further decisions. Relevance to any decidable case in the future is sufficient.

Court practice should be read as a totality of precedents in the same or similar cases. Court practice has a primary sociological meaning comprised of court activity in a public context.

In Latvia the term "*case law*" was introduced by a former Judge of European Court of Human Rights and a present Judge of European Court of Justice Egils Levits,

outlining that it is a narrower, purely legal concept. In Latvia the concept "*court practice*" is usually applied, but it is not the same as "*case law*". According to E. Levits the concept "case law" should refer only to the totality of effective and acknowledged as "good and correct" court decisions (a part of court practice, which includes abstract legal rules that could be applied by the court in a particular case in a line of arguments in order to justify its decision. (Levits, 2005, 27) It means the totality of (mainly the supreme) court decisions available to public (published) and which contains abstract legal rules. For example, revoked and obviously wrong decisions (but they belong to court practice) do not refer to case law. (Levits, 2003) But Prof. Kalvis Torgāns does not agree with the above referred opinion. In court practice in order to avoid the replay of mistakes it is necessary to distinguish also revoked and obviously wrong decisions regarding which repeatedly are stated to refer to court practice and not case law. A once rejected argument might have a lasting significance in a legal sense. Therefore, case law cannot be isolated from court practice according to correctness of a decision. Isolation happens otherwise: a family of abstract rules is separated from the practice materials. (Torgāns, 2005)

Thereby, according to K. Torgāns, case law is the major fundamental knowledge of jurisprudence that can be isolated both from effective and also revoked court decisions, and from such court decisions, which irrespective of this knowledge, per se are not justified.

The word "judicature" (case law) originates from the Latin word *iudicare,* within the meaning of "to judge, to administer justice, to decide, to adjudicate, to assess"; *iudicum* within the meaning of "verdict, opinion, resolution, thoughts". (Latin-Latvian Dictionary, 1994, 92) In everyday speech by the word "judicature" (case law) one can denote all judgements, or court resolutions, opinions, assessments.

Case law is a crucial part of court practice, thereby, the decisions which the judge has worded as a new comprehensive legal idea or thesis, which reflects the trend of understanding of law, court's attitude towards fact-finding and law application, can be considered as crucial. (Vainovskis, 2007) Such an idea or a thesis of a judge can serve in the future as a unit of case law and can be applicable in further legal developments and interpretations. (Sniedzīte, 2005; Alexy, Dreier, 1997, 23)

Understanding of legal ongoing development should be, first of all, sought for in the correct understanding of "law" and "justice" concepts (in their correct abstraction). "Justice" is not identical to the totality of "written laws"; besides, the mutual equation of "justice" and "law" does not satisfy the idea of a law – based state. (Jelāgina, 1999, 61) Justice does not manifest the only one effective source of law (Kalniņš, 2005, 315; Vīnzarājs, 1939, 221), therefore, the concept of "law" is narrower than the concept of "justice".

It follows from what has been said above: although it is impossible to directly avoid the existence of gaps in law, a legal system per se can be considered without "gaps", because the concept of legal gaps or imperfection of a legal system cannot be consistent with the perception of an "open" legal system. (Larenz, Canaris, 1995; Kalniņš, 2005, 315) Thereby, the ongoing legal development can be described as application of the entire legal system, moreover, this under no

condition conflicts regulations set forth in Article 83 of Constitution of the Republic of Latvia "Judges shall be independent and only subject to the law". Subordination of judges to the law at the same time means also their subordination to the entirety of the legal system, because the correct and fair application of law in isolation from a relevant legal system is unthinkable. For instance, under Article 20 Section Three of German Basic Law "the executive and the judiciary shall be bound by law and justice".

Ongoing legal development results in the creation of new legal provisions and even of whole institutions of law. Hence the term "judicial rights" is being applied particularly in connection with ongoing legal development. This term refers to the general legal provisions worded in judgements (motivation part), which does not exist as law or habitual (traditional) legal provisions, but might be applied in order to settle other similar (unsettled directly in law) life events. A significant role in the judicial rights development pertains to court practice and particularly – to case law CPL Article 5 Section Six. (CPL Art. 5 Section Six "When applying legal provisions the court takes into consideration case law") Both the principles of legitimate expectations and the principle of legal equality are entrenched in Constitution Article 91, which prescribes that all people in Latvia are equal before the law and the courts and human rights shall be implemented without any discrimination. Administrative Procedure Law Article 6 charges the law appliers with the duty to interpret legal provisions in all cases equally. (Levits, 2003) Notwithstanding, as is known, similar cases in practice are far and few between and there are a number of situations when a law applier not just can, but even is obliged to depart from the previous case law. As the more abstract a legal provision is interpreted the more likely it is to interpret it differently – and thereby, the greater risk of violation of the principle of equality, the more carefully the law applier must reconcile the results obtained by interpretation with the previous interpretation practice. For this reason the deliberate court practice development is an internationally recognized way to control the uniform application of indefinite legal concepts and legal provisions on the whole.

Similar to evaluating the inferences of case law, also legal doctrine inferences can be adopted and criticized by law appliers, still, if compared to case law, the effect of equality and legitimate expectations is not extrinsic to a legal doctrine.

In practice legal doctrine inferences are most often used, adopting thereof and transforming into the court argumentation that underlies the premise formation. For instance, the Latvian Republic Constitutional Court in its adjudication in case No. 2003-03-01 (Constitutional Court adjudication in case No. 2003.03.01) performs the substantive filling of a concept of "a fair trial", and, on the grounds of the legal doctrine findings, outlines that the "fair trial" concept covers also the principle of equal opportunities of the respective parties. It implies, firstly, that all parties involved in a proceeding cite the circumstances of the case and, secondly, denies either of the parties the significant advantages over the opponent.

2. Legal aspects of applying case law

However, the term "law" tends to be used in a broad and narrow sense. In Latvia in legal literature the term "law" is usually used in a narrow sense, interpreting law as a legislative instrument passed in the order set by a legislator.

Laws in a broader sense of the word mean the basic sources of Romano – Germanic law family. All of these family states are the lands of "a written law. In the modern legal theory it is openly recognized that the absolute sovereignty of law in the Romano-Germanic law family states is a fiction as next to law there is a space for other significant sources of law. Many well-known modern legal scholars outline that to mingle rights and law and to perceive in law only a source of law mean to contradict all Romano-Germanic law traditions. (Tiesību spogulis, 1999, 44) According to Romano-Germanic legal doctrine laws are divided into basic laws and common laws. The priority of basic law over common law is embedded in legal systems of all countries. Its predominance is consolidated by specific constitutional rights or by higher judicial bodies. In Latvia, as is known, Constitutional Court is an institution that decides on the law conformity to the Constitution of the Latvian Republic. International treaties and conventions ratified by the legislator deserve a special attention. The principle under which international treaties have a greater legal effect than national laws has been embedded in laws of many countries, including Latvia.

In the modern legal method teaching it is expressly acknowledged that even a carefully designed law cannot "regulate" to the fullest extent all possible legally significant cases of life, which would subject to the field of application of said law. Thereby one can consider that any law is objectively "incomplete" as the social, technical, economic and political development of society result in the emergence of such legal issues for which the law lacks adequate legal regulation. Such incompleteness, of course, can exist even from the moment of adoption, because the legislator deliberately or unwittingly leaves some legal issues unregulated. (Neimanis, 2004, 587)

Nowadays the equality before "law" only is mentioned in constitutions of the majority of European countries (The Spanish Constitution Article 14, The Italian Constitution Article 3, The German Constitution Article 3, The Swiss Constitution Article 8, The Greek Constitution Article 4, The Irish Constitution Article 40, The Estonian Constitution Article 12), into in this concept (both written and unwritten) the legal provisions, and all branches of state power and institutions involved in the creation and application of said provisions. Therefore the equality before "law" refers also to cases, when laws are applied by the court. Some countries, like Latvia, apply a wording of the 19th century, next to "law" specifically mentioning also "court" (The Russian Constitution Article 19, also the Lithuanian Constitution Article 29).

A deeper meaning of mentioning of court next to law goes back to the inferences of the 19th century theoreticians on court as an independent law creative institution that forms the judicial rights. In the atmosphere of positivism of that time it was necessary to emphasize that specifically. Nowadays this is not necessary, because the concept "law" is usually interpreted broader including therein any legal

provision. Therefore there is no necessity any more to emphasize "court" specifically in the text of the constitution. Wherewith the text of the constitution of the majority of countries solely the equality before "law" is outlined.

Wherewith, we can state that the equality before "court" defined in the 1st clause of the Constitution Article 91[1] covers cases, where court is engaged in the creation of laws, i.e., "judicial rights". The judicial rights manifest an integral part of a well functioned legal system, which, based on the needs of practice, safeguards a certain flexibility of a legal system, as a law (a legislative instrument) based on the legislator's forecasts can never be complete. It is necessary to outline that the division of the content between both concepts mentioned in the 1st clause of the Constitution Article 91 – "law" and "court" bears a mere theoretical meaning, as in both cases the regulation is equal. It is hard to imagine cases, where it be would practically necessary to differentiate both concepts. In practice it is sufficient to know that the principle of equal rights is fully binding upon court as well, when applying law (legislative acts) and creating judicial rights as well.

The place of case law as a source of law in the Romano-Germanic law family significantly differs from the Anglo-Saxon law family. Many legal scholars have emphasized that when evaluating the significance of court decisions in the creation of laws it is necessary to avoid simple formula, which refuses to recognize also the practice of law as a source of law. And in this regard it is important to find out what the concept "source of law" means. The author of the Paper considers that case law is unequivocally a source of law, since it is involved in law creation and further development. A broad scope of activities of judicial authorities defined by the legislator, law inconsistencies and gaps in law enable judges to make critical decisions, which precise law provisions.

Abiding by the role of court instances and the place in the hierarchy of court, lower courts in order to safeguard the principle of equal rights and the uniform application of laws must follow the Supreme Court case law in cases of different categories. Thereby the case law is being formed, which should be taken into consideration by law appliers. Court can introduce changes in case law solely and only by *a particular decision*. Court cannot communicate in advance how it will change its case law. Therefore it communicates on the change in case law in a particular decision. So, the principle of equal rights binds court to the extent that it basically follows case law, but, if it wishes to change thereof, then court must specifically justify such changes in court decision. The more significant the change is, the better argumentation should be to justify thereof. Though, the final change might be implemented solely when court of superior jurisdiction accedes to thereof as well. (Levits, 2003)

Before the Treaty of Lisbon and Charter of Fundamental Rights of the European Union coming into force, European contracts held relatively little directly inscribed rights, which unlike fundamental freedoms' mainly were affiliated with particular

[1] LR Constitution Article 91 "All people in Latvia are equal before law and court. Human rights shall be implemented without any discrimination."

legal procedures, civil rights and prohibition of discrimination. Thus the approval of fundamental rights as EU rights component was mainly left in the hands of the court of European Union. Since the beginning of the seventies the above mentioned court established extensive judicature about basic rights that is derived from common constitutional traditions and international contracts about human rights protection of member states, especially from European Human rights and fundamental freedom protection convention. Fundamental rights were developed from case to case. That ensured priority of flexibility and allowed the court to find „the best solution", based on the usage of different analysis methods in member states. Imperfection was the insufficient browsing and certainty. The court has also been criticized for exceeding its competence, „inventing" new fundamental rights. Parallel with development on European level, national courts, which hear the civil cases, have begun to take in consideration fundamental rights in application of national private laws. Their sources were more or less detailed fundamental rights catalogues in respective constitutions or – as in the case of Austria, where a blanket catalogue does not exist – protection convention of European Court of Human rights and fundamental freedom, which has the status of constitutional rights in Austria. In compliance with the so called method of interpretation which is appropriate for the constitution there has to be enforced such interpretation that is not in conflict with the constitution.

The same to great extent applies to European rights. In all fields, that are within the EU rights grasp, national rights are interpreted according to EU rights and since EU rights now include also Charter of Fundamental Rights of the European Union, then also according to this Charter.

At the embraced field of European Court of Human rights and fundamental freedom protection convention national courts must follow the judgements of European Court of Human Rights as guidelines. If that is not performed and if the forfeited side files a complaint to the European Court of Human Rights, respective country is found guilty and it may be set to indemnification of losses.

3. Consolidation of case law and general principles of law

Till now the hierarchy of sources of law in Latvia used to get too little attention. Yet this issue is topical not just in connection with case law, but also with the place and significance of the general principle of law in the legal system across Europe. The significance of the general principle of law in the states of the Romano-Germanic law family is manifested not only in the process of application of legal provisions, but also in their elaboration, where the legislator grounds the regulatory legal acts on said principles and also refers to them in the text of the acts. (Iljanova, 2005, 61) Thereby the legislator can in some cases refuse to work by himself and address lawyers so that they would find a fair decision adequate to a particular case. In such case it is considered that law has its own limits, that every case that cannot be regulated through legislation and lawyers, based on the criteria of justice, is afforded an opportunity to refer to natural rights. Taking the understanding of natural rights in legal epistemology and in philosophy as the basis, the author aligns with the

conclusion of Daiga Iļjanova, S. J. D (Iljanova, 2005, 52), that the general principles of law originate from the natural rights that exist independently and even before the legislator, function under conditions of a law-based state and serve as the criteria of legitimacy for written legal provisions, namely, for the work of the legislator. Thereby the work of the legislator must comply with the general principles of law and it means that legal provisions must comply with the general principles of law.

Egils Levits, Judge of the Court of the European Union expressed a point of view that within the frame of Western laws such sources of law as the general principles of law are recognized next to the written sources of law, "which can have even the higher rank than the constitution" (Levits, 2000, 332) Such understanding of hierarchy of sources of law is manifested also by the Court of the European Union. The Treaty Establishing the European Economic Community (EEC) of 1957 does not have a catalogue of human rights, but ignoring of human rights in the legal system is unthinkable. Thereby the Court of the European Union in its jurisprudence has developed the provisions of human rights in the form of the general principles of law.[1] The Court believes that Clause 220 of the Treaty Establishing the European Economic Community (Treaty establishing the European Economic Community) authorizes it to develop such general principles of law, as they, like written laws (regulatory legislation), are enclosed into the concept "legitimacy" for the purposes of Clause 220: regulatory legislation, which contravenes the general principles of law, cannot be considered as "legitimate". But such point of view enables drawing a conclusion that the general principles of law have a priority over the regulatory legislation created by the legislator.

