



International Conference of PhD Students  
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# INTEGRATING SOCIAL SCIENCES INTO LEGAL RESEARCH

CONFERENCE PAPERS

10–11 April 2014

VILNIUS



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## FOREWORD BY THE ORGANISERS

What is legal research? Is legal research's primary aim merely to collate, organise and describe legal rules and offer commentary on corresponding authoritative legal sources? Or should it cover a range of disciplinary contexts within the social sciences, humanities and law? Should it relate the legal realm to the sociological, economic, political and other dimensions of human activity? To what extent is legal research interdisciplinary today and how diverse will it be tomorrow? These and other questions are important to the contemporary legal science and will be the core subject-matter of the Conference.

Target participants of this Conference are PhD students and young researchers with background in social sciences or/and humanities who are exploring law by inclusion of other sciences into their legal analysis. Although the main focus of the Conference is devoted to legal research, legal practitioners and non-lawyers who are conducting an interdisciplinary research connected with law are participating as well.

The scope of the Conference is most extensive: from such questions as 'Law and Science – Relatives or Strangers?', 'How Can Legal Discourse Benefit from Philosophy?', 'Is Legal Foresight Crucial for Social Strategic Planning?' and 'Could Supply Chain Management Improve Legal Proceedings?' to interdisciplinary variety of other topics, including such themes as 'The Necessity of the Anthropological Dimension of Law and State in Modern Jurisprudence', 'The Nature of Modern Competition Law: Between Law and Economics', 'How Sociological Analysis Can Influence Constitutions', 'The Presence of Political Aspects in the Legal Research on International Private Law' and many others. Conference papers are presented by PhD students and scholars from Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Russia, Spain, Sweden, Ukraine and the United Kingdom.

The main objectives of the Conference are following: (1) to reveal and thoroughly discuss nominal and possible integration of social sciences into legal research; (2) to share exclusive experience of carrying out interdisciplinary research; (3) to summarise and provide solutions and guidelines for arising issues in various fields of interdisciplinary legal analysis and (4) to foster academic cooperation of PhD students and researchers while encouraging interdisciplinary legal science. Keeping in mind the last one, the readers of the Conference papers are encouraged to consider papers as interactive and contact authors with insights and questions.



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Venue: Vilnius University & Vilnius University Faculty of Law, Vilnius, Lithuania

Date: 10-11 April 2014

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## CONTENTS

Mohamed Sami Aldegwy TOWARDS AN INTEGRATED LAW AND ECONOMICS APPROACH TO ECONOMIC REGULATIONS: MOVING BEYOND FRAGMENTED PLURALITY AND CROSS-DISCIPLINARITY IN LAW AND ECONOMICS .....	9
Ioannis Apostolakis EU COMPETITION LAW AND ECONOMIC EFFICIENCY: THE INTERACTION BETWEEN LAW AND ECONOMICS IN THE FIELD OF VERTICAL RESTRAINTS .....	34
Saulius Arlauskas LAWYERS CANON OF THE PHILOSOPHICAL KNOWLEDGE .....	43
Sigitas Barakauskas THE IMPORTANCE OF ECONOMIC ANALYSIS OF LAW TO LEGISLATION: AN EXAMPLE OF THE LEGAL REGULATION REFORM IN LITHUANIA CONCERNING COMPANY RESCUE .....	55
Teresa Bedulska LAW AND SCIENCE – RELATIVES OR STRANGERS? THE LEGAL RESEARCH OF SCIENTIFIC FIELD .....	63
Roberta Biasillo BEHIND AND BEYOND THE ITALIAN FOREST LEGISLATION OF THE XIX CENTURY .....	72
Erik Björling JURIDIFICATION IN THE REALM OF THE COURT – STUDIES OF THE NARRATIVE CONSTRUCTION OF LEGAL REASONING .....	79
Marija Bliuvaitė OPPORTUNISM IN CIVIL LITIGATION: DIVERSE VIEWPOINTS ON SELF-INTEREST IN INTERIM RELIEF .....	88
Artūrs Caics THE CONCEPT OF POLITICAL RESPONSIBILITY IN THE LATVIAN LEGAL SYSTEM .....	93
Wojciech Ciszewski HOW CAN LEGAL DISCOURSE BENEFIT FROM PHILOSOPHY? A REMARK ON THE LAUTSI CASE .....	104

---

Marta Derlacz-Wawrowska	
<b>RIGHT OF EMPLOYEES TO INFORMATION ABOUT EMPLOYER'S OPERATION</b>	<b>110</b>
Martynas Endrijaitis	
<b>THE JUNCTION OF FINANCIAL ACCOUNTING AND TAX LAW</b>	
<b>AS AN EXAMPLE OF ECONOMICAL AND LEGAL DISCOURSE</b>	<b>116</b>
Egor Evtukhovich	
<b>THE VALUE OF CONFLICTOLOGY FOR THE RESEARCH IN THE FIELD</b>	
<b>OF CIVIL PROCEDURE AND ALTERNATIVE DISPUTE RESOLUTION</b>	<b>125</b>
Raquel Franco	
<b>BEHAVIOURAL ECONOMICS: AN UNDISPUTABLE INSTRUMENT</b>	
<b>TO BUILDING BETTER LEGAL SYSTEMS</b>	<b>132</b>
Maciej Gac	
<b>ECONOMIC ANALYSIS OF COMPETITION LAW – FROM LAW IN BOOKS</b>	
<b>TO LAW IN ACTION</b>	<b>142</b>
Gabrielė Gailiūtė	
<b>ARTISTIC VALUE AS A LEGAL PROBLEM: THE CASE OF CONTEMPORARY LITHUANIA</b>	<b>154</b>
Jadwiga Glanc	
<b>IN SEARCH OF THE LOST ECONOMIST IN EVERY COMMERCIAL LAWYER</b>	<b>160</b>
Tatjana Gordina	
<b>PSYCHOLOGICAL ASPECTS OF APPLYING PRE-TRIAL DETENTION</b>	<b>166</b>
Konstantin Ivanov	
<b>THE NATURE OF MODERN COMPETITION LAW: BETWEEN LAW AND ECONOMICS</b>	<b>178</b>
Žaneta Jakubiec	
<b>THE RESEARCH METHODS IN THE FIELD OF LAW AND ECONOMICS</b>	
<b>IN THE CONTEXT OF CORPORATE GOVERNANCE</b>	<b>184</b>
Gábor Kecskés	
<b>THE SOCIETAL EFFECTS OF ENVIRONMENTAL DISASTERS</b>	
<b>IN INTERNATIONAL ENVIRONMENTAL REGULATION</b>	<b>190</b>
Anna Kornecka	
<b>AN ECONOMIC ANALYSIS OF COPYRIGHT LAW - THE DURATION OF COPYRIGHT</b>	<b>197</b>

---

Maciej Kuta	
UNIFICATION OF CIVIL AND ECONOMIC REGULATIONS ON AN EXAMPLE OF POLISH REGULATION REGARDING ENFORCEMENT ORDER FOR UNCONTESTED CLAIMS. AN EXAMPLE OF TECHNOCRATIC LEGISLATION OR ONE OF PRACTICAL MEANS OF ENFORCING INDIVIDUAL'S RIGHTS? .....	202
Eglė Lauraitytė	
RECONCILING DIFFERENT REALMS: EXAMPLES OF ECONOMIC ANALYSIS OF CORPORATE LAW .....	208
Vitalij Levičev	
HOLISTIC PERSPECTIVE ON LEGAL RESEARCH .....	216
Nėrika Lizinska	
THE PRESENCE OF POLITICAL ASPECTS IN THE LEGAL RESEARCH ON INTERNATIONAL PRIVATE LAW .....	223
Isabell Mattsson	
COULD SUPPLY CHAIN MANAGEMENT IMPROVE LEGAL PROCEEDINGS? .....	229
Milosz Matuschek	
BOUNDED RATIONALITY AND THE LAW: HOW AFFECTED IS CONSTITUTIONAL LAW BY HEURISTICS AND BIASES? .....	236
Edvinas Meškys	
RESEARCH BIOBANKS' IN LITHUANIA: A QUESTION OF ITS HISTORICAL, SOCIAL, ETHICAL & LEGAL PERCEPTION .....	242
Rafał Michalczak, Magdalena Wojdala	
IS LEGAL FORESIGHT CRUCIAL FOR SOCIAL STRATEGIC PLANNING?.....	251
Leila Neimane	
THE INTERRELATION OF SOCIAL ASPECTS OF THE OLD TESTAMENT AND LAW .....	257
Maciej Pach	
HOW SOCIOLOGICAL ANALYSIS CAN INFLUENCE CONSTITUTIONS. A FEW REMARKS .....	264
Ricardo Pazos	
BEHAVIOURAL ECONOMICS AND CONTRACT LAW .....	273



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Vita Petrušauskaitė	
<b>CHILD'S RIGHT TO EDUCATION: LESSONS</b>	
<b>FROM A RESEARCH IN THE KIRTIMAI SETTLEMENT .....</b>	<b>283</b>
Bohdan Pretkiel	
<b>THE INFLUENCE OF THE LEGAL EXPERT AUTHORITY</b>	
<b>ON LEGAL REASONING – AN EXPERIMENT .....</b>	<b>291</b>
Victor Terekhov	
<b>'EUROPEANISATION': FROM POLITICAL IDEA TO THE LEGAL CONCEPT .....</b>	<b>295</b>
Evgeny Tikhonravov	
<b>THE PROCESS OF FILLING GAPS IN THE LAW AS A SPECIFIC POLITICAL ACTIVITY .....</b>	<b>303</b>
Bronislav Totskyi	
<b>BALANCE OF THE INTERESTS IN LAND SPHERE: LEGAL AND ECONOMIC ASPECTS .....</b>	<b>309</b>
Jonas Urbanavičius	
<b>INTERACTION BETWEEN ENVIRONMENTAL LAW AND NATURAL SCIENCES –</b>	
<b>A BASIS FOR SOUND ENVIRONMENTAL NORMS .....</b>	<b>315</b>
Alexander Zakrevskii	
<b>THE NECESSITY OF THE ANTHROPOLOGICAL DIMENSION</b>	
<b>OF LAW AND STATE IN MODERN JURISPRUDENCE .....</b>	<b>322</b>
CONFERENCE PROGRAMME .....	<b>333</b>

## TOWARDS AN INTEGRATED LAW AND ECONOMICS APPROACH TO ECONOMIC REGULATIONS: MOVING BEYOND FRAGMENTED PLURALITY AND CROSS-DISCIPLINARITY IN LAW AND ECONOMICS

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**Abstract.** Integration represents the core of interdisciplinary research. Interdisciplinary research process consists mainly of drawing insights from relevant disciplines in relation to specific research question and integrating those insights to provide a more comprehensive understanding of this research question. If a scholar approaches a problem traditionally belonging to one discipline from the perspective of another discipline, he is not conducting an interdisciplinary scholarship but a cross-disciplinary research. The latter is characterized by imperialism of cognitive perspective of one discipline to another discipline whose insights have been overlooked. Current law and economics research is stuck into cross-disciplinarity as it replaces the cognitive perspective of law by the cognitive perspective of neoclassical-new institutional economics. Legal research under law and economics has become a form of applied neoclassical microeconomics that reduced legal rules into economic policy instruments. This article advocates an integrated law and economics approach that attempts to integrate the insights of legal theory and various economic paradigms in approaching the analysis and design of economic laws. The article establishes, by drawing on philosophy of science and economic methodology, why integration is an epistemological necessity for analysis and design of economic regulations. Integrated law and economics as a *competing and complementary* approach to neoclassical-new institutional law and economics would provide a distinctive perspective over economic regulations. Further, as it opens the space for legal scholars to integrate insights from legal theory, sociology and heterodox economic schools of thought, it would enable legal scholars to provide their distinctive and well-informed interdisciplinary voice instead of acting as *low quality applied micro-economists in disguise*. Finally, it would provide a space for overcoming the limitations of neoclassical-new institutional law and economic approach to economic regulations. Further research is required for developing integration techniques and for application of integrated law and economics to concrete legal problems.

**Keywords:** Law and Economics, Economic Regulations, Regulatory Governance of Capitalism, Integration, Interdisciplinarity, Pluralism, Capitalism Perspective

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### INTRODUCTION

Drawing on economic methodology and interdisciplinary literature, this article would establish that integrative pluralism and interdisciplinarity (collectively referred to as integration) are *epistemologically necessary* for law and economics research on economic regulations. Following the

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requirement of integration would give rise to a new paradigm of law and economics, which I term “Integrated Law and Economics Approach”.

As law and economics scholars working on economic regulations are drawing on economics to address economic regulatory problems, they are importing the *cognitive perspective* of economics for explaining and addressing economic regulatory problems. By doing so, law and economics scholars are importing the cognitive paradigm of economics to form the basis for economic regulatory studies. Law and economics scholars have thus replaced the cognitive perspective of law by an economic cognitive paradigm. This is the famous epistemological failure known as economic imperialism. Further, importing the cognitive perspective of economics would involve importing the epistemological problems of modern economics.

This article advances a two-tier argument for integrated law and economics approach to economic regulations. First, the article establishes that pluralism of economic paradigms is epistemologically superior to monism in economic research as integration of economic paradigms would not be plausible if monism is epistemologically superior to paradigmatic pluralism in economics. The article establishes further that integration of economic paradigms (integrative pluralism) is epistemologically superior to fragmented plurality. By doing so, the article would establish the case for integration in economics. This argument would be *sufficient* for establishing the epistemological case for integration in law and economics research on economic regulations if they are *pure* economic phenomena. Since they are not, the article would secondly provide a subsequent set of arguments for integration in law and economics research on economic regulations.

This article proceeds as follows. Section I outlines the paradigmatic pluralistic state of modern economics. Section II introduces different types of plurality and their relation to integrative interdisciplinarity and transdisciplinarity. Section III establishes the epistemological superiority of integrative plurality to monism and fragmented plurality in economic research. Section IV reaches the conclusion that integration of relevant economic and non-economic paradigms (Integrated Law and Economics) is *epistemologically necessary* for research on economic regulations. Section V concludes.

## I. PLURALISTIC PARADIGMATIC STATE OF MODERN ECONOMICS

In modern economics, there are numerous labels for *distinctive* schools of thought such as neoclassical economics, old institutional economics, new institutional economics, experimental economics, behavioural economics, complexity economics, evolutionary economics, comparative capitalism, socio-economics, ecological economics, Austrian economics, post-Keynesian economics, feminism economics, Marxian and neo-Marxian economics and religion-based economics such as Islamic economics. Some heterodox economists categorize heterodox schools of economics into four main categories: critical institutional economics category (it includes different institutional economic paradigms such as socio-economics, old institutional economics, comparative capitalism and radical political economy), ecological economics, post-Keynesian economics<sup>1</sup> and Feminist

<sup>1</sup> I prefer to redefine this category to be Keynesian economics in order to cover old, new and post-Keynesian economics.

economics.<sup>2</sup> Further, there are some national economic paradigms such as German ordoliberalism and the French schools of regulation and conventions.

Despite this apparent plurality of non-integrative and partially integrative economic paradigms, one fundamental question would emerge; is this apparent plurality a truism or exaggerated? This article adopts the position that economics is paradigmatically pluralistic as it presumes that diverse economic paradigms represent distinctive, although generally proximate, cognitive perspectives.<sup>3</sup>

## II. TYPES OF PLURALITY AND THEIR RELATION TO INTEGRATIVE INTERDISCIPLINARITY AND TRANSDISCIPLINARITY

### A. Fragmented Plurality, Critical Plurality and Integrative Plurality

Plurality of cognitive paradigms of modern economics would raise the question of its form, whether fragmented, critical or integrative. Fragmented plurality refers to the situation in which different economic schools of thought do not communicate with each other. Economists working from within each paradigm communicate only with each other and do not communicate with works produced by other economic schools of thought.<sup>4</sup> Fragmented plurality can function under either a hostile or a tolerating institutional structure of academia. Heterodox economists consider the current institutional structure of economic education and research as hostile to plurality and thus call for tolerating institutional structure. The epistemological foundation for fragmented plurality is non-comparability of different economic paradigms. This is the famous Kuhnian Incommensurability thesis.<sup>5</sup> In comparison to monism, fragmented pluralism advocates that the institutional structure of modern economics should be conducive to *all* cognitive paradigms.

In comparison to fragmented or generalized plurality, some economists argue for structured pluralism<sup>6</sup> or critical pluralism.<sup>7</sup> Dow argues that Kuhn's incommensurability problem does not

2 J.-F. Gerber and R. Steppacher, 'Introduction', in J.-F. Gerber and R. Steppacher (eds.), 'Towards an Integrated Paradigm in Heterodox Economics: Alternative Approaches to the Current Eco-social Crises' (Houndmills, Basingstoke, Hampshire, New York: Palgrave Macmillan, 2012) 12. These categories are not inherently consistent as each category includes different paradigms that have not yet been integrated successfully. For instance, no institutional economics paradigm exists, which has successfully integrated all institutional paradigms in economics. Similarly, no Keynesian paradigm exists, which has integrated successfully different Keynesian paradigms of economics. These broad categories, however, provide an initial classification of heterodox economic paradigms, which could guide future research by heterodox economists as this classification suggests implicitly that heterodox economists should focus first on integrating economic paradigms that belong to the same category rather than integrating those belonging to different categories.

3 Due to space limits, I am not developing supporting arguments for this position here.

4 V. Bigo and I. Negru, 'From Fragmentation to Ontologically Reflexive Pluralism' [2008] 1(2) Journal of Philosophical Economics, 129.

5 S. Dow, 'Structured Pluralism' [2004] 11(3) Journal of Economic Methodology, 278.

6 *ibid* 282.

7 B. J. Caldwell, 'Beyond Positivism: Economic Methodology in the Twentieth Century' (London: George Allen and Unwin, 1982), 245–249. Caldwell advocates methodological critical pluralism and not paradigmatic critical pluralism, however, he seems to consider paradigmatic pluralism as a result of methodological pluralism and thus could be subsumed under his argument for methodological pluralism. Anyway, his arguments for methodological pluralism could be advanced also in defence of paradigmatic pluralism.

mean that different paradigms cannot be compared to each because their language cannot be translated to each other. Rather, it means that the language of each paradigm can be *imperfectly* translated to each other. Accordingly, communication among these paradigms is possible and their rational comparison according to both meta and non-meta criteria would be possible.<sup>8</sup> Critical pluralism advocates that critical communication among different economic paradigms would advance economic knowledge because it would result in cross-fertilization of different economic paradigms.

Integrative pluralism embraces critical pluralism, but it goes one further step. It argues that cross-criticism of economic paradigms would reveal complementarities and tensions among these paradigms.<sup>9</sup> By integration, these complementarities could be exploited. Further, criticism could resolve some of these tensions and thus facilitate creation of common grounds for integration.<sup>10</sup> Under integrative plurality, the institutional structure of economic research should promote both critical and integrative plurality. In the following section, I argue that integrative pluralism is epistemologically optimal.

## B. Relation between Different Forms of Plurality and Integrative Interdisciplinarity and Transdisciplinarity

In this sub-section, I briefly outline interdisciplinarity and transdisciplinarity and then identify their relation to different forms of plurality.

### *i. Outline of Interdisciplinarity and Transdisciplinarity: Partial versus Complete Integration*

In the nineteenth century, disciplines distinguished their territory and were institutionalized in university departments.<sup>11</sup> By establishing the ethic of narrow academic specialization, disciplinary mode of knowledge organization has achieved paramount successes in knowledge production.<sup>12</sup> On the cons side, disciplinary specialization has resulted in a fragmentation of knowledge<sup>13</sup> as different disciplines tackle same phenomena without due account of the knowledge produced by each other. Further, disciplines are unable to tackle complex interdisciplinary problems adequately because they follow a reductionist approach for addressing their research questions and they are not structured around real-world complex problems.<sup>14</sup>

Interdisciplinary research does not refer only to integration of insights of different disciplines regarding an interdisciplinary research question but refers also to integration of insights of different schools of thought (paradigms) or as sometimes called approaches within the same discipline.

8 Dow, 'Structured Pluralism' (n 5) 279.

9 Bigo and Negru (n 4) 142. The authors emphasize ontologically oriented criticism. Cross-criticism, in my opinion, should be undertaken with reference to both meta and non-meta criteria.

10 A. F. Repko, R. Szostak, M. P. Buchberger, 'Introduction to Interdisciplinary Studies' (U.S.A.: SAGE Publications, 2013), 187–188.

11 J. T. Klein, 'Interdisciplinarity: History, Theory, and Practice' (Detroit: Wayne State University Press, 1990), 21.

12 Repko and others (n 10) 65.

13 Klein (n 11) 20–21.

14 Repko and others (n 10) 123–124.

As mentioned above, neoclassical economics, behavioural economics and institutional evolutionary economics, as representing different cognitive paradigms within economics, would provide different insights in response to similar interdisciplinary research questions. Similar to distinct disciplines, each of these schools of thought has its distinctive perspective because each of them has its own ontological, epistemological, normative and methodical dimensions. Schools of thought therefore should not be confused with methods of research as the latter constitutes only one dimension of these schools of thought.

Accordingly, integration or synthesis represents the core of interdisciplinary research. Prominent interdisciplinary studies scholars such as Newell, Klein and Repko consider interdisciplinary research process to consist mainly of drawing insights from relevant disciplines in relation to specific research question and integrating those insights to provide a more comprehensive understanding of this research question.<sup>15</sup> If a scholar approaches a problem traditionally belonging to one discipline from the perspective of another discipline, he is not conducting an interdisciplinary scholarship but a cross-disciplinary research.<sup>16</sup> The latter is characterized by a colonization or imperialism of cognitive perspective of one discipline to another discipline whose insights have been overlooked.

Transdisciplinarity, on the other hand, refers to integration of disciplines, sub-fields (specializations) or schools of thought to establish a trans-discipline or inter-discipline constituting a new cognitive perspective. For example, integrating economics and sociology has resulted in economic sociology and integrating economics and psychology has resulted in behavioural economics. Integration can take place between sub-fields of one or more disciplines. Integrating finance and macroeconomics as sub-fields of economics has resulted in the inter-discipline of macro finance. Integrating sociology of environment with the sub-fields of bio-physics of environment and economics of environment resulted in the inter-discipline of environmental studies.

Dogan and Pahre in their book "Creative Marginality" argue that integration takes place only between sub-fields (or as they call them fragments) of different disciplines.<sup>17</sup> It does not take place between disciplines.<sup>18</sup> They argue that each discipline has its domain of inquiry. This domain of inquiry is divided among different specializations within the same discipline. Economics includes sub-fields of microeconomics, macroeconomics and finance. Each of these sub-fields has specializations (fragments). Macroeconomics includes monetary and fiscal economics. Finance encompasses corporate finance, banking and asset pricing. At the margin of the domain of each specialization, there are set of phenomena that cannot be adequately addressed only by

15 W. Newell, 'A Theory of Interdisciplinary Studies' [2001] 19 Issues in Integrative Studies, 15. Klein (n 11) 188. Repko and others (n 10) 27–28.

16 M. Stember, 'Advancing The Social Sciences Through The Interdisciplinary Enterprise' [1991] 28(1) The Social Science Journal, 4. For a good account of the major terms in interdisciplinary studies, see: T. Augsburg, 'Becoming Interdisciplinary: An Introduction to Interdisciplinary Studies', 2 ed. (Dubuque, Iowa: Kendall/Hunt Pub., 2006) 19–25. See also: K. Huutoniemi and others, 'Analyzing Interdisciplinarity: Typology and Indicators' [2010] 39(1) Research Policy.

17 M. Dogan and R. Pahre, 'Creative Marginality: Innovation at the Intersections of Social Sciences' (Boulder: Westview Press, 1990) 63–66.

18 *ibid* 115–119.

this specialization and requires specializations (fragments) belonging to different disciplines to address them. For example, corporate governance questions could not be adequately addressed without drawing on the fragments of corporate finance, new institutional economics, corporate law, organizational theory and environmental studies. As such, corporate governance would constitute an inter-discipline. The basic message of “Creative Marginality” in relation to corporate governance would be that some fragments of finance and economics such as asset pricing and macroeconomics would be irrelevant in addressing corporate governance issues whereas other fragments of economics and non-economic disciplines such as corporate finance, corporate law, environmental studies and economic sociology would be highly relevant. For which reason, there is no need to integrate the whole discipline of economics with that of environmental studies and sociology in order to address corporate governance questions as it is sufficient to integrate the insights of relevant fragments.

According to the above analysis, it seems, *prima facie*, that the subject matter of integration is the key difference between interdisciplinarity and transdisciplinarity. Interdisciplinarity integrates the *insights* of different disciplines, fragments or schools of thought whereas disciplines, fragments and schools of thought constitute the subject matter of transdisciplinary integration.<sup>19</sup> This famous portrait of difference between interdisciplinarity and transdisciplinarity is not accurate. Interdisciplinary integration process involves a creation of a *common ground* among different schools of thought based on which their insights could be integrated.<sup>20</sup> Common ground creation process takes different forms; many of them include modification of different dimensions of schools of thought such as theoretical or conceptual integration.<sup>21</sup> Interdisciplinary integration process *partially integrates* the subject matter (dimensions) of the fragments or schools of thought. Difference between interdisciplinarity and transdisciplinarity lies in their *degree* and not their *subject* of integration.

Since interdisciplinary integration is partially transdisciplinary, rise of interdisciplinary integration would result in incremental partial integrations that would facilitate complete transdisciplinary integration. As mentioned above, transdisciplinary integration would enrich disciplines with new cognitive paradigms providing newly integrative insights that would call for further interdisciplinary integration research. Both interdisciplinary and transdisciplinary integration are strengthening each other in positive feedback loop relation conducive to knowledge growth.

As corporate governance has not succeeded in integrating fully its relevant fragments and schools of thought, it has not yet constituted an inter-discipline, unless we construe inter-disciplines as any domain of inquiry that requires partial (interdisciplinary) or complete (transdisciplinary) integration of its relevant fragments and schools of thought. As next section will show, economic regulations constitutes an inter-discipline that cannot be approached adequately without interdisciplinary or transdisciplinary integration.

19 D. Manderson, ‘Some Considerations about Transdisciplinarity: A New Metaphysics’ in M. Somerville and D. J. Rapport (eds.), ‘Transdisciplinarity: Recreating Integrated Knowledge’ (Oxford, UK: EOLSS Publishers Co., Ltd., 2000) 86–87.

20 Newell (n 15) 20. A. F. Repko, ‘Integrating Interdisciplinarity: How the Theories of Common Ground and Cognitive Interdisciplinarity Are Informing the Debate on Interdisciplinary Integration’ [2007] *Issues in Integrative Studies*, 6–7.

21 A. F. Repko, ‘Interdisciplinary Research: Process and Theory’ (Los Angeles: SAGE, 2008) 272. Repko (n 20) 13.

Whether partial or complete, integration can be of first, second or higher orders.<sup>22</sup> For instance, corporate governance requires integration of corporate governance literature in corporate finance, new institutional economics, economic sociology and environmental studies. As both economic sociology and environmental studies are inter-disciplines, corporate governance would thus involve second-order integration, namely, *integration of integrated* fragments (inter-disciplines).

*ii. Relation between Different Forms of Plurality, Integrative Interdisciplinarity and Transdisciplinarity*

There are two forms of fragmented plurality, epistemological and institutional. Epistemological fragmented plurality rests on incommensurability thesis. According to this form of plurality, it is not possible to cross-criticize or integrate different cognitive paradigms. Epistemologically founded fragmented plurality is anti-integrative interdisciplinarity and transdisciplinarity. By contrast, institutionally founded fragmented plurality is not committed to incommensurability thesis but it is a result of low communication among different economic paradigms. Once institutional structure of economic research becomes conducive to inter-paradigm communication, fragmented plurality could be easily transformed into critical and integrative plurality.

Integrative interdisciplinarity and transdisciplinarity process involves cross-criticism of different economic schools of thought. Critical pluralism as such is a step in the integration process. Integrative pluralism<sup>23</sup> is just another fancy term for integrative interdisciplinarity.

There are, however, tacit differences between integrative interdisciplinarity and integrative pluralism. Integrative pluralism advocates two positions, pluralism and integration. Interdisciplinarity advocates *integration* of the insights of already existing pluralistic cognitive paradigms. Interdisciplinarity does not epistemologically advocate pluralism but takes it as its starting point. Interdisciplinarity captures the integration but not the pluralism dimension of integrative pluralism. Further, interdisciplinary integration takes place among different disciplines, paradigms belonging to diverse disciplines or belonging to the same discipline. In contrast, integrative pluralism denotes integration takes place among paradigms belonging to the same discipline.

Because of the above distinctions between integrative plurality and interdisciplinarity, I do not prefer to use integrative plurality and integrative interdisciplinarity interchangeably. Rather, they are separate concepts that overlap in their integration dimension.

22 Dogan and Pahre (n 17) 72. The authors use the term "second generation of hybridization" and "multi-generation hybrids" to denote this phenomenon. Instead, I prefer using the term "second order integration" for sake of consistency as I am using the term "integration" rather than "hybridization" to denote integration of relevant disciplinary or paradigmatic insights.

23 Bigo and Negru (n 4) 134. The authors did not explicitly use the term "integrative pluralism". However, they described their advocated form of pluralism as being reflexive and integrative.