In contradistinction to case law, as well as the general principles of law, the content of regulatory legislation and real notion are defined through interpretation. The content of the general principles of law is determined through the method of concrete definition. However, not always such concrete definition occurs in Latvian courts successfully. One of the major problems of this method refers to insufficient arguments of court, which means that court must not only refer to the application of the general principles of law notionally, but also must specify such principles as regards given factual circumstances. It is essential for law appliers to understand that between the general principles of law there is no hierarchic relationship in the sense of legal force. Collisions between the principles are resolved by the method of weighting and evaluation, defining which one has a greater weight exactly under corresponding circumstances, taking into consideration particular social, economic, political and other circumstances in a particular state at a particular time in order to arrange the best possible settlement. But, in cases, when there is a collision between the general principles of law and regulatory legislation, the general principles of law prevail over written legal provisions, which

[1] ECC judgement in case No.C-29/69 *Stauder v. Stadt Ulm*, European Court Reports (ECR)419; EKT spriedums lietā Nr. C-11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide un Futtermittel,* ECR 1125; refer also to Krūma K. Eiropas Konstitūcija: iesaldēta integrācija. //Likums un Tiesības, 2003, 5. sējums, Nr. 9 (49).

contravene thereof, because the general principles of law originate from the entire legal system, they reflect the spirit of this system and determines its content.

National court, before hearing a case has to ascertain whether applicable national rights are included in the EU rights regulation. Secondly, court has the duty to interpret these national rights according to EU rights and especially according to embraced principles of the Charter of Fundamental Rights of the European Union; so, consideration must be taken, that non-discrimination principle has essential importance in labour rights cases. If the respective condition is clear and unequivocal and if therefore it is impossible to be interpreted in a way in which it is not in contradiction with EU rights, then national court must refrain from applying this regulation. It depends on national rights, whether the court is allowed not to apply a regulation, which it considers not to be corresponding with the constitution, before the constitutional court has adjudged this regulation not to be corresponding with the constitution. National court has the freedom of action to decide, whether such fulmination for prejudicial adjudication is necessary.

In Latvian legal system the general principles of law play an increasingly growing role in the legislator's work. As a glaring example to that can serve the Administrative Procedure Law adopted in 2001 and Public Administration Law of 2002. But within the framework of this Paper the opinion of Daiga Iļjanova, S. J. D, is very important, with which the author of this Paper also aligns, that the Latvian court and administrative practice can be amended as regards cases, when a particular decision is reasoned only by the general principles of law. In the current situation usually the reference is given to any regulatory legislation, which covers a relevant general principle of law. In Latvian case this is usually Article 1 of the Constitution, where the principle of a law-based state can be found. Such practice is connected with still great, although not always publicly recognized impact of the positivism doctrine on the legalistic thinking of appliers of legal provisions. Since the general principle of law is true legal provisions, it manifests a sufficient and adequate justification of judicial disposition. (Iljanova, 2005, 118)

Conclusion

Sources of law fulfil a very important function, i.e., serve as the basis for settlement of a legal matter in order to attain fair decision-making. Referring to case law provides equal legally binding force and thereby the level of justice, because any source of law participates in the law creation and ongoing development. Thus, case law is a fundamentally important source of law, which guarantees equal application of rights and adherence to the principles of legitimate expectations within the entire legal system. Filling in gaps in law can not be based solely on legal assessments contained in law, in most cases a decisive significance belongs to case law.

Case – law is a set of knowledge on issues of law on the basis of which the court has decided issues on law interpretation, application in the factual circumstances, or filling in "a gap" in law. But they can not be applied by ignoring the law in general. Each cognition that creates case law and therefore precedent has independent meaning, adjudicating other cases.

In Latvia case law is not binding *de jure*, although courts should follow it on a regular basis. Only certain types of precedents are binding in Latvia *de jure:* The Constitutional Court judgment is binding upon all courts; interpretation of law delivered by the Senate of Supreme Court manifested in a court decision is binding upon court which handles matter anew. In other cases, the Supreme Court's case law is not formally binding, but it is taken into account, unless any reasons determine otherwise. Developing and forming high-quality case law, the legal system will win, if breaks from *formally* non-binding status of case law. Transforming the argumentation forces of case law into the legally binding force, the principles of equality and legitimate expectations will stabilize the legal system, as well as a uniform application of law will be ensured.

Application of case law is not a mechanical following to the previously existing provisions. Court is entitled to depart from the case law with good reason and if appropriate. Court in its decision must present motivated reasons for such change and must justify that the need for the practice change is greater than the public interest to preserve legal safety and predictability – so, a new inference should better reflect the *ratio legis* /underlying principle/ or also it should better suit new external circumstances, legal concept or legal inferences.

The understanding of sources of law is being developed in legal theory, i.e., general principles of law, regulatory legislative acts, case law, and legal doctrine. But, while applying law it is necessary to use all of these sources of law, without exception. Case law is an independent source of law, which serves as a regulator of legal relations and cannot be used only as a tool for interpretation of legal provisions. At the same time in-depth study and scientific elaboration of the methodology of case law application is necessary. Formation of case law always requires an accurate usage of methods and legally weighted and assessed argumentation.

In Latvian legislation it is necessary to supplement Administrative Procedure Act Article 15 and Criminal Procedure Law Article 2 and restate the effective legal regulation of case law so that to show clearly to law appliers and to the public that the Latvian courts, the European Community Court and European Court of Human Rights are forming considerable case law.

Considering the role and place of court instances in court system hierarchy, lower courts must follow the jurisprudence of the Supreme Court in different category cases, to ensure judicial equality principle and homogenous application of rights. Thus the case law is formed, which *must be taken into consideration* by those who apply rights. The court can input a change of case law only with a *specific adjudication*. It is impossible for the court to announce in advance, that it will change its judicial system. Therefore the change of case law is brought to notice at a specific adjudication. Consequently the principle of equal rights associates the court in a way, that on the whole it has to follow the judicial principle, but if it wants to change that, then this alternation has to be fortified by a judgement of court. The more substantial the alternation, the stronger has to be the argumentation to fortify it. But at the end the alternation materializes only in case if Supreme Court instantces sides with it. (Levits, 2003)

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LEGAL FRAMEWORK OF THE NATIONAL REFERENDUM INSTITUTE IN THE CONSTITUION OF THE REPUBLIC OF LATVIA (*SATVERSME*)

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The national referendum institute has already been established in the Constitution of the Republic of Latvia (hereinafter in the text – Satversme) since 1922 when the Constitutional Assembly adopted the Satversme of the Republic of Latvia. The national referendum institute was included in the text of the Satversme after in-depth and reasoned discussion.

Since then, a number of substantial amendments to the national referendum institute have been adopted in the Satversme – concerning both Latvia's membership in the European Union and granting of additional rights to citizens. However, these are not the only proposals discussed. Many of them were rejected, and are not yet included in the Satversme.

In modern times national referendums are a practice increasingly used in Latvia. Therefore the electorate must become more responsible and active in fulfilling their legal rights. The Satversme stipulates various types and provisions of the national referendum. Thus, adequate interpretation and understanding of these types and provisions would ensure everybody opportunities to know their meaning and necessity, and could also assist in making the right choice at the voting booth.

Pursuant to the Satversme, the Latvian people possess relatively wide opportunities for their participation in national referendums. Moreover, in certain circumstances the people may themselves initiate a national referendum.

This article investigates the legal framework of the national referendum in the Constitution of the Republic of Latvia – the Satversme. It includes an analysis of types and history of the national referendum, the issue of quorum, as well as assessment of strengths and disadvantages of the current regulation.

Keywords*:* Referendum, Classification of Referendums, Constitution, Direct Democracy, Electorate, Saeima, State President

1. Article 14 of the *Satversme*

Traditionally, timely dissolution of a parliament upon apparent excesses of the majority is viewed as an appropriate cure, the best cure to re-establish healthy blood circulation (Bismark, 2007).

In 1933, the Public Rights Committee of the *Saeima* (Latvian Parliament), during a review procedure of the *Satversme*, proposed to complement Article 14 of the

Satversme by stipulating the right of the people to initiate dissolution of the *Saeima*. The coup of May 15, 1934, precluded integration of this provision into the *Satversme*.

The Law "Amendments to the Satversme of the Republic of Latvia", which was adopted by the *Saeima* on April 8, 2009, and will become effective when the 10th *Saeima* holds its first sitting, sets forth the right of the people to initiate dissolution of the *Saeima*. The amendments to Article 14 state: "Dissolution of the *Saeima* may be initiated by not less than one tenth of the electorate. If at a national referendum the majority of voters and at least two thirds of the electors who participated in the previous *Saeima* elections vote for dissolution of the *Saeima*, the *Saeima* shall be dissolved. The right of a national referendum on dissolution of the *Saeima* shall not be applicable for one year after the first sitting of the *Saeima*, for one year before the mandate of the *Saeima* expires, during last six months of the mandate of the State President and at least six months after the last national referendum on dissolution of the *Saeima*. The electorate shall not possess the right to dismiss separate members of the *Saeima*."

By its nature, the national referendum stipulated in Article 14 is an optional referendum based on initiative of citizens who possess the right to vote. Thus, dissolution of the *Saeima* is an initiative of the people themselves. By this provision the people are guaranteed the right of the sovereign power under Article 2 of the *Satversme*.

The conditions for dissolution of the *Saeima* can be justified in view of the fact that without the above provisions the country would be overwhelmed by political, legal and economic chaos.

Quite importantly, at least one tenth of the electorate must first initiate a national referendum on dissolution of the *Saeima*, and only after that the national referendum is organised.

The right to dissolve the parliament is one of the most important authorities of the neutral power (Pleps, 2003).

2. Articles 48 and 50 of the *Satversme*

The body of citizens of Latvia possess a negative expression of the creative function with regard to two institutions of public authority: the *Saeima* which is formed as a result of a positive expression of the creative function by the same body of citizens, and the State President who is appointed by the *Saeima*. Both of these expressions are merged in a single act: national referendum on dissolution of the *Saeima* (Dišlers, 2004).

Article 48 of the *Satversme* sets forth that "The President shall be entitled to propose the dissolution of the *Saeima*. Following this proposal, a national referendum shall be held. If in the referendum more than half of the votes are cast in favour of dissolution, the *Saeima* shall be considered dissolved, new elections called, and such elections held no later than two months after the date of the dissolution of the *Saeima*."

In its negative expression the creative function of the State President is manifested in his proposition of dissolution of the *Saeima* (Dišlers, 1930). It is important to

understand that the State President is entitled to propose dissolution of the *Saeima* and not to dissolve it. This is an essential fact to be communicated to the people in order to educate them because quite often they believe that the President possesses such a right and urge him to do so becoming increasingly perplexed why the President takes no action. The right to decide on dissolution of the *Saeima* belongs to the people.

Proposition of dissolution of the *Saeima* would still cause a conflict between the State President and the *Saeima*, and the State President would let it be resolved by the highest organ of state power – the body of citizens (Dišlers, 1930). In this case dissolution of the *Saeima* is possible by joint activities of the State President and the people.

Thus, the State President as a representative of the people is assigned such a right in order to assist the body of citizens in fulfilling their creative function (Dišlers, 2004). Cielens has reasonably noted that the State President alone cannot be the barometer and decision maker concerning the point at which the *Saeima* no more correctly represents the will of the people (Pastars, 2007).

By its nature, such national referendum is an optional referendum for the initiative to dissolve the *Saeima* comes from the State President.

It is a well-known fact that by now none of the Latvian Presidents has exploited the right to propose dissolution of the *Saeima* under Article 48 of the *Satversme* though there have been a number of instances when presidents pronounced ideas concerning possible dissolution of the *Saeima*. However, it is more likely that such ideas were used as a resource to "shake up" the underperforming *Saeima* and not a purposeful activity by the State President under Article 48 of the *Satversme*. Therefore, such expressions of the State President have gained strong disapproval by power parties which have stated that the State President should not "throw out" similar ideas if they are not followed by concrete actions.

Article 53 of the *Satversme* sets forth: "Political responsibility for the fulfilment of presidential duties shall not be borne by the President. All orders of the President shall be jointly signed by the Prime Minister or by the appropriate Minister, who shall thereby assume full responsibility for such orders except in the cases specified in Articles forty-eight and fifty-six." Thus, such initiative by the State President – to propose dissolution of the *Saeima* – does not require co-signature (counter-signature) of the Prime Minister or any of ministers.

The act of the State President by which he proposes dissolution of the *Saeima* is an order not because it contains a prescription to the *Saeima* but rather because this manifestation of the will of the State President includes a prescription to the respective administrative authorities to organise the national referendum (Dišlers, 1930).

Article 50 of the *Satversme* states: "If in the referendum more than half of the votes are cast against the dissolution of the *Saeima*, then the President shall be deemed to be removed from office, and the *Saeima* shall elect a new President to serve for the remaining term of office of the President so removed".

Article 50 of the *Satversme* implies an essential restriction of the free will of the State President because, pursuant to this Article, a State President who proposes

dissolution of the *Saeima* takes the risk of removal: "If in the referendum more than half of the votes are cast against the dissolution of the *Saeima*, then the President shall be deemed to be removed from office" (Dišlers, 1927). This provision results in a situation that during a crisis situation when dissolution of the *Saeima* would be in the interests of the people the State President is forced to be more concerned about his post (Pleps, Pastars, Plakane, 2004).

Dišlers expressed the following assumptions: "However, it can be doubted whether dissolution of the *Saeima* would become an institute applied in practice. [..] Therefore it might be assumed that the State President would only use his right to propose dissolution of the *Saeima* when dissatisfaction of the wider public with the performance of the *Saeima* would sufficiently prove that the *Saeima* has ceased to be able to represent the will of the people. [..] In order to make premature dissolution of the *Saeima* applicable in practice the State President should be not merely formally but essentially entitled to freely propose such dissolution of the *Saeima*, i.e., without a risk to lose his position" (Dišlers, 1930).

By agreeing to Dišlers in this context, it is possible to maintain that the above strict condition – the possible loss of the post – is one of the main reasons why by now none of the State Presidents has proposed dissolution of the *Saeima*. Pastars has also made an assumption that, probably, none of the State Presidents has had a justifiable reason to dissolve the *Saeima*. (Pastars, 2007).

3. Article 68 of the *Satversme*

Before the national referendum on Latvia's membership in the European Union the *Satversme* was amended by including two additional provisions for the organisation of the national referendum, namely, Article 68 of the *Satversme* stipulates that: 1) Membership of Latvia in the European Union shall be decided by a national referendum, which is proposed by the *Saeima*; and 2) substantial changes in the terms regarding the membership of Latvia in the European Union shall be decided by a national referendum if such referendum is requested by at least one-half of the members of the *Saeima*.

According to this legal regulation the national referendum on Latvia's membership in the European Union took place on September 20, 2003.

4. Article 72 of the *Satversme*

Article 72 of the *Satversme* prescribes that the State President has the right to suspend the proclamation of a law for a period of two months. The President shall suspend the proclamation of a law if so requested by not less than one-third of the members of the *Saeima*. This right may be exercised by the President, or by one-third of the members of the *Saeima*, within ten days of the adoption of the law by the *Saeima*. The law thus suspended shall be put to a national referendum if so requested by not less than one-tenth of the electorate. If no such request is received during the aforementioned two-month period, the law shall then be proclaimed after the expiration of such period. A national referendum shall not

take place, however, if the *Saeima* again votes on the law and not less than three-quarters of all members of the *Saeima* vote for the adoption of the law.