### III. THE CASE FOR EPISTEMOLOGICAL SUPERIORITY OF INTEGRATIVE AND CRITICAL PLURALISM TO MONISM AND FRAGMENTED PLURALISM IN ECONOMIC RESEARCH

In her article on plurality in orthodox and heterodox economics, Sheila Dow states that:

What has been identified in the literature some twenty years later has been a process of increasing fragmentation within mainstream economics, going beyond the schools of thought identified earlier. However, it is contestable how far this is a change in degree of variety in orthodox economics, and how far just a matter of content<sup>24</sup> ... We have seen evidence that there are forces for heterogeneity in orthodox economics (at the level of theory and evidence) but much less at the level of methodology. Whether or not there is agreement as to the precise account of change within orthodox economics, and how far it is different from the past, it cannot be denied that there has been change. Yet this has attracted remarkably little critical scrutiny within orthodox economics itself, as if whatever change occurs must be socially optimal.<sup>25</sup>

Modern evolution of mainstream economics is doubtless a socially beneficial development but not a socially optimal one. Mainstream economics has moved beyond the monistic dominance of neoclassical economics in the Post-World War II period to a pluralistic mainstream under which new institutional economics, behavioural economics, experimental economics, evolutionary and behavioural game theory and complexity economics are well-established schools at the edge of the mainstream.<sup>26</sup> Such plurality is more socially useful than a monistic dominance of standard neoclassical economics because it enables critical perspectives over the neoclassical economics to be explored. Plurality does not only render the limitations of the orthodox paradigm explicit but it also provides alternative approaches that mitigate these limitations. Scholars working from within the orthodox paradigm are less incentivized to criticize it and more attentive to apply and defend the orthodoxy. They are the guardians of orthodoxy, if you wish to name them.

Plurality has a wider meaning than paradigmatic plurality. Plurality of economic paradigms reveal wider plurality in their dimensions including ontology, methodology, method, positive assumptions, substantive theoretical principles and normative premises. Table I below shows a comparison between neoclassical economics and integrated institutional and ecological economics prepared by Julien-Francois Gerber and Rolf Steppacher.<sup>27</sup> This table shows that these economic paradigms reveal plurality across economic paradigms. It also demonstrates that heterodox economic paradigms are inherently more pluralistic. Heterodox economic paradigms adopt methodical pluralism as they accept both quantitative and qualitative methods in comparison to neoclassical economics' commitment to formal quantitative methods. Further, heterodox economic paradigms adopt a pluralistic normative position where different norms are incommensurable. This ethical pluralism could be contrasted to the monistic normative approach of neoclassical economics as exemplified by utilitarian ethics of neoclassical economics.

24 S. Dow, 'Plurality in Orthodox and Heterodox Economics' [2008] 1(2) *The Journal of Philosophical Economics*, 89.

25 *ibid* 76.

26 D. Colander, R. Holt and B. Rosser Jr, 'The Changing Face of Mainstream Economics' [2004] 16(4) *Review of Political Economy* 486-487, 496. See also: J. B. Davis, 'The Turn in Economics: Neoclassical Dominance to Mainstream Pluralism?' [2006] 2(1) *Journal of Institutional Economics*, 5-6.

27 Gerber and Steppacher (n 2) 14.

Integrated Heterodox Economics	Neoclassical Economics
Open Systems Approach	Closed Systems Approach
Economy as a social construct with its history and specificities	Economy as a deduced structure based on a set of axioms
Heterogeneous, socio-ecologically embedded and institutionally conditioned agents	Universal self-centered, utility maximizing, rational agents with unlimited wants
Social and environmental ethics (incl. needs fulfilled, equitable distribution, sustainability)	Utilitarian ethics (incl. optimal welfare, pareto efficiency, externalities)
Co-evolution, heuristic behavior and satisficing	Optimization
Metabolic view of the society	Marginalist view of the economy
Methodological pluralism	Methodological Monism, namely, positivism
Experiential and Algorithmic Knowledge	Algorithmic Knowledge (mathematical formalism)
Value pluralism (incl. incommensurability)	Monetary commensurability
Circular and Cumulative Causation	Competitive equilibrium model
Focus on virtual, real and real-real economic levels	Focus on micro and macroeconomic levels
Steady state and selective degrowth	Conventional growth
Property and possession	Focus on private property
Funds/services, stocks/flows and their control	Natural capital
Bio-physical and social indicators, multi-criteria analysis	Monetary indicators, cost-benefit analysis
Focus on the community within the biosphere	Focus on the individual within the national state
Focus on disadvantaged social groups and classes	Focus on capitalists and managers

**TABLE I:** Comparison between eco-institutional heterodox economics and neoclassical economics. Adapted from Gerber, Julien-Francois and Steppacher, Rolf (2012)<sup>28</sup>

In the literature on pluralism in economics, plurality and pluralism are two distinct concepts. Pluralism is a normative precept, according to which plurality should be encouraged in economics. According to the norm of pluralism, economists can commit to different ontological and epistemological positions, and apply diverse methods.<sup>29</sup> On the contrary, monism advocates the position that only one epistemology, method and theory could be true and thus only the economic paradigm encompassing these epistemological, methodical and theoretical dimensions should dominate the explanation of economic phenomena.<sup>30</sup> Pluralism and Monism would have two different implications for the relation between economic paradigms. Monism perceives economic paradigms as competitive and alternative to each other. Economists should work from within the

<sup>28</sup> *ibid.*

<sup>29</sup> W. Samuels, 'The Case for Methodological Pluralism' in A. Salanti and E. Screpanti (eds.), 'Pluralism in Economics: New Perspectives in History and Methodology' (Cheltenham UK: Edward Elgar, 1997) 74. S. Dow, 'Methodological Pluralism and Pluralism of Method', in A. Salanti and E. Screpanti (eds.), 'Pluralism in Economics: New Perspectives in History and Methodology' (Cheltenham UK: Edward Elgar, 1997) 89.

<sup>30</sup> Monism has been the dominant position in the philosophy of science as philosophers of science have been mainly concerned about identifying a methodology for theory choice that would ensure production of true and justified knowledge. Logical positivism, Popperian falsificationism and Lakatos' research programmes represent famous examples of these proposed methodologies. The work of Kuhn, however, has illustrated the unavoidable subjectivity of scientific research and the sociological factors underpinning paradigmatic choices due to the incommensurability of scientific paradigms and under-determination problem. Kuhn's work has opened the door for diverse traditions in philosophy of science such as post-modernism, sociology of science and methodological pluralism.

correct paradigm. Pluralism argues that economic paradigms could be complementary to each other in relation to specific dimensions and could be contradictory in relation to other dimensions. Contradictions of dimensions and insights of different economic paradigms would open the door for cross-criticism and integration enabling development of more comprehensive and less internally biased economic paradigms. In contrast to pluralism, plurality is a descriptive concept that would describe the ontological, epistemological, methodical or normative positions of economics or of specific economic paradigm.<sup>31</sup> As mentioned above, modern economics is pluralistic because it includes pluralistic cognitive paradigms that have diverse ontologies, epistemologies, methods and theories.

In comparison to monism and fragmented plurality, the epistemological case for paradigmatic critical pluralism could be made on the grounds of complexity of socio-economic system, uncertainty of knowledge and heterogeneity of ontological structure of reality. Partial perspectivism embedding paradigmatic biases and inconsistency problems provide further arguments for both *cross-criticism and integration* against fragmented pluralism but they does not provide an argument for pluralism against monism.

#### A. Complexity of Socio-Economic System, Uncertainty of Knowledge and Heterogeneity of Ontological Structure of Reality

Advocates of pluralism originates from two main camps of philosophy of science: scientific realism and postmodernism. Scientific realism has two related axioms: the ontological axiom according to which there is an objective reality independent from the observer (i.e. independent from the subjective perspective of scientists) and the epistemological and methodological axiom according to which theories could be tested empirically until we reach the objective truth that mirrors the objective reality.<sup>32</sup> Under this realist approach, there is one objective reality, i.e., there is one ontology to explore and there is only one true fundamental theory about this reality and there are more suitable methodologies for the analysis of socio-economic system. Realism therefore embraces a clear monistic position. There is one true objective ontology, one true theory to be reached through the best methodology.<sup>33</sup>

Realists, however, advocate methodological and theoretical pluralism on the grounds of two basic arguments, namely, the complexity and multi-facetedness of socio-economic system and uncertainty of knowledge. The socio-economic system is complex and multi-faceted and thus no one model (theory) can capture all aspects of reality.<sup>34</sup> Accordingly, it is important to have different complementary simplified models to capture different dimensions of this complex reality.<sup>35</sup>

31 U. Maki, 'The One World and the Many Theories' in A. Salanti and E. Screpanti (eds.), 'Pluralism in Economics: New Perspectives in History and Methodology' (Cheltenham UK: Edward Elgar, 1997) 38.

32 E. Screpanti, 'Afterword: Can Methodological Pluralism be a Methodological Canon?' in A. Salanti and E. Screpanti (eds.), 'Pluralism in Economics: New Perspectives in History and Methodology' (Cheltenham UK: Edward Elgar, 1997) 299.

33 For this reason, some scholars consider scientific realism as advocating monism rather than pluralism, see: *ibid* 300–301.

34 Maki (n 31) 40.

35 *ibid* 41–42.

Further, the multi-faceted feature of the complex economic system relates to the fact that the economic system can be approached from different perspectives. Each methodology can provide a peculiar perspective complementing other perspectives.

The uncertainty argument proceeds as follows. We do not know which methodology or method captures best the objective reality and in face of this uncertainty, we have to accept methodological pluralism that would result in plurality of complementary and substitute theories.<sup>36</sup> This is a *relative* pluralism position conditional upon our uncertain knowledge of whether the methodology suits the economic phenomenon under analysis. If economists are certain about the suitability of one methodology to the analysis, other inferior methodologies should be disregarded.

In addition to the arguments of complex and multi-faceted nature of economic system and uncertainty of knowledge, an ontological argument could be advanced. The economic system is not a unified ontological system where all its sub-systems share the same properties. For instance, although investment decisions may take place under radical uncertainty conditions,<sup>37</sup> consumers of supermarket fruits do not make their decision under radical uncertainty. Despite of intensive connectedness of the sub-systems of the economic system, each sub-system may have its own peculiar properties that require different methodologies and methods to explore them.<sup>38</sup> In this sense, scientific realism does not impose one methodology and method as being the best for analyzing the economic system; it rather advocates critical pluralism.

According to this form of pluralism, there should be conditions under which each methodology could be applied, i.e., each methodology should have a clear domain of application and its limitations when applied to other domains should be well defined. Determining the conditions of application and limitations of economic methodologies should be made with reference to meta-criteria such as the ontology of system under scrutiny.<sup>39</sup> In addition, non-meta-criteria such as internal consistency of methodologies, methods and theories and their practical success in predicting the change in the socio-economic system or in introducing changes into the system could be used as well in the critical evaluation of methodologies, methods and theories.

In sum, scientific realism does not advocate *anything goes pluralism* under which each scholar has a complete freedom to make ontological assumptions, adopts methodological or methodical positions and develop any theory he believes to be suitable to explain the economic phenomenon. Rather, scientific realism adopts a critical pluralism approach where meta-criteria such as ontological nature of the phenomenon under analysis and non-meta criteria such as internal consistency and practical utility are employed to evaluate methodologies, methods and theories. Dow calls this form of pluralism “structured pluralism”.<sup>40</sup>

<sup>36</sup> *ibid* 42.

<sup>37</sup> J. M. Keynes, ‘General Theory of Employment, Interest and Money’ (California: BN Publishing 1936 reprinted in 2008) 147–148.

<sup>38</sup> T. Lawson, ‘Economics and Reality’ (London: Routledge, 1997), 19–20. Tony Lawson argues that social reality involves a narrow event regularities space that would justify deductivism. Apart from this narrow space of event regularities, deductivism would not fit the social ontology. His argument thus implies the heterogeneity of the social ontology.

<sup>39</sup> *ibid* 15–16. It is noteworthy that Tony Lawson is the major advocate of scientific realism in economic methodology literature.

<sup>40</sup> Dow, ‘Structured Pluralism’ (n 5) 282.

In contrast, postmodernism distinguishes between objective reality that exists and objective truth that does not exist. Since scientists establish models that mimic the real world, they undertake the activity of subjective constructiveness of reality rather than reflecting objective truth about reality.<sup>41</sup> Under pragmatism variant of postmodernism, models and theories should be compared on basis of pragmatic criteria. According to the latter, the better theory or model would be the better instrument in changing the world.<sup>42</sup> Theories should not be evaluated according to meta-criteria such as meta-methodologies, methodologies or methods because the latter are scientific subjective constructs created by scientists to help them construct theories. Theories are in turn merely subjective scientific constructs (tools or instruments) to be used for changing the world.

Under the premise of constructivism and pragmatism of postmodernism, it is not possible to decide whether one theory mirrors the objective reality, i.e., whether one theory or one methodology results in the objective truth.<sup>43</sup> Methodologists therefore should abandon doing methodology as a meta-criteria for evaluating theories' ability to reflect the objective truth about the economic system. It is only possible to decide whether a method or a theory are good instruments for changing the world.<sup>44</sup> Postmodernism thus rejects any role for methodology or meta-methodology (ontology) in science.<sup>45</sup> Some schools of postmodernism, therefore, advocates *anything goes* pluralism, a position known as methodological anarchism.<sup>46</sup> Other variants of postmodernism such as pragmatism advocates assessing methods and theories on basis of pragmatic criteria, namely, their utility in introducing desirable change in the world.<sup>47</sup>

Although scientific realism and postmodernism are apparently in stark contrast regarding pluralism, particularly, ontological and methodological pluralism, both of them provide useful insights regarding pluralism in economics. Subjectivity of economic theories as proclaimed by postmodernism is inevitable. Economists select factors they believe to be fundamental in driving the phenomenon under investigation and leave out others. They subjectively select methodology and methods they believe to be more suitable to the problem in hand. They also select certain problems in which they are interested and thus they tend to interpret the data in a manner consistent with their subjective orientation. Modelling is not a purely objective exercise but it is not also a purely subjective one. Economists, taking the state of knowledge, has to situate their work and justify it to each other. They have to justify their *subjective* choices *objectively*. Although this seems paradoxical but it works quiet well in economics because economists within each paradigm

41 Screpanti (n 32) 301.

42 D. W. Hands, 'Reflection without Rules: Economic Methodology and Contemporary Science Theory' (Cambridge: Cambridge University Press, 2001), 223, 227-228.

43 Screpanti (n 32) 301.

44 W. Samuels, 'Methodological Pluralism: The Discussion in Retrospect' in A. Salanti and E. Screpanti (eds.), 'Pluralism in Economics: New Perspectives in History and Methodology' (Cheltenham UK: Edward Elgar, 1997) 309.

45 Screpanti (n 32) 304. See also: M. Boumans and J. Davis, 'Economic Methodology: Understanding Economics as a Science' (London: Palgrave Macmillan, 2010) 154.

46 Feyerabend is the key advocate of methodological anarchism and he eloquently defended his position in his famous work: P. K. Feyerabend, 'Against Method', 4th ed. (London: Verso 2010).

47 Hands (n 42) 223, 227-228.

of thought have been developing *paradigm as exemplar standards* for modelling and for communication among each other. Such standards are not perfectly objective because they have embedded subjective elements. Nevertheless, these paradigm as exemplar standards and the economic theories that have been developed according to these standards have to go through persuasion and contestation phase that takes place among economists within the same economic paradigm. Further, validity of developed theories have to be tested according to their practical value and usefulness as well as empirical evidence. This persuasion, contestation and validation process would reduce subjectivity of theory development and choice.

Scientific realism recognizes the subjectivity of scientific inquiry but it seeks to devise methods through which scholars can minimize subjectivity in order to progress towards an objective understanding of the economic system. Scientific realism recognizes that a complete objectivity is unattainable because of the subjective human nature of those undertaking science but to the contrary of postmodernism, it considers that minimizing such subjectivity should and can be done.

Accordingly, despite of their different epistemological positions, both scientific realism and pragmatism advocate critical pluralism of economic schools of thought.<sup>48</sup> They differ in the criteria to be employed for *cross-criticism*. Scientific realism advocates mainly meta-criteria for theory (paradigm) choice. By contrast, pragmatism advocates pragmatic criteria for such choice. Their divergence over criteria for criticism should not affect their agreement over *epistemological superiority of critical pluralism* in comparison to monism or fragmented plurality. Further, both scientific realism and pragmatism, as being the most important epistemologies in modern philosophy of science, does not object to integrative plurality as a step following critical plurality.

## B. Partial Perspectivism Embedding Paradigmatic Biases

The institutional structure of each economic paradigm and the rational subjective choices of the economists working from within each economic paradigm regarding its positive and normative dimensions determine its distinctive cognitive perspective. Each economic paradigm would thus attach *inherent biases* reflecting its institutional structure, subjective rational choices of its economists regarding positive and normative dimensions of the paradigm.

Monism would exacerbate these inherent biases because it advocates approaching economic phenomena from the perspective of one economic paradigm. Fragmented plurality would result in inconsistent solutions to same problems. Each of these solutions would embed the inherent biases of its paradigm. Fragmented plurality would not thus minimize paradigmatic biases, particularly, if it takes the forms of over-representation of one economic paradigm.

On the contrary, an institutional structure of academic research that provides a sufficient and locally quality controlled space for economic paradigms would establish a ground for communication, cross-criticism and thus integration of economic paradigms. Critical and integrative pluralism would minimize inherent biases of economic paradigms as it would enhance cross-criticism and

<sup>48</sup> Some scholars who reject the pragmatic and realist arguments made in defence of pluralism would accept pluralism on ethical basis. See, for example: Screpanti (n 32) 306. They argue that it is inconsistent with scientific freedom to impose certain ontological, methodological or methodical position on scholars. Although I sympathize with this ethical position, it falls short of establishing an epistemological case for pluralism.

refinement of different economic paradigms resulting in a less biased and pluralistic economic regulatory process.<sup>49</sup>

### C. Inconsistency (Incoherence) Problems

Fragmented plurality results in four forms of inconsistencies in economics. First, different economic paradigms result in *divergent* economic explanations and regulatory policies. Economic explanation and regulatory policy recommendation reflect partial rationality of their underlying economic paradigm. This is the case of *cross-paradigmatic inconsistency*.

Second, some paradigms evolve by importing dimensions of other paradigms resulting in partially integrative paradigms. Since these integrative efforts are undertaken implicitly without due attention to dimensional structure of integrated economic paradigms, the partially integrative paradigm may become a hodgepodge of inconsistent dimensions. This is the case of *internal paradigmatic inconsistency*.

Third, in their informal analysis, law and economics scholars, for example, draw on insights of different economic paradigms without paying due attention to integrating these insights consistently. This is the case of *cross-paradigmatic inconsistent integration*. The latter is more pronounced in informal analysis of law and economics undertaken by legal scholars because informality allows them to draw freely on different economic paradigms. Posner is an excellent example on this point. In some of his works, he has been committed to automatic application of neoclassical economics to economic regulations.<sup>50</sup> He dismissed new institutional economics as a distinctive economic paradigm.<sup>51</sup> However, in some of his recent works, he has engaged in a combination of neoclassical and institutional analysis of law.<sup>52</sup> Cross-paradigmatic inconsistent integration is a wide spread phenomenon in social sciences due to multiplicity of paradigms and rise of *pseudo forms of interdisciplinarity* that does not attempts to integrate divergent insights consistently.

Finally, various paradigms have differential influence over diverse economic regulations in regulatory policy arena. For example, neoclassical law and economics in Europe has more influence over design of competition law and banking regulation in comparison to its influence on labour regulation. Sociology, political economy, socio-economics and traditional legal research have more extensive power resources in the regulatory process of labour regulation in comparison to their influence in regulating corporate governance, banking and competition law. This differential

49 I do not assume that changes in academia would result in one-to-one changes in economic regulatory policy because of the distinct power structures underpinning both academia and politics. However, changes in academia would have an effect on politics due to the inherent power of ideas that politicians would attempt to exploit in their debates. Changing the power resources of heterodox economic ideas through critical and integrative pluralism in academia would thus grant these ideas an access to the arena of economic regulatory process resulting in its plurality of voice.

50 See for example his famous work: R. A. Posner, 'Economic Analysis of Law', 8th ed. (Austin u.a: Wolters Kluwer, 2011). See also his article on labour law: R. A. Posner, 'Some Economics of Labor Law' [1984] 51 University of Chicago Law Review 988.

51 R. A. Posner, 'The New Institutional Economics Meets Law and Economics' [1993] 149(1) Journal of Theoretical and Institutional Economics, 85.

52 See, for example, R. A. Posner, 'From the New Institutional Economics to Organization Economics: With Applications to Corporate Governance, Government Agencies, and Legal Institutions' [2010] 6(1) Journal of Institutional Economics.

influence results in *inconsistent regulatory governance of capitalism* as regulatory governance of different markets (product, financial and labour markets) and organizations is informed by inconsistent paradigms. This form of inconsistency could be called “Inconsistency/incoherence of the Regulatory Governance of Capitalism”. It may result not only from differential influence of various economic and non-economic paradigms in regulatory policy arenas, it may also result from adopting regulatory policies grounded on paradigms suffering from *internal paradigmatic inconsistency* or on law and economics research suffering from *cross-paradigmatic inconsistent integration*. Indeed, if regulators follow only one economic paradigm in design of regulatory governance of capitalism, they would avoid the incoherencies of such governance resulting from fragmented plurality problem. However, such regulatory governance structure would embed other incoherencies resulting from the failure of most existing economic and non-economic paradigms to adopt a capitalism perspective.<sup>53</sup>

Critical and integrative plurality and interdisciplinarity avoid some of these inconsistencies and minimize others. Integrative plurality and interdisciplinarity ensure internal paradigmatic consistent integration and consistent integration of insights of different paradigms. Integrative plurality and interdisciplinarity thus overcome internal paradigmatic inconsistency and cross-paradigmatic inconsistent integration.

Since integration of economic paradigms would result in newly integrative paradigms, cross-paradigmatic inconsistencies would persist. However, consistent integration of insights would mitigate cross-paradigmatic inconsistencies. Further, cross-paradigmatic inconsistencies would provide a space of innovation under critical and integrative pluralism and interdisciplinarity as there is a potential for cross-criticism and synthesis that would result in a more comprehensive understanding, explanation and prediction of economic phenomenon resulting in evolution of knowledge. Critical and integrative plurality transforms cross-paradigmatic inconsistencies from an epistemological failure into an epistemological opportunity for evolution of economic knowledge.

#### IV. EPISTEMOLOGICAL NECESSITY OF INTEGRATION IN LAW AND ECONOMICS RESEARCH ON ECONOMIC REGULATIONS

The previous section has established the epistemological superiority of critical pluralism over monism and fragmented plurality. Paradigmatic biases and inconsistency (incoherence) problems provided further arguments for *integration* in both economics and economic regulatory research. This section would provide further three arguments in support of integration in legal research on economic regulations. These arguments include the complexity and multi-facetedness of capitalism as a subject matter of regulatory governance and the fact that the problems of regulatory governance of capitalism cut across multi-levels of organization. Further, integration is necessary to construct the informational basis of capitalism perspective required for analysis and design of economic regulations.

53 Section IV would provide a brief outline of capitalism perspective over legal institutions of capitalism.

## A. Complexity and Multi-facetedness of Capitalism as a Subject Matter of Regulatory Governance

Interdisciplinary research is required for any phenomenon or problem that exhibits either multi-facetedness<sup>54</sup> or complexity.<sup>55</sup> A multi-faceted phenomenon is a phenomenon that could be approached from different disciplinary or paradigmatic perspectives. Most hard and soft regulations, whether national, transnational or international, are multifaceted phenomena as the same regulatory regime could normally be approached from the disciplinary perspectives of legal theory, economics, politics, sociology and anthropology. Regulatory governance of capitalism is clearly a multi-faceted phenomenon as it could be approached from the perspectives of diverse disciplines and economic schools of thought. Multi-facetedness assumes that the same research question could be addressed entirely by drawing on each of relevant disciplinary or paradigmatic perspectives. However, the resulting answer would reflect partial rationality of the selected discipline or paradigm and would ignore the perspectives of other relevant disciplines or paradigms. Accordingly, a more complete understanding of a multi-faceted phenomenon would require integrating the insights of relevant paradigms and disciplines.

In addition to multifaceted phenomena, complex phenomena require interdisciplinary research as well. Complexity is a *“feature of the structure as well as the behavior of a complex system, ... complexity [is] generated by nonlinear relationships among a large number of components”*<sup>56</sup> and by the feedback effect of the overall patterns of the complex system on the behaviour of its components.<sup>57</sup> In addition, Complex systems are normally characterized by multi-levelled structure.<sup>58</sup> For instance, economic system is structured into micro and macro levels in neoclassical paradigm and into micro, meso and macro levels under evolutionary institutional paradigm.<sup>59</sup>

Complex problems emerge as part of a wider interdependent package of problems that do not only cut across wide range of variables at the same level of the complex system, but also across its various levels. This would call for an analysis of the complex system that embeds this interdependent package of problems rather than focusing on the peculiar complex problem in isolation of its interdependent problems. No one discipline or school of thought could provide a comprehensive understanding of complex problems because diverse disciplines or schools of

54 Newell (n 15) 2. Newell considers multi-facetedness to be a property of complex systems, therefore, he considers complexity as the only requirement for justifying interdisciplinarity. M. A. Somerville, ‘Transdisciplinarity: Structuring Creative Tension’ in M. Somerville and D. J. Rapport (eds.), ‘Transdisciplinarity: Recreating Integrated Knowledge’ (Oxford: EOLSS Publishers Co., Ltd., 2000) 98. Somerville captures the multi-facetedness of the interdisciplinary problem by referring to the *“different coloured lens”* metaphor according to which each discipline represents a distinctive coloured lens over the problem.

55 Newell (n 15) 2.

56 *ibid* 7.

57 W. B. Arthur, ‘Complexity Economics: A Different Framework for Economic Thought’ [2013] SFI Working Paper, p. 2. Available at: <http://www.santafe.edu/research/working-papers/abstract/36df2f7d8ecd8941d8fab92ded2c4547/> (accessed 7 March 2014).

58 This is called the hierarchy property of systems. It means that the system has a multi-level organization. See: L. Skyttner, ‘General Systems Theory: Problems, Perspectives, Practice’, 2<sup>nd</sup> ed. (Singapore, Hackensack, NJ: World Scientific, 2005) 54–55.

59 K. Dopfer, J. Foster and J. Potts, ‘Micro-Meso-Macro’ [2004] 14(3) *Journal of Evolutionary Economics* 266–269.

thought may better explain *some* of the non-linearly interconnected variables<sup>60</sup> pertinent to these problems.

The capitalist economic system is both multi-faceted and complex multi-layered system. As to multi-facetedness of capitalism, diverse economic schools of thought such as neoclassical economics, institutional economics and Keynesian economics provide distinctive cognitive perspectives over the functioning of the capitalist economic system. As to complexity property of capitalism, not only economic variables are non-linearly interdependent but also economic agents observe the aggregate patterns of the economic system and respond to these patterns by modifying their preferences and behaviour.<sup>61</sup> Further, the economic system cannot be decomposed from its socio-political and bio-physical environment. It is socially and bio-physically embedded.<sup>62</sup> Much of *apparently pure* economic issues such as finance, corporate governance, competition and tax policy are therefore embedded within a network of *socio-political and bio-physical* problems. Accordingly, integration of relevant economic and non-economic paradigms is an epistemological necessity for developing an account of the functioning of capitalism. Such account may take the form of either integrative theory or model of capitalist system, which is a necessary pre-condition for any regulatory intervention into the capitalist economic system.<sup>63</sup>

## B. Regulatory Governance of Capitalism Cuts Across Multi-Levels of Organization

The plethora of economic regulatory interventions of the state has given rise to the phenomenon of regulatory governance of capitalism,<sup>64</sup> i.e., governance of capitalism through a network of socio-economic regulations. Regulatory governance of capitalism is a highly complex research area. Manfred A. Max-Neef has convincingly argued that any research problem that cuts across different levels of organization is inherently interdisciplinary.<sup>65</sup> Figure II below illustrates these different levels of organization of physical and social reality. Level 1 is the empirical level. It attempts to understand and explain positively phenomena taking place in this level. Positive economics, physics, biology and chemistry occupy this level. Positive economics attempts to understand and explain the functioning of the economic system. The latter is a complex multi-levelled system, which has its various levels of organization, namely, micro and macro-levels under the neoclassical paradigm. As the previous section has established, the economic empirical level is inherently interdisciplinary due to its multi-facetedness and complexity.

60 Newell (n 15) 16–17.

61 Arthur (n 57) 2.

62 C. L. Spash, 'Towards the Integration of Social, Ecological and Economic Knowledge', [2012] SRE-Discussion 2012/04, p. 2. Available at: [http://www-sre.wu.ac.at/sre-disc/sre-disc-2012\\_04.pdf](http://www-sre.wu.ac.at/sre-disc/sre-disc-2012_04.pdf) (accessed 10 March 2014).

63 I would prefer using the terms "capitalism" and "capitalist economic system" to using the term "market economy" because the latter carries a market bias. Further, the term "market economy" de-emphasizes the systemic property of capitalism.