This Article sets forth a provision on withdrawal of a law adopted by the *Saeima* but not yet proclaimed by the President. This procedure was applied, for instance, by the national referendum of October 3, 1998, on withdrawal of the Law "Amendments to the Law on Citizenship". Such national referendum is called optional referendum which qualifies as a veto by the people who fulfil their legal right in its negative function – by repealing a law. This way the people have an opportunity to vote anew and reject the solution chosen by the *Saeima*.

For this purpose a respective requirement concerning quorum and majority is defined: at least one half of the voters who participated in the previous *Saeima* elections must participate in the national referendum and majority of them must vote for withdrawal of the law. The above requirements correspond to those defined for the adoption of an "ordinary" law, i.e., by majority of MPs present at the sitting. Such national referendum may be organised concerning matters to be addressed under the so-called common legislation procedure (legislative referendum), except for the matters stipulated in Article 73 of the *Satversme*.

5. Article 73 of the *Satversme*

Article 73 of the *Satversme* sets forth a number of restrictions with regard to those matters which cannot be submitted to a national referendum. These matters include the budget and laws concerning loans, taxes, customs duties, railroad tariffs, military conscription, declaration and commencement of war, peace treaties, declaration of a state of emergency and its termination, mobilisation and demobilisation, as well as agreements with other nations.

Similar restrictions are enforced in many countries. This can be regarded as a positive solution in view of the fact that every separate citizen is not able to decide on sensitive matters of national importance. For instance, when adopting a decision on tariffs, the respective person is likely to choose an option most favourable for his/her personal needs leading to adverse effects on the state budget and revenues. Thus, the above restrictions are justifiable in view of their level of complexity requiring expertise which is too specific to pass a sound decision by means of a national referendum.

The restrictions of Article 73, however, apply to national referendum and not to proposition of laws. Nevertheless, such draft law would only become a law provided it is adopted by the *Saeima* under the same procedure as for other draft laws (by amending or supplementing it as deemed necessary by the *Saeima*).

6. Article 74 of the *Satversme*

Article 74 of the *Satversme* stipulates: "A law adopted by the *Saeima* and suspended pursuant to the procedures specified in Article seventy-two shall be repealed by national referendum if the number of voters is at least half of the number of

electors as participated in the previous *Saeima* election and if the majority has voted for repeal of the law."

Dišlers commented on this provision: "According to this Article, the purpose of national referendum seems to be repeal of a law. This view could be supported by taking into consideration that a law adopted by the *Saeima* requires no further approval provided the State President proclaims it" (Dišlers 1930).

Therefore this type of national referendum can also be called repealing referendum by which the people fulfil their right of veto (the right to reject a law adopted by the *Saeima*).

7. Article 75 of the *Satversme*

Regarding opportunities to organise a national referendum pursuant to Article 72, another provision should be mentioned by which the *Saeima* may prevent national referendum on a law. This provision is stipulated in Article 75 of the *Satversme*: "Should the *Saeima*, by not less than a two thirds majority vote, determine a law to be urgent, the President may not request reconsideration of such law, it may not be submitted to national referendum, and the adopted law shall be proclaimed no later than the third day after the President has received it."

Thus, the *Satversme* sets forth two provisions by which the *Saeima* may, on certain conditions, prevent national referendum under Article 72.

8. Article 77 of the *Satversme*

Article 77 of the *Satversme* defines that if the *Saeima* has amended the first, second, third, fourth, sixth or seventy-seventh Article of the Constitution, such amendments shall be submitted to a national referendum. Such national referendum organised under Article 77 is a compulsory referendum because it is required for the above amendments to come into force as law. By its content, this referendum can be regarded as a constitutional referendum.

The referendum stipulated in Article 77 can also be described as a post-parliamentary and approving referendum as the respective amendments which are adopted at the *Saeima* are submitted to the people for their approval. This compulsory referendum covers a narrow range of matters – six articles of the *Satversme* which include the most essential privileged provisions which are to be amended or repealed in order to change the form of this State.

9. Article 78 of the *Satversme*

Article 78 of the *Satversme* prescribes that electors, in number comprising not less than one tenth of the electorate, have the right to submit a fully elaborated draft of an amendment to the Constitution or of a law to the President, provided this draft does not concern the matters listed under Article 73 of the *Satversme*. The President further submits the draft amendments or the draft law to the *Saeima*. This is an automatic referendum by which the people fulfil their legislative power in its

positive function, i.e., by adopting a law which according to its legal (and political) status is similar to a law adopted by the *Saeima*. If the *Saeima* does not adopt it without change as to its content, it shall then be submitted to a national referendum where:

- in case of a draft law the requirements are similar to those for the above optional referendum which qualifies as a veto, namely, a draft law is deemed adopted if the number of voters is at least half of the number of electors as participated in the previous *Saeima* election and if the majority has voted in favour of the draft law. Thus, in this case the automatic referendum is related to matters to be addressed under the common legislation procedure (legislative referendum);
- in case of draft amendments to the *Satversme* (irrespective of the provision to be changed) the requirements are more strict, namely, an amendment to the Constitution submitted for national referendum shall be deemed adopted if at least half of the electorate has voted in favour. As any amendments to the *Satversme* under Article 76 require a certain quorum and qualified majority (two third of the two thirds of MPs present at the *Saeima* sitting), a qualified majority (a half of all electors) is also required for the people because the provisions in question do not concern matters to be addressed under the common legislation procedure but constitutional matters. Therefore this is a constitutional referendum.

This Article of the *Satversme* prescribes the right of legislative initiative of the people, and, apparently, in this case organisation of a national referendum depends on the fact whether the *Saeima* accepts or rejects the draft law without change as to its content. As it is possible that no national referendum actually takes place, this type of referendum cannot be regarded as a compulsory referendum. However, if a national referendum still takes place then it is not initiated by the people themselves so it is also not an optional referendum.

In view of the fact that this national referendum depends on approval or disapproval of a draft law proposed by the people and that, in fact, it takes place automatically, this type of referendum can be regarded as an automatic referendum.

10. Article 79 of the *Satversme*

Article 79 of the *Satversme* stipulates the quorum requirement for a national referendum organised in relation to an amendment to the *Satversme* (upon initiative of the *Saeima* or the people), to a legislation initiative of the people, or to a decision concerning Latvia's EU membership or substantial changes in the terms regarding this membership: "An amendment to the Constitution submitted for national referendum shall be deemed adopted if at least half of the electorate has voted in favour. A draft law, decision regarding membership of Latvia in the European Union or substantial changes in the terms regarding such membership submitted

for national referendum shall be deemed adopted if the number of voters is at least half of the number of electors as participated in the previous *Saeima* election and if the majority has voted in favour of the draft law, membership of Latvia in the European Union or substantial changes in the terms regarding such membership."

11. Article 80 of the Satversme

Article 80 of the *Satversme* sets forth that "all citizens of Latvia who have the right to vote in elections of the *Saeima* may participate in national referendums".

In order to assess the results of the respective national referendum, it is necessary to establish compliance with the quorum requirement. Dišlers explains: "Quorum of a national referendum means the statutory share (or the number) of citizens who possess the right to vote which is required in order to ensure that the national referendum is decisive or legally valid" (Dišlers, 1930).

Conclusions

National referendum is a resource to be used to promote dialogue between the state and its citizens. Such dialogue plays a very significant role. The *Satversme* provides for this democratic institute since the very beginning – 1922.

The *Satversme* lists seven ways by which a national referendum can be organised in Latvia. Each of them is of specific character implying different practical applicability. Some types have never been used.

Therefore, more precise and comprehensive understanding by the people of the opportunities, aims and potential consequences of national referendums would lead to increased application of all types of national referendums stipulated in the *Satversme*.

Upon active insistence of the people who sought more opportunities for fulfilment of their rights, the *Satversme* is supplemented by a new type of national referendum – dissolution of the *Saeima* proposed by the people by means of a national referendum. This will be a test to both the people and to the parliamentary representtatives. Hopefully, the people will thoroughly examine the meaning of this right and the necessity of its fulfilment, but members of the Parliament will certainly become more liable to the electors.

Past national referendums in Latvia showed that a successful outcome cannot be expected in all cases. This, however, does not mean that such process is destructive for democracy. The last three national referendums (once in 2007 and twice in 2008) did not meet the quorum requirement. Consequently, it is possible to question whether cooperation of politicians and other experts during their pre-referendum campaigns was successful and whether financial and other resources were used in the most efficient way. Therefore, the necessary preparatory activities are essential to ensure sound use of funding and to explain the meaning of such national referendum. To this end, high quality explanatory and education work is required.

National referendum as an institute of direct democracy will only become effective in Latvia when its aims comply with the internationally recognised principles of human rights, when public support and understanding is ensured, when the public is not misled and when all the necessary organisational and technical preconditions are ensured for successful preparation and conduct of national referendum.

National referendums ensure more precise expression of the will of the electorate, involve citizens in political and legislative processes and, to some extent, balance the weaknesses of any representative democracy – alienation of the people from public authorities, lack of information about decision making and political deadlock.

The negative sides include possibility that national referendums are used for personal gain and concerns that a decision adopted by a majority could infringe the minority rights.

National referendum should be an option used carefully; if it is used too frequently it could cause the so-called voter fatigue and a decrease in their level of activity. It is difficult for the people to decide on complicated matters; consequently, the people make their decision relying on politicians or mass media, or use the national referendum as a means to express their protest against the policies being implemented.

Further practical application will show pros and cons of the various types of national referendum providing opportunities and justification for enhancement of this legal institute, including amendments to the *Satversme*.

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INTERNATIONAL CIVIL AVIATION ORGANIZATION AND ITS ROLE IN THE CREATION OF STANDARDS AND PRACTICES FOR THE WORLD CIVIL AVIATION

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The aim of this paper is to present the International Civil Aviation Organization (ICAO) as a specific institution empowered with several unique competences aimed to promote and develop safe air travel and transportation. In the introductory part, a historical note will be included describing the origin of the ICAO establishment. Further, the structure of the organization will be shortly recalled with special emphasis on the competences of the Council and Assembly. In the further part, the paper will focus on the international standards and recommended practices set by the ICAO and explain their role in the functioning of the international civil aviation.

Keywords: International Civil Aviation Organization, international organization, civil aviation, international standards, recommended practices, SARPs

1. A historical note – consensus at the 1944 Chicago Conference

The invitation by the United States Government, as the initiator of the international conference on civil aviation planned for November/December 1944, had been answered by representatives of 52 states who then met in Chicago to discuss essential aviation problems. The World War II – which caused a unique and extended use of air technology, also brought a lot of legal questions to be relied to, including the status of the air space above the state territory and directions of the international civil aviation development. (Milde, 2008,14-16). The Paris Convention of 1919 (The Convention Relating to the Regulation of Aerial Navigation) provided for a full and absolute sovereignty in the air space above the country's territory. The conference in Chicago aimed at designing a new legal order for the use of air space. American idea was to open the sky and let the market forces regulate the access to the air routes. It was confronted with the British fear of American domination which argued for the principle of sovereignty maintained and in addition, lobbied for the establishment of the international organization responsible for the management of air routes, fares and safety of travels. (Hedlund, 1994, 266; Vamos-Goldman, 1995-96, 431)

As most of the countries present at the conference were supporting the protectionism approach, the convention signed as a result, leaned toward the British vision. As stated in Article 1 of the Convention on International Civil

Aviation (ICAO Doc. 7300/8, hereinafter – Chicago Convention or Convention), "the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory". With exceptions concerning the non-scheduled flights, the Chicago Convention left the arrangement of access to the air territory (including the performance of transportation) of contracting states for the further bilateral and multilateral agreements based on the principle of equality.

One of the compromising effects of the conference was the establishment of the authority empowered to deal with civil aviation issues. Between the date of signing and date of entry into force of the Chicago Convention, the Provisional International Civil Aviation Organization was set up which turned into the International Civil Aviation Organization on April 4, 1947. (Sassella, 1972, 51) Reasons for the creation of such authority are well argued in Article 44 of the Chicago Convention and aim at the safe, secure, equal and peaceful development of air relations among contracting states.

The Convention was signed 67 years ago and the ICAO is only a couple of years younger. The ways of the airspace use and technical possibilities of the aircraft have grown immensely and are still developing. However, the fundamental principles of the air space regulations have not changed and the ICAO's work still falls into three major categories: air navigation (including safety and regularity of flights), economic aspects of air transportation and development of international air law. (Orr, 1950, 94)

2. ICAO Assembly and Council – competences

The International Civil Aviation Organization is affiliated with the United Nations as a Specialized Agency of the United Nations Organization since May 13, 1947. It is therefore invested with special powers, including entering into agreements with other organizations and bodies as stated in Article 66 of the Convention. During the 1944 conference, the negotiating states had to come up with a compromise as to how powerful the organization should be, especially in the fields of economic and political issues. It was finally agreed that the newly established authority would have strong powers in the technical field, whereas the economics and politics were only slightly included into the competences of the ICAO's main bodies. (Osieke, 1979, 3-4)

The structure of the ICAO composes of two main organs (Assembly, Council), some subordinate bodies (i.e. Legal Committee, Air Navigation Commission) and a Secretariat.

The composition and division of competences between the Assembly and Council is specific and influences the entire mechanism of the ICAO functioning.

There are total of 190 states – signatories of the Convention and members of the ICAO. All of them are equally entitled to be represented in the Assembly with one vote assigned to each state. Ordinary meetings of the Assembly should be held not less than once in three years, whereas extraordinary sessions may be called by Council or at the request of at least on-fifth of the membership (based on the art

48 of the Convention and Rules 1 and 2 of the Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization ICAO Doc. 7600/5).