64 For an excellent treatment of regulatory governance of capitalism, see: J. Braithwaite, 'Regulatory Capitalism: How it Works, Ideas for Making it Work Better' (Cheltenham: Edward Elgar, 2008).

65 M. A. Max-Neef, 'Foundations of Transdisciplinarity' [2005] 53 Ecological Economics, 9.

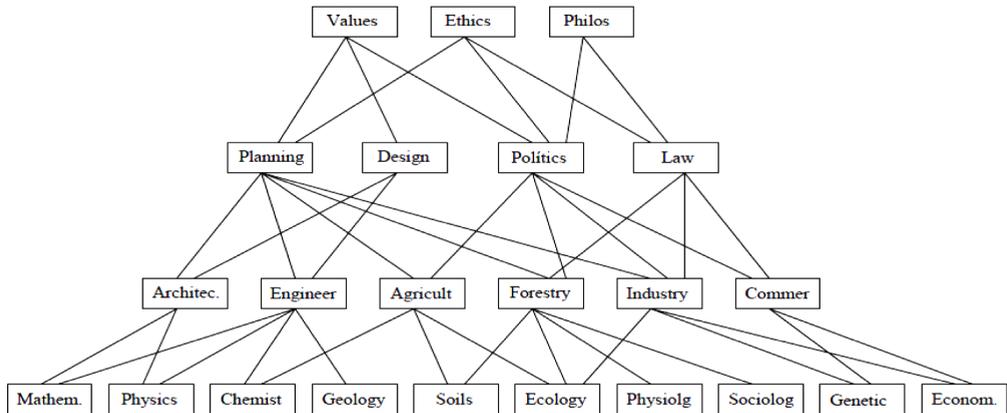


FIGURE II: Levels of Organization. Adopted from Manfred A. Max-Neef (2005)66

Nevertheless, problems of regulatory governance of capitalism do not fall completely within the empirical level that is inherently interdisciplinary. Understanding empirical level and its relation to higher levels of organization is necessary for approaching regulatory governance of capitalism. A pragmatic level that embeds our technological capacities occupies the next level of organization. “This level asks and answers the question what are we capable of doing? (with what we have learned from the empirical level)”.<sup>67</sup> This is an engineering level. It illustrates which changes we could bring into the systems at the empirical level. The normative planning level determines which changes we *desire or ought to* bring into the empirical level. The highest level is the value level and it guides the construction of normative objectives at the normative level.<sup>68</sup>

Each level is consisted of highly interdependent complex multi-levelled systems and, as figure II shows, these levels are higher interdependent. For which reason, Manfred A. Max-Neef argues, convincingly, that all planning disciplines occupying the normative level such as management and law are *interdisciplinary by definition* because their questions could only be answered by drawing on different disciplines and schools of thought informing each of these levels of organization.<sup>69</sup>

Regulatory governance of capitalism by cutting across different levels of organization requires a due understanding of each of these levels and their interdependence. Each of these levels constitutes a complex economic phenomenon whose understanding would require integrative interdisciplinary analysis. Accordingly, addressing regulatory governance of capitalism would mandate *an interdisciplinary integrative analysis of second, third or higher orders*.

Complexity of regulatory governance of capitalism extends beyond the multi-level complex nature of its constituting questions and their interdependence across different levels of organization. The questions of the regulatory governance of capitalism are closely linked to the problem of judicial interpretation and application of economic regulations. The problems of regulatory design

66 *ibid.*

67 *ibid* 7.

68 *ibid* 7-8.

69 *ibid* 7.

of economic laws cannot (and should not) be separated from the problems of judicial interpretation of economic laws. Regulatory law and doctrinal (judicial) law are interdependent.

Various schools of legal theory have attempted to address the interdependence relation between regulation theory and adjudication theory. Law and economics scholars argue that judges should interpret legal rules in a manner conducive to the achievement of its underlying regulatory normative objectives.<sup>70</sup> Judges are no longer the mouth of law; they are making and remaking the law to ensure the maximization of its underlying regulatory normative objectives, namely, economic efficiency. Under law and economics, interpretation of law would be a question of *regulation theory* because judicial law is not an autonomous multi-levelled system. It is rather an extension of regulatory process and it should therefore be subsumed under its internal logic.

By contrast, both formalism and social system theory of law hold the position that judicial law is an autonomous multi-levelled system that has its own internal logic.<sup>71</sup> Judges should interpret and apply legal rules according to their internal logic and not according to the internal logic of regulatory law. Under formalism and social system theory, interpretation of law should not thus be subsumed under regulation theory.

Law and economics approach, formalism and social system theory would result in different sets of problems. Distinctive inherent logic of law under social system theory would create a mismatch problem between the inherent logic of regulatory law and its interpretation by the Judiciary. It would therefore pose problems to the regulatory law system. Similarly, under law and economics approach, instrumentalization of law would create another set of problems for the judicial law system. Judges are not well equipped to decide which interpretation of regulatory law would maximize its underlying regulatory objectives, particularly, economic efficiency. Making and remaking of law by judges may undermine public trust in the independence and integrity of the Judiciary, particularly, in civil law countries. Further, well-established canons of interpretation may mandate an interpretation that runs counter the internal logic of regulatory law. Canons of interpretation may thus create tensions between the judicial hermeneutical logic and the instrumental regulatory logic, which are not easy to address under law and economics. In sum, economic regulatory problems and judicial interpretation are interdependent multi-levelled systems. This interdependence increases the complexity of regulatory governance of capitalism and provides further epistemological justification for integrative plurality and interdisciplinarity.

### C. Epistemological Necessity of Integration in Law and Economics Research on Economic Regulations to Construct The Informational Basis for Systemic Capitalism Perspective

The previous sections have established that economic regulatory questions (questions of regulatory governance of capitalism) cuts across multi-levels of organization and that each level encompass interdependent complex systems. As such, economic regulatory questions are interdisciplinary par excellence. The question then arises: how can we approach analysis and design of the

70 R. A. Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987' [1987] 100(4) Harvard Law Review 761.

71 K. Grechenig and M. Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism' [2007] 30(1) Hastings International and Comparative Law Review 341. A. J. Jacobson, 'Autopoietic Law: The New Science of Niklas Luhmann' [1989] 87(6) Michigan Law Review 1649.

*inherently interdisciplinary* economic regulations? Can we approach economic regulatory questions using analytical deconstructive and reductionist approach? Or should we approach these problems using a systemic approach?

Neoclassical economic research has been based on a Newtonian mechanistic view of the economic system under which economic problems can be decomposed from other problems. Under neoclassical economics, economic system could be decomposed from its socio-political and bio-physical environment. Further, the micro-level can be decomposed from macro-level. The former could be decomposed further into isolated areas of scholarship such as microeconomics of banking, corporate governance and competition policy. This is the *reductionist analytical* methodology of neoclassical economics. It suffices to say here that this reductionist methodology has enabled economists to understand fragments of the economic system but they are still lacking a due understanding of *how the capitalist system functions as a complex adaptive and evolutionary system*. Neoclassical economics has not succeeded in reconstructing the fragments together and thus failed to follow an institutional, embedded and globalized capitalism perspective, simply, because these fragments were not decomposable in the first place.

Due to its adoption of this analytical reductionist methodology, neoclassical-new institutional law and economic approach to regulatory governance of capitalism has been predominantly micro-oriented. It applies neoclassical microeconomics to analysis of legal institutions. Post-financial crisis, Posner argued that the dominance of micro-perspective in law and economics has caused legal scholars to overlook macroeconomic effects of economic regulations.<sup>72</sup> Although some scholars called for law and macroeconomic approach to economic regulations prior to the global financial crisis of 2007-2009,<sup>73</sup> law and macroeconomics has not been well received by law and economics research that remained predominantly micro-oriented.

Microeconomic and macroeconomic analysis of legal institutions of capitalism overlook the insights of comparative capitalism literature.<sup>74</sup> The latter provides a distinct perspective over legal institutions by emphasizing their *interdependence*.<sup>75</sup> In contrast, law and economics scholars do not only abstract from sociology, politics, and environment, they also *reduce legal institutions into external constraints* of agents' behaviour. This reductionist understanding of capitalism *downplays interdependence and hierarchy of legal institutions*.

Analysis of legal Institutions of capitalism requires moving beyond comparative capitalism literature as well as micro and macro perspectives of law and economics. I have argued elsewhere<sup>76</sup>

72 R. A. Posner, 'On the Receipt of the Ronald H. Coase Medal: Uncertainty, the Economic Crisis, and the Future of Law and Economics' [2010] 12(2) American Law and Economics Review 268.

73 See for example, Mark Kelman, 'Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics' [1993] 45(5) Stanford Law Review 1215. J. C. Humes, 'Macroeconomic Analysis of the Law: The Missing Piece of the Law and Economics Puzzle' [2002] 42 Washburn Law Journal 957. B. Goff, 'Regulation and Macroeconomic Performance' (Berlin: Springer, 1996)

74 For an excellent overview of comparative capitalism literature, see: P. A. Hall and D. W. Soskice (eds.) 'Varieties of Capitalism: The Institutional Foundations of Comparative Advantage' (Oxford, New York: Oxford University Press 2001).

75 P. A. Hall and D. W. Soskice, 'An Introduction to Varieties of Capitalism' in P. A. Hall and D. W. Soskice (eds.) 'Varieties of Capitalism: The Institutional Foundations of Comparative Advantage' (Oxford, New York: Oxford University Press 2001) 17-18. The authors emphasize the institutional interdependence that takes the form of complementarity.

76 For a complete account of capitalism perspective, please see my PhD dissertation, currently under progress under the auspices of LEMF Doctorate program and tentatively titled "Towards an Integrated Law and Economics

for integrating micro and macro perspectives and comparative capitalism literature to constitute what I call “institutional embedded and globalized capitalism perspective” to be the informing perspective for research on legal institutions of capitalism. Capitalism perspective is an integrative systemic perspective that would approach legal institutions as *embedded institutional network* and not as isolated institutional spheres.

In sum, as reductionism of neoclassical economics is reaching its limits, modern economics has to complement reductionist thinking by adopting *integrative systemic thinking* of the capitalism perspective, using methods such as complexity theory and agent-based modelling.<sup>77</sup> It is necessary to show that mature natural sciences have already moved to integrative systemic thinking. A newly emerged sub-field of biology termed “integrative biology or integrative systems biology” has adopted a complex systemic integrative approach for understanding biological systems.<sup>78</sup>

The application of the analytical micro-perspective requires an informational basis different from that required for following the systemic capitalism perspective. The informational basis of analytical deconstructive micro or macro perspectives is purely economic and thus could be secured by drawing upon specific economic paradigm such as neoclassical economics. In contrast, the capitalism systemic perspective emphasizes interdependence among legal and non-legal institutions, economic and non-economic phenomena. Its informational basis cannot therefore be secured without integration of insights of economic and non-economic paradigms relevant to the complex economic regulatory problems. No one economic paradigm (such as neoclassical-new institutional law and economics) could explain the interdependent levels of organization of physical and social reality in which economic regulatory problems are embedded. Indeed, neoclassical economics falls short of explaining the empirical economic level as it has not yet provided a unified theory or model for capitalism as an adaptive complex multi-levelled system. By drawing on disciplines and economic paradigms relevant to various levels of organization and their constituting complex systems, the informational basis of the systemic capitalism perspective could be secured.<sup>79</sup> Capitalism systemic perspective would then transform this informational basis into a coherent whole.

Approach to Economic Regulations. With an Application to Normative Objectives of Economic Regulations”. See also my conference paper titled “Beyond Micro and Macro Perspectives of Economic Analysis of Legal Institutions of Capitalism: Towards an Institutional Embedded and Globalized Capitalism Perspective” submitted and accepted for presentation in the 19th annual UBC Interdisciplinary Legal Studies Graduate Student Conference. The Conference will be held at Allard Hall, University of British Columbia, in Vancouver, Canada, on May 8-9, 2014.

77 For complexity economists, Agent-based modelling is the paramount modelling technique suitable for economics under complexity theory. For a succinct account of agent-based modelling in economics, See: J. D. Farmer and D. Foley, ‘The Economy Needs Agent-based Modelling’ [2009] 460(7256) *Nature*. See also: D. D. Gatti, E. Gaffeo and M. Gallegati, ‘Complex Agent-based Macroeconomics: a Manifesto for a New Paradigm’ [2010] 5(2) *Journal of Economic Interaction and Coordination*.

78 For a brief account of integrative biology, see: M. H. Wake, ‘What is “Integrative Biology”?’ [2003] 43(2) *Integrative and Comparative Biology*. See also: J. S. Pearse, ‘The Promise of Integrative Biology: Resurrection of the Naturalist’ [2003] 43(2) *Integrative and Comparative Biology*.

79 For example, some economic and non-economic disciplines and economic paradigms would better explain *specific levels* of the capitalist economic system (micro, meso or macro). Other disciplines and economic paradigms would better explain the behaviour of *some* of the interdependent variables at the same level of capitalist economic system. For example, Keynesian paradigms would better explain macroeconomic levels whereas evolutionary institutional paradigms may better explain micro and meso levels. Neoclassical economics has made fundamental advances in analysing the micro level. Further, it explores now micro-macro level in areas such as macro finance. Further, sociology and environmental studies are necessary for exploring the embeddedness dimension of economic regulatory problems.

## V. CONCLUSION

This article has established a solid case for integration of economic and non-economic paradigms in approaching economic regulations. I have emphasized, however, integration of economic paradigms in the title of this article by coining the term “integrated law and economics approach” because I think that integrated law and economics should be the starting point for a broader approach to regulatory governance of capitalism, which I would call “Integrated Law and Science Approach”. The latter would integrate **relevant** paradigms of law, economics, sociology, politics, and environmental studies in approaching regulatory governance of capitalism. Integrated law and economics approach as well as integrated law and science approach would kick off a research agenda in regulatory law, which moves beyond cross-disciplinarity to integrative pluralism and interdisciplinarity in legal research. Further, the above analysis has shown that doctrinal legal research should be conceived as coupled with regulatory research. This coupling would pose a challenge to traditional legal research as a mono-disciplinary research agenda.

This article has established the epistemological case for pluralism and integration in law and economics research on economic regulations. Further, it has indicated briefly that systemic approach (capitalism perspective) is the best integrative approach to economic regulatory analysis. This article, however, has not attempted to address the methods of integrating the insights of various economic paradigms in relation to economic regulatory issues. The article has not shown how the insights of ecological economics could be integrated with neoclassical economics in relation to corporate governance, for example. Integration methods would be the major epistemological challenge for developing the integrated law and economics approach. Further research is required on this front.

These integration methods could then be put into action by applying integrated law and economics approach to specific legal problems. This would ensure a consistent process for developing an integrated law and economics approach to economic regulations starting from *epistemology, going through methods and ending with application*. This continuum reflects my epistemological stance that philosophy of science does matter.

Integrated law and economics is intended to complement and not to replace neoclassical-new institutional law and economics. The article has illustrated major epistemological failures of monism and fragmented plurality such as paradigmatic biases and inconsistency problems. Dominance of neoclassical-new institutional law and economics in legal research on economic regulations has brought about these failures into legal scholarship. The article has further briefly illustrated the limits of the reductionist and analytical perspective of neoclassical-new institutional law and economics approach. Integrated law and economics approach would involve cross-criticism and refinement of the insights of neoclassical-new institutional law and economics in relation to economic regulatory questions prior to integrating these insights with relevant insights of other economic and non-economic approaches. Integrated law and economics approach refines but does not exclude the insights of neoclassical-new institutional law and economics approach to economic regulations. Integrated law and economics approach would thus have the objective of overcoming the limits of neoclassical-new institutional law and economics approach and the

epistemological failures associated with its dominance in current legal research on economic regulations.

Finally, complexity of economic regulatory problems as illustrated in this article seems prohibitively terrifying, as it would epistemologically require third, fourth or higher orders of integrative systemic research. I would rather consider these multi-levelled complexities and multi-facetedness of economic regulatory problems as *epistemological potentials* for research on economic regulations. Integrated law and economics approach would bring about vast potentials for regulatory governance of capitalism. Despite of this epistemological potential of integrated law and economics in comparison to the currently dominant neoclassical-new institutional law and economics approach to economic regulations, this advocated approach remains highly tentative at this stage of research. The case for integrated law and economics approach will be well-established only if integrated law and economics approach succeeds in providing new insights when applied to concrete regulatory problems. Further applied research is required for exploring the potentials of integrated law and economics approach to economic regulations.

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## EU COMPETITION LAW AND ECONOMIC EFFICIENCY: THE INTERACTION BETWEEN LAW AND ECONOMICS IN THE FIELD OF VERTICAL RESTRAINTS

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**Abstract.** Competition law is arguably the field of legal scholarship where the legal and economic frameworks are intertwined to the greatest extent. Economic theory has played a crucial role in the evolution of antitrust law and policy, first in the United States and, subsequently, in the European Union, albeit to a different extent in either jurisdiction. In the EU specifically, the European Commission's treatment of various competition law issues has traditionally balanced between legal formalism on the one hand and adherence to economic principles on the other. So, how consistent with economic theory is the enforcement of rules the purpose of which is *economic* efficiency? And how feasible – or even desirable – is a purely economic approach to antitrust?

Although there is a general consensus on the harmful effects of agreements between competitors (the so-called 'cartels'), the approach to other forms of inter-firm collaboration is far from being unanimous. The antitrust treatment of vertical agreements, namely agreements between undertakings operating at successive levels of the production or distribution chain, has been an ambiguous issue on both sides of the Atlantic. In the light of the heavy criticism that it had been receiving, particularly from the proponents of the Chicago school of thought, in 2007 the US Supreme Court lifted the general ban on vertical price-fixing agreements, so that all vertical restraints are now assessed under the rule of reason. Nevertheless, and despite the US precedent, the European Commission continues to regard vertical agreements imposing minimum or fixed resale prices or conferring absolute territorial protection upon distributors as anti-competitive by nature, even under the recently revised Vertical Guidelines.

**Keywords:** EU Competition Law, vertical restraints, resale price maintenance, export bans

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### I. INTRODUCTION

Contrary to other fields of legal scholarship, the objectives of competition law have been the subject of much debate, particularly with regard to the European Commission's (hereinafter 'the Commission') enforcement priorities when applying the respective rules. Although it is generally

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accepted<sup>1</sup> that the main purpose of antitrust is to safeguard consumer welfare through enhancing economic efficiency, it is apparent that both the Commission and the European Courts have been driven by an amalgam of divergent objectives, which are not always consistent with economic theory.

Being the product of the interaction between law and economics, competition law is inherently interdisciplinary. Its nature is, however, reflected not in the theory of antitrust, but rather in practice: economic principles invariably serve as the theoretical foundations of the law, but it is the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') by the enforcement authorities that has on various occasions been criticised as overly formalistic. More specifically, the treatment of vertical restraints under Article 101 TFEU has been particularly controversial, as the European antitrust enforcers seem to prioritise legal certainty over a case-by-case, effects-based approach to vertical price and non-price restraints.

The purpose of this paper is to examine the interplay between law and economics in the competitive assessment of vertical restraints, and to shed light on the objectives pursued by the Commission's treatment thereof. We shall attempt to demonstrate that the integration of economic principles into legal research can be attained, but only to a limited extent, at least in the field of vertical restraints. To this purpose, we will examine the Commission's stringent approach to both vertical price and non-price restrictions of competition, comparing it to the more relaxed approach suggested by economic theory.

## II. THE CONCEPT OF 'ECONOMIC EFFICIENCY'

Antitrust aims at protecting effective competition from all sorts of restraints, whether imposed unilaterally, by a dominant undertaking, or through a restrictive agreement entered into between two or more independent economic operators. Economic theory suggests that restrictions of competition are 'inefficient' and thus harmful to consumer welfare: they result in higher prices and reduced quantities of goods, and limit the firms' incentive to innovate, conditions which are obviously to the detriment of consumers.

Consumer welfare refers to the difference between the maximum price that consumers were prepared to pay for a specific good or service and the price that they actually pay for it in the marketplace: where this difference is positive, the market in question is characterised by consumer surplus. Under conditions of perfect competition, consumer surplus is maximised, as the price for the goods and services never rises above marginal cost, namely the cost incurred by the manufacturer for the production of one extra unit of output. By contrast to firms operating in

1 Bork, for example, explicitly states that "the case for exclusive adherence to a consumer welfare standard is clear", RH Bork, 'The Antitrust Paradox: A Policy at War with itself' (New York: The Free Press 1978) 81. Similarly, Posner argues that "[e]fficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow to look no further", RA Posner, 'Antitrust Law' (Chicago: University of Chicago Press 2001) 29. Finally, Bain states that "'non-economic goals' [have no] place in the application of competition policy, both because of their non-quantifiable nature, and because of the desirability of promoting efficiency as the sole goal", see M Furse 'The Role of Competition Policy: A Survey' [1996] 17 E.C.L.R. 250, 253, citing JS Bain 'Barriers to New Competition: Their Character and Consequences in Manufacturing Industries' (1956) .

competitive markets, a monopolist is responsible for the entire output in a given industry and faces no competitive constraints; under such circumstances, the monopolist has the ability to charge a supra-competitive price, thereby enlarging its profit margin. At the same time, however, some consumers will be deprived of products that they would otherwise be willing to pay for, were the market competitive.

In order to further clarify how undistorted competition improves consumer welfare, it is necessary to examine the efficiency-enhancing results generated in competitive markets, which can be classified in two categories: *allocative* and *productive efficiency*.<sup>2</sup> Allocative efficiency refers to a market which is in *equilibrium*: the quantity of output demanded by the consumer is the same as the quantity supplied by the manufacturers.<sup>3</sup> In other words, goods and services are allocated between consumers according to the price that the latter are willing to pay. Under conditions of perfect competition, it is consumers who are the price-makers, and suppliers are obliged to produce the quantity dictated by them if they want to survive in the market: if an individual manufacturer attempts to reduce its output and charge a price higher than that of its competitors, it is bound to lose all its customers who will in turn switch to different sources of supply. Productive efficiency, on the other hand, is a concept 'symmetrical' to that of allocative efficiency,<sup>4</sup> and is related to the production of goods at the lowest possible cost. As has already been demonstrated, in perfectly competitive markets producers cannot sell above cost. As a result, in order to make any profit at all, producers are required to reduce their cost to the minimum; otherwise they will be forced to exit the market. In this sense, competition is efficient, as it entails that only "as little of society's wealth is expended in the production process as necessary".<sup>5</sup>

### III. VERTICAL AGREEMENTS AND THEIR ROLE IN PROMOTING ECONOMIC EFFICIENCY

The above discussion, despite its theoretical significance, is unfortunately of limited practical use for two reasons. First, in real-world situations, perfectly competitive markets do not exist. Industries dominated by one firm are likely to be encountered – although rarely – and can be created either by state regulation (*statutory monopolies*) or because the market itself cannot sustain the operation of more than one firms (*natural monopolies*).<sup>6</sup> Perfect competition, on the other hand, is merely a theoretical paradigm used to demonstrate the efficiency-enhancing effects of competition. The second reason is that in everyday business transactions competition hardly ever remains undistorted: every commercial arrangement, to a lesser or greater extent, obviously restricts the parties' conduct in the marketplace, along with their freedom of action. It has, therefore,

2 In Bork's words, "[t]hese two types of efficiency make up the overall efficiency that determines the level of our society's wealth, or consumer welfare", RH Bork, 'The Antitrust Paradox: A Policy at War with itself' (New York: The Free Press 1978) 91.

3 KN Hylton, 'Antitrust Law: Economic Theory and Common Law Evolution' (Cambridge: Cambridge University Press 2003) 2.

4 RH Bork, 'The Antitrust Paradox: A Policy at War with itself' (New York: The Free Press 1978) 104.

5 R Whish and D Bailey, 'Competition Law' (Oxford: Oxford University Press, 7<sup>th</sup> edition, 2012) 5.

6 For a discussion on natural monopolies see H Hovenkamp, 'Federal Antitrust Policy: The Law of Competition and its Practice' (USA: Thomson/West, 3<sup>rd</sup> edition, 2005) 31-36.

accurately been stressed that the concept of effective competition refers not to the form of the competitive process, but rather to its effects on consumer welfare.<sup>7</sup>

In that sense, vertical agreements are a controversial issue under EU competition law, as their treatment under Article 101 TFEU shows that the Commission embraces goals other than economic efficiency. Vertical agreements are agreements between undertakings operating at different levels of the production and distribution chain. They constitute a ubiquitous commercial practice, through which manufacturers establish their control over their distributors' actions with regard to the resale of the goods produced or the services provided by the former. To this purpose, vertical agreements may include various clauses restricting the distributors' commercial freedom, which may take the form of either price or non-price restrictions. The former refer to restrictions on the resale price charged by the distributors, whereas the concept of non-price restraints includes a broad range of practices, the most important of which is aimed at limiting the number of resale outlets in one specific territory (*territorial restraints*). From an economic perspective, besides their anti-competitive effects, both price and territorial restraints may generate considerable efficiencies and may, in fact, stimulate *interbrand* competition, namely competition between firms supplying different brands of the same good or service.

Although the European Commission has, generally, adopted an effects-based approach to the assessment of vertical restraints under Article 101 TFEU,<sup>8</sup> two types of restrictions are still regarded as having as their object the restriction of competition: resale price maintenance ('RPM') and absolute territorial protection ('ATP'). Despite any pro-competitive justifications suggested by antitrust scholars, the aforementioned restraints will be held to fall within the scope of Article 101(1) without a prior appraisal of their effects,<sup>9</sup> while they are also extremely unlikely to qualify for an exemption under Article 101(3).<sup>10</sup>

In the analysis that follows, we will focus on the presentation of the possible pro-competitive effects of both resale price maintenance and absolute territorial protection, as suggested by economic theory. We will then attempt to explain and criticise the inconsistency between the underlying economic principles on the one hand, and the Commission's approach to such schemes on the other. To this purpose, we will take into consideration additional objectives pursued by the Commission and try to examine whether adherence to these objectives could justify a deviation from the ultimate goal of antitrust, economic efficiency.

7 S Bishop and M Walker 'The Economics of EC Competition Law: Concepts, Application and Measurement' (London: Sweet & Maxwell 2010) 20-21.

8 See the European Commission's Guidelines on Vertical Restraints [2010] OJ C130/10.

9 According to the CJEU, "it is unnecessary to consider the actual effects of an agreement if it is apparent that it has the object of preventing, restricting or distorting competition", see *Verband der Sachversicherer e.V. v. Commission*, Case 45/85 [1987] ECR 405, at para. 39.

10 Guidelines on the Application of Article [101](3) of the Treaty [2004] OJ C101/97, at para. 46. See, however, *Matra Hachette SA v. Commission*, Case T-17/93 [1996] ECR II-595, where the General Court held that, in principle, there are no restrictive agreements that could not satisfy the four requirements set out in Article 101(3) (para. 85).

### i) *Resale Price Maintenance*

The concept of ‘resale price maintenance’ refers to vertical arrangements whereby the manufacturer imposes on its dealers a fixed or minimum price for the resale of its products. It is apparent that RPM agreements restrict price competition in the downstream market, since they prevent distributors from offering discounted resale prices. Furthermore, an industry-wide operation of RPM schemes may facilitate collusion in both the upstream and the downstream markets: vertical price-fixing could be employed by a cartel with the purpose of monitoring its members’ adherence to its rules. An additional concern raised by RPM is that it can be used by a manufacturer with significant market power in order to foreclose its rivals’ access to downstream outlets, as dealers will normally enter into an agreement that guarantees a larger profit margin.<sup>11</sup>

Ever since the 1960’s, however, antitrust economists have been arguing that restrictions of intrabrand<sup>12</sup> competition may be indispensable for the enhancement of interbrand competition. In the case of price restraints, it has been stated that “by enhancing the pricing power of the retailer, the manufacturer induces the retailer to engage in activities that stimulate demand”.<sup>13</sup> Commentators have put forward several arguments to justify the pro-competitive effects of vertical price fixing.

The most prominent justification for RPM is the ‘free rider’ argument suggested by Telser in a seminal article published in 1960.<sup>14</sup> Telser argued that sales at the retail level depend on both the product’s price and the product-specific services provided by the retailer. Customers value the additional services, but, given the chance, they would rather buy the product at a lower price. In the absence of RPM, retailers offering those special services would inevitably charge more than those who do not, due to the higher costs that the former incur. As a result, it is highly likely that a customer will be convinced to purchase a certain product by taking advantage of the pre-sales services provided by one retailer, but will eventually buy the product at a lower price from a competing dealer that offers no such services. In that way, a dealer takes a free ride on the ‘full-service’ competitor’s promotional efforts. Accordingly, fewer or no dealers will provide pre-sale services, which in turn will cause a reduction in the sales.

Moreover, RPM can be used as a very effective tool for a new firm that attempts to penetrate a market or for existing players that seek to launch new products. It is generally not very likely that a retailer will take the risk to stock either the products of unknown brands or novel goods, the customer demand for which is still unknown. A larger profit margin, guaranteed by means of RPM, will act as an inducement for the retailer to stock products the success of which is rather uncertain. Finally, an additional justification is that RPM facilitates resale density, especially with regard to relatively inexpensive goods, such as newspapers. It is good for the manufacturer to have its products sold not exclusively from large retail outlets, but also from, say, easily accessible convenience stores. However, large outlets offering discounts will attract a considerable amount of purchasers.

11 For a complete list of the possible anti-competitive effects of resale price maintenance, see the Guidelines on Vertical Restraints [2010] OJ C130/10, at para. 224.

12 Intrabrand competition is the competition between distributors of the same manufacturer’s products.

13 FM Scherer, ‘The Economics of Vertical Restraints’ [1983] 52 Antitrust L. J. 692.

14 LG Telser, ‘Why Should Manufacturers Want Fair Trade?’ [1960] 3 J. L. & Econ. 86.

Economic theory suggests that not all consumers have the same willingness to search more in order to spot the lower price. As a result, the convenience stores will lose those consumers who would travel longer in order to profit from a better price, and they will find it unprofitable to stock the manufacturer's products. Thus, by fixing the resale price of such goods, the manufacturer can ensure that its goods will be available everywhere.<sup>15</sup>

Despite these pro-competitive effects, resale price maintenance is still regarded as a 'hardcore' restraint under EU competition law. The Commission, although expressly acknowledging their efficiency-enhancing potential,<sup>16</sup> persists in stating that RPM agreements "are presumed to restrict competition... [and are] unlikely to fulfil the conditions of Article 101(3)".<sup>17</sup> This approach is also reflected in the Vertical Agreements Block Exemption Regulation which, in Article 4(a), specifically excludes vertical price-fixing from the benefit of the exemption.<sup>18</sup> Both the Vertical Guidelines and the Block Exemption Regulation were issued three years after the US Supreme Court, in its seminal *Leegin* decision,<sup>19</sup> put an end to an almost century-long rule under which RPM agreements were held to be *per se* illegal. According to the Supreme Court, a vertical price-fixing scheme is to be assessed under the rule of reason: only where it is adequately established that the agreement's impact on competition is harmful will it be caught by Section 1 of the Sherman Act. Despite the US precedent, however, the Commission still refuses to adopt an effects-based approach to RPM.

There is no denying that resale price maintenance can have both pro- and anti-competitive effects, at least in theory. For this reason we think that an appraisal of the impact of such clauses on competition on a case-by-case basis would be more appropriate than an outright ban. The Commission instead seems to persist on a rule that has already been abandoned on the other side of the Atlantic. The prohibition on RPM has the advantage that it provides both the authorities and the undertakings with legal certainty, which cannot easily be guaranteed by an individualised analysis of the effects of every agreement separately. A relevant benefit is that the antitrust enforcers can save up on costs and resources that would otherwise be dedicated to the appraisal of agreements the impact of which on competition cannot easily be determined, given their complex nature. A more profound integration of economic principles, however, is likely to prove more efficient than a general formalistic prohibition of RPM as it will result in a number of benign or even pro-competitive agreements escaping the application of Article 101(1) TFEU.

## ii) *Absolute Territorial Protection*

On many occasions, the manufacturer may wish to define a specific geographical territory in which, or a certain group of customers with whom its distributor will do business. Such arrangements, commonly referred to as 'exclusive distribution agreements' can be further reinforced through the prohibition of parallel imports from other, also exclusively allocated territories; by imposing export bans, the manufacturer provides its dealers with absolute territorial protection.

<sup>15</sup> See H Hovenkamp, *supra* note 6, p. 460.

<sup>16</sup> Guidelines on Vertical Restraints [2010] OJ C130/10, at para. 225.

<sup>17</sup> *Ibid*, at para. 223.

<sup>18</sup> Regulation 330/2010 OJ [2010] L 102/1.

<sup>19</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007).

The prohibition of ATP is unique under EU competition law, as the Commission has chosen to prioritise other objectives, overlooking the possible pro-competitive effects that such an agreement may produce.

In particular, territorial exclusivity agreements aim at ensuring that the dealer will offer the optimal amount of product-specific services. As with vertical price fixing, economists consider territorial restraints as a means to eliminate the ‘free-rider problem’ by guaranteeing the provision of the required level of pre-sales and post-sales services. Thus, the manufacturer has the option to prevent dealers from outselling their full-service competitors by taking advantage of the latter’s expenditures, by assigning a defined territory to one specific distributor; this distributor shall promote the goods more effectively by providing the exact amount of services desired by the customers in that territory.

A second pro-competitive justification of vertical territorial restrictions is that the allocation of exclusive territories may ensure that the manufacturer’s products will be available in as many geographical markets as possible. Given that “the profitability of distributor sales will be inversely proportionate to the distance between customer and distributor”,<sup>20</sup> every dealer shall broaden its market coverage up to the point where it is no longer profitable. As a general proposition, every prospective distributor will choose to operate in a territory that is not being served by an existing dealer, so that there will be no overlap in their market coverage. Nevertheless, if the existing distributors’ operations are profitable and absent the exclusivity clause, the prospect of profits will attract new entry in the same territory. At the same time, however, certain fringe areas, that would otherwise not have access to the goods, can be accommodated only if a separate distributorship is established.

Finally, a third reason for the imposition of territorial restraints is the ‘centralisation of control over distribution’, which will, in turn, result in the facilitation of the flow of information between the supplier and its distributors.<sup>21</sup> This information flow is in fact vital for the operation of both the supplier and the dealer, since it will result in the optimisation of the promotional methods, by providing guidance as to the effectiveness of the techniques already employed. Moreover, the centralisation of control may also entail a significant reduction of transaction costs. Indeed, given that the negotiation of distribution contracts may be costly, the conclusion of long-term distributorship agreements can not only help the supplier avoid these expenditures, but also enable the more accurate planning of its future policy.<sup>22</sup>

In the landmark *Consten and Grundig* case,<sup>23</sup> the CJEU rejected the parties’ argument that the agreement in question, under which a distributor was granted immunity from competition by means of an ATP scheme, not only was not detrimental to competition, but it also resulted in an increase in trade. In other words, the restriction of intrabrand competition in this case actually stimulated competition between manufacturers, as any territorial restrictions imposed were

20 LE Preston ‘Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards’ [1965] 30 Law & Contemp. Probs. 513.

21 See B Kellman ‘Vertical Territorial Restrictions and the Limits of Planning’ [1977] 46 Antitrust L. J. 1107, 1115-1116, and PC Carstensen ‘Vertical Restraints and the Schwinn Doctrine: Rules for the Creation and Dissipation of Economic Power’ [1976] 26 Case W. Res. L. Rev. 771, 776-777.

22 B Kellman, *supra* note 21, 1116.

23 *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission*, Cases 56 and 58/64 [1966] ECR 299.

indispensable for a more effective promotion of the supplier's products in France. Nevertheless, the Court held that the agreement was by its object restrictive of competition, and as such the appraisal of its effects was unnecessary. It is beyond doubt that this counterintuitive approach, whereby a, potentially, efficiency-enhancing arrangement is treated as anti-competitive, was based on anything but economic grounds.

In condemning the ATP agreement in question, the Court clarified that "what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States".<sup>24</sup> The goal of market integration is of crucial significance for the Union<sup>25</sup> and the partitioning of national markets constitutes an obstacle to the attainment of this objective, as it may result in the prevention of the "free flow of trade between the Member States."<sup>26</sup> This strict rule against prohibitions on parallel imports is still valid today;<sup>27</sup> the single-market imperative takes precedence over any legitimate economic arguments, although in the light of "the lessons taught by modern industrial organisation, such a ban is no longer evident".<sup>28</sup>

#### CONCLUDING REMARKS

Vertical restraints are arguably the most controversial aspect of the enforcement of Article 101 TFEU, as the interplay between law and economics seems to be limited to the minimum extent, in order for goals other than economic efficiency to be attained. Although the Commission and the Courts do not generally hesitate to acknowledge the pro-competitive potential of vertical price and non-price restraints, they insist on classifying RPM and absolute territorial protection as 'hardcore' restraints.

The main question to be asked in this case is: how *efficient* is this approach to competition law? With regard to the prohibition on export bans, we think that it is necessary that market integration, the overriding goal of the Union, be safeguarded and promoted – and competition law is indeed the most suitable vehicle to this purpose, even if this entails the limitation of the practical significance of the underlying economic principles. Legal certainty, on the other hand, does not justify, in our opinion, the stringent treatment of resale price maintenance. The economic justifications put forward by antitrust scholars are convincing enough to result in a more lenient approach to RPM, which could consist in exemptions being granted to such schemes under the future vertical block exemption regulations or, alternatively, under 101(3) TFEU.

<sup>24</sup> *Ibid.*

<sup>25</sup> See also Article 34 TFEU: "Quantitative restrictions on imports and all measures having equivalent effects shall be prohibited between Member States", to be read in conjunction with Article 7 TFEU, which states that "[t]he Union shall ensure consistency between its policies and activities taking all of its objectives into account".

<sup>26</sup> R Burnley 'Interstate Trade Revisited – The Jurisdictional Criterion for Articles 81 and 82 EC' [2002] 23 E.C.L.R. 217, 220.

<sup>27</sup> Examples of decisions condemning absolute territorial protection include: *Sandoz Prodotti Farmaceutici SpA v. Commission*, Case 277/87 [1990] ECR I-45, *Konica* [1988] OJ L78/34, *BASF v. Commission*, Cases T-175-6/95 [1999] ECR II-1581, *Volkswagen AG v. Commission*, Case C-338/00 [2003] ECR I-9189, *GlaxoSmithKline Services Unlimited v. Commission*, Case C-501/06P [2009] ECR I-9291.

<sup>28</sup> R van den Bergh 'Modern Industrial Organisation versus Old-Fashioned European Competition Law' [1996] 17 E.C.L.R. 75, 76.

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## LAWYERS CANON OF THE PHILOSOPHICAL KNOWLEDGE

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**Abstract.** The high qualified lawyer ought to be characterised not only by good technical skills, but also by good professional comprehension of theoretical law foundations. The three most important qualities of legal norms discussed in the philosophy of law are meaningful to legal practice: I. The link of legal norms content with the moral values; II. The grounds of the legal norms system autonomy; III. The efficacy and power of law (the origion of motivation to respect the law by the legal addressee). The first quality unfolds within natural law theories (I. Kant, J. Messner, H. G. Hegel and others). These theories reveal the essence of freedom, help to frame the catalogue of basic human rights and freedoms, explain on which theoretical ground the right to choose the models of action is ascribed to the human being. The second quality unfolds within the hermeneutical-historical law approach. (H.-G. Gadamer, Ch. Taylor and others). This philosophical explanation of legal norms origin helps to understand the deep reasons of legal issues, conflicts and also expose on what political decisions and ethical attitudes these conflicts may be overcome and guarantees respect to the law itself by legal subjects (the rule of law). The third quality unfolds within the positivistic-procedural law approach (J. Bentham, H. Kelsen, H. L. A. Hart, J. Habermas and others). These theories explain why and for who it is necessary to separate legal norms and moral norms as well as the theories expose by which mode lawmaking operates as autonomic process. Moreover, the theories are the grounds of the relationship between democracy and law, formulate fundamental principles of all procedural law institutes.

**Keywords:** law, philosophy, ontology, rights, morals, virtues

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### INTRODUCTION

The law as a purposive instrument of a human activity requires appropriate theoretical reflection. The task of the legal theory and philosophy – correctly to justify the mission of the law to regularize the social relationships authoritatively. The people those who exercise by legal rules may do not reflect in the abstract what is the law. But this does not mean that the theoretical reflection of law is not significant fo them. Mostly of them follow the strong epistemological attitude, that legal rules are powerful to sustain any theoretical test. The people simply would regard the law as worthless if doubt in the theoretical perfectness of it.

Studies of law backed on the theoretical soudness and social authority. In the most part would-be lawyers a priori state that theoretical correctness of law is not doubtfull and they try to memorize many rules written in the codes and known from customs. Late on they put to use cumulate knowledge of legal rules in the practice according to their skills.

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It is obviously that qualified practice of the legal rules is not conceivable then, when legal norm applied mechanically. The legal subject is managed rationally to clarify not only *how* the legal norm orders to act, but also *why* the legal norm demands to act on one way or another either why it is more useful to society to live in accord to the legal requirements. Only abstract answer to the questions of such character may do not suffice for the many people. It is important to the people to ascertain how the obligation to obey to the authority of the law originates and it is needful for them to know when legal norm itself is good or bad. These questions show that it is important to good lawyers to cognize the philosophical prospect of law or in other words to learn about metaphysics of law it is important.

In the history of the regulation social relationships there was a prevailing conviction that the status and the authority of law as a social welfare arose from human being metaphysics. People believed the subsistence of a man and overall humanity were a part of the cosmic scheme planned by nature and the Creator of the universe. The social order ought to fulfill the cosmic ideas. Consequently the mission of the law is clear – to serve for people’s cosmic existential ideals.

One the classical law metaphysics proponents is medieval philosopher Thomas Aquinas. In the tractate “Treatise on Law” T. Aquinas begins his considerations from fundamental ontological thesis meaning that the law is a set of instructions of Divine Reason that projects “the principles of people external acts”<sup>1</sup>. The concept of Divine Reason by latter natural law principles directs a man to seek for a good’ and ‘avoid badness’ (“the good is to be done and ensued and evil is to be avoided”) in order to reach a common good<sup>2</sup>. This legal imperative arising from the vision of cosmic order were amplified in religious Catholic education, Canon law and also it was the most important principle in the medieval secular law systems.

A big upheaval for the traditional classic law metaphysics was when in the new ages the vision of rationalistic world became prevalent in the consciousness of European nations. This new vision questioned the authority of settled Divine order and did not leave any space for the irrationally descriptive cosmic justice. In philosophical level the nominalistic universal nature’s criticism in scientific methods was the most disadvantageous for the classical “cosmic” law metaphysics. As famous German philosopher of law Arthur Kaufmann states, “in nominal approach there is no any existing universal natural law in reality” and what is called “natural law” is “only scientific generalizations (german Verallgemeinerungen), just “theoretical instruments”<sup>3</sup>.

Even though in post-classical historical period the constructing of theoretical model based on principles of human reasoning and scientific cognitive methods began, but the demand of philosophical reasoning did not disappear. According to A. Kaufmann “All philosophies of law – directly or indirectly – pursue the task to distinguish law from unlaw” and as a result there are two problems: “1. *What is law?* 2. *How do we cognize law or to be precise how do we implement it?*”<sup>4</sup> In nowadays the classical question of law metaphysics is: “Where does the justice of law come from” endures actual. The answer to this question definitely must rely not on the persuasion about God’s

1 T. Aquinas. Treatise on Law (Summa Theologica, Questions 90-97) (Regnery Gateway: A Gateway edition) 1.

2 Ibid. 59-60.

3 A. Kaufman/ W. Hassemer/ U. Neumann. Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart. (Heidelberg: C. F. Muller Verlag) 218

4 Ibid. 26.

cosmic order for people and nature, but on recognition of the principles of social order that people create purposely on the Earth.

Recently the science of law takes the metaphysic question: “what is correct law?” into consideration and highlights three most important philosophical positions. Each of them reads the source of legal norm and finds principles of positive law systems (provisions of ontological complexion). Philosophical law reflections create completeness vision of law with its inherent metaphysics.

One of them – modern notion of natural law – seeks to cognize the universal valuable content of law in legal norms. At this moment human rights and freedoms are conventionally accepted object of legal protection and the ground of legal regulation. This tendency in philosophy of law endeavors to explain what is the nature of a human’s freedom? What the content to this right is? What catalogue of universal human rights accepted in all legal systems could be?

The second – ethical- hermeneutical notion of law – while trying to explain fair conditions of legal relations, pays attention to the role of ethical grounds (customs, traditions, morals) by coexistence of collective participants in lawmaking process.

The third – legal positivism and proceduralism – endeavors to emphasize social creative nature of legal norms. This nature shows how lawmaking proceeds and how it should proceed in order its result – legal norm – could not raise any moral doubts for legal subjects. This movement in philosophy of law researches the origin of fundamental lawmaking procedural principles and interprets the relation between law and democracy.

## 1. FUNDAMENTAL HUMAN RIGHTS AS RATIONALLY ARTICULATING VALUES (PRINCIPLES) IN THE ONTOLOGY OF NATURAL LAW

For the concept of human rights, as for the object of natural law, there are two very important theoretical providences found in theories of natural law. The first providence is related to the source of principles of natural law and their ontological status: the second – the whole of these principles (the fundamental catalogue of human rights and freedoms).

### 1.1. The Source of Natural Law Principles and Their Ontological Status

Notwithstanding Aquinas natural law treats as inborn for human reason, though at the same time this law is defined as a creation of human reason. Aquinas relates this thesis with mind that a man acts *freely* when he follows his reason: not at the time a man does not do anything bad because of God wants so, but only then when anything bad is not done as he in his reason is cognized as evil.<sup>5</sup> Thomas Aquinas describes the reason as criterion of a good will and a rule which creates the principle of welfare and “not only “subjective“ moral law, but as an objective *measure* and *criterion*. As the reason is not only admeasuring and regulating “instance“ in the meaning of measure application but also it is a moral measure and norm by itself.”<sup>6</sup> Hence according to

5 A. – F. Utz Ethik des Gemeinwohls (Gesammelte Aufsätze 1983 – 1997. Herausgegeben von W. Ockenfels. 2. Auflage. Paderborn, München, Wien, Zürich: Ferdinand Schöningh 2002) 14 - 15.

6 M. Rhonheimer Natur als Grundlage der Moral. Die personale Struktur des Naturgesetzes bei Thomas von Aquin: Eine Auseinandersetzung mit autonomer und teleologischer Ethik. Innsbruck (Wien: Tyrolia – Verlag 1987) 36.

Aquinas' attitude freedom and the reason determines each other. A man is free when he acts reasonably on purpose. Reasonable acting is moral acting. These Aquinas' minds about moral nature of human freedom represents that the source of all man's acting justification (the source of law) is the human reason. A man has such a rights that reasonably and morally considering creates himself.

Moreover, the source of human freedoms and natural law is reasoning by Kant in a similar way to Aquinas. Kant treats human freedom as a natural law and its possibility relates with moral law. In order to be actually (really) free, according to this philosopher, it is essential to determine own acting not as any empirical object but a man ought to follow respect for the categorical imperative that declares: „**Act only on that maxim through which you can at the same time will that it should become a universal law.**“<sup>7</sup>

The natural human freedom, the right to follow his reason by himself, decide what and how to do (the right to choose) is treated like integral right in democratic countries. Thus the exceptional and ontological status of the nation is indicated. The laws of a state must demonstrate respect to human rights and ensure the human freedom. For instance in the 3th article of Basic Law for the Federal Republic of Germany it is said that a citizen of the country has a right to act as categorical imperative or laws require.<sup>8</sup>

## 1.2. The Catalogue of Natural Law Principles

Conforming to Aquinas the nature is some direction rather than a factual given thing. In his philosophy “the nature of the man as well as of any alive creature primary unfolds through the desire he seeks.”<sup>9</sup> – states A. Navickas. The reasonable nature as well as responsibility not to act “below a human” in the situations where he supposed to act in accordance with human dignity<sup>10</sup> – notices famous austrian neotomist J. Messner (1891 – 1984). Because of the purposes existing in the human sensual and spiritual nature that are implementing by his decisions (freedom to it) in a variety of life situations. These purposes can be called as human “existential aims”<sup>11</sup>. Every single creature is directed to a goal and is able to reach this goal by its special activity. Though in consonance with J. Messner's thesis that the natural law expresses the greatest aims of the human being however it is not obvious what they exactly are. Concretizing the greatest aims of human being, it is possible to embrace the philosophical ideas of other german representative of classical philosophy F.W. Hegel. In the work *Elements of the Philosophy of Right*“ Hegel treats moral autonomy analysed by Kant as not only form of freedom but just as the form of human freedom of conscience beside other possible forms of individual freedom. “*The conscience* is the absolute right of subjective self-awareness, namely to know in itself and from itself, what the law and the duty are

7 I. Kant Critique of Practical Reason (Vilnius: Mintis 1987) 45

8 Deutsche Gesetze (Munchen C. H. Beck'sche Verlagsbuchhandlung, 1995. GG 1. Art. 2) 5

9 A. Navickas Natural Law and Natural Rights: From Thoams Aquinas up to Thomas Hobbeas (Problemos, 2005. Nr. 67.) 77.

10 J. Messner Vom Sinn der menschlichen Gesellschaft. (Zwei Spätwerke Messners. Wien, München: Verlag für Geschichte und Politik – Oldenbourg Verlag 2003) 69.

11 Ibid. 69.

and recognize nothing except what it knows about well...<sup>12</sup> At the same time Hegel conforming that human freedom and the reason is inseparable seeks to delineate not only the form of moral freedom but also other possible forms of human reasonable existence. It follows thence that he modifies Kant's interpretation of notion of the freedom content. The aim of this modification is that Hegel perceives human freedom as a process of individual identity (peace with himself) which is structurally composed. According to this philosopher a man identifies himself as abstract universal (Firstly I am pure activity, universal being in himself...<sup>13</sup>) and as a subject depending on external natural and social conditions "...however this universal defines itself and thus it is not in itself but it declares itself as any other being and as a result ceases to be universal."<sup>14</sup> at least and as subject implementing its abstract goals in the external environment and become absolutely free.<sup>15</sup> Hence the human freedom is a process in which a man realizes his own creative potencies as well as he finds his identity in the results of his activity.

Considering the idea of identity as the human natural and therefore lawful and ontological ground of being in the World it is possible to analyse what concrete, empirically verified normal human being forms externalized the identity and reasonable can be treated as the natural ground of human freedom and rights. This thesis can be based on both theoretical speculations and remedies of empirical sciences, for instance, the science of sociology. Considering it from sociological view, it is possible to speak about limitary situations of human existence in the World. In these situations every rational thinking subject often dedicates one and the same natural laws to oneself and to others and similarly or even equally interpretes the content on these law.<sup>16</sup> These situations are: 1. Human existence in the nature when the main goal of the man is the fulfillment of physical survival and health. In the law practise it is called as the right of individual physical and psychical inviolability (the right to integrity). 2. The identification of human being in legal property relations when his essential rights are the right to possession, the to property, the right to freedom of contracts. In the legal practise considering this context it is operating with conceptions of the institute of property and the immunity of individual privacy. 3. The human identification of himself as a moral subject and the projection of purely moral relations with the people round about. In the legal practise in the view of this aspect it is considered about human moral integrity – his dignity as well as the freedom of conscience. 4. The human identifications of himself as member of a family, society, country, at least historical nation or humanity. Those identifications signify possibilities of human public autonomy and in the legal practise are expressed as the notions of justice, legitimacy, sovereignty, wills of the World nations, etc.<sup>17</sup>

12 G. W. F. Hegel *Elements of the Philosophy of Right* (Vilnius: Mintis 2000) 219

13 *Ibid.* 63

14 *Ibid.* 63.

15 *Ibid.* 63.

16 S. Arlauskas *Substantial Law Foundations* (Vilnius: Mykolo Romerio universitetas 2004)

17 S. Arlauskas *Philosophy of Contemporary Law* (Vilnius: Charibdė 2011) 54.

## 2. ONTOLOGICAL SIGNIFICANCE OF CONVENTIONAL MORALITY TO LAW IN THE ETHICAL-HERMENEUTICAL LAW APPROACH

In the modern pluralistic world the institutes of human rights protection confront with the nations affection to the forms of their traditional forms that define imperatives of social life. M. Romeris emphasizes that customs and forms of traditional life “are various norms of human acts and behavior. They are according to communal goals, imperative, prescriptive or prohibiting to do something or restraining from acting...” as well as “... are objective, transitive from convictions of members of the social groups in regard to the goals and functions of these groups...”<sup>18</sup>

In order to define the hierarchy of human preferences and other traditional practices of lives in the system of human rights there are strong debates in a public space. One of them suggest the human life to treat as the most important right, others – human privacy (the right to choose). In some nations abortions are prohibited (illegal) with reference to importance of a human life and traditions, in another nations the abortions are legal as thus showing the respect for the woman right to choose and her privacy. The conflict of human convictions is clear in the dispute. This circumstance determines that for the science of law it is very important to explain how moral aims of legal regulations depend on human convictions that are determined by traditions and customs.

Philosophical hermeneutics analyses the role of belief provisions in social behavior. Its argumentation shows that constructs of the human reason (as well as the provisions of natural law) have a symbolic meaning. The authorities of them depend on how the the man individually experiences it and beliefs in it. It seems if a man rationally chooses the model of his behavior, there is no possibility model of any traditional life is a trigger off. However he treats the model of his life as known “truth” of the life. A traditional lifestyle affords examples of problem solving and peaceful concord.

German philosopher Hans Georg Gadamer seeking to reveal the valuation of living traditional life forms for man’s convictions, considers the notion of *superstitions* discredited in the age of enlightenment. „...the common enlightenment tendency is that no one authority should be treated as acceptable, everything must be given only to the court of reasoning.”<sup>19</sup> The content of superstitions has not only negative aspects but also positive ones according to H. G. Gadamer. “The superstition does not mean wrong conception; it contains positive as well as negative complexions.”<sup>20</sup>, the notion of superstitions formally means “the first conception that is made without revising all factual circumstances.” According to Gadamer, people before recognizing their being reflexively, they understand themselves as members of the family, community and state they are living in... *Therefore the reality of human historical being is composed more of superstitions (Vorurteile) rather than reasoning (Urteile)*.<sup>21</sup>

Superstitions can be defined as the legends about exceptional importance of a state or a family in human life when a man treats this superstitions as the truth in his first knowledge of life. In this situation the truth is basically based on the belief. On the other hand the man without believing in this truth would not have supporting points of his life. Therefore the aim of the knowledge is not to falsify the truth coming from the traditions of common life but contrary to save them in order

18 M. Romeris *The State* (I tomas. Vilnius: Pradai, 1995) 293-294.

19 H-G Gadamer *True and Method* (Москва: Прорпекс 1988) 322, 323.

20 *Ibid.* 323

21 *Ibid.* 329.

the man could feel a strong historical ground. "Traditions are saving of that what is, saving implementing when various historical changes happen",<sup>22</sup>— H. G. Gadamer states. Additionally, he emphasizes: "Customs and the ethical attitude exist mainly through legends. They are absorbed freely and not at all created and cogitated by free reasoning. Likely the basis of their significance is called traditions by people".<sup>23</sup>

As reported by Gadamer, the trust of legends should not be blind. If "the authority is reasoned by acknowledgement and consequently by the act of reasoning when the limit of the reason is realized and others are treated as more intelligent than there is no blind trust and the meaning of the authority is understood correctly."<sup>24</sup> Gadamer states that "there is no unconditional confrontation between the reason and traditions". Traditions are the maintaining of the past. "This maintaining is specific as it is invisible act of the reason. <...> The maintaining of the past is also free attitude no less than revolution or resumption".<sup>25</sup>

According to Gadamer, traditions become human self (ethical attitude) while the content of legends is actively contemplated and accepted or in other words when hermeneutical act is exercised. Gadamer indicates three dimensions of hermeneutical thinking process: "understanding" (*intelligere*); "interpretation" (*esplicare*) and "adaptation".<sup>26</sup> All three moments of comprehension compose a whole entirety where application is the part of integral hermeneutical process alike as understanding or interpretation".

If considering about the legitimacy of legal order it is particularly important to recognize the link between law and morality as well as to explain what moral features should describe subjects of legal relations. The moral features are basis for motivation of the partners to treat the relations as fair. Alisdair MacIntyre in his book "After Virtue"<sup>27</sup> plausibly elucidates the role of virtues character in the human relations. He explains how people because of their virtues naturally pursue to preserve the "internal goods" inherent to different social practices, and how they pursue not primitive personal good, but "the good of their integral life" and how they sustain through their virtues traditions, which "provide the essential historical context to their practices and lives".<sup>28</sup>

Human virtues denote the requirements of collective (conventional) morality, which arises from traditional life forms backed by the way of customs or conventions (agreements). One or second modes sectional moral development are important to law, because provides ethical conditions to submit to requirements of laws. When traditional customary moral norms don't maintain statutory regulation or society groups follow different moral preferences, then are unavoidable conflicts and disagreements concerning per se limits of human rights. On the other hand, the convention concerning moral values becomes legal convention when after political declaring are implemented into constitutional legal acts. But such a step is conceivable only to such moral attitudes, which are backed by traditions and have a strong customary-ethical foundation.

22 Ibid. 334.

23 Ibid. 333.

24 Ibid. 332.

25 Ibid. 334, 335

26 Ibid. 366, 364.

27 A. MacIntyre After Virtue (Gerald Duckworth & Co. Ltd) 1981

28 Ibid. 207

### 3. ONTOLOGY OF DEMOCRATIC LAWMAKING IN THE LEGAL POSITIVISM AND PROCEDURALISM

The legal regulation is a factual social phenomenon. Thus it is possible to examine law by applying the methods which scientifically describe the legal phenomenon. This goal is held by legal positivism. One of the founders of the legal positivism Jeremy Bentham (1748-1832) delineated the law as a relations between the lord and subordinates. According to J. Bentham legal norms are „the sanctions backed up by the directions of sovereign“.<sup>29</sup> While sovereign is „a person or body of the persons and to the will of which it is supposed, that political community is complied to submit: and that will be no priority to the will of any other person“<sup>30</sup>. This theoretical prospect plainly points on the one part that the legal norms are artificially established rules and on the other part it anticipates the premise, that the lawmaking is a procedure by which the sovereign formulates the commands and subordinates conform to them.