The functions (powers and duties) of the Assembly are listed in Article 48 of the Convention and include: elections of the members of the Council, examination of the Council's reports, voting and accepting the budget and financial regulations of the Organization. Most of the Assembly decisions are taken by consensus in the form of resolutions. They usually contain instructions or policy settings for the Council, Secretariat, other organs or even member states themselves. It should be noted however, that those resolutions formally do not bind the states. The resolutions' implementation is based solely on the members' conviction of their necessity. (Weber, 2007, 19-20)

The Assembly is often criticized for the inability to perform "real" competences as a main representative organ of an international organization. The meetings of the Assembly have been difficult to schedule regularly and the growing number of members (from 52 to 190) makes it even more complicated and subject to discussion about the reform. (Tourtellot, 1981; Fossungu, 1998-1999, 2-4)

The main functions of the ICAO are carried out by its Council elected by the Assembly for a three-year term and composed of 36 states (the number has been increasing through total of 4 amendments from the originally established 21 members). The Council is a permanent body responsible before to the Assembly (Article 50 of the Convention). The Council elects its President for a term of three years. As Article 51 allows for reelection, the possibility was used in the most unique way. During 66 years of the ICAO's functioning there have been only 4 Council Presidents. Dr Assad Kotaite who served as the President for 30 years, was replaced in 2006 by the fourth President in the ICAO's history – Roberto Kobeh Gonzales. (Bliss, 2006, 13,245)

There are two types of the Council functions: mandatory and permissive. The latter one allows the Council to conduct research in the fields of air transportation and navigation, carry out investigations in situations causing problems to the international aviation or study matters affecting the Organization itself and the fields of its operation (Article 55 of the Convention). According to Article 54 the Council has 14 obligations including: obligations toward the Assembly (submitting reports, carrying out its directions), organizational and administrative tasks (appointments and establishment of additional organs and some other positions within the Organization), financial competences (administration of the Organization's finances), reactions to the infractions of the Convention (reports to contracting states and the Assembly). List of mandatory functions also includes a highly important position under Article 54 (l) which states: "Adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken". This particular function is of a great importance to the entire mission of the International Civil Aviation Organization. The fact that it is carried out solely by the ICAO Council confirms its strong position and makes it the most influential organ of the Organization. (Tourtellot, 1981, 51-51) It should be noted that in the adoption of

the standards and recommended practices (SARPs) the Council is assisted by the Air Navigation Commission in technical matters, the Air Transport Committee in economic matters and the Committee on Unlawful Interference in aviation security matters.

3. International standards and recommended practices (SARPs) – forms and fields covered

The Chicago Convention empowered the ICAO with the above described functions and structured the main bodies so the goals of the Convention may be achieved. The Convention itself is a classical international agreement, signed and ratified by almost all of the existing countries. It creates rights and obligations for the contracting parties and violation of those is regarded as violation of international law.

The ICAO organs are entitled to issue and adopt many different forms of documents and acts. The Assembly accepts resolutions which are of a great importance but not legally binding. The Council on the other hand, is granted the competence to adopt international standards and recommended practices (known as SARPs), to designate them, for convenience, as Annexes to the Convention, and to notify all contracting states of the action taken (Article 54 (l) of the Convention). Those standards and practices are formally not binding either. The idea behind their adoption is to make sure that every flight carried out by the carriers of the ICAO member states is subject to the very same principles and procedures concerning technical and operational aspects of international civil aviation. (Making an ICAO Standard: *http://www.icao.int/icao/en/anb/mais/index.html*)

It should be noted, that even though this paper focuses on SARPs, there are also other provisions adopted within the ICAO. For example, the Procedures for Air Navigation Services (PANS) or Regional Supplementary Procedures (SUPPs) are published separate from the standards and practices, so outside the scope of the Annexes to the Convention, but they are of the same value and importance. (Weber, 2007, 36)

First Assembly resolutions were dedicated to the definitions of standards and recommended practices. A Standard has been defined as "any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention". A Recommended Practice is "any specification for physical characterristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation, and to which Contracting States will endeavor to conform in accordance with the Convention". (ICAO

Assembly Resolution A1-31 no longer in force, currently the definitions are included in the Assembly Resolution A35-14 in 2004).

At the moment there are total of 18 Annexes to the Chicago Convention. They are mostly dedicated to technical issues (there are two concerning facilitation and security) including standards and practices with regard to: personnel licensing, rules of the air, metrological service, aeronautical charts, telecommunications and information services, units of measurement, operation, nationality, and airworthiness of aircraft, air traffic services, search and rescue, aircraft accidents, aerodromes, environmental protection.

Annexes describe particular fields and provide common understandings of technical issues. They are also, as allowed by Article 37 of the Convention, amended from time to time as necessary. For instance, Annex 7th is dedicated to the Aircraft Nationality and Registration Marks. It was firstly adopted in 1949 and has been amended five times since then. It provides member states with detailed instruction on how the aircraft should be classified, identified so that the nationality may be easily distinguished. It gives specific definitions, introduces certificates of registration and even sets rules of letters, numbers and other graphic symbols to be used in the nationality and registration marks, and spells out where these characters will be located on different types of airborne vehicles. (Information to Annex 7 to the Convention on International Civil Aviation, retrieved from the ICAO website: *www.icao.int*). Particular procedures and mechanisms included in the Annexes are used in many circumstances, even outside the civil aviation scope. Annex 13th has been a subject of nationwide analysis and dispute in Poland after the presidential aircraft crashed in April 2010 causing death of 96 persons including the President and his wife. As there was no legal basis to used for the accident of state aircraft, it was decided to apply the regulations of the civil aviation standards concerning the accidents and investigation included in Annex 13th to the Chicago Convention as they explained the rights and obligations of states involved in the international air catastrophe.

The creation of standards and practices (or amendment of the already existing ones) begins with a proposal for action from one of the member states or the ICAO itself. Next, Air Navigation Commission takes over the leading role and carries out series of analysis and consultations in the specially designed groups, panels and committees. During the process ICAO's member states and some other international organizations are asked for comments and the final texts of the proposals or amendments are drafted by the Air Navigation Commission and presented to the Council for adoption. The Council votes with the 2/3 majority and within 2 weeks of the voting date, member states receive the newly adopted documents. (Making an ICAO Standard:
http://www.icao.int/icao/en/anb/mais/index.html)

4. SARPS – differences, legal effect and practice

The numbers regarding the world use of civil aviation are overwhelming. Even with slight decrease caused by the financial crisis during the last couple of years, the recent ICAO data shows that total scheduled traffic carried out by the airlines of the 190 member states in 2009 amounted to approximately 2 280 million passengers and 38 million tones of freight (Annual Report, 2009,. 5) With such high frequency of flights, the net of standards and recommended practices aim to make those flights efficient, safe and secure.

What is then the legal effect of standards and practices? Are states obliged to follow and apply them in their internal regulations? The answer comes from the 1944 regulations. It brings some doubts and causes uneven reactions. Article 37 of the Chicago Convention provides that "Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation". As a consequence, instruments listed in art. 37, including standards and practices have no formal binding effect. The states are committed to introduce them into the national legislation, but they do have an option to reject them upon specific notification.

Further provisions of the Chicago Convention oblige states to immediately notify the ICAO Council of situations where, after a new standard is introduced, they find it "impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard". In case of the amendment to the already existing standard, "any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take". Once such notification is given by the state which does not accept the standard or the amendment, the Council has to make "immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponddng national practice of that State". (Article 38 of the Convention). When no notification is given by the member state, it is assumed that it accepts the standards and will fully implement them. On the other hand, if a state notifies its objection as required by the Convention, it is then etitled to reject some or all the provisions of the Annexes. (Dempsey, 2004-2005, 14) Moreover, no sanction is provided for states which simply give no reaction to SARPs, so they fail to give any notification to the ICAO.

Moreover, article 38 of the Convention is addressed only to international standards and procedures. It does not mention recommended practices, therefore there is no obligation for the states as to any reaction to the introduction of new or amended

recommended practices. As such, the non-observance of practices have no legal effects. They serve as advisory instruments. (Abeyrante, 1998, 144; Weber, 2007, 35)

It does not require any long argumentation, that aviation safety is a common aim of all the countries involved in air transportation, so they should be interested in harmonization of the national legislations concerning civil aviation based on the internationally created and consulted guidelines included in SARPs. Universally understood effectiveness of the air flights' quality, safety and security can only be guaranteed if all carriers (from 190 member states of the ICAO) follow the same regulations and apply common mechanisms. The Chicago Convention itself requires the states to keep their regulations uniform, to the greatest extend possible, with those established under Convention (Article 12 of the Convention). The practice however, showed a high degree of ignorance. No reaction was given to any communication regarding the international standards in 66-75% of member states and there was no instrument of any audit of the implementation of standards and practices. (Milde, 1996, 64; Dempsey, 2004-2005, 16)

The ICAO had to come up with an idea for an effective control over its standards' implementation. In 1992 the ICAO Assembly passed a resolution establishing a voluntary safety oversight program. Two years later, the program was provided necessary funding and on January 1, 1999, the Universal Safety Oversight Audit Programme (USOAP) replaced the voluntary one and became an instrument for the SARPs' implementation supervision. The program serves to identify the problems with SARPs implementation as the purpose of the audits in member states is to examine if and how the implementation of standards has been carried out. (Bliss 2006, p. 13,246, Stimpson 2002, p. 13,156) The USOAP audit rounds were closed in 2010 and the results are posted on the ICAO's website proving that countries which implemented the ICAO standards and recommended practices have a lower accident rate. (*www.icao.int*, Stimpson 2002, p. 13, 156) The wording af the Chicago Convention has not been changed and SARPs continue to have only a "soft" legal effect, but the results of USOAP and hopefully the results of new audit programs launched by the ICAO will send a clear signal to all member states: compliance with internationally consulted and adopted statndards and practices make world aviation safer.

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THE EVALUATION OF AN ECONOMICALLY MOST ADVANTAGEOUS TENDER IN THE PUBLIC PROCUREMENT

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The award system has a key role in the public procurement, because it determines what the contracting authority considers as the "economically most advantageous tender". According to the Public Procurement Law, the criterion of the economically most advantageous tender is one of the basic criteria for the selection of the tender. But as it is seen in the practice, many award systems have serious deficiencies arising out of the inappropriate choice of criteria, algorithm and specific weight. As a result, the tender chosen is not really the most advantageous. There will be aspects demonstrated in this article, which should be taken into account by choosing this evaluation criterion so that this choice would be warranted and justified. Firstly, the basic principles for the evaluation of the tender will be considered, because the criterion of the economically most advantageous tender is regulated only in general in the Public Procurement Law. Such evaluation factors as the price, technical solutions will be discussed, as well as the importance of their chosen specific weight. Also, those factors will be discussed which cannot be evaluated as a tender selection criteria. Those algorithms which, when applied, contribute to the optimisation of the tender or, on the contrary, does not allow it, will be analysed. At the end, the necessity of the justification for the procurements commission decision will be discussed. Since the evaluation of the tenders is often complex and voluminous, the applicants or commission itself finds that there are mistakes in the evaluation frequently already after the notification of the results. So we will take a look at the possibilities to repeal or to revise the decision of the commission. Finally, the conclusions and proposals that arose in the course of the work will be presented.

Keywords: the economically most advantageous tender, evaluation criteria, algorithm

Introduction

A State or local government institution, a local government, other derived public person or institution thereof, as well as a legal person governed by private law, which concurrently conforms with the defined criteria, is contracting public works, supply or service contracts by performing procurement procedures according to the Public procurement law (hereinafter – the Law, 2006).

When the procurement procedure begins and the procurement documents are prepared, the criterion for the selection of a tender should be given. From the supplier's point of view this is self-evident, because the decision whether his proposal will win or not should be based exclusively on this criterion.

The Law prescribes two criteria for the selection of the tender: the economically most advantageous tender (hereinafter – the EMAT) and the tender with the lowest price. When choosing the criterion of the EMAT, it is important to choose evaluation factors that are economically justified. At the same time a transparent procurement procedure and equal and fair attitude towards the involved parties, promoting fair and open competition should be ensured.

Selection of the most economically advantageous option still calls doubts both of the honour of the commissioning party and the validity and economic efficiency of the criteria (factors), which are often incomprehensible, because it is not clear who has the benefit of the "most economically advantageous tender". Therefore the aim of the article is to evaluate the most important aspects, which should be taken into account when choosing this criterion. To achieve this goal, available information about the aspects, related to the criterion of the EMAT will be summarised and analysed, and the assessments and suggestions will be given. Although this issue is topical, because the practice of the application of the EMAT criterion in Latvia is not uniform, for the present there is not much discussion and are few publications except for some explanations of the Procurement Monitoring Bureau[1](hereinafter – the Bureau). The regulation that is in force at the time of writing of the article will be reviewed in this article and research and comparative analysis will be used.

1. The conditions for the evaluation of the tender

According to the Article 46 of the Law, the commissioning party for the comparing and evaluation of the tenders chooses the criterion of the EMAT. Only in the case if the commissioning party considers it to be more effective to select the tender with the lowest price and the technical specification prepared by the commissioning party is detailed, the commissioning party is entitled to use the criterion – the tender with the lowest price – for the comparison and evaluation of tenders.

It must be taken into account that the procurement commission evaluates the applicants and their tenders in accordance with the Law, the procurement procedure documents and other laws and regulations. Therefore, it must be taken into account that the criterion for the award of public contracts must be consistent with the requirements for the documents and information submitted by the applicant laid down in the Regulations when evaluating the tenders. Otherwise, it is

[1] The Procurement Monitoring Bureau is a State administrative authority, which monitors the conformity of the state and local government procurement procedures. Fulfilling the duties provided by Law, Procurement Monitoring Bureau is publishing Tender notices and Contract award notices, examining complaints, providing methodological assistance and consultations, compiling and analyzing the statistical information, we have compiled a large amount of information. *www1.iub.gov.lv*

not possible to make an effective and accurate evaluation of tenders and it is considered to be a breach of equal treatment towards suppliers because the transparency and objectivity of the procurement procedure is not ensured (ECJ, C-448/01, 2003).

At first one should select those factors that will be compared to compare and evaluate the tenders when the criterion of the EMAT is chosen. Then these factors should be ranked in the order of their importance, then the specific weight should be specified and finally the algorithm of the choice of the tenders should be shown according to those criteria. Also there should be a description how each criterion will be evaluated. Only the tender with the highest score or percentage assessment will be recognized as the economically most advantageous tender.

One should take into account such factors as the deadlines of the supply or execution of the contract, operating costs and other costs, effectiveness, the quality of works, goods or service, aesthetic and functional features, environmental performance, technical advantages, the availability of the spare parts, security of the supply, price and other contract-related factors that must be specifically stated and they should be comparable or assessed by objective considerations when choosing the criterion of the EMAT (The subdivision 1 of the paragraph 1 of Article 46 of the Law).

The evaluation criteria (factors) mentioned above are not necessary applicable in all cases. The commissioning party has the right to choose which ones of them to take into account in each individual case, depending on the nature of the procurement. Also other evaluation criteria, not mentioned in this provision can be identified (PMB, Nr.4-1.2/08-431, 2008.). It is not acceptable that the commissioning party determines coefficients of criteria or additional criteria to those mentioned before in the procurement documents or in the publication of a notice regarding a contract later in the procurement procedure. Therefore, all of the factors and their relative importance which the commissioning party will take into account choosing the economically most advantageous tender should be known to the potential tenderers already when they are preparing the tender. Furthermore the commissioning party is precluded from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice (ECJ, C-532/06, 2008).

1.1. The principles

As the Public procurement law regulates the provisions of the EMAT only in general, more important are the principles of law, which should be applied when there are no provisions of the Law.

The requirements of the commissioning party must be set to ensure the aim of the Law: the transparency of the procurement procedure, free competition of the suppliers and equal and fair attitude towards them. The European Court of Justice has stated that all forms of the non-discrimination principle are in substance a derivation from the fundamental principle of equality (Craig, 2007). That is why it should be taken into account that the non-discrimination principle is connected

with the principle of free movement of goods because "the principle of free movement of goods includes that the public procurement could not be organised in a way that only the local entrepreneurs would be the beneficiary" (Craig, 2007) And the discrimination in the public procurement occurs when an applicant is excluded because of his nationality (Trepte, 2007). This must be taken into account when choosing the conditions for the evaluation of the tender and determining the evaluation factors.

One of the most important principles of the Public Procurement Directives is the principle of transparency. The principle of transparency serves two main objectives: the first is to introduce a system of openness into public purchasing in the member states, so a greater degree of accountability should be established and potential direct discrimination on grounds of nationality should be eliminated. The second objective aims at ensuring transparency in public procurement and represents a substantial basis for a system of best price for both parts of the equation but is of particular relevance to the supply side, to the extent that the latter has a more *proactive* role in determining the needs of the demand side (Bovis, 2007). Some basic aspects of the principle of transparency are publicly available information about the procurement procedure, public access to the conditions of procurement, for example, to the award criteria, a legal decision and finally, the opportunity for the applicant to request a review of a decision made. It includes also the obligation of commissioning party to justify the decision and the possibility of an appeal.

1.2. The evaluation of price

In the evaluation of a tender, price is one of the most essential factors. But it must be noted that, when choosing the EMAT criterion, the evaluation of the price itself is not defined mandatory in the Law. In case the price is non-essential for the commissioning party or the situation in the particular market is that the prices for the public works, supply and service do not vary or differ insignificantly, the commissioning party can ignore the price, but evaluate other factors, considered to be more important by the commissioning party. At the same time the commissioning party has a duty to comply with the regulation of the law "On Prevention of Squandering of the Financial Resources and Property of the State and Local Governments" (1995) about appropriate utilization of the financial resources and property of the State and local governments. The commissioning party must ensure that the financial resources and property of the State and local governments are utilized lawfully and in conformity with the public interest, to prevent the squandering and ineffective utilization of such financial resources and property. The actions of the commissioning party shall be such as necessary to achieve objecttives with the minimum use of financial resources and property.

The procurement requirements and criteria as a whole must ensure that the commissioning party will obtain a service with optimal price and quality ratio. In any case, the commissioning party must be able to explain and justify the reasons for excluding the price criterion from the award system in each case.

1.3. The evaluation of technical solutions

Applicant should be able to already know all about evaluation criteria, including the existence of the subdivisions, as well as their impact when preparing the tender. As a result, they can prepare different tenders according to this information. For example, suppose there is a situation where the commissioning party intends to evaluate the technical advantages and functional characteristics of the applicant. There must be a clear definition of the technical options that the commissioning party will regard as advantages and also there must be stated solutions that the commissioning party will regard as functionally most successful and also situations when the evaluation will be reduced. All of the above mentioned information should be stated to make an objective comparison of the tenders submitted, and to evaluate and select the most advantageous tender.

Since the criteria must be directly related to the subject-matter of the contract, to evaluate, for example, technical advantages, only the technical solution which will be used in the execution of contract and which can ensure more efficient and better performance of contract should be evaluated. So, for example, technical resources of the applicant cannot be evaluated, since they relate to the evaluation of the qualification of the applicant and they only testify about the ability to execute the contract rather than the existence of a greater advantage (PMB, 02.08.2010.).

1.4. Quality evaluation

The quality factor is very important and in most of the cases " quality" is understood as a) technical capability, e.g., ergonomic, durability, technical support, service, spare parts, and b) functional capability, e.g., suppliers' competence, references, guarantee, quality management, product or service concept and suitable to use and to purchaser's current systems. Some of these qualitative elements could also refer to the ecological characteristics of the product and thus environmental soundness of the product can be taken into account in the form of qualitative factors (Parikka – Alhola, Nissinen, Ekros 2006).

1.5. Specific weight of the score

It would be wrong to believe that, for example, if the total score is 100 points, by giving 50 points for the price and another 50 for the date of delivery, the selected tender definitely will be the "economically most advantageous tender". But that's what is happening in practice, although not always the delivery date will have the same significance as the price in reality. Therefore, the specific weight should be evaluated carefully. Because, for example, if the specific weight for the date of delivery is overrated, the "fastest" applicant can win. But the gain of some weeks or even days will not countervail the supply of "expensive" and/or "low-quality" goods for the whole year.

Also, a situation when some important factor, for example, quality has no effect on the total score and as a result very cheap and fast, but low-quality service is bought must be avoided.

It must be taken into account that the factors related to the applicants experience and its personnel experience and qualification must be provided as the selection criteria (paragraph 2 of Article 42 of the Law) not the criteria for selection of tenders (Article 46 of the Law) when choosing the criteria for evaluation. The aim of the evaluation of the applicant and its personnel is not to determine the economically most advantageous tender but to prescribe the minimal level of the requirements, so that the commissioning party can verify the applicants' ability to perform the public procurement contract (ECJ, *C-513/99,* 2002; *C-315/01,* 2003; *C-532/06,* 2008). So, factors that should be regarded and evaluated as qualification requirements under the Section 40 to 44 of the Law should not be included in the choice of factors for the EMAT criterion (PMB, 19.11.2008).

2. Scoring methodology and algorithm

The commissioning party must prescribe exact methodology for the scoring of each criterion of evaluation. If no such methodology is prescribed in the procurement documents, it is a breach of the principle of openness established in paragraph 1 of Article 2 of the Law. This principle requires setting of the requirements for the applicants before the announcement of the procurement procedure (PMB, Nr. 4-1.2/10-123., 2010).

An algorithm could also be applied for the scoring. Algorithm is a system of actions and calculations, done accordingly to strictly defined laws. After the consequent completion of those calculations it leads us to the result of the set task (Vārdnīca, 1978). Often, an algorithm like this is applied in practice: Score = 50 x L/P, where L = lowest price among the tenders, and P = price of the tender for which the score is calculated. Obviously, in this example the score will always depend from other tenders, therefore, it can be influenced.

Nowadays many commissioning parties in The Netherlands are using a following, a little bit complicated, but more effective, algorithms. Score = 100 – 50 x log (P / L) / log 2, where L = lowest price among the tenders, and P = price of the tender for which the score is calculated (Chen, 2005). But the influence from other tenders is possible in this example as well. But it would not be like that if, for example, the calculation would be like this: Score = 1000 – P + W, where P – price, and W – warranty (Chen, 2008).

If the award system is fully transparent, the applicants will be able to calculate their scores and thus optimize their tender while they are drafting it. In this case the commissioning party would also be a winner, because it really can get the economically most advantageous tender. But in practice most award systems use relative scores. The relative scores exist and are expressed in comparison with something, in relation to something; they vary depending on ambient conditions (Vārdnīca, 1978). It means that it is impossible for applicants to calculate their

scores and thus optimize their tender while they are drafting it and that could not lead to the economically most advantageous tender for the commissioning party (Chen, 2008).

For objectively identifiable criteria like "building costs" or "works schedule" only the mathematical proportionality could be applied, otherwise the evaluation could not be objectively justified (PMB, Nr.4-1.2/08-366, 2008).

The Article 46 of the Law does not detail the degree to which the algorithm must be defined in the procurement documents. Namely, this provision does not prescribe that the algorithm for the selection of the tender must be defined in procurement documents in regard to every factor which will be evaluated in the process of the selection of the economically most advantageous tender. Moreover, both the Law and the Directive 2004/18/EC of the European Parliament and of the Council (March 31, 2004) on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (2004), allows to use in the process of the selection of the EMAT such criteria that are not only of economic nature and that are measurable in qualitative, not quantitative category (ECJ, 1985) and in relation to which nor mathematical, nor in other way precise algorithm for the selection of tender could be defined. But the fact itself that the evaluation criteria are not mathematically measurable (they can not be measured quantitatively) does not mean that evaluation by these criteria is not objective, although it is based on the procurement commission (expert) individual ratings (PMB, Nr. 4-1.2/09-448, 2009).

If, however, the algorithm (formula) for the selection of the tender is not prescribed in the procurement documents, it does not mean that the members of procurement commission can evaluate the tenders according to their discretion, applying different methods. Because what is said in the paragraph 2 of Article 24 of the Law that each member of the procurement commission shall evaluate the tender individually is related to the process of the evaluation of the tenders, not the selection of the algorithm (formula) of the selection of the tender. Besides, the fact that the members of the procurement commission evaluate the tenders individually does not release them from the duty to justify why they granted a greater or lesser number of points for each of the evaluation criteria (PMB, Nr. 4-1.2/08-366, 2008.)

3. The justification of the decision

Since every decision of the procurement commission must be justified and it is an administrative act, arguments which have been expressed in published court judgments and legal literature, as well as in other special literature, can be used for the justification as required by paragraph 5 of Article 67 of the Administrative Procedure Law (2001). This is why the commissioning party must show the justification of the decision concerning rejected applicants, as well as the tenders that did not comply with the requirements of the procurement documents, both in the protocols and the notice regarding the results of a procurement procedure. Article 37 of the Law states the amount of information which should be included

in the notice, inter alia, the tender evaluation summary and justification of the selection of the tender if the EMAT criteria is applied.

The above mentioned rule means that in the notice the commissioning party must show the total score which testify about the selection of the EMAT. The commissioning party must in general describe the advantage of the tender comparing to other tenders, without mentioning particular technical solutions or brands. According to the paragraph 3 of Article 35 of the Law, the protocols, notice and other procurement documents, except the tenders, are generally available information.

In any case the commissioning party must observe the commercial secret and information that could be classified as confidential or as limited availability information under normative acts must not be published (in this case the attention must be drawn to the information shown in the qualification requirements and other information included in the tenders).

The procurement commission commits a substantial procedural violation as well as non – compliance with the principle of justification, one of the basic principles of the state by not specifying the reasons for the decision made. Besides, the applicant can make sure whether the decision is correct and assess if there are grounds to challenge or appeal this decision by seeing the justification of the decision (PMB, 2010).

4. Repeal of the decision

The tenderers should note that until the contract is concluded the decision is in the administrative appeal stage and the act has not yet obtained its permanent validity, so the relevant participant must consider the possibility of declaring it invalid (Briede, 2005).

The principle of state administration includes openness with respect to private individuals and the public, the protection of data, the fair implementation of procedures within a reasonable time period and other regulations, the aim of which is to ensure that State administration observes the rights and lawful interests of private individuals, pursuant to the paragraph 5 of Article 10 of the State Administrative Structure Law (2002). According to this, if an institution ascertains that an unlawful administrative act has been issued, it can repeal the act on one's own initiative in the stage of the disputing of an administrative act.

Though the Administrative Procedure Law does not directly provide that the institution, in this case – the commissioning party's procurement commission, can by its own initiative (with the exception of the cases of correction of clerical and mathematical calculation errors under Article 72 of the Administrative Procedure Law) change the content of an act which is favourable to a person and issued and notified to the addressee. But it can be concluded from Article 57 of the Administrative Procedure Law which says that an institution which has jurisdiction over a matter shall initiate an administrative matter if it becomes aware of facts on the basis of which, in accordance with the norms of law, an appropriate administrative act must or may be issued, and also where the institution has grounds for considering that such facts may exist.

Under the paragraph 1 of Article 86 of the Administrative Procedure Law an unlawful administrative act unfavourable to the addressee may be revoked at any time. And under the clause 1 of paragraph 2 of the same Article an administrative act favourable to the addressee may be revoked if the addressee has not yet exercised his or her rights, which are confirmed or granted by such administrative act (PMB, Nr.4-1.2/10-58, 2010).

So, if the commission detects an error of evaluation already after the result has been announced, it still has the rights to repeal the decision made and to eliminate the mistake on its own initiative.

If the procurement commission has made its decision about entering into contract, under paragraph 5 of Article 23 of the Law, the decision of the commission is binding for the commissioning party if the contract is concluded.

Conclusions

When the criterion of the economically most advantageous tender is chosen, not only all of the evaluation criteria in order of their importance, their specific weight and numerical value, but also the algorithm for the evaluation and a description about how each criterion will be evaluated should be shown in the procurement documentation. Also the evaluation criteria should be directly connected to the subject-matter of the contract.

Evaluation factors connected with the applicant's experience and experience and qualification of its personnel should be determined as the qualification criteria for applicants, not the evaluation criteria for the tenders.

The right choice of the methodology and algorithm has a very big importance since only transparent and previously known criteria will give a chance for the applicant to optimize its tender and for the commissioning party to get economic benefit. Unfortunately, many award systems do not allow for economic optimization at all.

The procurement commission's decision is binding for the commissioning party if the contract is concluded. The decision must be justified, but it must be noted that the decision can be repealed or changed before the conclusion of the contract.

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THE HISTORICAL DEVELOPMENT OF THE PUBLIC PROCUREMENT IN LATVIA

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The procurement is one of the fields where the state meets the activity of private entrepreneurs. The objective of an efficiently functioning law is to entail a beneficial public law environment for entrepreneurs in order for them to be able to plan their activities better considering a predictable state procedure. The notion of the state procurement in Latvia has a long-standing history – already during the time of the first Republic of Latvia in 1927 the Law on Works and Supply for the State Needs was passed. During that time a regulation of public procurement developed and many of the problems disappeared, but some of them remained the same. By tracking the historical development of the public procurement we can learn from mistakes of the past and improve the present regulation.

Keywords: national supply, government orders, public procurement, history of the public procurement

Introduction

The notion of the state procurement has a long-standing history in Latvia – already during the time of the first Republic of Latvia, in 1927 the Law on Works and Supply for the State Needs was passed. Already then there was a view that holds that there must be some kind of a regulation for dealing with the state property in a legal state, so that it would not be used against national and public interests and the legal state principle would be taken into account. It will be examined during this article how these principles were enforced and consolidated in legal norms following the period between the foundation of the state and nowadays and emphasizing the problems that have not lost their urgency until now. The aim of this article is to stress the problems connected with the development and application of laws and regulations, paying attention to those of them, which could be avoided in the future. An analysis will be done with historical, analytical and comparative methods. There have not been any publications about the history of public procurement in Latvia in legal literature till now.

1. The initial period

The public procurement is as old as the state, because there is a necessity to manage the household already from the beginning of the state. "State is the

supreme master in the state"[1] pointed out the deputy J. Hāns in the Saeima meeting in 1927, and we can not disagree with that. There emerged a necessity for the Republic of Latvia to control the economic processes in it with the establishment of the new state declaring its independency on November 18, 1918 and adopting the Constitution in 1922. And all the democratic principles fixed in Constitution, for example, "all citizens in Latvia shall be equal before the law and the courts"[2], should be taken into account in this process.