Hans Kelsen delineates the creative nature of the legal norms as a J. Bentham. He states, that “the basic forms of the legal rule is such”, that “under the determined conditions of the legal order it ought to be executed the coercive act prescribed by the legal order“.<sup>31</sup> H. Kelsen also formulates the necessity of determination of the legal procedure. It supervenes from the justification of the validity of the legal norm. According to H. Kelsen the validity of legal norm is “a specific existence of the norm” and adds, that the valid norms “only the competent body” can produce and that it is possible to base these competence by “the norm, empowered to produce the norms“.<sup>32</sup> This norm is a basic norm (*grundnorm*).

H. L. A. Hart as a H. Kelsen believes that legal system ought to lean by the procedural rules and denominates these rules as a *secondary* rules. Differently as *primary* rules, which „demand, that people would perform some acts or refrain from doing it“ the secondary rules „provide the powers – public or private“.<sup>33</sup> That are procedural rules, which suppose how to identify the legal norm, mutate it or adjudicate the lawsuits.

J. Bentham’s, H. Kelsen’s, H. L. A. Hart’s legal positivism points out, that the essence of the laws operation is some legal procedures. Jürgen Habermas, the German philosopher, seeks to disclose the ontological grounds of these procedures. Considering about the procedures of the normative statements formulation he applies Kant’s idea of the law of practical reason (categorical imperative) and transforms it to the idea of the „*communicative*“ reason.<sup>34</sup> „Communicative reason differs from practical reason first and foremost in that it is no longer ascribed to the individual actor or to a macrosubject at the level of the state or the whole society. Rather, what makes communicative reason possible is the linguistic medium through which interactions are woven together and forms of life are structured. This rationality is inscribed in the linguistic telos of mutual understanding and

29 H. McCoubrey and N. D. White Textbook on Jurisprudence (Oxford: University Press 1999) 18.

30 Ibid. P. 18.

31 H. Kelsen Pure Theory of Law (Vilnius: Eugrimas 2002) 95.

32 Ibid. P. 49, 173.

33 H. L. A. The Concept of Law (Vilnius: Pradai 1997) 163

34 J. Habermas Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Cambridge: Polity Press 2007) 3.

forms an ensemble of conditions that both enable and limit.<sup>35</sup> – J. Habermas states. According to J. Habermas by the linguistic communication on the ground of common consensus a correct and valid statements are formulated. In his view „truth is an [implicit] claim to validity“ and a statement „is true when the claim to validity implicated in the speech act whereby we assert the statement by means of sentences is justified“.<sup>36</sup>

The further theoretical step, made by J. Habermas, is to identify the principles framing the discourse and containing the ontological significance. It is possible establish these principles by the delineating of the features of the ideal speech situation. One of the principles which in the ideal speech situation describes the origin of normative statements power is a discourse principle. This principle states: „Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse“.<sup>37</sup> The discourse principle essentially is a precondition to another ontological idea – principle of *democracy*. J. Habermas states: „The principle of democracy results from a corresponding specification for those action norms that appear in legal form“.<sup>38</sup>

Discourse and democracy principles shape the other features of ideal speech situation, which concretize the procedural conditions of adapting correct and valid statements. R. Alexy calls these conditions the rules of rationality and justification.<sup>39</sup> The rules of rationality suppose the requirements for equal rights, universality, and lack of coercion:

1. Everyone who is able to speak can take part in discourse. (“concerns entry into discourse”)
2. (a) Everyone can problematize an assertion.-  
(b) Everyone can introduce the assertion into the discourse.  
(c) Everyone can express his or her attitude, wishes and needs. (“These rules govern freedom of discussion”)
3. Nobody can be prevented from exercising the rights laid down in (1) and (2) by any kind of coercion internal or external to the discourse. (this rule “has the task of shielding of discourses from every kind of coercion”).<sup>40</sup>

J. Habermas calls the first rule of justification as the principle of *generalizability*. According to this principle “norm is capable of being generalized if its direct and indirect consequences for the satisfaction of *everyone’s* needs are acceptable to *everyone*“.<sup>41</sup>

- 2.1. The consequences of norms application must be acceptable to everyone.<sup>42</sup>

The next rule of justification provides the possibility of „criticism of moral rules generated by this development process and exerting influence on our thinking and reasoning“.<sup>43</sup>

2.2. The interpretation of needs which have to be generally accepted must be able to stand up to examination in terms of „critical genesis“.

35 Ibid. P. 3-4.

36 R. Alexy A Theory of Legal Argumentation A theory of Rational Discourse as Theory of Legal Justification (Vilnius: Teisinės Informacijos Centras 2005) 123

37 J. Habermas Op cit. 107.

38 Ibid. P. 108.

39 Ibid. P. 149, 154.

40 Ibid. P. 149-150.

41 Ibid. P. 152.

42 Ibid. P. 152.

43 Ibid. P. 153.

#### 4. EXERCISING OF ONTOLOGICAL PROVISIONS IN PRACTICAL LEGAL DISCOURSE

It is possible to notice the exercising ontological principles in the cases of human rights. ECHR and parties in the case *PRETTY v. THE UNITED KINGDOM* (Application No: 2346/02)<sup>44</sup> substantiated their positions the ontological statements.

The litigation process depends upon the ontological procedural principles. The latter suppose equal status to the parties in the court as well as the obligation to the parties to protect their positions in accordance with legitimate aims. These principles also suppose the last decision must be based on the best argumentation.

„The applicant complains, under Article 2 of the Convention, that **it is for the individual to choose whether to live** and that the right to die is the corollary of the right to live and also protected. Accordingly there is a positive obligation on the State to provide a scheme in domestic law to enable it in order to exercise the right“.

The applicant also complains „under Article 3 that the United Kingdom **Government is obliged not only to refrain from inflicting inhuman and degrading treatment** itself, but also to take positive steps to protect persons within its jurisdiction from being subjected to such treatment. The only effective step available to protect the applicant in this way would be an undertaking not to prosecute her husband if he assisted her to commit suicide.“

Both arguments of the applicant „it is for the individual to choose whether to live“ and „government is obliged not only to refrain from inflicting inhuman and degrading treatment“ are based on the natural law ontology. The claimant appeals to her **privacy** of existential aims and **dignity** as the immunity of natural laws.

„The Court recalled that Article 2 **safeguarded the right to life, without enjoyment of any of the other rights and freedoms in the Convention was rendered nugatory.**“

Courts position in this point is also based the on natural law ontology. The court protects the existential aim (natural law) – human life (physical and psychological integrity).

In the case the collision of existential goals is emphasized - what is more valid – The human right to choose dignified death or community’s responsibility to protect the life of human.

The court having difficulties reasoning which existential goal is more important uses the argument of conventional morality (ethical - hermaneutral) ontology of law: „The applicant had claimed rather that the refusal of the DPP to give an undertaking not to prosecute her husband if he assisted her to commit suicide and the criminal law prohibition on assisted suicide disclosed inhuman and degrading treatment for which the State was responsible. This claim however placed a new and extended construction on the concept of treatment. While the Court had to take a dynamic and flexible approach to the interpretation of the Convention, **any interpretation had also to accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection.**“<sup>45</sup>

These court’s arguments: „**any interpretation had also to accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection**“ are based

<sup>44</sup> *Pretty v. United Kingdom*, Application no. 2346/02 [2002] 35 Eur. H.R. Rep. 1 [sim.law.uu.nl/.../bcf7f36eb7c9970141256baa0035f55b]

<sup>45</sup> Ibid.

on the ontology of christian conventional morality (ethical-hermeneutical law approach) that is well-founded by the humanistic tradition where the life of human is considered as the highest value.

The last decision of the court is regard as the most suitable and fair because in the system of Christian conventional morality values the protection of human life is more important value than the right to privacy and the right to choose.

## CONCLUSIONS

1. Legal systems of countries protecting human rights and legal interests exercise the provisions of ontology. The philosophical reflection of law reveal the content of these provisions.
2. The philosophical reflection looking into natural provisions in law shows that law ensures the protection of human existential goals. The existential goals express the forms of authentic human being (the identity). These forms represent fundamental human rights such as the human right to physical and psychical integrity (the right to life and health protection), the right to privacy ( a man's identity in his or her possession field), the right to dignity (individual's moral autonomy (identity)), the right to public autonomy (the human identity in a family, community or history).
3. The philosophical reflection analyzing the ontological provisions' influence of conventional morality to legal regulation reveals the legal system are based on the moral values' hierarchy accepted by the majority of a community. This hierarchy comes through the morality of society's members and respect to the forms of traditional life. In the majority of legal cases the conventional morality do not beg questions and consequently a legal decision is made without problems. In the hard cases the collision of existential cases is emphasized (for instance, in the case *Pretty v. United Kingdom* the collision between the protection of life and the privacy). In such cases a decision is made preferring some form of conventional morality.
4. The philosophical reflection exploring ontological fundamentals of human communication reveals the link between law and democracy as well as identifies procedural principles that ensure legitimate decisions. In democratic lawmaking and well founded procedural institutes their participants (parties) have equal political (procedural) status, are protected from physical and psychical coercion, have procedural possibilities to dispute by reasonable arguments the decision which is unfair in their opinion.

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## THE IMPORTANCE OF ECONOMIC ANALYSIS OF LAW TO LEGISLATION: AN EXAMPLE OF THE LEGAL REGULATION REFORM IN LITHUANIA CONCERNING COMPANY RESCUE

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**Abstract.** By means of the recent legal regulation reform in Lithuania concerning company rescue, the paper tries to reveal a close connection between the law and economics, especially the importance of economic analysis of law to legislation. This paper argues that an economic influence to law should be significant as the legal regulation concerning relations of economic substance is being created. Therefore, the legislature should also consider economic arguments while creating or changing the content of such regulation. This paper aims not only to reveal the close relation between the law and economics but also to encourage further discussions on this issue.

**Keywords:** company rescue, insolvency, economic analysis

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### INTRODUCTION

Regulating various social relations and seeking to ensure the proper balance of the interests of members of society, which are often different, the state certainly takes part in the regulation of economic processes. The legal regulation of company rescue is one clear example. The main purpose of company rescue procedure, in a broad sense, is to ensure the wealth maximisation to all the subjects that are influenced by the procedure. Such purpose of company rescue procedure virtually corresponds to one of the main postulates of economic analysis of law that law must be effective in economic terms. Hence, the conclusion may be drawn that the purpose of legal regulation of company rescue procedures is to promote subjects' behaviour that is acceptable in economic terms by means of legal rules regulating company rescue procedures.

It should be noted that legal reasoning and economic reasoning try to solve the same problem and achieve similar goals. Both of them try to find the answer to the same question – how to allocate resources and responsibilities in the society, but by using different methodologies<sup>1</sup>. The economic analysis of law, meanwhile, is the interface between the law and economics; the essence of economic analysis is the use of economic thinking (methods, models, etc.) in the research and evaluation of the law and its functionality<sup>2</sup>. The economic analysis of law provides the possibility to look at the same phenomena from a different perspective<sup>3</sup>. This paper intends to look at the legal

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1 J. R. Macey, 'Pervasive Influence of Economic Analysis on Legal Decision Making' [1994] 17 Harv. J. L. & Pub. Pol'y 108

2 D. Murauskas, 'Ekonominė teisės analizė (susiformavimas)' [2012] 83 Teisė 221

3 D. Murauskas, 'Ekonominė teisės analizė: metodologinės prielaidos ir tyrimų kryptys' [2012] 84 Teisė 153

regulation reform in Lithuania concerning company rescue from a different perspective than usual. By using economic thinking this paper tries to reveal the shortcomings of the legal regulation that has come into force after the reform. It should be noted that this paper does not make any proposals concerning the improvement of valid legal regulation but makes an attempt to reveal the importance of economic analysis of law to legislation.

#### AN ECONOMIC APPROACH TO COMPANY RESCUE PROCEDURES

The purpose of legal regulation of company rescue procedures should be to promote subjects' behaviour that is acceptable in economic terms. Legal regulation of company rescue is efficient if it ensures the continuance of companies that are economically efficient but financially distressed. The regulation enabling viable companies to survive promotes wealth maximisation. Naturally, business always involves taking risks and dealing with crises, and the price of progress is that only those able to compete successfully will survive<sup>4</sup>. Companies that are economically inefficient and whose resources could be better used in some other activity should be liquidated<sup>5</sup>. Where a company is not viable, the main thrust of the law instead of company rescue should be swift and efficient liquidation to maximise recoveries for the benefit of creditors<sup>6</sup>. Therefore, the proper distinction between viable and nonviable companies is of great importance (i.e. separation of financial and economic distress) and it may be made by using certain economic models (methods)<sup>7</sup>.

The opportunity for viable companies in temporal financial distress to survive and to avoid involuntary liquidation ensures the maximisation of assets value, better recovery rates for creditors and saving jobs as well as encourages entrepreneurship, etc<sup>8</sup>. As a result of these reasons the rescue culture has been attracting more and more attention globally over the last years. Having recognised the economic importance of company rescue procedures, a number of countries initiated reforms of valid legal regulation concerning company rescue in order to encourage rescue of companies and to create friendly environment for companies to overcome temporary financial difficulties<sup>9</sup>. Gradually, company rescue even became one of the main purposes of insolvency procedures<sup>10</sup>, many jurisdictions started to use insolvency procedures as a means of company rescue<sup>11</sup>. It should be noted that Lithuania has also adopted a new law on company rescue with

- 4 V. Finch, 'Corporate insolvency law: Perspectives and Principles' (Cambridge: Cambridge University Press 2009) 144
- 5 M. J. White, 'The corporate bankruptcy decision' In 'Corporate bankruptcy: Economic and legal perspectives', J. S. Bhandari & L. A. Weiss, eds. (Cambridge: Cambridge University Press 1996) 207
- 6 World Bank, 'Principles for Effective Insolvency and Creditor Rights Systems' [2011] 6 at <http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/ICRPrinciples-Jan2011%5BFINAL%5D.pdf>
- 7 E. I. Altman, T. Kant, T. Rattanaruengyot, 'Post-Chapter 11 Bankruptcy Performance: Avoiding Chapter 22' [2009] 21(3) *JACF* 53-63
- 8 European Commission, 'Commission staff working document impact assessment accompanying the document Revision of Regulation (EC) No. 1346/2000 on insolvency proceedings' (Strasbourg 2012) 11-12 at [http://ec.europa.eu/justice/civil/files/insolvency-ia\\_en.pdf](http://ec.europa.eu/justice/civil/files/insolvency-ia_en.pdf)
- 9 P. J. Omar, 'Four models for rescue: convergence or divergence in European insolvency laws? Part 1' [2007] 18(4) *I.C.C.L.R.* 127-128
- 10 *Ibid.* 135
- 11 D. Soden & P. Bowers, 'Review of the European Insolvency and Restructuring Regime' [2013] 10(2) *Int'l Corporate Rescue* 72

a view to creating better conditions for financially distressed companies to use the possibilities provided by the rescue procedure<sup>12</sup>. However, the question whether the above-mentioned goal that the Lithuanian legislature pursued has been achieved will be addressed by evaluating newly established essential conditions for company rescue after the legal regulation reform in Lithuania from economic perspective.

#### NEWLY ESTABLISHED ESSENTIAL CONDITIONS FOR COMPANY RESCUE AFTER LEGAL REGULATION REFORM IN LITHUANIA

Proper drafting of essential conditions for company rescue is of great importance in order to create economically efficient legal regulation concerning company rescue. Only such regulation that presents the real opportunity for viable financially distressed companies to take advantage of rescue procedures and survive while saving jobs, maximising recoveries for creditors, etc., may be considered to be economically efficient. Doctrine also recognises that essential conditions for company rescue should be drafted in such a way as to ensure the timely initiation of company rescue<sup>13</sup>. The later response and appropriate measures to overcome financial problems, the more radical these measures should be, the longer and more complicated rescue procedure would be and the prospects of successful company rescue would be limited<sup>14</sup>. Due to improper legal regulation viable companies may be forced to withdraw from the market simply because necessary support was not timely provided although the rescue would be economically and socially beneficial. Hence, proper conditions should be ensured for companies to take immediate actions to prevent a further deepening of the crisis and to make the successful company rescue possible. Further the newly established essential conditions for company rescue after the legal regulation reform in Lithuania would be evaluated whether they comply with the above-mentioned requirements for economically effective regulation.

One of the newly established negative essential conditions (i.e. that should not occur) for company rescue is company insolvency. Where the court in the course of examination of the petition for company rescue makes a reasoned conclusion that a company is insolvent, the court should refuse to initiate the rescue procedure<sup>15</sup>. The law does not provide for any exceptions to this rule and the court does not even have the competence to decide whether the rescue of an insolvent company would not be justified and would not ensure wealth maximisation in a specific case. The concept of insolvency differs in various countries<sup>16</sup>. In Lithuania insolvency is understood as the state of a company when it fails to discharge its obligations and the overdue liabilities are in

12 Lietuvos Respublikos įmonių restruktūrizavimo įstatymo pakeitimo įstatymo projekto aiškinamasis raštas [2009] at [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=359926](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=359926)

13 C. Anderson & D. Morrison, 'The Commencement of the Company Rescue: How and When Does it Start?' In 'International Insolvency Law: Themes and Perspectives', P. J. Omar, ed. (Aldershot 2008) 84

14 Nacionalinė verslo administratorių asociacija, 'Įmonių restruktūrizavimo procesų studija – Veiksniai trukdantys vykdyti įmonių restruktūrizavimą' [2004] 5 at <http://www.bankrotodep.lt/Doc/nvas.doc>

15 Lietuvos Respublikos įmonių restruktūrizavimo įstatymas [2010] 7 str. 5 d. 3 p. Žin. 86-4529

16 S. Barakauskas, 'Nemokių įmonių gaivinimo formalios procedūros: Lietuvos ir užsienio valstybių patirtis' [2013] 89 Teisė 121-122

excess of half of the value of the assets entered in the balance<sup>17</sup>. It is obvious that according to this definition even a company whose assets significantly exceed all liabilities (when all liabilities are overdue and they insignificantly exceed the value of the assets) may not be rescued in Lithuania despite the fact that the creditors do not face the real risk that obligations would not be fulfilled in case of involuntary liquidation of a company. Conventional economic reasoning also suggests that a company should be kept alive as a going concern as long as its going concern value is higher than its liquidation value<sup>18</sup>. Whereas in Lithuania a company may not be rescued merely because of its insolvency in spite of the fact that the rescue of such a company would be acceptable in economic terms. It needs to be noted that even giving the second chance to an insolvent viable company increases the welfare of the company itself, its employees, creditors and society as a whole, etc., and the welfare diminish in such cases is the same as in any other company rescue procedure (company insolvency does not influence, per se, welfare diminish as regards the rescue of viable companies). Economic benefit of company rescue procedures is globally recognised<sup>19</sup>; thus, it may be stated that the benefit produced by the rescue procedures of viable insolvent companies fully compensates those whose welfare diminishes because of these procedures with a net gain in welfare and therefore efficiency would be ensured (i.e. rescue of such companies would be effective according to Kaldor-Hicks criteria<sup>20</sup>). Hence, unconditional prohibition to rescue insolvent companies (in the absence of any efficient rescue procedure of such companies at all<sup>21</sup>) is not well-thought-out from economic perspective. It is not surprising, therefore, that insolvency is not an obstacle for company rescue in developed countries<sup>22</sup> and the Lithuanian courts have also start to interpret certain provisions of law on company rescue not from linguistic but from economic perspective<sup>23</sup>.

Another newly established positive essential condition (i.e. that should occur) for company rescue is financial difficulties or real possibility that financial difficulties will arise within the next three months<sup>24</sup>. Timely initiation of company rescue procedures is the key to the rescue of viable companies. In order to create economically efficient legal regulation excessive delay should be

17 Lietuvos Respublikos įmonių bankroto įstatymas [2001] 2 str. 8 d. Žin. 31-1010

18 H. Eidenmuller, 'Trading in times of crisis: formal insolvency proceedings, workouts and the incentives for shareholders/managers' [2006] 7(1) E.B.O.R 241

19 M. Succurro, 'Bankruptcy systems and economic performance across countries: some empirical evidence' [2012] 33(1) E.J.L.&E. 108; S. Sundgren 'Does a Reorganization Law Improve the Efficiency of the Insolvency Law? The Finnish Experience' [1998] 6(2) E.J.L.&E. 194

20 M. Klaus, 'Efficiency Instead of Justice?: Searching for the Philosophical Foundations of the Economic Analysis of Law' (Springer 2009) 38-39, 152-153

21 S. Barakauskas, op. cit., 132

22 S. Barakauskas, op. cit., 125-129

23 The Court of appeal of Lithuania in one of its recently adopted decisions concluded that determination of insolvency does not provide the basis to refuse to initiate the company rescue procedure because other significant circumstances should be also evaluated and determined whether financial problems of a company may not be eliminated in rescue procedure (Court of appeal of Lithuania decision adopted on 26 April 2013 in civil case UAB „Sporto komunikacijos“, No. 2-1130/2013); although for a long time before that insolvency was considered to be a separate ground to refuse to initiate the company rescue procedure (Court of appeal of Lithuania decision adopted on 11 April 2011 in civil case UAB „BM būstas“, No. 2-970/2011, and Court of appeal of Lithuania decision adopted on 21 April 2011 in civil case C. G. v. UAB „Fureksa“, No. 2-1170/2011)

24 Lietuvos Respublikos įmonių restruktūrizavimo įstatymas, op. cit., 4 str. 1 d. 1 p.

avoided while providing support for financially distressed companies. Excessive delay may result in additional costs that may be avoided in case of timely rescue and even may prevent a company from being rescued (i.e. excessive delay may cause economic inefficiency). The condition of imminent insolvency allows initiating rescue procedure while a company is still properly fulfilling its obligations, which enhances the possibilities of successful rescue. The Lithuanian legislature also asserted that the success of company rescue largely depends on timely start of the process<sup>25</sup>. Even though the legislature has recognised the importance of timely start of the process, the condition being analysed is drafted improperly. A company may be aware that certain financial difficulties will arise within the longer period than the next three months and she will not be able to overcome them without external support. Thus, the constraint to initiate company rescue procedures as soon as the first signs of imminent insolvency are noted is also not well-thought-out from economic perspective (company failure may be predicted in advance by using logit regression, multiple discriminant analysis, etc.<sup>26</sup>). Due to excessive delay to take necessary measures there will be no other option than to liquidate a company<sup>27</sup>. Being faced with imminent insolvency a company should not be forced to wait but rather should be motivated to initiate rescue procedure as soon as there are signs of financial distress that she is not likely to overcome in the future<sup>28</sup>. The more rapid response, the more likely the economically efficient result will be achieved. As a result in many countries it is possible to initiate company rescue procedures at the earliest possible moment thereby protecting the interests of all parties as much as possible. Only Lithuania has established a period of the absolute nature (i.e. there are no exceptions to this period and the court does not have the competence to decide whether this term should be applied or not) during which financial difficulties should arise<sup>29</sup>. The existing legal regulation obviously does not encourage subjects' behaviour that is acceptable in economic terms but on the contrary establishes groundless restrictions to such behaviour and because of this concerned parties incur unjustified losses.

Another two newly established positive essential conditions for company rescue are: (1) a company should be established at least three years before the date of filing of a petition to initiate company rescue procedure; (2) if a company was rescued before, at least five years should be passed from the coming into effect of the court decision to close the procedure or to terminate the procedure on the grounds specified by the law<sup>30</sup>. These conditions as previously analysed are of the absolute nature (i.e. there are no exceptions to these established periods and the court does not have the competence to decide whether in specific case a company should be allowed to benefit from the protection provided by rescue procedures even when a certain period established by law has not lapsed). Consequently, companies that were established less than three years ago or

25 Lietuvos Respublikos įmonių restruktūrizavimo įstatymo pakeitimo įstatymo projekto aiškinamasis raštas, op. cit.

26 A. Belcher, 'Corporate Rescue' (London: Sweet & Maxwell 1997) 57-69

27 J. Ventura, 'The Business Turnaround & Bankruptcy kit' (United States of America: Dearborn Trade Publishing 2003) 1

28 International Bank for Reconstruction and Development, 'Doing Business 2010: Reforming through Difficult Times' [2010] 62-63 at <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB10-FullReport.pdf>

29 S. Barakauskas, 'Nauja Lietuvos Respublikos įmonių restruktūrizavimo įstatymo redakcija: pasikeitusio teisinio reguliavimo pranašumai ir trūkumai' [2011] 75 Justitia 40

30 Lietuvos Respublikos įmonių restruktūrizavimo įstatymas, op. cit., 4 str. 1 d. 4 p. ir 5 p.

that were rescued previously and periods established by the law have not yet elapsed may not be rescued without any regard to the circumstances that, in a specific case, caused financial distress of a company. This restriction has been probably imposed to avoid rescue of nonviable companies and abuse of this procedure. However, despite the fact that pursued objectives are appropriate, the legal regulation is defective because it puts constraints that, in some cases, are not reasonable (i.e. are not proportional to the objective sought) and thereby hindering subjects' behaviour that is acceptable in economic terms. Merely the facts that a company suffers financial distress that she is not able to overcome without external support and this financial distress occurred before a certain period established by law has lapsed does not mean, per se, that rescue of this company is not justifiable. Financial problems of a company may arise from a global economic crisis, a single accidental tort, contrahents insolvency, or other reasons that may be unrelated to a company's business and company's viability at all. So far as analysed conditions are concerned, it should be noted that the same outcomes may be achieved (i.e. avoidance of nonviable companies rescue and rescue procedures abuse, etc.) at lower cost (i.e. by reducing the number of involuntary liquidation of viable companies). For instance, this may be achieved by giving more discretion to the court that examines a petition for company rescue<sup>31</sup>. Absolute prohibition concerning company rescue based essentially on formal grounds without evaluation of the reasons that led a company to financial distress is inappropriate and does not ensure proper conditions for economic efficiency and wealth maximisation.

## CONCLUSIONS

The brief assessment of the present legal regulation reform in Lithuania concerning company rescue (i.e. brief analyse of newly established essential conditions for company rescue) allows asserting that the legal regulation of company rescue procedures in Lithuania is not effective in economic terms and does not always promote behaviour that is acceptable in economic terms and what is more, sometimes even creates legal barriers to such behaviour. Due to analysed shortcomings of the legal regulation concerning company rescue some viable companies that may be rescued are forced to withdraw from the market and some rescue procedures result in additional costs that may be avoided if necessary support for financially distressed companies would be provided on time. It must be considered that the main reason for the defects of herein analysed legal regulation is that economic arguments do not always receive appropriate attention at legislative

31 In order to avoid abuse and to ensure proper balance between the interests of a company and its creditors the courts of the United States of America defined and developed the Good faith standard that is applicable to a petitioner. According to this standard, if a petitioner wants to initiate company rescue procedure (i.e. 11 chapter procedure), he must prove that he acts in good faith, has no immoral intentions and his intentions comply with reorganisational purposes and the main purpose of the petition is valid reorganisation of a company (United States Court of Appeals, Third Circuit, decision adopted on 29 December 1999 in civil case SGL Carbon Corporation, Official Committee of Unsecured Creditors, No. 99-5319, v. Nucor Corporation, Nucor-Yamato Steel Company, No. 99-5382. No. 200 F.3d 154; United States Court of Appeals, Third Circuit, decision adopted on 20 September 2004 in civil case Integrated Telecom Express, INC. a/k/a Integrated Technology Express, Inc. a/k/a Delaware Integrated telecom express, Inc., NMSBPCSLDHB, L.P., v. Integrated Telecom Express, Inc., and The Official Committee of Equity Holders, et al. No. 384 F.3d 108).

level during legal discussions and maybe sometimes these arguments are not even considered at all. The legal regulation reform in Lithuania concerning company rescue is one of the examples when some important legislature's decisions were made without proper consideration of economic efficiency of law. Therefore, due to the lack of economic influence to law as the legal regulation concerning relations of economic substance is being created, the legal regulation that is not economically efficient and does not ensure wealth maximisation has been created. Certainly, economic efficiency of law should not be understood as a goal in itself, but as a means for creation a better regulation. With more resources, of course more goals can be achieved. But there is still a need to find the proper balance (trade-off or cooperation) between economic efficiency and other factors that influence legislation, for instance, justice, legal certainty, etc.

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## LAW AND SCIENCE – RELATIVES OR STRANGERS? THE LEGAL RESEARCH OF SCIENTIFIC FIELD

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**Abstract.** The main aim of this article is to discuss the interaction between science and law. Three fields of such interaction are discussed – legal practice, legislation and the correlation with human rights protection.

It is argued, that the interdisciplinary legal studies allow the researchers to be the first to explore previously unknown grounds. Secondly, study of other sciences can be a big help when considering relevant provisions of traditional branches of law. It can shed some light on the provisions which seem odd or unclear, or otherwise, to reach a conclusion, that some seemingly reasonable norms do not match today's reality. It is not enough for the lawyer just to call an expert and make him answer arising questions. And in the case of judge – blindly relying on the experts' opinion means passing to others capability to decide justice, which should belong only to judges.