The Republic of Latvia originally applied the principle of legal continuity in the territory of Latvia regarding former laws of the Russian state. So after establishing its constitutional framework there was an urgent task for the Republic of Latvia, to create a Latvian national legal system. (Lēbers, 2000, 218) It should be noted that already then the legislator considered it important to have a regulation for actions with the state property to avoid an inexpedient devastation against the national interests and to comply with democratic and law-governed state principles.

The period between the year 1923 and 1930 is known as the time of the economical growth in the Western Europe (apart from insignificant weakening of the economic activity around year 1925 and 1927). There were no significant events in the political life considerably affecting the economical life of Latvia during this time. There was a lack of stability and security overall in the politics, necessary to get the most possible advantage of favourable conditions for the economical growth. Never ceasing introductions of amendments of the laws and orders inevitably resulted in an unsteadiness of the economical field. And many big and important foreign investments passed by because of this uncertainty, which would otherwise increase the income of the nation and raise its wealth. Also A. Klīve in his speech on April 21, 1923 took a notice of this question. He said: "If you (..) want to start negotiations with the foreigners, they will give an answer that they can not know, how long this will last, how long this will go. You will have to receive admonition that we have no certainty and we tolerate enormous arbitrariness, both in legislation and all other questions. How could they invest their capital here under these circumstances?" (Lēbers, 2000, 265.–266.)

Similar situation can be noticed these days. A lack of stability and certainty in legislation, economy and government decisions does not only concern and decide the destiny of only individual entities. It also even affects and destroys whole commercial sectors. So this situation, which is created by the lack of experience and a struggle between the political forces, considerably holds back the growth of national economy. (Skrastiņa, 2010)

One should keep in mind the goals, which the masters of the economical policy of that time tried to achieve and in first place – national political goals, to understand

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[1] Saeimas stenogramma. Latvijas Republikas II Saeimas V sesijas 6. sēdē 1927. gada 4. februārī.

[2] Latvijas Republikas Satversme. // Latvijas Republikas likums. Pieņemts Satversmes sapulcē 15.02.1922.,spēkā stājies 07.11.1922; ar grozījumiem, kas izsludināti līdz 03.05.2007.// Latvijas Vēstnesis 01.07.1993., Nr.43.

the course of events described here. A. Klīve drew attention to a historical interaction between the economical and political position and the fact that Latvians have to secure both of them. In connection with this A. Klīve asked: "Can it be allowed in a democratic state like Latvia to permit some kind of support for entrepreneurs of only one nationality?", and gives his answer right away – "Yes". He justifies his answer as follows: "To give the possibility for Latvian storekeepers to compete with their foreign colleagues, the state should help the weakest for the sake of equality. It should fill the gap derived from foreign dominance over the Latvians before the war." (Lēbers, 2000, 271.–272.) These words are also important nowadays, when there is a ten-dency in public procurements that many of the products, which are produced in Latvia as well, are purchased from foreign entities because of their competitiveness both in price and the advantageousness of the offer. This is the sphere, where politicians, economists and legislators should work in one direction to create favourable environment for the local entrepreneurs. (Skrastiņa, 2010)

The concept of public procurement was already mentioned in the Latvian legal system in 1922, when the Article 32 of the Constitution of the Republic of Latvia turned against exploitation of a vocational position of selfish motives. The Article prescribed, that *no member of Saeima himself, nor in the name of another person, is allowed to get any order or a concession from the State*[3]. The same applied to ministers if they were not members of the Saeima. In 1923 the law regulating the work of the State Control was passed. The law described the State Control as an independent collegiate institution and as its objective appointed to fix one's focus on collecting and using of state property, and to follow whether actions with the state property are legal, expedient and well organised. (Lēbers, 2000, 227.–228.)

1.1. Temporary rules about the delivery of work and materials to the state institutions

On April 26, 1924 "Temporary rules about the delivery of work and materials to the state institutions"[4] were passed under the arrangement of Article 81 of Constitution of Republic of Latvia. There were only four articles in these rules, prescribing that the work and supplies in the state institutions could be performed by entrepreneurs or the contracting authority itself. The contractor could be choosen in an auction (organised on the ground of Law of the government delivery) in a tender or by collecting prices by requests of proposals from individual persons and companies. Not only could the lowest prices in choosing the contractor in a competition or by collecting the prices be taken into account, but also the honesty of entrepreneur, his work experience, urgency of supply,

[3] Latvijas Republikas Satversme://Latvijas Republikas likums. Pieņemts Satversmes sapulcē 15.02.1922.,spēkā stājies 07.11.1922; ar grozījumiem, kas izsludināti līdz 03.05.2007.// Latvijas Vēstnesis 01.07.1993., Nr. 43.

[4] Pagaidu noteikumi par darba izdošanu un materiālu piegādāšanu valsts iestādēs. Pieņemti 26.04.1924. *Valdības vēstnesis* 95. n., 28.04.1924. [Nav spēkā]

interests of local industry and other reasons alike. The reasons should be presented in the protocol or in the decision, why the supplier or entrepreneur with lowest price has not been chosen.

1.2. Instruction about the delivery of work and materials to the state institutions

The Cabinet of Ministers passed an "Instruction about the delivery of work and materials to the state institutions"[5] on May 7, 1925. The instruction was passed to apply the above mentioned rules. It stated that there should be an announcement in the "Valdības Vēstnesis" and other newspapers according to the choice of institution about the work or supply delivery in a competition and that it should be advertised beforehand (at least one week earlier). The principle of openness in a public procurement procedure was ensured for the first time in this way. The following should be indicated in the advertisement: 1) the nature, extent and amount of the work; 2) final day, hour and the place for submitting the written tender proposals; 3) place for requesting more details about the requirements.

If the contractors were chosen by collecting prices by requests for proposal orinstitutions delivered aforementioned information to individual persons or companies according to their choice, then they had to give the tenderers enough time for drafting and submitting of the tender proposal.

When a competition was held or prices were collected by requests of proposal, the market price had to be enquired. The established procedure for a written auction had to be also taken into account (in accordance with temporary rules and this instruction) in examining the submitted tenders and concluding a contract.

1.3. Passing of the "Law on Work and Supplies for the State Needs"

The most comprehensive and significant regulation of the public procurement is connected with the year 1927, when the Law on Work and Supplies for the State Needs[6] was passed. There was a fierce debate that testifies about the big importance of the law before passing it. For instance, deputy J. Hāns said: "This draft law has a very large-scale economical significance. It can even be said, than no other law has such significance in the economical sphere," in the 6th meeting of the session No. V of II Saeima of the Republic of Latvia on February 4 1927.

The Old Russian instructions were applied for all of the state deliveries and orders until this time. But there were a lot of complaints about them. So this law was necessary to prevent all of the undesired malevolence in future. The budgetary commission tried to draft a new law, so that it could satisfy both the state and

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[5] Instrukcija par darba izdošanu un materiālu piegādāšanu valsts iestādēs. *Valdības vēstnesis* 111., 20.05.1925. [Nav spēkā]

[6] Likums par darbiem un piegādēm valsts vajadzībām.// Latvijas Republikas likums. Pieņemts Latvijas Republikas Saeimā 08.03.1927. //*Valdības vēstnesis* nr. 54 [Nav spēkā]

economical community and organizations. But it must be taken into account that it could not be expected to preclude all of the undesired malevolence from this law. J. Hāns said: "The prevention of malevolence depends not on the law itself, but on those, who enforce the law". He continues: "If the law is enforced incorrectly then, of course, malevolence will not be stopped, it will continue. So the law should be enforced correctly and fairly". It must be noted, that this law did not apply to the local municipalities, because their practice of public procurements did not induce any complaints.

Everyone who wanted to receive a state order was constrained to pay a security deposit or submit other guarantee according to the instructions of Russian time. It was too difficult for Latvian craftsmen, workmen artels and farmers, so they had no opportunity to take part in the tenders and get an order. This problem is still urgent nowadays. Frequently requests for a security deposit is the reason why farmers, craftsmen, new companies do not participate in the procurements. And pretty often this request is introduced intentionally, so that "the small companies" do not participate.

But there is another side to this problem – often casual people get the order. And the reason why is that the requirements allow everyone to try their luck. The difficulties are in the obstacle that you have to combine two, in a way opposite, objectives in the procurement – an efficient use of the state resources, and good quality, skilful executors. On the one hand you must ensure free competition, so that everyone can participate, but on the other hand – a good quality of performance and skilled entrepreneurs are required. Very good and also very cheap outcome is hard to achieve in practice, almost impossible. The contracting authority must find the golden mean, but it is not always easy to accomplish. And the contracting authority is forced to ask for a guarantee to avoid fortune-hunters and to be sure, that the tender applicant will be able to do the job. But it does not give a chance to those, who have no available money. The contracting authority had to evaluate the amount of guarantee very carefully, taking the size of an order, total costs, market situation and other conditions into account.

You can not cover all of the sectors, nor solve all of the problems with one law. J. Hāns described the purpose of this law very precisely: "With this law we have to manage the question of the public procurement, so that on the one hand we could protect state against malice and on the other hand ensure that no unfounded requirements from the contracting authority are applied to entrepreneurs"[7]. This point of view is very farseeing, but although a long time has passed, this goal has not been fully reached yet.

The Saeima of the Republic of Latvia passed and the president of the State promulgated the Law on Work and Supplies for the State Needs[8] on March 8,

[7] Saeimas stenogramma. Latvijas Republikas II Saeimas V sesijas 6. sēdē 1927. gada 4. februārī

[8] Likums par darbiem un piegādēm valsts vajadzībām.// Latvijas Republikas likums. Pieņemts Latvijas Republikas Saeimā 08.03.1927. //*Valdības vēstnesis* nr. 54

1927. This law was applicable to the works and supplies for state needs, which could be done by either individual persons or legal entities. Works and supplies could also be done by foreign companies.

According to the law, names of those entrepreneurs and suppliers which were identified as negligent by the heads of individual department in consultation with state controller were included in a special registry and announced in the "Valdības Vēstnesis". And those who were in this register were not allowed to take part in other procurements. (Ošiņš, 1935, 28) There is no such special register currently. Attitude towards dishonest tender applicants at the moment is too liberal according to the author. State contracting authorities are in no way protected from the suppliers, which do their job in low quality year after year. When the contract with this kind of supplier is discharged and a new public procurement procedure is promulgated, this dishonest tender applicant is participating again as a result.

There were regulated rules of realisation of work and supply for state needs in the law. It was said that the rules have to be complete, clear and precise, so that there was no need for improving the contract. It must be noted, that we have to face with lack of clearness and certainty in the papers of public procurement nowadays as well. For the present the Public Procurement Law regulation has not been sufficient to avoid the same problems.

It is very important for the whole procurement procedure that the procurement documents are absolutely clear and precise. Violation of those principles creates problems and complications already when the documents are released. Unfortunately these days the contract documents often are of a very poor quality. So the procedure must be suspended, sometimes even after all the tender applications have been submitted. Although all of the tender applicants have spent their time and money to prepare the tenders, afterwards no one is responsible for the wasted resources. As it is said in the law, procedure must be stopped "by the objective considerations"[9] and all tender applicants can try again later.

The law established that an auction (oral, written, mixed), a competition could be organised for the selection of the supplier or the work could be executed by the contracting authority itself. A notification about the public procurement was to be promulgated in the "Valdības Vēstnesis" and in two local newspapers as well. The law regulated both the conclusion of contract and the acceptance of work and payment.

There were progressive mechanisms of public procurement incorporated in this law which are also topical nowadays. Their purpose was to ensure equality, support competition and transparency of public procurement procedure.

State needs resources and performance of some actions in order to carry out one's functions efficiently and to administrate the territory. To a great extent it was

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[Nav spēkā]

[9] Publisko iepirkumu likums.// Latvijas Republikas likums. Stājas spēkā 01.05.2006.// *Latvijas Vēstnesis*. 25.04.2006. Nr. 65., ar grozījumiem 20.05.2010. *Latvijas Vēstnesis 09.06.2010. Nr. 91.*

ensured by the regulation of the aforementioned Law on Work and Supplies for the State Needs. But the law is not enough, if there is no sufficiently effective supervision over it from both society and the state itself. Although an effective government is evidence of state existence (Wallace, 2002,60), government's existence itself does not mean anything, if it does not enact an effective control. (Malanzuk, 1997, 77) The deficiency of control over public procurement was topical then and still is now. But the criterion for government to be "efficient enough" is not absolute; it is a rather relative concept. It is often said, that the control realized must be effective enough to guarantee the rights of other states in the territory of the state according to the international law. (Evans, 2006, 233)

Still the basic task for all governments in the first place is to take care for the development of the state, "aiding the weakest in the name of equality" and by supporting the local entrepreneurs. But the instability in all fields in the state, weak control of the procurements and ill fame of procurements then and now favours nor local, nor foreign entrepreneurs' desire to take part in the procurements of our state. (Skrastiņa, 2010)

The associations of entrepreneurs must be mentioned as another problem, topical then and now, which aim to exclude the mutual competition, divide the market, agree on the prices and increase the profit. There were no laws prohibiting or at least regulating the activity of such monopolistic associations in the whole period of independence of Latvia. So it was impossible for the state institutions to supervise them. The state started to make state monopolies itself in some of the economic sectors (Aizsilnieks, 1968, 379.–381.) in these conditions. The result was that the state tried to take over a greater and greater part of the Latvian economical life, exposing it to state's direct governance. There were autonomous state enterprises, the state assigned functions of enterprises to ministries and departments and divisions. But it did not result in a very good outcome, because there were no competition and the economical growth delayed. Perhaps the national leaders would have found the most efficient economical management form, learning from one's mistakes. But this possibility was taken away by the great depression, which took over all of the worlds economies and placed the government of Latvia in front of new and hard problems.

There were no important changes in this law in the later years until the moment that state ceased to exist. If there is no state, there is no contracting authority and there was no one to apply the law.

2. The period of the planned delivery from 1941 till 1991

The occupation of Latvia by the Soviet Union Red Army in 1940 had far-reaching consequences. The result was loss of the national independency of the Republic of Latvia and inclusion of its territory into the USSR. The Latvian legal system was replaced by the Soviet law. In the Soviet period the public procurement or state supply become a tool for the accomplishment of planned economics targets. There was no place for free competition. There appeared a sudden break in the development of Latvian legal system, lasting for whole 50 years. So it was not possible to talk about the procurement procedure in today's sense at all.

3. The period of the state resumption from 1992 till 2001 year

But the history repeats and the public procurement field became important in its previous understanding again. The declaration "On the Restoration of Independence of the Republic of Latvia" was adopted in May 4, 1990 and several articles of Constitution of the Republic of Latvia (1922) were restored, including first article, which said: "Latvia is an independent democratic republic".