**Keywords:** law, human rights, biotechnologies, bioethics.

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### INTRODUCTION

Law and the science – how do they relate? From the first glance it might be difficult to tell, that there exists a relation at all. Especially it is hard to imagine, that law can have something in common with the technologies science. Of course, we use technological solutions in our daily routine, but do not seem to consider them as objects of legal study. Many areas of the science, such as biotechnology still remain terra incognita for the legal researchers. There can be found only a few books uniting law and other scientific topics. However, fast development has caused a high demand for lawyers with scientific/ technology backgrounds.

This paper tries at least partially covering the gap in the legal doctrine. Due to the complexity of the topic and the scope of the article, more questions and answers can be found in here. One could also wonder why there are not discussed the Lithuanian legal practice questions. In order to maintain the integrity of the topic of the article, author narrowed the research only to biomedicine/bioethical issues, which maybe are not in stake in Lithuania but cause important problems globally.

Why do we need knowledge of other sciences? A practical approach.

The article 31 of Lithuanian Constitution grants the accused the right to be tried by impartial and just court.<sup>1</sup> In order to provide the just decision the judges must be “acting in accordance with

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1 Lietuvos Respublikos Konstitucija (Lietuvos Respublikos piliečių priimta 1992 m. spalio 25 d. referendumu)// Valstybės Žinios, 1992 m. Nr. 31-953

their own knowledge of the facts, without which it is impossible to ensure full justice while blaming other people for criminal acts”.<sup>2</sup>

This statement becomes the most important, when talking about the evaluation of the expert’s report during the trial. The purpose of calling the expert is the judge’s need for the opinion which emanates from a field of specialized knowledge. It is worth recalling, that the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of a witness possessing special knowledge or experience in the area.<sup>3</sup> The word “assistance” indicates that the final decision in the case still belongs to judge. The given opinion has to be evaluated in the light of evidence of the case; also its reliability should be checked. There exists a possibility of summoning expert to the trial, in order to question him additionally. However, it should be pointed out, that only the person, who knows, what exactly he does not know, could ask appropriate questions.<sup>4</sup>

Therefore, in order to pass a just decision, the judge should receive at least a bit of knowledge of other sciences. The law only is not enough.

One might say that there is a possibility to request additional expert opinion and therefore no need to study other sciences from the side of the judge. This opinion should not be followed, as it deprives judge of the means to verify the opinion, and places the expert into the place of Justice. Sometimes, even the numerous experts can adopt wrong views, besides that possibility of error can not be excluded.

In the 2007, the Australian Supreme Court had to make a decision in the complicated criminal case. The basis for the prosecution was the expert evidence, which concluded, that numerous unexplained children deaths in the same family amount to the homicide. The court examined various experts’ opinions and reports, and made conclusions, that were based by the knowledge on the topic. “... it is wrong on the forensic pathology evidence available in this case to conclude that one or more of the Matthey children are the victims of a homicide. There is no merit in forcing certainty where uncertainty exists. The very existence of the enigma of SIDS demonstrates how little we know about why some babies die. It is not for a pathologist to conclude that a number of infant or childhood deaths, with no significant pathological findings at all, are homicides on the basis of controversial circumstantial grounds”.<sup>5</sup>

The question can be raised how it is possible, that the single judge will be aware of all the scientific developments. Some authors propose the specialization in this field, as to say the creation of “bioethical” courts. This would ensure that only the judges who are experts in the concrete field will decide the bioethical cases.

Another problem, which is raised in legal doctrine is that “ ... in the most cases, the courts of general jurisdiction, which examine “bioethical” case, do it very superficially, as they have no

2 B. Skarga. „O odpowiedzialności.” Gazeta Wyborcza z dnia 17/18 stycznia 2009 r.

3 The Law Commission. “Consultation Paper no. 190 “The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales. A New Approach to the Determination of Evidentiary Reliability. A Consultation Paper [2009] [http://lawcommission.justice.gov.uk/docs/cp190\\_Expert\\_Evidence\\_Consultation.pdf](http://lawcommission.justice.gov.uk/docs/cp190_Expert_Evidence_Consultation.pdf)

4 J. Gurgul. „O swobodnej ocenie opinii biegłego.” [2013] 10 Prokuratura i prawo, p. 34 - 56

5 E. Cunliffe. “Murder, Medicine and motherhood” (Oxford and Portland, Oregon: Hart Publishing 2011) p. 7

proper legal standards and appropriate legal mechanisms to deal with bioethical disputes and resolving bioethical problems.”<sup>6</sup> And this takes us to another field of interaction of science and law – the regulation of scientific processes and discoveries.

## TWO SIDES OF THE SAME MEDAL: HOW TO REGULATE AND HOW TO DEVELOP

Not all the scientific discoveries can be accepted by the individuals. While reading these words, one might say that the progress must be achieved and the ones, who disagree, should go back to Stone Age. The problem is that beyond the word “progress in science, medicine and so on” there is hiding something more than only the benefit for the society.

Let us examine an example from prenatal development of human being. Biotechnologies specialists search for the methods which would increase the survival of the embryos and also would solve the problem of infertility. One of ways this process could be developed is the transfer of pregnancy from woman’s organism to other environment. This could be so called male pregnancy, when the fetuses are implemented to the man’s organism. This also could be fetal development in totally artificial environment, when all the process from the fertilization to the full growth would be executed outside any live organism. Above-mentioned options seem to be more or less acceptable to our mind. The idea about men’s pregnancy was raised long ago, and even is realized nowadays. There are also examples of transferring of many stages of the prenatal development to the tube.

In the 1996 all the world was speaking about the sheep Dolly. Why was it so famous? Dolly was a female domestic sheep, and the first mammal to be cloned from an adult somatic cell, using the process of nuclear transfer.<sup>7</sup> The production of a healthy clone therefore proved that a cell taken from a specific part of the body could recreate a whole individual. i.e if both people in a couple were infertile, they could clone a child from one of them. If both partners were carriers of the gene for a serious recessive disorder, and did not want to risk having child with that disorder, they could clone one of them. Cloning could also be used to clone a child who died, or an admired relative, or a public figure. It has also been suggested, that a person could create a clone to serve as organ donor.

As one can see, the progress can choose different ways. But all these achievements have a very important test to undergo. The measure for acceptance is the compliance with bioethics. Bioethics, as defined in article 1 of the Universal Declaration on Bioethics and Human Rights, concerns “ethical issues related to medicine, life sciences and associated technologies as applied to human beings, taking into account their social legal and environmental dimensions.”<sup>8</sup>

On the other hand, expanding commercialism and the need to recover biotechnology investments and research funding through profits, has lead to the invasion of the scientific domain by

6 V. Grygoryevna Tretiakova. “The international Community must take care of bioethical protection of every person – to form unified system of international and national bioethical courts”. [2013] 87 Teisé p. 231-236.

7 R. G. McKinnell, M. A. Di Berardino “The Biology of Cloning: History and Rationale”. [1999] 49(11) Bioscience: 875–885.

8 UNESCO. The Universal Declaration on Bioethics and Human Rights. [2005] [http://portal.unesco.org/en/ev.php-URL\\_ID=31058&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html)

legal issues surrounding IP, access to research data and conflicts of interest.<sup>9</sup> The expansion of biotechnologies raises concerns with regard to possible commercialization of its results. Modern developments of science offer the wide opportunities for those who want to make business out of parts human body or even of human itself. Surrogacy, donation of organs and tissues can amount to a highly profitable business.

Various international legal documents were adopted in order to deal with the arising issues. The Universal Declaration on Bioethics and Human Rights from 2005<sup>10</sup> provided a list of principles that should guide States while dealing with bioethical sensitive issues. The principles include the respect for human dignity and human rights, maximization of benefit and minimization of harm, the necessity of carrying out medical intervention and scientific research only with the prior, free and informed consent of the persons concerned. Convention on Human Rights and Biomedicine<sup>11</sup> from 1997 declared as its purpose “to protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to application of biology and medicine”. It also declared primacy of human being over the sole interest of society or science and upheld the rule, that organs and tissues cannot constitute a product for trade.

There are also legal documents, which cover specific aspects of bioethics. It is worth mentioning UN Declaration on human cloning, which enacted the rule, that cloning of human beings is prohibited, UN convention on biodiversity, universal declaration of human genome and human rights and the international declaration on human genetic data<sup>12</sup>. All these legal instruments have in common the emphasis on human being and its primacy.

The laws enacted with regard to biotechnologies are not only those which adopt the guidelines for the progress. In fact, there are two groups of them. The first group is formed by legal instruments that can be considered as roadmap to the science development. But there are also different laws – intended to deal with situations when people are using the results of scientific progress. Existing legal categories need to be revised in order to cover the new social relationships. i.e. US contract law has been adapted to cover the surrogacy issues. An attorney needs to be retained to create a contract between the intended parents and the surrogate, often referred to as the surrogacy agreement. IVF (in vitro fertilization) clinics require a surrogacy agreement to be in place prior to beginning any medical procedures. The purpose of the contract is to answer many of the questions that may arise during pregnancy such as who will have custody of the child if something were to happen to the intended parents prior to the birth. The contract is not only in place in the

9 T. Phillips. „Pursuing a career in science and law“ <http://biotech.about.com/od/careers/a/sciencelaw.htm>

10 UNESCO. The Universal Declaration on Bioethics and Human Rights. [2005] [http://portal.unesco.org/en/ev.php-URL\\_ID=31058&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html)

11 Council of Europe. Convention for the Protection of Human Rights and Dignity of Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine [1997]. <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>

12 The UN Declaration on Human Cloning [2005] [http://www.nrlc.org/uploads/international/UN-GAD\\_eclarationHumanCloning.pdf](http://www.nrlc.org/uploads/international/UN-GAD_eclarationHumanCloning.pdf); UN Convention on Biological Diversity [1992] <http://www.cbd.int/convention/text/>; UNESCO Universal Declaration on the Human Genome and Human Rights [1997] <http://www1.umn.edu/humanrts/instree/Udhrhg.htm>; UNESCO International Declaration on Human Genetic Data [2003] [http://portal.unesco.org/en/ev.php-URL\\_ID=17720&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17720&URL_DO=DO_TOPIC&URL_SECTION=201.html);

event of a dispute, but can also prevent disputes from occurring by laying out all of the intricacies of the process beforehand<sup>13</sup>. Many countries define this contract as unenforceable, if the surrogate fails to give the child in question to the intended parents.<sup>14</sup>

Therefore international legal documents can be considered as roadmap of the way the medicine and science has to be developed, or at least, which way of their development is acceptable to the society. On the other hand, medicine and biology provide us with solutions, use of which has to be regulated in order not to cause more harm than benefit.

## HUMAN RIGHTS AND APPLICATION OF LAW

Although science may have done without lawyers in the past, there are now many important bioethics issues that must be dealt within areas of environmental science, biotechnology, genetics and medical research.

At the turn of second millennium the humankind faced itself with global problems that were generated by the rapid development of science and technology, especially in the field of biology and medicine, and which are called "bioethical issues", because they are directly related to the preservation of physical and mental integrity of the person.<sup>15</sup>

Furthermore, in the XXI century, there was a shift from priority of the interests of the state towards the recognition of importance of individual human rights. Life, integrity, health, dignity and freedom of every human being are considered as a core values for modern states.

The international legal instrument of universal importance – Human rights declaration<sup>16</sup> obliged the states to ensure they do not break the rights recognized by the convention. The second most important to Europe document – European Convention of Human Rights and Fundamental Freedoms<sup>17</sup> went further. It, together with the jurisprudence of European Court of Human rights declared that it is not enough just not to violate human rights. The states shall bear the obligation to ensure the protection from the possible violation.

Recent developments in the field of science raise serious concerns as to their compliance with the protection of human rights, especially with human dignity. As stated in legal scholars' works, the principle of human dignity is the base of the emerging branch of biomedical law.<sup>18</sup> Nevertheless, despite occupying this position, the principle of human dignity does not have an exact definition. The legislators and the courts prefer to use negative description, case by case deciding, which behaviors should be considered as being in breach of the above-mentioned principle.<sup>19</sup> After re-

13 D. S. Hinson, L.C.ReVeal. "Surrogacy laws and legal considerations". <http://www.hrc.org/resources/entry/surrogacy-laws-and-legal-considerations>

14 The Law Library of Congress „Bioethics Legislation in Selected Countries“. [2012]. [http://www.loc.gov/law/help/bioethics\\_2012-008118FINAL.pdf](http://www.loc.gov/law/help/bioethics_2012-008118FINAL.pdf)

15 V. Grygoryevna Tretiakova. "The international Community must take care of bioethical protection of every person – to form unified system of international and national bioethical courts." [2013] 87 Teisė p. 231-236.

16 UN Universal Declaration of Human Rights. [1949] <http://www.un.org/en/documents/udhr/>

17 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by protocols No. 11 and No. 14 [1950] <http://conventions.coe.int/treaty/en/treaties/html/005.htm>

18 M. Gałązka. „Prawo karne wobec prokreacji pozaustrojowej.“ (Lublin: Wydawnictwo KUL 2005) p. 68

19 *Id.* p. 67

viewing various definitions, one can decide that all the behaviors that deny the humanity of the person, which put the equality sign between person and the thing, are prohibited. The problem is that depending on various philosophical trends one can create absolutely different definition, of what is compliant with human dignity and what is not.

Similar conclusion can be drawn with regard to right of life. Considered as the fundamental right, which every person possesses, he right to life includes both a positive and a negative obligation of the State: a positive obligation to affirmatively protect the right to life, and a negative obligation that prohibits acts of the State that deprive an individual of life with extremely narrow exceptions.<sup>20</sup>

Article 2 of ECHR imposes a duty to implement certain procedures to ensure the right to life. For example, the State must implement appropriate procedures to remedy errors and shortcomings that jeopardize the right to life, such as legal schemes ensuring that authorities will act upon known threats to life. There is also a positive obligation to establish an independent, unbiased, and effective investigative procedure that penalizes violators of the right to life, and to maintain an unbiased court system that gives careful consideration to interferences with the right to life.<sup>21</sup>

The wording of the Convention seems to cover everything. Still, some important issues are not solved. I.e. from what point of time does the protection of life apply? Convention is silent on that issue. European Court of Human Rights “considered that the issue of when the right to life begins was a question to be decided at national level: firstly, because the issue had not been decided within the majority of the States which had ratified the Convention, in particular in France, where the issue has been the subject of public debate; and, secondly, because there was no European consensus on the scientific and legal definition of the beginning of life.”<sup>22</sup>

Various opinions can be adopted, from the moment of fertilization to the birth of the child. These theories are based upon a fact that can be proven scientifically or seen. In the middle are the theories which build the understanding upon the fact that the fetus developed some organs or is able to survive when separated from his mother’s organism. These also can be proven by scientific evidence. But there are also some views expressed, that “every person is a human being, but not every human being is a person”. The main aim of this theory, when speaking in very general terms, is that for some human beings there never will be any right of life (or another right), because they have not developed a personality. And the only protection for them i.e from killing is that they can fill pain, so it is inhuman to kill them.<sup>23</sup>

20 Douwe Korff, “The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights,” EUROPEAN COUNCIL 7 [2006]. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

21 Human rights and environment. The case law of European Court of Human Rights. Legal analysis, justice and environment. [2011] [http://www.justiceandenvironment.org/\\_files/file/2011%20ECHR.pdf](http://www.justiceandenvironment.org/_files/file/2011%20ECHR.pdf)

22 Vo v France, Application no. 53924/00 [2004] ECHR [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61887#{"itemid":\["001-61887"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61887#{)

23 More on this question please see M. Gałązka „Prawo karne wobec prokreacji pozaustrojowej”. (Lublin: Wydawnictwo KUL 2005) p.33.

There is an example from Lithuanian reality, which illustrates completely different views on bioethical issues with relation with human rights.

In 2013 a group of Parliament members come out with initiative to pass a law which would ensure the protection of prenatal life, so-called law on prohibition of the abortion.<sup>24</sup> From the very beginning this project has caused intense discussions as to its compliance with human rights protection.

The scope of this article does not permit the author to discuss all the human rights-based arguments, given both by the opponents and backers but it should be noted, that there is one conceptual problem in the discussion. Two unequal rights are weighted – right to life and right to respect for private life. As stated by ECHR judge Ress, specific laws on voluntary abortion, as they exist in all the Contracting States, would not have been necessary if the fetus did not have a life to protect.<sup>25</sup> Therefore, important bioethical question about the beginning of life must be answered first, and then private life protection issues should be discussed. What decision will be made depends on the attitudes of the legislators. Whether voluntary abortion will be declared legal, or prohibited, the decision can be well grounded by protection of human rights.

Therefore, human rights may be considered as a roadmap to develop the biomedical law, but still, when it comes to concrete situations, it follows, that both arguments pro and contra given solution can be justified. It is worth to recall the sentence of Richard E. Ashcroft, that „human rights must be understood as messy practices emerging from the interplay of doctrine, intellectual debate, institutional form, political interests and the actions of interested parties.”<sup>26</sup> This sentence discloses in a blunt way the most important side of human rights protection – they are not absolute, they must be balanced between themselves.

## CONCLUSIONS

The interaction between science and the law can be very visible in the courtroom, as the judge, who bears the burden to give the just judgment, must rely not only take for granted the expert opinion, but also to enhance his own knowledge in the sphere of other sciences.

The development of science has a huge impact on the legislation – laws are being enacted in order to cover new emerging situations. But the legislation can also draw a line for the science development, by approving or prohibiting some behaviors.

The protection and primacy of human rights is considered as the roadmap for the development of the biotechnologies. Nevertheless, this roadmap is sometimes so broad that contrary provisions can be accepted.

24 Lietuvos Respublikos Seimo narių grupė. „Gyvybės prenatalinėje fazėje apsaugos įstatymo projektas“ XIIP-337.2013 [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=444122&p\\_tr2=2](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=444122&p_tr2=2)

25 Dissenting opinion of judge Ress. *Vo v France*, Application no. 53924/00 [2004] ECHR [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61887#{„itemid“:\[„001-61887“\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61887#{„itemid“:[„001-61887“])

26 R. E. Ashcroft. “Could human rights supersede bioethics?” [2010] *Human Rights Law Review*; Dec 2010, Vol. 10 Issue 4, p639

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## BEHIND AND BEYOND THE ITALIAN FOREST LEGISLATION OF THE XIX CENTURY

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**Abstract.** The Italian unification ended in 1861, but the very first Forest Act dated back to 1877, more than fifteen years later. The Parliament took the stance of keeping together the main positions on it: on one side the demand for forest conservation, and on the other side the request for the greatest degree of freedom. If the 1877 Act didn't mark a turning point, the 1882 draft law regarding the reforestation question – passed in 1886 – did.

The determinant was a ruinous flood that hit a northern region in 1882, but other elements such as the consideration for old bylaws should be considered equally important; the role of the State; the legitimacy of a forest legislation in itself; the relationship – and the definitions – between public and private interest and between protective restriction and individual liberty; the hydrogeological instability; scientific theories; and the cultural outlook.

Through the analysis of these elements a radical change in the ruling classes's attitude toward forests can be inferred but it was not simply due to the 1882 disaster, some ground-breaking tendencies from the Sixties and Seventies had left their marks.

The Eighties represent both a culmination and a starting point for two different proposals of liberalism. As a matter of fact during this decade Italy experienced a deep cultural rethinking, and one of the consequences was a shift in the way forests were considered. Through the forest issue – especially in a so highly populated and mountainous Country – we can try to look at this general change from a new point of view.

**Keywords:** Environmental History; Forest Acts; Public and Private Interest; Nature, Knowledge, and Culture.

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### INTRODUCTION

The aim of the paper is to show the interconnection between the process of making and passing laws and other elements – both traditional and innovative – involved in the historic research.

The direct correlation between social changes and legislative changes was already known in the XIX century. As a matter of fact, an Italian jurist, Giuseppe Salvioli, clearly claimed in 1890 in his main book that laws are never the result of one or just a few inventive minds, but that laws deal with the social, economic and political issues of a period<sup>1</sup>. New correlations can be suggested by environmental history: from this perspective the physical world and weather phenomena play a role in private and public law of a State.

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<sup>1</sup> G. Salvioli, 'Storia del diritto italiano' (Torino: 1921) 1. First edition 1890.

An analysis of the Italian forest legislation in the second half of XIX century could prove the point. This conference paper tries to combine traditional legal principles with direct – and sometimes scientific – observation of natural phenomena and with a typical historical approach to culture and society.

#### TOWARDS A LAW ON FORESTS: AN OBSTACLE COURSE

The very first Forest Act dated back to 1877, more than fifteen years later. It was the stance adopted by the Parliament to keep together the main positions on it: on one side the demand for forest conservation, and on the other side the request for the greatest degree of freedom.

Until that date the forest management was officially regulated by old by-laws different from area to area but, off the record, it seemed to be not regulated at all: laws existed but nobody, not even the ruling classes, recognised them or paid attention to them. The abolition process of the old regulation system can be interpreted as a first attempt to reduce the State power. This evolution started in 1865 when the ministry of agricultural policy defined the law in force in a central area of the country unclear, incomplete and irrational, in other words «a series of strict bans and excessive penalties»<sup>2</sup>. Many other members of the Parliament shared the opinion that pre-unification rules were the result of «misunderstood public duties»<sup>3</sup> and the «overstatement of government interference», thereby they should have been repealed as soon as possible. Drafting an institutional act could have taken a long time, but meanwhile measures already rejected by public opinion had to be cancelled because they offended against liberal principles, good sense and justice, they are a «relic of oppression»<sup>4</sup>. The forest regime was described as anarchic, ineffective, excessive<sup>5</sup>, not carried out and impossible to execute<sup>6</sup>. In 1877 it was about time to introduce a new legislation and gave up an «unbearable» state of affairs<sup>7</sup>.

By going through the bills proposed until 1877, the reasons why forests should have been protected appear clear to have been slowly eroded by repeated attempts. In 1868 forests were taken into consideration for two main reasons: a physical one – to ensure against landslides, landslips, and too harsh climate conditions – and an economic one – saving private and public money on dealing with hydrogeological instability, making provision for timber<sup>8</sup>. Since 1870 many of the forests functions had been called into question: a law was not allowed any more to meddle with the economic sphere and there was no scientific evidence able to prove the influence of forests

2 Camera dei Deputati, Progetto di legge per la promulgazione nelle provincie di Perugia, Ancona, Macerata, Pesaro ed Urbino della legge forestale 21 agosto in vigore nelle provincie meridionali, 1865, Atti Parlamentari [AP] Leg. VIII Sess. 2, 4099-4100.

3 Camera dei Deputati, Progetto di legge per l'abrogazione di decreti, rescritti e chirografi sovrani contenenti disposizioni in materia forestale negli ex-ducati di Parma e Modena, 1868, AP Leg. X Sess. 1, doc. 171, 2.

4 Camera dei Deputati, Relazione della Commissione sul progetto di legge per l'abrogazione di decreti, rescritti e chirografi sovrani contenenti disposizioni in materia forestale negli ex-ducati di Parma e Modena, 1868, AP Leg. X Sess. 1, doc. 171-A, 1.

5 Camera dei Deputati, Discussioni, 4 marzo 1874, AP Leg. XI Sess. 3, 360.

6 Camera dei Deputati, Relazione della Commissione sul progetto di legge forestale del 1874, 1875, AP Leg. XII Sess. 1, doc. 28-A, 3.

7 Camera dei Deputati, Progetto di legge sull'ordinamento forestale, 1877, AP Leg. XIII Sess. 1, doc. 48, 5.

8 Senato del Regno, Progetto di legge sull'ordinamento forestale, 1868, AP Leg. X Sess. 1, doc. 86, 1.

on climate<sup>9</sup>. A law was expected to limit the damage, to keep soil erosion and water regime under control<sup>10</sup>.

The Italian Reign had not been able to keep and develop the forest law as a proper and autonomous branch of the right standing in total contrast to the private one. This aspect can be analysed considering the relationship between public and private interest. During the Sixties, Governments admitted that any kind of forest regulation would have been incompatible with the free trade theories which inspired the whole administration system, and that sometimes self-interest could have damaged common good<sup>11</sup>. In spite of who went on thinking that forestry was worthy of public control<sup>12</sup>, the opinion of rendering the forests fully available to private owners gathered strength. The 1877 Act reached a compromised agreement based on the highest possible respect towards private property and the minimum possible respect to public interest<sup>13</sup>.

A preliminary step should have been wondering about the intrinsic value of a forest law, about its legitimacy in itself at that time. At first, the objectives that a law should have achieved were the fusion of individual and state guarantees according to an eternal ethical code and social justice<sup>14</sup>. Since a connection between woods and welfare existed, regulation was moreover necessary, because State intervention was the only thing that could preserve forests both for the time being and for the future. Italy was wanted to be at the avant-garde of protection<sup>15</sup>. Over few months, a quick change of opinion occurred: few rules had been in force, but none of them succeeded in safeguarding forests against the individual profit. This empirical fact was used to demonstrate that limiting the private behaviour on private land were theoretically wrong and practically counter-productive<sup>16</sup>.

Another couple of essential elements of a legal debate about forest management was restriction and freedom, the former played a decisive role in whatever forest regulation and the latter was critical to liberal countries. How restriction could be defined? Although it was rumoured to be necessary<sup>17</sup>, members of Parliament fought strenuously to avoid it<sup>18</sup>. In order to introduce the 1877 law, the proposer ministry spelt out that restriction was «reduced to the bare minimum» and was «negative», namely only cuttings and tillages were forbidden. Of course a “not-to-do” restriction did not complete the set of legal obligations of property owners toward wooden areas,

- 9 Camera dei Deputati, Progetto di legge sull'ordinamento forestale, 1870, AP Leg. X Sess. 2, doc. 15, 2-5.
- 10 Camera dei Deputati, Relazione della Commissione sul progetto di legge forestale del 1874, 1874, AP Leg. XI Sess. 3, doc. 5-A, 7-10.
- 11 Senato del Regno, Progetto di legge sull'ordinamento forestale del 1868, 1868, AP Leg. X Sess. 1, doc. 86, 2.
- 12 Camera dei Deputati, Discussioni, 25 gennaio 1872, AP Leg. XI Sess. 2, 610.
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but the idea of reforestation was not even remotely conceived<sup>19</sup>. Even such a moderate constraint collided with the basic concept of a State which was supposed to remain neutral and had been imposed by the Parliament without any de facto positive feedback. Could the generic limit – the maximum altitude where chestnut trees could grow – invalidated the sacred private law? Could that limit impair national and individual wealth<sup>20</sup>?

## 1882: THE TURNING POINT

After 1850 mountains and hills appeared exposed to hydrogeological instability and it made clear the connection between over-exploitation of high-land regions and floodplains. From the North to the South many chapbooks and official documents and speeches publicized the terrible losses caused by floods. A forest inspector resuscitates Cavour – a founding father of the Nation – to warn against the natural state the nation was in<sup>21</sup>; a representative in Parliament from a northern region describes the rural practice of carrying soil from the bottom to the top of the Alps<sup>22</sup>; and another representative, but this time from the South, speaks out against the custom of converting woods into cornfields, whose productivity dropped over few years<sup>23</sup>.

Those examples are the warning signal of a structural improper management of highlands, that became evident to the Country on the occasion of the 1882 flood in Veneto along the river Piave basin – an area in the North-East. More than 280.000 hectares of fields had been submerged by flood-water<sup>24</sup>.

The event of 1882 can be reconstructed using four main sources: a scientific study; a memorandum written one century later; an official report commissioned by the Government; newspapers. In 1937 the local environmental engineer, Luigi Miliani, carried out a survey which revealed that all the past attempts to cope emergencies were doomed to failure, for the reason that they lacked a general vision of the question. Authorities had no option but launching immediately a campaign for reforestation<sup>25</sup>. The governmental enquiry into the causes of the tragedy came to the same conclusions and it was convincingly argued that the places where the heavy rains caused extensive damage were the same place where human intervention had been a strong influence<sup>26</sup>. A more emotionally involved point of view is conveyed by the other two sources: first local and then national newspapers spread dreadful news about the frightful and excruciating scene, the desperate screams of casualties, the food shortage, the complete destruction. The dead toll rose rapidly and there was an urgent need for everything – provenders, clothing, assistance, medicines, refuges, encouragement, comfort – but first of all, it was mandatory to bury corpses in order to

19 Camera dei Deputati, Progetto di legge sull'ordinamento forestale, 1877, AP Leg. XIII Sess. 1, doc. 48, 11-13.

20 Camera dei Deputati, Discussioni, 16 aprile 1877, AP Leg. XIII Sess. 1, 2497-2499.

21 G. Viglietta, 'Sulle inondazioni in Italia e sui modi di evitarle. Sogno di A. Negundo' (Macerata: 1876) 3-8.

22 Camera dei Deputati, Discussioni, 21 aprile 1877, AP Leg. XIII Sess. 1, 2660.

23 Camera dei Deputati, Discussioni, 17 aprile 1877, AP Leg. XIII Sess. 1, 2520.

24 U. Leone, 'Rischio e degrado ambientale in Italia' (Bologna: 1998) 71.

25 L. Miliani, 'Le piene dei fiumi veneti e i provvedimenti di difesa. L'Adige' (Firenze: 1937) 5-6.

26 A. Lazzarini, F. Vendramini, 'La montagna veneta in età contemporanea. Storia e ambiente. Uomini e risorse' (Roma: 1991) 52, 60.

avoid the spread of diseases<sup>27</sup>. Each and every area of the Country donated large sums<sup>28</sup> and the Government allocated special funds to the disaster victims, but damages amounted up to 100 million<sup>29</sup>. On September 1882 the disaster provoked a national outcry: it symbolized «the wreck of a Nation»<sup>30</sup>. A century later all the details were still fresh in the collective memory: 1882 had been called «l'àn de la brentàna» - expression that means the year of the deluge – per excellence and in the first decades of XX century a popular poem thought in primary school put in the children's mind the calamity. Two of the consequences on population were a new emigration wave and an epidemic of smallpox<sup>31</sup>.

The September 1882 devastation in the North-East was relevant to the Country also because at the same time the public opinion had been made aware of nature conservation. From 1878 the State started to play an important role in the economic planning<sup>32</sup>; a Reclamation Law was enacted in the same year<sup>33</sup>; and between 1884 and 1888 a decisive incentive to draft a national topographic map<sup>34</sup>.

#### THE REFORESTATION ACT: A NEW COURSE?

After that date, over few years, a change in the public mind-set can be inferred.

First of all, politicians were fully conscious that the forest question was entering into a new phase: from tree destruction to tree restoration<sup>35</sup>. Soon after the flood, the bill proposed was introduced as «a first step or a sample» of what should have done in the future<sup>36</sup>.

The aim of the draft law was a big news, for the very first time reforestation was the main purpose of a law. The Parliament was unanimous in its condemnation of the past methods and management and recognised as a starting point the inadequacy of the two regulations in force: the 1874 Commons Act aimed mostly to privatize on large scale the collective properties and the 1877 Forest Act aimed to decontrol wooden areas as much as possible<sup>37</sup>. It was high time the Government approved a reforestation law.

The break with the past can be realised through the widespread criticism levelled at the 1877 Forest Act. Data about restricted and unrestricted funds are explanatory: so far, the aim of that law had been freeing plots of land from restriction and it was not a coincidence that the possibility,

27 «La Gazzetta Piemontese», 18 settembre 1882.

28 Comitato Centrale di Soccorso ai danneggiati dalle inondazioni dell'Alta Italia nell'anno 1882, 'Relazione e rendiconto' (Roma: 1882) I-II.

29 «La Gazzetta Piemontese», 22 settembre 1882.

30 «La Perseveranza», 21 settembre 1882.

31 C. Trotter, 'Tra fiumane e alluvioni. 1882: l'àn del la brentàna in Primiero' (Trento: 1982).

32 G. Candeloro, 'Storia dell'Italia moderna' (Milano: 1978) VI, 78-84; V. Castronovo, 'Storia economica dell'Italia. Dall'Ottocento ai giorni nostri' (Torino: 1995) 41-51.

33 P. Bevilacqua, M. Rossi-Doria, 'Le bonifiche in Italia dal '700 ad oggi' (Bari: 1984) 48-49; G. Barone, 'Mezzogiorno e modernizzazione. Elettività, irrigazione e bonifica nell'Italia contemporanea' (Torino: 1986) 39.

34 D. Brianta, L. Laureti 'Cartografia, scienza di governo del territorio nell'Italia liberale' (Milano: 2006) 22-23, 136-137.

35 Senato del Regno, Disposizioni intese a promuovere i rimboscimenti, 1886, AP Leg. XV Sess. 1, doc. 271, 5.

36 Camera dei Deputati, Discussioni, 27 marzo 1886, AP Leg. XV Sess. 1, 17756.

37 Camera dei Deputati, Relazione della Commissione sulle disposizioni intese a promuovere i rimboscimenti del 1882, 1884, AP Leg. XV Sess. 1, doc. 35-A, 3-6.

allowed by law, to preserve forests set below the chestnut tree line remained on paper. This objective can be gathered from a departmental report dated 1881 and from a ministerial directive dated December 1878, where 1.664.326 hectares released were acknowledged as an excellent intermediate point and where administrators were encouraged to go on with the same pace<sup>38</sup>.

The worry about reforestation was preceded by the concern about the defence of existing woods, since a wrong implementation of the law contributed to the drastic reduction in the wooden surface so much that it has been defined «an anti-forest act»<sup>39</sup>. While in few districts forest committees had been completely inflexible, in many others they had been extremely flexible; the legislative unification was not achieved<sup>40</sup>. In addition forest rangers were so underpaid that they were apt to be bribed by private owners<sup>41</sup>. In 1892 the process of making a law more acceptable started and it lasted about thirty years.

A good gauge of the cultural change is the acceptance of the ideas of legal bound, public interest and State intervention. The first was interpreted not only as a legal obligation, but also as a social duty<sup>42</sup>; forests were deemed the greatest defence against the Italian hydrogeological instability<sup>43</sup>; mission of the state should have been preparing a «public sense» through the spread of forest societies in the Country<sup>44</sup>.

This transformation was not only due to the 1882 natural disaster, it was also due to groundbreaking but minority opinions from Sixties and Seventies such as the defence of forests as a precautionary measure, the direct connection between forests and hygienic and sanitary conditions, the necessary of state properties. Nevertheless, the legal process lasted for six years and tangible consequences arrived at the beginning of the XX century.

The same chronological division suggested by history is confirmed by a legal approach. The jurist Romualdo Trifone retraced the steps of Italian forest legislation and recognised the 1888 Act as the start of a new course. According to him, from that date the following laws ensured continuity: the 1912, the 1923 and the 1928 Acts were focused on an integrated system of mountains and valleys<sup>45</sup>. Another jurist, Amilcare Martinelli, in his comment on the draft law of the 1882 claimed that it marked a change in government policy<sup>46</sup>.

38 Ibidem, 10.

39 Camera dei Deputati, Discussioni, 27 marzo 1886, AP Leg. XV Sess. 1, 17781; Camera dei Deputati, Discussioni, 27 febbraio 1888, AP Leg. XVI Sess. 2, 1096.

40 Camera dei Deputati, Relazione della Commissione sulle disposizioni intese a promuovere i rimboschimenti del 1888, 1888, AP Leg. XVI Sess. 2, doc. 105-A, 4.

41 Camera dei Deputati, Discussioni, 27 marzo 1886, AP Leg. XV Sess. 1, 17761.

42 Senato del Regno, Progetto dell'ufficio centrale sulle disposizioni intese a promuovere i rimboschimenti del 1882, 1887, AP Leg. XIV Sess. 1, doc. 3-A, 1-2.

43 Senato del Regno, Disposizioni intese a promuovere i rimboschimenti, 1886, AP Leg. XV Sess. 1, doc. 271, 2.

44 Camera dei Deputati, Discussioni, 27 marzo 1886, AP Leg. XV Sess. 1, 17760.

45 R. Trifone, 'Storia del diritto forestale' (Firenze: 1957).

46 A. Martinelli, 'il disegno di legge sul rimboschimento presentato alla Camera dei Deputati dal ministro d'agricoltura, industria e commercio. Esame critico' (Torino: 1883) 291-293, 339-340.

## CONCLUSION

If history is the reconstruction and the interpretation of the past, the legal angle allows on one hand to consider vividly the mind-set of ruling classes and their ideas of society. Ideas and not idea because of the variety of concepts, since an official position generally does not mean a unique position. So, through the analysis of the decision-making process, it is possible to identify not only the stances toward a particular law, but also the different visions of the world. On the other hand, the legal angle unofficially informs on social turmoils which could not come to light directly.

Conversely, looking at human and natural events, jurists can catch the deeper meaning of legal interventions, draft or passed, and can compare the final version with the other possible choices. Looking at and beyond a law the complexity of a decision can be conveyed.

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## JURIDIFICATION IN THE REALM OF THE COURT – STUDIES OF THE NARRATIVE CONSTRUCTION OF LEGAL REASONING

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**Abstract.** This paper takes its onset in two alternative discourses for legal argumentation, namely the discourse of *subsumption* and the discourse of *transformation*. The aim is to describe theoretical and methodological possibilities of constructing a legal discourse that considers law as a normative and continuous process of ‘becoming’ (the discourse of transformation) rather than a discourse that revolves around the ‘existence’ of law (the discourse of subsumption). The methodological part of the paper gives examples from the author’s pilot studies where narratology has been used to examine the process of justification in civil law cases. Narratology offers possibilities to reveal correlations between the narrative structure of legal argumentation and underlying norms. These norms are in this paper described as *transformation rules*, or *transformation conventions*. The normative process, which in the discourse of subsumption is described as consisting of an application of different types of facts (abstract legal facts, concrete legal facts, evidentiary facts, means of proof) is in the discourse of transformation described as a *juridification process in the realm of the court*. It is argued that subsumption, rather than being a deductive logic process where procedural facts relate in a one-to-one fashion, instead is a normative process involving several phases of transformation ‘jumps’ guided by transformation rules. If legal reasoning does not have an internal way of communicating and justifying these normative aspects of legal argumentation it stands the risk of losing legitimacy.

**Keywords:** juridification, subsumption, jurisprudence, civil procedure, narratology

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### INTRODUCTION

*Juridification* is a concept with origins in the discipline Law and Sociology. It has been used to describe various legal phenomena; most common is perhaps concepts such as ‘flood of norms’ on a macro level and ‘conflicts as property’ on a micro level.<sup>1</sup> *Juridification* has also been used as one of the key ingredients to describe the autopoietic character of legal reasoning and thereby contributed to understanding of legal discourse.<sup>2</sup> However, although it has been an established concept for several decades, and has contributed to the understanding of legal argumentation, it has yet

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1 See e.g. Leila Brännström, *Förrättsligande: en studie av rättens risker och möjligheter med fokus på patientens ställning* (Malmö: Bokbox, 2009), Lars Chr. Blichner och Anders Molander, ‘Mapping Juridification’, [2008] 14/1 *European Law Journal*, 36-54, Nils Christie, ‘Konflikt som eiendom’ [1977] 61 *Tidskrift for Rettsvitenskap*, 3-32, Gunther Teubner, ‘Juridification - Concepts, Aspects, Limits, Solutions’, in Gunther Teubner (ed.), *Juridification of Social Spheres: A comparative analysis in the areas of labor, corporate, antitrust and social welfare law* (Berlin: W. de Gruyter, 1987) 3-48.

2 Gunther Teubner, *Law as an autopoietic system* (Oxford: Blackwell, 1993).

to become an integral part of legal practice. *Legal argumentation* is here used in the descriptive meaning ‘written observations by parties, and written documents created by the court’. I use juridification as a concept for approximation towards a legal discourse.<sup>3</sup> The definition of juridification in the realm of the court is therefore wide. It includes mechanisms for describing legally relevant facts in a conflict between parties, as well as the methods for describing the application of law on the identified situation. This paper will discuss how important aspects of the process of juridification can be studied, on an institutional level, in civil law cases. In a civil procedure circumstances are presented as *evidentiary facts* and *concrete legal facts* in order to be matched, in a process of *subsumption*<sup>4</sup>, with *abstract legal facts* (legal prerequisites). Seen from this perspective juridification is closely linked to subsumption, since they both deal with the process of constructing legal argumentation. But as we shall see, even though they are closely linked, they focus on different aspects of the legal argumentation. I will argue that the juridification perspective, which focuses on the normative process of adapting to the legal sphere, rather than the subsumption perspective, which focuses on matching different sort of facts, is in many ways more suitable for constructing a more transparent and therefore also more legitimate and functional way of legal argumentation. There are many theories on legal reasoning and argumentation available.<sup>5</sup> There are also many ways of understanding the concept of subsumption. In Sweden, the concept is no longer, at least in doctrine, synonymous with deduction in a non-normative, non-evaluative manner. Nonetheless, the concept of subsumption has origins in a logic-positivist tradition on legal reasoning that can be difficult to ignore simply by stating that subsumption nowadays involves a normative process.<sup>6</sup> Examples of this will be given below.

## SUBSUMPTION AND TRANSFORMATION RULES

In a civil case (and also other legal cases) there are several steps of what is often described as *subsumption*. The word indicates that it is possible for a concrete fact to be subsumed under an abstract norm in a process of deduction, a logical assessment with a yes or no answer. Either a fact can be sorted under the norm or it cannot be sorted under the norm.<sup>7</sup> Legal reasoning, at least in

3 The process of approximation towards a legal discourse is not seen as a “on or off”-relationship. There seems to be many ways in which a legal discourse can be constructed around a conflict between parties. For other ‘discourse-based’ definitions of juridification see Brännström (2009) 36, and Jan Torpman, *Rättssystemets lärande* (Stockholm: Stockholms Universitet 2002) 16.

4 This is a term used in Swedish procedural law with roots in German law. See Bengt Lindell, *Sakfrågor och rättsfrågor: en studie av gränser, skillnader och förhållanden mellan faktum och rätt* (Uppsala: Iustus, 1987) 377.

5 Different “rule”-based models as well as for example hermeneutical, sociological, mathematical and cognitive approaches, see Peter Wahlgren, ‘Legal Reasoning - A Jurisprudential Model’ [2000] 40 *Scandinavian Studies in Law*, 199-282. 200. In a theoretical perspective this is not a new discussion, see e.g. Neil Maccormick, *Legal reasoning and legal theory* (Oxford: Clarendon, 1978). However, When dealing with the normative character of legal reasoning it is my impression that theories mainly are interested in the process of discovery and not, as in this paper, the process of justification.

6 Concerning the logic-positivist origins see, Lindell, (1987) 377f.

7 This view on norms could be referred to an idea where the norm itself already contain the information necessary for all future applications of the norm. Thérèse Björkholm, ‘To Reach Bedrock – Wittgenstein on Rules and Rule-

a Swedish procedural law doctrinal context, is often described as a series of subsumptions where means of proof can be subsumed under evidentiary facts (*factum probandum*), evidentiary facts under concrete legal facts and that concrete legal facts can be subsumed under abstract legal facts<sup>8</sup>, as shown in fig. 1.

However, it may be contested whether it is possible for a concrete legal fact to deductively (from a logical perspective<sup>9</sup>) constitute itself as an abstract legal fact. From a theoretical perspective, which will be discussed in more detail in the next section, it is evident that each concrete legal fact must be evaluated and assessed before it can be decided whether it can be referred to a certain abstract legal fact. Means of proof and evidentiary facts must undergo the same normative procedure. These normative steps could be described as category ‘jumps’ rather than subsumption. The ‘jumps’ could be regarded as a ‘hub’ in the construction of legal argumentation, a hub of institutional juridification. Since it is a normative jump it is also a *transformation*. I will give examples of what I mean with ‘transformation’ and ‘normative process’ later on in this paper. At this moment I will just give a brief illustration. Swedish tort law has a provision with the wording, roughly, that “Anyone who intentionally or recklessly causes bodily injury or property damage must compensate the damage”.<sup>10</sup> The provision includes a number of abstract legal facts; ‘anyone’, ‘intentionally’, ‘recklessly’, ‘causes’, ‘bodily injury’, ‘property damage’. In a case that refers to this provision a number of concrete legal facts must be invoked in order to be matched with the abstract legal facts. As an example the plaintiff, Ewa, could argue that the defendant, John, stole her bicycle whereupon he tripped and the bicycle was damaged. Its pretty straightforward to match John and the damaged bicycle with ‘anyone’ and ‘property damage’. The sorting of “stole her bicycle whereupon he tripped” is perhaps a bit more complicated to match with “intentionally or recklessly causes”, but with the help of the principle “*casus mixtus cum culpa*” it also seems like a well established linking of concrete and abstract legal facts. Nevertheless it is a shift of category from the concrete to the abstract and therefore not possible to deductively subsume the concrete under the abstract. Still, as in this example, this normative process can be more or less stable depending on the type of circumstances and the abstraction level of the wording of the norm to which circumstances are to be referred to. The normative process of juridification in the realm of the court could perhaps therefore be understood as following more or less stable

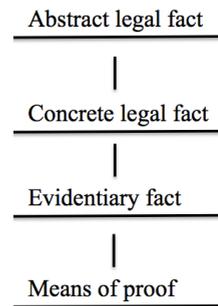


FIG. 1. Subsumption

Following Behaviour’ In Nils Jareborg (ed.), *Elsa Eschelsson: Ad Studium Et Ad Laborem Incitavit* (Uppsala: Iustus, 1997) 185-204, 189.

8 Lindell, (1987) 24, 174-175, 368. See also Per Olof Ekelöf, *Rättegång H. 1* (Stockholm: Norstedts juridik, 2002) 87-88, Per Henrik Lindblom, *Sena uppsatser: om domstolsprocessen, processmaterialet och den alternativa tvistlösningen* (Stockholm: Norstedts juridik, 2006) 171-172.

9 What I mean here is that it does not follow logically in the same way as something that is deductively analytical like the sentence “If Jack is a bachelor, then he is not married”. Aulis Aarnio, Robert Alexy, och Aleksander Peczenik, ‘The Foundation of Legal Reasoning (Parts 1, 2 and 3)’ [1981] 12 *Rechtstheorie*, 33-58, 257-79, 423-48, 36ff.

10 The author’s translation, in Swedish: “Den som uppsåtligt eller av vårdslöshet vållar personskada eller sakskada skall ersätta skadan” Skadeståndslag (1972:207) 2 kap. 1 §.

*transformation rules*<sup>11</sup> or *transformation conventions*.<sup>12</sup> It follows that transformation here is used as overlapping the concept of juridification.

As already stated, I argue that the traditional procedural law discourse in many ways is focused on the facts of the subsumption process and not on the transformation that takes place when different categories of facts are matched. A discourse of transformation<sup>13</sup> would add focus on the levels ‘between’ the facts, on *how* the matching is performed, as illustrated in fig. 2.

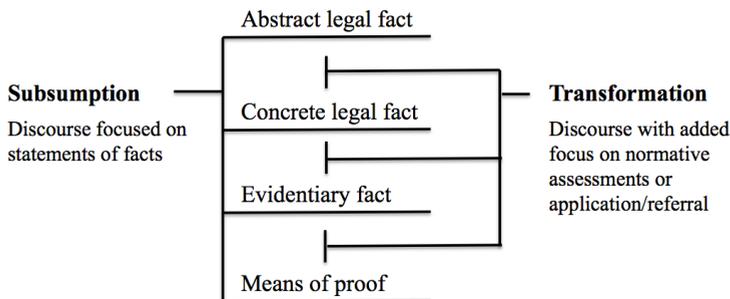


FIG. 2. Alternative discourses of subsumption and transformation

## THEORETICAL FRAMEWORK

The basis for my interpretation of a transformation discourse relies on social constructivism. Yet, it is a constructivist perspective that does not give ‘the social’ a value on its own.<sup>14</sup> The social is merely the result of a description method that assembles associations made by the actors in the process of legal argumentation.<sup>15</sup> If the actors change their ways of association the construction of legal reasoning will also change; “If a dancer stops dancing, the dance is finished”.<sup>16</sup> If lawyers starts to interpret legislation in relation to its societal function instead of the historical intentions

- 11 Aarnio, Alexy and Peczenik use the wording ‘jump’, transformation and transformation rules mainly when they discuss the activation of law as such. I have borrowed his terms and use them for describing legal reasoning in relation to subsumption. Aarnio, Alexy, och Peczenik, (1981).
- 12 In turn the ideas behind *transformation rules* could be examined as part of the legal deep structure. It should here be noted that this paper does not address juridification (or transformation) in a ‘before and after’ perspective. It is not focused on describing the discourse difference of a prelegal and legal discourse, but rather the mechanism that influences the juridification process, in a every day civil law case court situation.
- 13 Alternative names for such a discourse could be a *discourse of application* or a *discourse of referral*.
- 14 Social constructivism is used in a great variety of ways. My onsets are based on, John R. Searle, *The construction of social reality* (London: Allen Lane, 1995), Ian Hacking, *The social construction of what?* (Cambridge, Mass: Harvard Univ. Press, 1999) and Bruno Latour, *Reassembling the social: an introduction to actor-network-theory* (Clarendon lectures in management studies; Oxford: Oxford University Press, 2007).
- 15 Latour, (2007) 7-9.
- 16 Latour, (2007) 37. My theoretical framework shares many onsets with the sociological movement Actor-Network-Theory. The associations described by lawyers could be seen as the lawyers take on a (from their perspective) suitable juridification in the realm of the court with regard to that particular case. “In other words, it seems that there is law when it is possible to mobilize a certain form of totality with regard to an individual case, irrespective of how tiny it may be – and this is precisely why we call some reasoning ‘legal’”. Bruno Latour, *The Making Of Law: an ethnography of the Conseil d’Etat* (Cambridge: Polity, 2010) 256-257.

of the legislator, law will change, not because of a change in the body of law but because of a shift in lawyer associations. A shift in discourse would probably in itself change associations and thereby also change the law. Furthermore, the idea of a legal argumentation as constructed in a continuous process, is connected to a theory of language, advocated by e.g. Wittgenstein (later period), where the relationship between sign and meaning is based on conventions rather than linked in an objective one-to-one relationship. There is no 'natural' way in which the meaning of words relate to 'reality', no natural reason "why a particular [signifier] and [signified] should be linked. Instead, words rely on other words in order to bear meaning.<sup>17</sup> It follows that since legal argumentation is mediated by language there can be no theory free or convention free description of legal facts.<sup>18</sup> Wittgenstein would also argue that the conventions of sign systems are instable, they are constantly changing within "language games".<sup>19</sup> Different discourses do not have hard boundaries. Therefore the rules for what lies within the legal sphere can never be exhaustively specified. They depend on the participants in the game, in the field of law, the lawyers.<sup>20</sup> So, neither abstract legal facts nor concrete legal facts can be objectively described and related to each other in a way where the latter can be deductively subsumed under the first. With this theoretical approach one could assume that subsumption is a processes within language conventions rather than statements about the nature of law or the nature of things. It follows that a discourse focused on transformation, based on associations made by lawyers, is more closely connected to the normative process of legal application, compared to a discourse built on statements of legal facts. Nevertheless, it is important to stress that nothing precludes legal facts as being part of associations, and thereby arguments, made by lawyers.

There are many aspects of legal reasoning that could be assessed in a discourse of transformation. The pilot studies I have conducted have focused on approaches towards law connected to theories of knowledge and language. Within these areas I have selected, in terms of legal application, to more closely study the dichotomies of positivism vs. constructivism and formalism vs. language games and in terms of the substantial reasoning, deep structure aspects of law, e.g. by relating the texts to dichotomies such as monocentrism and polycentrism.

#### IDENTIFYING JURIDIFICATION WITH NARRATOLOGY

The theoretical approach discussed so far indicates that it would be of relevance for legal research to have an operational discourse for dealing with and identifying the normative aspects of legal application in civil procedure. Ideally, this discourse could form an integral part of the 'internal' legal research.<sup>21</sup> So, what tools can be used to examine juridification in the realm of the court?

17 Guyora Binder and Robert Weisberg, *Literary criticisms of law* (Princeton: Princeton University Press, 2000) 120-121.

18 Binder and Weisberg, (2000) 113.

19 Concerning this concept, se e.g. Bo Wennström, *The Lawyer and Language* (Uppsala: Iustus 1996) 85f.

20 Binder and Weisberg, (2000) 113, 122-123 Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1968) 67.

21 "There is no stronger metalanguage to explain law than the language of law itself. Or, more precisely, law is *itself its own metalanguage*." Latour, (2010) 260.

I have conducted a number of pilot case studies, using narratology, in order to study juridification and I will here give some examples of the types of findings that narratology makes possible. But first a few words on narratology as a method for legal research. Narratology has not entirely been welcomed into legal research with open arms. According to Sherwin law as narrative has been received with scepticism since it is not in accordance with the "logo-scientific" genre of law. "The world according to this genre is one in which logic makes its demands and reality complies".<sup>22</sup> This, of course, is quite different from the theoretical framework presented above.

Narrative studies of law are focused on understanding the *story*, *plot* and *narration* in which legal argumentation is situated. The *story* consists of a number of *sequences*, which can be compared to building blocks. The outer limits of what is regarded as a story (the totality of text) can vary depending on the interest of study. It can consist of a presentation of the legal basis for a case, an assessment of evidence, an assessment of concrete legal facts in relation to abstract legal facts, etc. In a presentation of the legal basis the presentation of each concrete legal fact can be regarded as one sequence. The *plot* can be described as the order in which the sequences are placed. The plot creates causality between the different sequences and depending on the way the sequences are ordered, and emphasised, different *narratives* are constructed, each with different potential for upgrading or downgrading sequences as important in relation to the totality of the story. In other words, the narrative is the overall scheme deciding how to present the story, by ordering sequences into a plot.<sup>23</sup> For a presentation of the legal basis of a case, the narrative is often built to match the outline of the abstract legal facts (the prerequisites) that the party want the concrete legal facts to be subsumed under. This means that the sequences are ordered in a plot that follows the order of the abstract norm (e.g. a regulation concerning damages) and with a level of detail to match the details required by the prerequisites.

## PILOT STUDIES

Different forms of narratives are suitable for legitimizing different types of legal argumentation. And the same total amount of sequences can be used for different purposes depending on the way they are ordered and the level of detail that each sequence contains in comparison with other sequences of the same story. Danto argues that there is no natural outer limit for sequences in historic narratives. The storyteller (the lawyer) must decide on the level of detail and the context for each sequence. Since each sequence can be causally related to a large number of other sequences there are many accounts for the same event that are equally legitimate.<sup>24</sup> An effect of this is that it is the narrative that sets the tone for each sequence rather than the historic events themselves. This has of course great impact on the presentation of legal facts as a type of historic narrative. In one of the cases that I have studied, *the same sequences* was used (but in different

22 K. Richard Sherwin, 'The Narrative Construction of Legal Reality', [2009] 6 *Journal of the Association of Legal Writing Directors*, 88-120, 95.

23 Håkan Andersson, 'Rättens narratologiska dimensioner – interaktion och konstruktion', in Minna Gräns och Staffan Westerlund (ed.), *Interaktiv rättsvetenskap* (Uppsala: Uppsala Universitet, 2006), 11-46, 18.

24 Binder and Weisberg, (2000) 221. Arthur C. Danto, *Narration and knowledge* (New York: Columbia University Press, 2007) 233-56.

narrative settings) by the different actors in the court, in order to narrate different types of situations. The plaintiff's narrative indicated an oral contract of fixed price, the defendant's narrative indicated an oral contract of current account, and finally the court's narrative indicated a declaration of approximate price given from the plaintiff to the defendant.<sup>25</sup> The domination of this kind of narrative for presenting the basis of case could be regarded as a transformation rule that forces the facts of a case to be presented in a certain style if they are to be accepted as 'legal'.

Another category of narrative findings, that I have identified in the pilot study, concern correlations between the narrative and the *deep structure* of law.<sup>26</sup> The cases I have studied have been taken from the field of consumer law and it is evident that the written observation of the company often places sequences in a narrative correlating with the idea of individual formal autonomy and freedom of contract. The written observation of the consumer, on the other hand, places the sequences in a narrative that correlates with a competing view on individual autonomy more suitable for welfare state approach, empowering the individual.<sup>27</sup> Both of these narratives could be seen as 'legal' and they therefore also provide information of the pluralistic aspects of the legal system.<sup>28</sup> This could be regarded as an example of competing transformation conventions that guide the normative assessment creating different kinds of 'category jumps' by referring to different deep structure justifications for juridification. Depending on the type of case and the level of competing values underlying the law, the transformation process becomes more or less complex and therefore more or less unlikely to find a legitimate justification within the discourse of subsumption.

A third category of findings deals with the situation when the narrative lacks sequences for how the subsumption was performed and instead simply states that 'the concrete legal facts do not constitute the abstract legal fact'. An example of this can be taken from a case I examined where the Swedish Supreme Court stated that a monitor in the entrance of a fitness facility with information about termination of the contract for the membership card, did not constitute the abstract legal fact of a clear and precise reminder of the contract terms.<sup>29</sup> The statement does not give information on *how* that assessment was made but simply that the facts of this case are not possible to be subsumed under the relevant abstract legal facts. Nevertheless, this type of narrative does correlate with a legal discourse of deductive subsumption. A narrative that does not deal with subsumption as a normative process could be seen as signalling that there is no reason to present the normative aspects of subsumption to the reader, since this only could have been executed in *one* way, namely the correct way according to the deductive logic of subsumption.

It should be stressed that the narrative approach is not a method for finding out whether or not the judges or the parties really on a conscious level represent the normative approach that the narratives correlates with. It is not a method for investigating the process of discovery; it is only

25 *NJA 2005 s. 205*, The Swedish Supreme Court, case T 2362-01.

26 Concerning the concept of "deep structure" see Tuori Kaarlo Tuori, *Critical legal positivism* (Aldershot: Ashgate, 2002).

27 *NJA 2012 s. 776*, The Swedish Supreme Court, case T 2085-11.

28 Concerning this way of using the concept of pluralism, see Håkan Gustafsson, *Rättens polyvalens: en rättsvetenskaplig studie av sociala rättigheter och rättssäkerhet* (Lund: Sociologiska institutionen LU, 2002).

29 *NJA 2012 s. 776*, The Swedish Supreme Court, case T 2085-11.

targeting the process of justification. It is therefore a method well suited for addressing legitimacy. A narrative style, which correlates with a normative approach of deductive subsumption, signals an approach where law *is* rather than where law *becomes*. Such an approach leads to blind spots where important aspects of the juridification process, the becoming of law, are not presented, and therefore not made accessible for scrutiny and discussion.