The beginning of the recovery of national economy could be seen already at the time of perestroika, the Mikhail Gorbachev'*s* program of economy. It was the time when individual work and entrepreneurs' initiative started to evolve. It was the beginning of the formation of cooperatives and there were principles of economic calculation and self-financing in state and local businesses introduced, as well as a stimulation of farms and the foundation of savings bank done. (Lēbers, 2000, 443)

3.1. The legislation of the public procurement in the time of state resumption

Procurements were organised according to the procedure prescribed by the regulations of the Cabinet of Ministers of the Republic of Latvia No. 207 (November 26, 1990), No. 250 (September 26, 1991) and No. 60 "On Work and Supplies for the State Needs" (March 23, 1994) until the passing of the law " On the State and Local Order" (October 24, 1996).

The development of the law "On the State and Local Order" started in 1993 to adjust the public procurement sphere to the international requirements. The guidelines on public procurement from European Community's directive, adopted on June, 1993 and World Trade Organisation agreement, signed on April 14, 1994 in Marrakesh both were included in this law.

3.2. Law "On the State and Local Order"

Law came into force on January 1, 1997 and it was in force until December 31, 2001. It defined the state and local municipality procurement as a delivery of goods, performing of a job or rendering of services for which the payment was to come fully or in part from the state or local municipalities. Methods for the awarding a contract were as following – auction, competition and competitive

dialogue. Contracting authority was allowed to consider only one tender application or execute order itself in special cases. This law was related also to the local municipality's budget, not only the state budget in contradiction to the regulations of the Cabinet of Ministers of the Republic of Latvia No.60. Thus, all of the state budget resources were under supervision. The law stated the procedures for verifying the qualification of tender applicants, document-tation of procurement procedure and dealing with complaints of entrepreneurs about lawfulness of decisions of the contracting authority. There was a State and local procurement supervision department formed under the control of Ministry of Finance for the supervision of execution of the law.

The goals of the public procurement were: 1) to ensure rational use of the state and local municipalities resources; 2) to promote the range of suppliers and contractors participating in public procurement accomplishment as wide as possible; 3) to provide free competition between the suppliers and contractors, as well as equal and fair attitude towards them; 4) to achieve transparency of public procurement and to ensure the confidence of the society in these processes. However, in their broader and absolute sense they were not achieved.

The objectivity of procurement is often doubted by the entrepreneurs and time after time these doubts are well-founded. Inspection of State Control established a consistent negligence in the procedures of procurement. Most often the requirements, determining the procedure for granting state and local municipality's orders were infringed. There were cases found where no announcement of public procurement was published in the "Latvijas Vēstnesis" or a local newspaper. Or the contract documents did not contain evaluation criteria or the criteria were not formulated and described precisely enough. The cheapest offer was frequently rejected without any economical or legal motivation. The winner of an auction did not comply with the delivery dates fixed in the contract in some cases. Unfounded prepayments of partial or whole contracting amount were done. Resources were not used according to the approved estimated costs or the contracting amount was exceeded. Contracts about the delivery of goods, providing of services or work were also concluded without organising an auction (competition) or competitive dialogue. The evaluation criteria included in tender documentation were changed in favour of contractor and without any justification during the procedure or even after the tender was concluded. Many of the above mentioned infringements are also topical today.

The corruption in public procurement is still a serious and widespread problem in spite of efforts to pass more and more severe laws for the regulation of public procurement. A bribe of 10–20% from total contract costs was named as a charge to get a state or a local municipality order.[10] There are no reasons for assuming that situation is much different nowadays.

[10] Atvērtās sabiedrības institūta (ASI) 2002. gada novembrī publicētais pētījums par korupciju. Citēts pēc: Analītisks materiālu vērtējums revīzijas temata ietvaros. Gada pārskats 2002. http://www.lrvk.gov.lv/page.php?id=653 [skatīts 13.06.2010.]

It is said in the report of State Control, that the most important is the meaning of the law, so the legislators must be legally more precise.[11] When the negotiations started about joining the European Union (EU), the legislators of Latvia created a European legal system in quite short time. But the imprecision in formulation of laws often gives an opportunity to translate the law according to one's needs. The offenders are allowed to avoid the responsibility by simply hiding behind some small law formalities. The laws appear in order on paper in Latvia, but there are great problems in application and execution of them. It is still not ensured that in all the institutions and courts laws are applied and translated alike.

The analysis of the public procurement gives evidence that the requirements, laid down in normative acts, are not fulfilled precisely. It causes reflection whether the requirements are not feasible or the officials are uninformed, do not perform their duties as required or even are negligent. It could also testify about the risk of corruption. Documentary unsubstantiated procurements do not encourage public trust in these processes and the above mentioned problems still exist.

3.3. Law "On procurement for the state or local needs"

On July 5, 2001 the law "On procurement for the state or local needs" was passed in Saeima continuing to harmonise regulations of the Latvian public procurement system with the requirements of EU directives. The law came into force on January 1, 2002. Together with the law coming into force, the Procurement Monitoring Bureau (hereafter – Bureau) began its work. This institution is in subordination of Ministry of Finance and its function is to supervise compliance with the law in public procurement field.

It was more precisely prescribed in which cases competition, competitive dialogue or negotiated procedure should be chosen in the new law. The contracting authority had no more opportunity to execute procurement by looking through only one tender application. All interested persons could take a look at the competition statutes and draft contract. It was easy to access information about the composition of the procurement commission, number of submitted tenders (including names of all of the tender applicants and their offer price), criteria for selection of tenders and summary of negotiations after the conclusion of the contract. The contract could not be concluded for 10 days after the announcement of a winner. At that time the tender applicants could make a complaint in the Bureau. In the case of a complaint it was not allowed to conclude a contract without permission of the Bureau. There were several points of procedure that could not be complained of before this law, now complaints could be submitted about the whole procedure.

All in all, the law was considerably improved and it was a relevant step towards transparent and effective use of the state and local municipality's resources and equal competition between contractors. Nevertheless there were still visible

[11] Analītisks materiālu vērtējums revīzijas temata ietvaros. Gada pārskats 2002. http://www.lrvk.gov.lv/page.php?id=653 [skatīts 13.06.2010.]

imperfections in the law and a correction of them was vital to guarantee sufficient transparency of the public procurement.

There were several inaccuracies relating to the principle of information disclosure in the law. It was stated that one part of the protocol of the competition is publicly accessible, but nothing was said whether the protocols of competition dialogue and the contract are available for anyone.

The law did not prescribe the disclosure of concluded contract as well as it did not ensure the prevention of lawless action in the procedure of procurement. But the accessibility of contract would deter officials from underhand dealings and illegal deals.

Contracting authority should take into account that the tender applicant could complain, but the law imposed restrictions on the range of persons which could complain. The law did not prescribe how to ensure supervision of procurements if no one complained. A situation arose in the result that, if there is no complaint, it is not necessary to control anything.

The Bureau could affect course of a tender only if the complaint were lodged duly. When the contract was concluded, it was too late to complain in the Bureau, it was only possible to turn into court. The law did not prescribe what happened when the tender applicant brought an action into court – whether the contract should be stopped during the lawsuit or not. The court proceedings could last for a long time, the contract was still in force at that time. But what if the court adjudges the unlawfulness of the procedure and decides that the contract should be suspended or discharged? The previously accomplished work is an irreversible process and it could cause new lawsuits where the previous contractor requests compensation for material damage. It could prolong the whole execution period and raise the price of the order. But who will be responsible and pay for the mistake done? At the present only the state and local municipalities are doing it from their budget not the persons in charge. The most severe penalty for contracting authority is prohibition to conclude contract wih the chosen tender applicant. Guilty officials are not bothered with the fine of LVL 100–200, prescribe in Latvian Administrative Violation Code.[12]More severe punishment should be considered Bribery and offences punishable under criminal law should be fought with more repressive methods (prosecution, increased fines etc). The qualification of officials should be in such level that it would not be possible to justify misconduct with the lack of knowledge and inability. So there should be knowledgeable officials and strong system of responsibility for them.

One of possible ways how to lower the risk of corruption is to reduce monopoly of officials' power, to decrease their freedom of action and to strengthen the obligation to report about their activity in procurement field. At the present moment there is no need to be afraid from punishment for the ones who make

[12] Latvijas Administratīvo pārkāpumu kodekss.// Pieņemts 07.12.1984. Stājās spēkā 01.07.1985.// Publicēts:*Ziņotājs*. 51., 20.12.1984

doubtful decisions. The report of the State Control for year 2002 said that no official has been called to justice till year 2002.[13]

But the Law "On Procurement for the State or Local Municipalities Needs" did not ensured the implementation of directive 93/38/EEC (coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors) into national legal system. So the procurements of public service providers were regulated separately and the law "On constructions, delivery, rent and services for the needs of public service providers" was passed on July 1, 2000. But on October 21, 2004 the law "On needs of the public service providers" was passed and it is still in force.

3.4. Public Procurement Law

On May 1, 2006 the Public Procurement Law came into force. With this law the Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts[14] (hereafter – Directive 2004/18/EC) was adopted.

The Public Procurement Law has established all of the compulsory public procurement procedures – open competition, closed competition, negotiated procedure, design competition and competitive dialogue at the moment.

The aim of the latest amendments (July 15, 2010) was to implement the directive 2007/66/EC and the directive 2009/33/EC, including the regulation for "the reduction of the shadow economy" and for the centralization of procurements, as well as for implementing the directive 2009/81/EC.

Until now pretty often in procurements won those entrepreneurs who paid their employees very low wages by avoiding tax paying. This is why they could offer lower prices in procurements than those entrepreneurs, who paid taxes and social contributions for their employees in full amount. Therefore honest entrepreneurs did not win in procurements and the state lost its budget income. There are legal provisions now after the amendment, stating that entrepreneur must pay his employees at least 70% of the average wage in the corresponding field for participating in the procurement. So presumably new amendments in the law will continue to improve and make the competition fairer.

The most evident offence in the procurement organisation is connected with unfounded requirements, including the requests of unreasoned references and giving less time to receive them than the law sets down. The evaluation criteria are

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[13] Analītisks materiālu vērtējums revīzijas temata ietvaros. Gada pārskats 2002. http://www.lrvk.gov.lv/page.php?id=653 [skatīts 13.06.2010.]

[14] Directive 2004/18/EC of the European Parliament and of the Council (March 31, 2004) on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. http://www.iub.gov.lv/files/upload/ftp/tiesibuakti/direktiva_2004-18-ec_en.pdf [skatīts 20.07.2010.]

also not formulated precisely enough. There are also requirements for purchasing of procurement documentation, even though it should be free of charge and accessible for everyone. This is a breach of one of the most important principles of the Public Procurement Directives – the principle of transparency. The principle of transparency serves two main objectives: the first is to introduce a system of openness into public purchasing in the member states, so a greater degree of accountability should be established and potential direct discrimination on grounds of nationality should be eliminated. The second objective aims at ensuring transparency in public procurement represents a substantial basis for a system of best price for both parts of the equation but is of particular relevance to the supply side, to the extent that the latter has a more *proactive* role in determining the needs of the demand side. (Bovis, 2007, xxi 65) Some basic aspects of the principle of transparency are publicly available information about the procurement procedure, public access to the conditions of procurement, for example, to the award criteria, a legal decision and finally, the opportunity for the applicant to request a review of a decision made. It includes also the obligation of commissioning party to justify the decision and the possibility of an appeal.

But the most evident offence, established in the time of procurement procedure, is the retreat of contracting authority from initially postulated criteria in procurement documentation. Namely, by evaluating the submitted tenders and determining the winner, the contracting authority decides that the claimed document (for example, a certificate or paper, confirming the experience of tender applicant) is not so important and commission decides that the winner is the tender applicant, who in fact does not comply with all of the requirements. The contracting authority must assess all of the requirements and claimed documents before, not while evaluating the tenders. Maybe some of the requirements are not necessary and even disproportionate with the size of procurement, but later there will be no possibility to change it in appropriate way.

For the procurements in EU under the threshold, fixed in the directive, the state can prescribe and apply national legislation.[15] Nonetheless in our law this national regulation are applied only to the so called "small procurement" (the predictable contract price of public supply contracts or the service is 300 – 20 000 LVL, but the contract price of public works contracts is 10 000 – 120 000 LVL). Contracting authority organizes these procurements according to the Article 8.[1] of the Public Procurement Law and it means that the procedure is easier. But the Public Procurement Law is not applicable under these thresholds. So state can decide itself, what to do will all the rest of the procurements, as the directive 2004/18/EC must be applied only to the procurements above fixed thresholds

The aim of the procurement procedures, regulated in directive 2004/18/EC, is to ensure the EU common market (international trade) and to achieve economical efficiency. But the efficiency of the demands of the above mentioned directive can be lesser concerning the procurements with lower value, taking the administrative

[15] IUB Iesniegumu izskatīšanas komisija lēmums Nr. 4-1.2/08-416 2008. gada 31. oktobrī.

costs of such a procedure into account. In our state the thresholds of national level are heightened and procurements are regulated as severe as those in directive. But national legislation could be more preferential and supportive of our local and new entrepreneurs, farmers. The severe requirements are not encouraging to participate in the procurements. It makes it more complicated for contracting authorities to organise such procedure as well. We are trying to regulate spheres where it is not necessary and so it does not justify itself, because the administrative costs are not proportional with the benefit.

Of course we can not forget that we are in the EU and all of the essential legal principles of the EU should be respected as well. One of the most important principles in the context of the European common market is the non-discrimination principle. And the discrimination in the public procurement becomes apparent when the tender applicant is excluded because of his nationality. (Trepte, 2007, lxx, 1. 14) The non-discrimination principle is connected with the principle of free movement of goods because "the principle of free movement of goods includes that the public procurement could not be organised in a way that only the local entrepreneurs would be the beneficiary". (Craig, 2673)007, clii.

The principle of the rule of law, which is one of the basic principles of judicial state, also states that the law must be predictable and transparent as well as persistent and unchangeable. (Kūtris, 2009) But not at all can it be elluded to the Public procurement law, because talks about new amendments start even when the latest amendments had not come in force yet. So it is the same instability now as it was almost a century ago.

Conclusion

The legal life of Latvia lacked stability in the interwar period necessary to fully take advantage of the economical growth. Frequent legislation changes stimulated instability in economical community. We can also see the same problem in today's Latvia. It creates an especially negative impact in nowadays economical situation, when the stability of legal system is very important for the development of the state. The lack of legal framework and variability caused a political environment where the ones in power used their status inadequately to common interests.

The officials do not perform duties as required or even are negligent and it opens the way to corruption, because the contract documents are prepared in low quality, the requirements are not clearly formulated, the contracting authorities depart from their originally fixed requirements and there happens to be no motivation for choosing one tender applicant as a winner or rejecting other. So there should be knowledgeable officials and strong system of responsibility for them to enforce all the requirements of the law.

Although the regulation of European Union is biding for us, we still have a chance to regulate many questions on the national level. We should join the will of politicians, economists and legislator to support local entrepreneurs and to give chance for Latvian entrepreneurs to compete with their foreign colleagues. State should help them in the name of equality, learning from the mistakes of past, not repeating them.

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KOPSAVILKUMS

BŪVNIECĪBAS TIESĪBU VIETA UN LOMA TIESĪBU SISTĒMĀ

Mg. iur. **Jānis Bramanis**

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TIESISKAIS NIHILISMS PĒCMODERNITĀTES SABIEDRĪBĀ

Dr. phil. **Jānis Broks**

Vārdu salikums 'tiesiskais nihilisms' mūsdienās visai bieži sastopams sabiedrības dzīves ēnas puses izgaismojošā publicistikā. Parasti uz to norāda kā uz vienu no pēdējiem cēloņiem, skaidrojot gan atsevišķu indivīdu delikvantas uzvedības gadījumus, gan kritiski vērtējot valsts veidoto tiesisko iekārtu, tās noteikto normatīvo kārtību, institucionālo struktūru un, it sevišķi, ar tiesiskiem līdzekļiem realizēto valsts politiku. Apzīmējums 'tiesiskais nihilisms' labi spēlē retoriskas figūras lomu, taču, ja netiek konceptuāli pētīta šis parādības iedaba, visai maz spēj palīdzēt norādīto problēmu dziļāko cēloņu izpratnē un to izraisošu negāciju novēršanā. Raksta nodoms ir, sekojot publiskajā sfērā praktizētajai identifikācijai, projicēt Eiropas filozofiskajā tradīcijā izstrādāto nihilisma koncepciju uz tiesības problemātiku ar mērķi noskaidrot publicistikā aktualizēto parādību fundamentālo izcelsmi un iedabu. Īpaša uzmanība tiks veltīta tam, kā šī tēma, kas rietumu intelektuāļus nodarbina jau otro gadsimtu, izgaismojas mūsdienu kultūrā un sabiedrībā. It sevišķi daudzējādā ziņā savdabīgajā Latvijas situācijā.

Atslēgas vārdi: nihilisms, vērtības, modernitāte, pēcmodernitāte, juridiskais pozitīvisms

PASAŽIERU UN TŪRISTU TIESĪBU IEVIEŠANA EIROPAS SAVIENĪBĀ: IZAICINĀJUMS TŪRISMA SEKTORAM

Prof. Dr. **Holgers Buks**

Gadu desmitiem patērētāju aizsardzība ir bijusi ES likumdošanas koncepcijas uzmanības centrā. Jautājumā par pilna servisa ceļojumiem (Padomes direktīva 90/314/EEC) tūrisma industriju ietekmē stingrs patērētāju aizsardzības likums. Interneta un zemo izmaksu lidsabiedrību piedāvājumi radikāli mainījuši veidu, kā patērētāji plāno savas brīvdienas – aizvien vairāk tūristi sākuši tās plānot paši. Un aizvien mazāk viņu intereses aizsargā 1990. gada direktīva. Šī iemesla dēļ ES Komisija pārstrādā likumu, kas labāk apmierinātu mūsdienu patērētāju vajadzības un saskanētu ar jaunajiem uzņēmējdarbības modeļiem. Pēdējo gadu laikā, apzinoties, ka līdz ar pieaugošo starptautisko mobilitāti pakalpojumu kvalitāte un vietējo un starptautisko pasažieru tiesību (iekļaujot sociālos jautājumus) aizsardzība ir nepietiekama, ES Komisija ir stiprinājusi pasažieru tiesības. Tas ir būtisks solis tūrisma industrijas juridiskās sistēmas uzlabošanā. Šis raksts aplūko tās juridiskās problēmas, ar kurām saskaras tūrisma sektors.

Atslēgas vārdi: ES likums, tūrisma likumdošana, patērētāju aizsardzība, pasažieru tiesības, ES tūrisma likuma *status quo* novērtēšana, starptautisko pārvadājumu liberalizācija

JUDIKATŪRAS VIETA TIESĪBU AVOTU SISTĒMĀ

Mg. iur. **Kristīne Dārzniece**

Tiesību avoti pilda ļoti svarīgu funkciju – kalpot par pamatu juridisku lietu izlemšanai, lai panāktu taisnīgu lēmumu pieņemšanu. Atsaukšanās uz judikatūru nodrošina vienādu juridiski saistošu spēku un līdz ar to taisnīguma līmeni, jo jebkurš tiesību avots piedalās tiesību radīšanā un tālākā attīstībā. Tādējādi judikatūra ir principiāli svarīgs tiesību avots, kas garantē tiesību vienlīdzīgas piemērošanas un tiesiskās paļāvības principu ievērošanu tiesību sistēmā kopumā. Likuma robu aizpildīšana nevar pamatoties vienīgi uz likumā ietvertiem tiesiskiem vērtējumiem. Vairumā gadījumu izšķirošā nozīme ir judikatūrai.

Latvijā judikatūra nav saistoša *de iure,* lai gan tiesām regulāri tai būtu jāseko. Tikai atsevišķi precedentu veidi Latvijā ir saistoši *de iure:* Satversmes tiesas spriedums ir obligāts visām tiesām; Augstākās tiesas Senāta sniegts likuma tulkojums, kas izteikts tiesas spriedumā, ir obligāts tiesai, kas šo lietu skata no jauna. Citos gadījumos Augstākās tiesas judikatūra formāli nav saistoša, taču tā tiek ņemta vērā, ja vien kādi iemesli nenosaka citādi. Attīstot un kvalitatīvi veidojot judikatūru, tiesību sistēma iegūs, ja atbrīvosies no judikatūras *formāli* nesaistošā statusa. Transformējot judikatūras argumentējošo spēku uz tiesiski saistošu spēku, tiesību sistēmā tiks stabilizēti tiesiskās vienlīdzības un paļāvības principi, kā arī nodrošināta vienveidīga tiesību piemērošana.

Tiesību teorijā tiek veidota izpratne par tiesību avotiem. Tie ir: vispārīgie tiesību principi, normatīvie tiesību akti, judikatūra, tiesību doktrīna. Savukārt, piemērojot tiesības, nepieciešams izmantot visus minētos tiesību avotus bez izņēmuma. Judikatūra ir patstāvīgs tiesību avots, kurš kalpo kā tiesisku attiecību regulators un nav izmantojam tikai kā instruments tiesību normu interpretācijai. Līdztekus tam ir nepieciešams padziļināti pētīt un zinātniski izstrādāt judikatūras piemērošanas metodoloģiju. Judikatūras veidošana vienmēr prasa precīzu metožu izmantošanu un izsvērtu juridisku un vērtējošu argumentāciju.

Latvijas likumdošanā Administratīvā procesa likuma 15. pantu un Kriminālprocesa likuma 2. pantu nepieciešams papildināt un izteikt esošo judikatūras tiesisko regulējumu tādā redakcijā, kas tiesību piemērotājam un sabiedrībai nepārprotami noteiktu, ka Latvijas tiesas, Eiropas Kopienu tiesa un Eiropas Cilvēktiesību tiesa veido vērā ņemamo judikatūru.

Tiesa judikatūras maiņu var ievadīt tikai un vienīgi ar *konkrētu nolēmumu*. Tiesai nav iespējams iepriekš paziņot, ka tā mainīs savu judikatūru. Tādēļ tā judikatūras maiņu dara zināmu konkrētā nolēmumā. Tātad, līdztiesības princips tiesu saista tādā veidā, ka tai ir principā jāseko judikatūrai, bet, ja tā vēlas to mainīt, tad šī maiņa tiesas nolēmumā ir īpaši jāpamato. Jo būtiskāka maiņa, jo labākai jābūt argumentācijai, lai to pamatotu.

Atslēgas vārdi: tiesību avots, judikatūra, normatīvais raksturs, vispārējie tiesību principi, tiesību doktrīna

REFERENDUMA TIESISKAIS REGULĒJUMS LATVIJAS REPUBLIKAS KONSTITŪCIJĀ (SATVERSMĒ)

Mg. iur. **Oskars Garkājs**

Tautas nobalsošanas institūta esamība Latvijas Republikas Satversmē tika nodrošināta jau no 1922. gada, kad Satversmes sapulcē pēc pamatīgām un argumentētām diskusijām tika pieņemta Satversme. Tajā tika iekļauta tautas nobalsošana. Kopš tā laika Satversmē, attiecībā uz tautas nobalsošanu, ir veikti ievērojami papildinājumi – gan saistībā ar Latvijas dalību Eiropas Savienībā, gan plašāku pilnvaru piešķiršanu pilsoņu kopumam. Taču tie nav vienīgie jautājumi, par kuriem tiek diskutēts. Daudzi diskutētie priekšlikumi nav guvuši tālāku virzību un Satversmē nav iekļauti.

Mūsdienās tautas nobalsošana tiek plaši piemērota praksē. Vēlētājiem, realizējot savas tiesības, ir jākļūst aizvien aktīvākiem un atbildīgākiem lēmumu pieņemšanā. Latvijas Republikas Satversme nosaka dažādus tautas nobalsošanas variantus un reglamentē to norises kārtību, paredzot tautas nobalsošanas iniciatīvas tiesības valsts prezidentam, vēlētājiem. Bez iniciatīvas tiesību noteikšanas Satversmē un citos tiesību aktos, svarīgs ir tiesiskais regulējums, atbilstoši kuram ir paredzēts dažāds kvorums. Taču tautas nobalsošana viennozīmīgi ir tiešās demokrātijas izpausme un pilsoņu līdzdalība valsts un pašvaldību lietu kārtošanā.

Atslēgas vārdi: referendums, referendumu iedalījums, konstitūcija, tiešā demokrātija, vēlētāji, Saeima, Valsts prezidents

STARPTAUTISKĀ CIVILĀS AVIĀCIJAS ORGANIZĀCIJA UN TĀS LOMA STANDARTU UN RISINĀJUMU RADĪŠANĀ PASAULES CIVILAJAI AVIĀCIJAI

Dr. **Izabela Kraśnicka**

Šī raksta mērķis ir raksturot Starptautisko Civilās Aviācijas Organizāciju (SCAO) kā īpašu institūciju, kuras rīcībā ir specifiskas unikālas prasmes un kuras mērķis ir sekmēt un attīstīt drošus gaisa ceļojumus un kravu pārvadājumus. Ievaddaļā ir neliels vēsturisks apskats par SCAO (Starptautiskā Civilās Aviācijas Organizācija) rašanos. Turpinājumā īsi raksturota organizācijas struktūra, īpaši akcentējot padomes un pilnsapulces lomu. Pēc tam rakstā pievērsta uzmanība starptautiskajiem standartiem un ieteicamajiem rīcības modeļiem, kurus iedibinājusi SCAO, kā arī to lomas izskaidrošanai starptautiskās civilās aviācijas funkcionēšanā.

Atslēgas vārdi: Starptautiskā Civilās Aviācijas Organizācija, starptautiska organizācija, civilā aviācija, starptautiskie standarti, ieteicamās rīcības

SAIMNIECISKI IZDEVĪGĀKĀ PIEDĀVĀJUMA IZVĒRTĒŠANA PUBLISKĀ IEPIRKUMA KONKURSĀ

Dr. iur. **Jānis Načisčionis**, Mag. iur. **Una Skrastiņa**

Publiskajos iepirkumos piedāvājumu vērtēšanas sistēmai ir galvenā loma, jo tieši tā nosaka, ko pasūtītājs uzskata par "saimnieciski visizdevīgāko piedāvājumu." Saskaņā ar Publisko iepirkumu likumu, saimnieciski visizdevīgākā piedāvājuma vērtēšanas kritērijs ir viens no pamata piedāvājuma izvēles kritērijiem, bet, kā liecina prakse, tad daudzām vērtēšanas sistēmām ir nopietni trūkumi, kuri rodas nepareizi izvēloties kritērijus, algoritmus, īpatsvarus un tā rezultātā tiek izvēlēts ne gluži ekonomiski visizdevīgākais piedāvājums. Šajā rakstā tiks apskatīti aspekti, kas būtu jāņem vērā, izvēloties šo vērtēšanas kritēriju, lai šī izvēle patiešām būtu attaisnota un pamatota. Pirmkārt, tiks apskatīti galvenie principi, kuri jāievēro, vērtējot piedāvājumus, jo Publisko iepirkumu likums saimnieciski visizdevīgākā piedāvājuma vērtēšanas kritēriju regulē tikai vispārīgi. Tiks apskatīti tādi vērtēšanas faktori, kā cena, tehniskie risinājumi, kā arī apskatīts to izvēlētā īpatsvara nozīmīgums, norādīti tādi faktori, kurus nedrīkst vērtēt kā piedāvājuma izvēles kritērijus. Tiks analizēti arī algoritmi, kuru piemērošana veicina piedāvājumu optimizāciju, vai gluži vienkārši to nepieļauj. Nobeigumā tiks apskatīta iepirkuma komisijas pieņemtā lēmuma pamatojuma nepieciešamība. Par cik piedāvājumu vērtēšana bieži vien ir sarežģīta un apjomīga, tad nereti jau pēc rezultātu paziņošanas pretendenti vai pati komisija konstatē, ka vērtēšanā ir pieļauta kļūda, tādēļ tiks apskatīts iepirkuma komisijas pieņemtā lēmuma atcelšanas vai grozīšanas iespējas. Nobeigumā tiks izdarīti secinājumi un priekšlikumi, kas radās darba gaitā.

Atslēgas vārdi: saimnieciski izdevīgākais piedāvājums, izvērtēšanas kritēriji, algoritms

PUBLISKĀ IEPIRKUMA VĒSTURE

Mag. iur. **Una Skrastiņa**

Valsts pasūtījuma jēdzienam Latvijā ir sena vēsture, jo jau pirmās Latvijas Republikas laikā (1927. gadā) tika pieņemts likums "Par darbiem un piegādēm valsts vajadzībām". Jau tad valdīja uzskats, ka tiesiskā valstī nepieciešams regulēt rīcību ar valsts mantu, lai tā netiktu izšķērdēta pretēji valsts un sabiedrības interesēm un tiktu ievēroti tiesiskas valsts principi. Tas, kā ir izdevies šos mērķus realizēt un nostiprināt tiesību normās, tiks pētīts attiecībā uz laika posmu no valsts pastāvēšanas sākuma līdz mūsdienām, akcentējot tieši tās problēmas, kuras savu aktualitāti nav zaudējušas joprojām. Šī raksta mērķis ir akcentēt valsts pasūtījumu normatīvo aktu izstrādes un piemērošanas problemātiku, un pievērst uzmanību problēmām, no kurām nākotnē būtu iespējams izvairīties.

Atslēgas vārdi: valsts piegādes, valdības rīkojums, publiskais iepirkums, publiskā iepirkuma vēsture