## CONCLUSION

This paper has discussed the alternative discourses of *deductive subsumption* and *transformation*. The aim has been to examine theoretical and methodological possibilities of constructing a legal discourse that regard law as a normative and continuous process of ‘becoming’. A process that involves several steps of category ‘jumps’. Lawyers could be studied as actors involved in negotiations where the goal is to mobilize a ‘certain form of totality in the individual’. Development towards a discourse of transformation could be a way of making important normative aspects of legal reasoning visible and operational. Narratology has been presented as a suitable method for identifying correlation between existing legal narratives and underlying transformation rules. But understanding narratology is also part of a greater theoretical discussion that sees law as a construction within language games with non-distinct borders. In order to take this theoretical approach seriously social science and literary techniques should form an integral part of legal research.

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## OPPORTUNISM IN CIVIL LITIGATION: DIVERSE VIEWPOINTS ON SELF-INTEREST IN INTERIM RELIEF

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**Abstract.** Opportunistic nature of civil litigation and private law institute on the whole is familiar. The idea given is that the party in civil litigation always tries to advance his or her personal interests and therefore benefits from technically legal but unkind and undesirable behaviour. The analysis is carried out using the instrument of interim relief and several opposite aspects of it: (a) a party abuses legal rules to insist on an injunction even if the injunction would suggest a 'grossly disproportionate hardship on the other party'<sup>1</sup>; (b) a party manipulates legal rules to deny necessity for interim measures. The purpose of this discussion is not to demonstrate the dilemma of damages-versus-injunctions, but rather evaluate the effect of subjective self-interest seeking on the legal balance of the parties' position in civil litigation. The hypothesis worth exploring is that there are certain niches where opportunism can find a place as a legal, economic, ethical and psychological phenomenon and all these niches can be used either for or against the legal good. It varies from the ability of a judge to make a reasonable decision to the economic morality and confidence of trade society. The research therefore will be concentrated on how purely opportunistic motivation of the parties can be identified in the area of civil litigation and how to prevent it affecting parties' right to due process.

**Keywords:** civil litigation, interim relief, opportunism, judge

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### INTRODUCTION

The term 'opportunism' appears to have originated in the 19<sup>th</sup> century and, contrary to popular belief, is primary related to political, not economic or social processes. Opportunistic vision, however, has striking similarities in differently profiled cases. Opportunism is related to expediency, exploitation, taking advantage, maneuvering, pragmatism, realism and unscrupulousness<sup>2</sup>. On the whole, these reflect the actions of someone who takes every opportunity to gain an advantage and is willing to behave in an unfair and/or manipulating way<sup>3</sup>. Needless to say, human behaviour is directed to the self-interest. It goes through legal, economic, political, social, psychological, ethical fields with the same credo of advantageous position. The purpose of this research is to demonstrate the role of the opportunists in civil litigation and consider the possibility of excluding purely egoistic procedural movements in the case. One can hardly explain how could private law be not pragmatic or advantageous, but the aim of the paper is not to deny the self-orientated nature

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1 H. E. Smith, 'An Economic Analysis of Law versus Equity' [2011], at [http://www.law.yale.edu/documents/pdf/LEO/HSmith\\_LawVersusEquity7.pdf](http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf);

2 Oxford dictionary online, at <http://www.oxforddictionaries.com/definition/english/opportunism?q=opportunism>;

3 Macmillan dictionary, 2nd edition [2002], Macmillan Education.

of civil litigation. Focus is on identifying the differences between legally reasoned movements and breaches of law. In other words, the object of the analysis is between legal and prohibited selfishness.

The paper mainly focuses on the institute of interim measures and the abovementioned presumptions are applied to the procedure of granting interim relief. Interim measures are so-called precautionary instruments in civil procedure linked with keeping *status quo* during the litigation<sup>4</sup>. The question is how the abuse of legal rules for interim measures could be controlled and eliminated when opportunistic views of the party/parties suggest the opposite. It appears in some cases that the 'best' decision the court could make granting interim relief is on the merits of one party. The core principle of the provisional measures is to reduce the risk of failure to fulfill obligations and to stabilize the balance of the procedural and material position of the parties. However, asset freezing injunctions, certain payments etc. are being used to gain an advantage and law is under intense pressure to allow it. The aim of the paper is to propose some ideas on the grounds of opportunistic theory and to develop the possibility of the connection between self-interest and abuse of civil rights.

#### PHENOMENON OF LEGAL OPPORTUNISM IN CIVIL LITIGATION

Laws can currently be divided into that serving the people and serving the person. The former has less opportunistic nature because self-interest here is actually a combination of interests of different subjects: state, society, groups and individuals. As John Rawls reveals in his 'A Theory of Justice', since the principle for an individual is to advance as far as possible his own welfare and own system of desires, the principle for society is to advance as far as possible the welfare of the group<sup>5</sup>. On one hand, the idea of the sectional good correlates with the separate level of social and economic satisfaction of each member in the group. On the other hand, where the group acts for its benefit and domination and celebrate the own profits, opportunism is glaring. It is often said that one reason law fails is that the need for general rules leaves loopholes wide open for the opportunists to exploit<sup>6</sup>. Moreover, these loopholes are not only mistakes of a legislator or a judge, but of much wider area of acting. First of all, when the question of rights and duties in civil litigation is raised, it appears that the parties and the spectators foreknow, who will have freedom to manipulate the legal norms provided by the legislator. In other words, one of the parties is always in a better position to use legal regulations in the field of interim relief. Dispositive nature of civil law leaves the moral aspect very important but undesirable to rely on. Although the claimant does not intend to ruin defendant's business when he asks the court to impose freeze of assets, he might do that simply because he is allowed to. In case the claimant is familiar with another party's reasonably good financial state, he will probably do the same. Such behaviour is technically legal but is used to secure unintended benefits from the system. Another situation is when the party

4 K. Oellers- Frahm, 'Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function' [2011]12 German Law Journal 1279;

5 J. Rawls 'A Theory of Justice' [1971], Belknap Press of Harvard University Press;

6 H. E. Smith, 'An Economic Analysis of Law versus Equity' [2011] at [http://www.law.yale.edu/documents/pdf/LEO/HSmith\\_LawVersusEquity7.pdf](http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf).

manipulates legal rules to avoid interim measures. For example, if the defendant is almost certain that if he loses the case, he will not be able to fulfill the financial obligations and he, nevertheless, overspends. Taking of opportunities as and when they arise, regardless of planning or principle is one of the opportunistic mottos<sup>7</sup>. One's interest becomes more important than a system on the whole.

However, such cases put grossly disproportionate hardship and lead to unequal treatment of the parties. Moral duty and fairness in the process are confronted to possible undesired economic losses and tactical mistakes while balancing between the values. First of all, a person acts properly to achieve his own greatest good and to advance his rational ends as far as possible<sup>8</sup>. If, however, that good cannot be reached in a morally right manner, a person balances between moral duty and probable profits. The problem of this rationale is that moral values are not respected when it comes to civil litigation. Contrary to criminal cases, here money is usually involved and in case of immoral behaviour the greatest loss of other party would be a certain amount of money. Therefore these moral wrongdoers could barely be stopped by the sense of fairness. The damage that could be done is not so remarkable as to frighten a business person. However, the court could take into account this as an indicator of further possible opportunistic moves in the case. Secondly, competition in court is the result of competition in business sector. It is said that people would not normally trade, if they would not expect to gain something by it. The background of the market presupposes at least respect for the basic rights of the party being traded with. Nevertheless, the gains or benefits of trading activity (and indeed the losses), although entirely legal, might be distributed very unequally or in ways not anticipated by previous expectations, and thus economic opportunism can arise in many different forms<sup>9</sup>. Even if the economic advantage taken does not violate the law, opportunist has a power to influence an outcome by the attitude he assumes in practice. In fact, national courts must particularly take into account the European Community judiciary's assessment of the balance between the European Community interest and the interest of the sector concerned<sup>10</sup>.

Needless to say, it is the competence of the judge to decide on the question of applying interim measures. The mechanism of interim relief now exists to burden the court in the way where parties are looking for the gaps in legal regulation and the judge not only has to conduct a case and make a decision but also be a *coryphaeus* of equity in considering each request for provisional measures. Awareness of the opportunists requires the court always be 'the court of conscience' and evaluate properly actions of the parties. The process becomes complicated because weighing of interests is the reflection of the problem, not a solution and the solution needs discretion of the judge. It is a commendable thing that interim measures exist as a discretionary remedy and courts leave the door open to denial of injunctions where the risk of opportunism is great<sup>11</sup>. However,

7 Oxford dictionary online, at <http://www.oxforddictionaries.com/definition/english/opportunism?q=opportunism>;

8 J. Rawls 'A Theory of Justice' [1971], Belknap Press of Harvard University Press;

9 K. Eggert, 'Limiting Abuse and Opportunism by Mortgage Servicers' [2004]. Housing Policy Debate (Fannie Mae Foundation), Vol. 15, Issue 3;

10 An opinion of Advocate General Elmer in *Atlanta Fruchthandelsgesellschaft and Others v. Bundesamt für Ernährung und Forstwirtschaft*, Case C-465/93 [1995], ECR I-3761.

11 H. E. Smith, 'An Economic Analysis of Law versus Equity' [2011], at [http://www.law.yale.edu/documents/pdf/LEO/HSmith\\_LawVersusEquity7.pdf](http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf);

civil law more or less depends on the choice of the individual and leads naturally to a reduction of legal (claim) rights in terms of power to enforce a duty<sup>12</sup>.

#### BALANCE OF RIGHTS AND DUTIES IN APPLICATION OF INTERIM MEASURES

Basically, proper legal background is of great importance in the procedure of interim relief. However, when it comes to opportunism, the process becomes relative and the judge needs more components to make a competent and rightful decision. All parties are usually presumed to be capable of a sense of justice but the vital rule here should be the concept of so-called '*mutually disinterested rationality*'<sup>13</sup>. This model suggests that the parties do not seek to gain benefits or to impose injuries on one another but to get as many points in the case as possible. In other words, here legal good is combined with moral good and the opportunistic attempts are reduced. However, the idea of *mutually disinterested rationality* could be properly implemented only under such circumstances where the party is capable of scoring without affecting strongly another party. Furthermore, it appears that legal rules can be deliberately changed, whereas moral rules cannot be<sup>14</sup>. The good practice of this situation is that legal regulation of interim relief is changing and new more effective versions of rules are being included. In addition, rights and duties of the parties should, in any case, be considered in the light of specification of the dispute. The Court of Justice of European Union in one of its cases refused to accept the argument that the harm to fundamental right to the protection of the professional secrets was purely financial and could be repaired<sup>15</sup>. The Court held that even if it cannot be adequately identified or quantified, it would necessarily cause significant harm and that the ensuing damage could be irreparable. Whenever it comes to granting interim measures, the court has to evaluate different aspects of a separate branch of law and to clarify what harm could be done to the party in every individual case. Moreover, the obligation imposed on the national judge comprises the consideration of both the legal aspects and the factual findings<sup>16</sup>. For example, by ruling of 4 June 2009 in civil case 2-663/2009<sup>17</sup>, the Court of Appeal of Lithuania refused to overrule interim measures of protection because the defendant's financial evidence did not eliminate doubts about the defendant's ability to fulfill obligations before the court.

The most important thing about the concept of rights and duties in civil law is that they are based on what people are willing to pay for something rather than on the happiness they would derive from having it<sup>18</sup>. Legal opportunists neither want to pay for something, nor to miss the opportunity to benefit. Therefore the role of a judge is by all means to provoke rational willingness to pay instead of stealing. In order to do this, he has to eliminate constructing a justification for the policy that favours one's own interest and concentrate on the complex of legal, economic and

12 A. Halpin, 'Rights and Law. Analysis and Theory' [1997], Hart publishing, Oxford;

13 J. Rawls, 'A Theory of Justice' [1971], Belknap Press of Harvard University Press;

14 H. L. A. Hart, 'The Concept of Law' [1961]. Oxford University Press;

15 *European Commission v. Pilkington Group Ltd.*, Case C-278/13 [2013], ECR II;

16 An opinion of Advocate General Tesouro in *R. v. Secretary of State for Transport, ex parte Factortame*, Case C-213/89 [1990], ECR I-2433;

17 *ACME v. GPP* in the Court of Appeal of Lithuania, Case 2-663/2009 [2009];

18 R. A. Posner, 'The Economics of Justice' [1981], Harvard University Press.

moral connections in case analysis. Such interdisciplinary evaluation is necessary in the present level of competition in civil litigation.

## CONCLUSION

Opportunistic nature of civil litigation and its participants requires great attention and discretion of the court when deciding on the matter of interim relief. Although legal regulation has put a certain background on granting interim measures, the party still have some space to act in a self-oriented and, most importantly, defective to another party way. We presume that the majority of the subjects included in the process make rational and reasonable decisions, however, sometimes disadvantageous starting position is the verdict for the weaker party. In order to avoid such disproportional hardship, legal self-interest seeking must be limited by the court and economic, moral, etc. aspects should be not complementary, but equally relevant and useful. Further analysis of such interdisciplinary mechanism could shape a more effective safety scheme of the preservation of *status quo* and keep the balance of rights and duties in civil litigation.

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7. H. E. Smith, 'An Economic Analysis of Law versus Equity' [2011], at [http://www.law.yale.edu/documents/pdf/LEO/HSmith\\_LawVersusEquity7.pdf](http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf);
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## THE CONCEPT OF POLITICAL RESPONSIBILITY IN THE LATVIAN LEGAL SYSTEM

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**Abstract.** Author of the present paper at first describes theoretical political dimension of the concept of *political responsibility* basing on numerous researches that, inter alia, recognizes *political responsibility* as retrospective as well as prospective responsibility; relates *political responsibility* to blame and guilt as well as separates these concepts; acknowledges it as category reflecting relationships between persons; accepts *political responsibility* as specific type of emotional reaction (attitude) and as phenomenon associated with certain obligations (duties) and implementation of sanctions.

In the following chapters Author provides information with regard to the usage of *political responsibility* in the Latvian legal acts and case-law, and thus constructs legal dimension of this concept. *Political responsibility* as a concept is used in several Latvian legal acts, including those acts which are not in effect anymore. It is ascribed to the government and ministers mostly, and sets responsibility for the work of respective ministry and sector as well as it prescribes certain duties. However the concept of *political responsibility* is used without comprehensive definition. *Political responsibility* as a concept is used in the Latvian legal acts and case-law to describe proper fulfilment of obligations (duties), accounting for respective sector (ministry) and implementation of sanctions, e.g. resignation, dismissal, negative vote of trust.

It is important to note that due to the limited amount, the present paper does not reflect the complete content of *political responsibility* dimensions however it provides general idea about the usage of this concept in the Latvian legal system, which is the main object of this paper.

**Keywords:** Ministers, Latvia, Parliament, duty, sanctions, political responsibility

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### INTRODUCTION

*Political responsibility* is an interesting concept that can attract attention from various persons. For example, researchers, representatives of various fields of science, can be attracted by its broad and controversial content, politicians – by pragmatic considerations to use it as means to decrease support of competing politicians and organisations and increase their own support, journalists – by professional calling because the given concept, its related topic (accounting of politicians and their punishing) can be a much demanded material in public, electorate – by protection of interests because *political responsibility* may be used as means to control officials, i.e. put pressure to achieve that the officials are punished or would act in compliance with demands of electorate.

Due to the semantics of the words contained in the phrase *political responsibility* it can be primarily related to political sciences. However it can be analysed also within the scope of the

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legal science, should it be taken into account that the concept of *political responsibility*<sup>1</sup> is used in legal acts, including the Latvian Constitution (*Satversme*), as well as in judgements of various court institutions. However, legal norms and case-law does not formulate a precise and comprehensive explanation of this concept, therefore it is even more interesting to analyse its use in legal acts and case-law, to compare it with findings of various researchers, as well as to assess their mutual consistency.

## I. THE MANY FACES OF THE CONCEPT OF POLITICAL RESPONSIBILITY

The concepts used in legal texts can have different degrees of abstraction or falling content certainty. The highest degree of abstraction is inherent in the open – ambiguous concepts that provide an approximate notion about the possible direction where to find content of this concept<sup>2</sup>. In this regard, it is necessary to stress that the *political responsibility* can be classified as an ambiguous concept, if its characteristic degree of abstraction is taken into account – the broad and variously interpreted content. Thus the content of the concept *political responsibility* needs to be clarified by several legal interpretation methods, including teleological method that provides for assessment of the purpose and meaning of the content of legal document in the context of the constantly changing real life and logics of public development<sup>3</sup>. The mentioned method also includes extended assessment of information sources, e.g. analysis of various researcher works which are necessary for filling content of a concept. Through this method, the legal science and practice can merge with other sciences and fields of work. Thus, in order to have a comprehensive analysis of the concept *political responsibility* and to determine its content, lawyer may need to assess works by representatives of not only the legal science but also other sciences.

In relation to analysis of the *political responsibility*, it is necessary to note another interesting feature. Namely, in various languages it is possible to use different, but mutually related words (concepts) with a different content that might have no precise (alternative) counterpart in other languages, and when translated into another language these words may be presented by several words or only one word instead. See for example:

- 1) in English: *political responsibility, political liability, political accountability, public accountability*;
- 2) in Latvian: *politiskā atbildība, politiskais atbildīgums*;
- 3) in Russian: политическая ответственность.

1 By use of the concept *political responsibility* in regulatory enactments, judicial decisions, transcripts and public documents the author of the present paper understands both the noun *political responsibility*, and the adjective *politically responsible*. The given work describes concept that is used in the Latvian language, i.e. *politiskā atbildība*. Due to the specific traits of the Latvian language, the concept includes features of several English concepts (e.g. *responsibility, accountability, liability*); however, in order to ensure uniformity and compliance with the wording of the texts in Latvian, this paper uses one concept *political responsibility* only, i.e. the translation most often used in dictionaries and documents.

2 E. Meļkīsis, 'Iztulkošanas metodes'. In: *Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā: Rakstu krājums/Dr.habil.iur., profesora Edgara Meļkiša zinātniskā redakcijā* (Rīga: Latvijas Universitāte, 2003) 116-117

3 E. Meļkīsis, 'Iztulkošanas metodes'. In: *Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā: Rakstu krājums/Dr.habil.iur., profesora Edgara Meļkiša zinātniskā redakcijā* (Rīga: Latvijas Universitāte, 2003) 124

It is advisable to separate these various concepts of responsibility<sup>4</sup>, however, their translation in different language may fill content of one concept that thus becomes broader than the translated concepts. This refers also to the Latvian language where one concept is mainly used – *politiskā atbildība*.

The *political responsibility*, among others, can be characterised as a broad concept and defined as an idea-symbol<sup>5</sup>, i.e. denomination of an ideal and provision that in practice is not applied as a really functioning administration mechanism<sup>6</sup>, but is used in political manipulations instead<sup>7</sup>.

Despite the lack of precise borders of the content, researchers try to limit and define it within the scope of particular researches, and in this regard the *political responsibility* can be described, for example, as a set of relationships between authorisers-authorized and superiors-subordinates based on reporting (giving account) on political activities, e.g. parliament's accounting to the people<sup>8</sup> or minister reporting to the parliament<sup>9</sup>, in case of a possibility that sanctions will be imposed (e.g. dismissal from the position)<sup>10</sup>, or sanctions are imposed actually<sup>11</sup>, – everything depends on how person performs the obligations, how the respective activities are assessed, what decision is adopted and how this is implemented<sup>12</sup>. The *political responsibility* can be described also as manner of social-emotional reaction and attitude of the persons involved in a political process related to the person's past, present and future obligations and regulated by political mechanisms, including political assessment criteria<sup>13</sup>. Thus the *political responsibility* can be understood as retrospective responsibility (assessment of the past, imposing sanctions<sup>14</sup>), and as prospective responsibility (activity directed to future, performance of obligations and commitments<sup>15</sup>), including responsibility related to guilt and responsibility that is separated from the guilt<sup>16</sup>.

- 4 E.g. A. Schedler, 'Conceptualizing Accountability'. In: *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, CO: Lynne Rienner, 1999) 19; T.H. Bivins, 'Responsibility and Accountability'. In: *Ethics in Public Relations: Responsible Advocacy* (USA: Sage Publications Inc., 2006) 21
- 5 M. Bovens, 'Public accountability'. In: *The Oxford Handbook of Public Management* (USA: Oxford University Press, 2005) 184
- 6 S. Shetreet, J. Deschenes, 'Judicial independence: the contemporary debate' (Dordrecht: Martinus Nijhoff Publishers, 1985) 558
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- 9 D. Woodhouse, 'Ministers and Parliament: Accountability in Theory and Practice' (USA: Oxford University Press Inc., 1994) 3
- 10 В.В. Маклаков, 'Конституционное право зарубежных стран. Общая часть' ([b.v.]: Волтерс Клувер, 2006) 412
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- 14 A. Schedler, 'Conceptualizing Accountability'. In: *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, CO: Lynne Rienner, 1999) 14
- 15 I.M. Young, 'Political Responsibility and Structural Injustice. Political Science, University of Chicago. Presented as the Lindley Lecture, Philosophy Department, University of Kansas, May 5, 2003', 11-15. Available: [http://www.bc.edu/content/dam/files/schools/cas\\_sites/sociology/pdf/PoliticalResponsibility.pdf](http://www.bc.edu/content/dam/files/schools/cas_sites/sociology/pdf/PoliticalResponsibility.pdf) [accessed on 08.02.2014]
- 16 I.M. Young, 'Responsibility for Justice' (New York: Oxford University Press, 2011) 75-94

## II. THE CONCEPT OF POLITICAL RESPONSIBILITY IN THE LATVIAN LEGAL ACTS

The concept *political responsibility* is used in several Latvian legal acts, both effective<sup>17</sup> and ineffective<sup>18</sup>.

Most of the Latvian legal acts contain references or indications, or characteristics that can be referred to *political responsibility* of Members of the Cabinet (government). However, no clear definition has been determined and features have not been listed to distinguish the *political responsibility* from other forms of responsibility.

Some of the references and indications are identical in form or essence. This aspect can be evaluated positively because it forms uniformity of concept use. The mentioned uniformity can be referred to responsibility of Members of the Cabinet for the fields in their charge<sup>19</sup>. Similar formulations have been used in various ministry by-laws from 1993 to 2001. Although it should be noted that the grammatical content of the editorial wording in the by-laws slightly varies, e.g.:

- 1) *"the ministry work is managed [...] by a minister who is **politically responsible** towards the Parliament for the ministry's activities"*<sup>20</sup>;
- 2) *"minister [...] is **political responsible** for the ministry's activities on the whole"*<sup>21</sup>;
- 3) *"minister is **politically responsible** for implementation of the state power in the field of interior affairs and for performance of the ministry's tasks"*<sup>22</sup>;
- 4) *"the ministry's work is politically managed [...] by a minister [...] who is **politically responsible** towards the Parliament and the Prime Minister for the activities of the ministry, as well as institutions subjected, managed or supervised by the ministry"*<sup>23</sup>;
- 5) *"minister [...] is **politically responsible** towards the Parliament for the cultural situation and culture processes in the country"*<sup>24</sup>;

17 E.g. Latvijas Republikas Satversme (the Constitution of Latvia – in English); Ministru kabineta iekārtas likums (the Law on Cabinet of Ministers – in English), likums „Par sabiedrisko pakalpojumu regulatoriem” (Law on Regulators of Public Utilities – in English), Ministru kabineta 2009.gada 7.aprīļa noteikumi Nr.300 „Ministru kabineta kārtības rullis” (Rules of Procedure of Cabinet of Ministers – in English), Ministru kabineta 2003.gada 20.maija noteikumi Nr.263 „Valsts kancelejas nolikums” (By-law of the State Chancellery – in English).

18 E.g. Law on Ministries, Rules of Procedure of Cabinet of Ministers (previous edition), Rules on competence of the Deputy Prime Minister, Regulations on Ministries and various by-laws of ministries which were approved with Cabinet of Ministers regulations or decisions (from 1993 till 2001 mostly) e.g. Ministry of Environmental Protection and Regional Development (Regulations No 338, 30.09.1997), Ministry of Finance (Regulations No 301, 12.08.1997), Ministry of Welfare (Regulations No 286, 05.08.1997), Ministry of Economics (Regulations No 40, 21.01.1997), Ministry of Defence (Regulations No 361, 24.09.1996), Ministry of Education and Science (Regulations No 224, 25.06.1996), Ministry of Transport (Regulations No 220, 20.06.1996).

19 Compare, e.g., paragraph 11 of the Rules of Procedure of Cabinet of Ministers: „[...] *via the member of the Cabinet who is politically responsible for the relevant field, sector or sub-sector*” and paragraph 2 of Article 10 Law on Regulators of Public Utilities: „[...] *via the member of the Cabinet who is politically responsible for the relevant field, sector or sub-sector*”.

20 By-laws of several ministries, e.g. Ministry of Defence (Regulations No 361, 24.09.1996), Ministry of Economics (Regulations No 47, 07.03.1996) and (Regulations No 40, 21.01.1997), Ministry of Transport (Regulations No 220, 20.06.1996), Ministry of Finance (Regulations No 39, 21.02.1995), Ministry of Justice (Decision No 118, 23.08.1994).

21 By-law of the Ministry of Foreign Affairs (Decision No 138, 22.11.1994)

22 By-law of the Ministry of Interior (Regulations No 223, 18.07.1995)

23 By-law of the Ministry of Education and Science (Regulations No 224, 25.06.1996)

24 By-law of the Ministry of Culture (Decision No 147, 06.12.1994)

- 6) “[...] *minister is **politically responsible** for country reforms in general, as well as for the institutions subjected to and supervised by the ministry*”<sup>25</sup>.

Most of respective by-laws prescribe towards whom ministers are responsible. However, there are some exceptions and differences, e.g. the area that the ministers are responsible for is formulated differently.

Similar formulations have been used in relation to State minister<sup>26</sup>, Deputy Prime Minister and Minister for Special Assignments (responsibility towards the Parliament, e.g. for the sector<sup>27</sup> or a field<sup>28</sup> or a performance of obligations<sup>29</sup> specified in detail in by-laws).

The used responsibility formulations for ministers and state ministers were included in by-laws on the basis of Cabinet Regulations No 5, 04.01.1994 “Regarding ministry system” and later – the Law on Ministry System<sup>30</sup>. It should be noted that the Law on Ministry System lost its force when the State Administration Structure Law came into force on 1 January 2003 which did not contain the concept *political responsibility*. In addition, ministry by-laws obtained a common form that likewise did not contain the respective concept. Thus the particular regulation referable to ministers’ *political responsibility* for the ministry’s activities was not directly stated (at the level of the law and in by-laws) because the Law on the Cabinet of Ministers (wording that was in force until 30 June 2008) and the State Administration Structure Law did not include the concept of *political responsibility*. However, this concept was re-included in the legal act regulating operations of the Cabinet of Ministers, i.e. in the new Law on the Cabinet of Ministers that came into force on 1 July 2008.

The “basic norm” that specifies the *political responsibility* is Article 4 of the abovementioned law. The title of this norm is “responsibility” and it is referred to general responsibility of the Cabinet of Ministers, including but not limited to the *political responsibility*.

Article 4 of the Law on the Cabinet of Ministers is expressed in the following wording:

*“(1) The Cabinet of Ministers is generally responsible for the policy implemented by the government. Each member of the Cabinet of Ministers is **politically responsible** for his activities.*

25 Temporary By-law of the Ministry of State reforms (Decision No 46, 09.11.1993)

26 According to Section 2 of the Law on the Cabinet of Ministers (previous edition), a State minister is an official appointed by the Prime Minister, who manages a sector included in the scope of authority of a respective ministry. At the moment when this work was being prepared, the position of a State minister does not exist and is not regulated in norms of law.

27 It should be noted that responsibility for a sector is variously formulated, i.e. both the responsibility “for operation of the respective sector”, and “for operation of sectors of the ministry falling in one’s scope of authority”, “for operation of the sector entrusted to him” (see for example by-laws of the Ministry of Finance (Regulations No 301, 12.08.1997), the Ministry of Welfare (Regulations No 286, 05.08.1997), the Ministry of Agriculture (Regulations No 28, 31.01.1995), the Ministry of Foreign Affairs (Decision No 138, 22.11.1994)).

28 By-Laws of several ministries, e.g. the Ministry of Education and Science (Regulations No 224, 25.06.1996), Ministry of Environmental Protection and Regional Development (Regulations No 343, 14.11.1995) and (Regulations No 57, 21.03.1995).

29 Rules on competence of the Deputy Prime Minister (Regulations No 67, 04.02.2003), Rules on obligations and rights of the Deputy Prime Minister J. Kaksītis (Regulations No 117, 01.04.1997); Rules on supervision of Local Governments and on obligations of Minister for Special Assignments for Local Government (Regulations No 35, 13.02.1996)

30 Both regulatory enactments contain two identical formulations, i.e. “The ministry’s work is **politically managed** by the minister who is **responsible** towards the Parliament for the ministry’s activities” and “The state minister is **politically responsible** towards the Parliament for activities of the respective sector”.

- (2) *The Prime Minister is **politically responsible** for the work of the Cabinet of Ministers in general.*
- (3) *Irrespective of the **political responsibility**, a member of the Cabinet of Ministers is responsible for his activities also in accordance with regulatory enactments regulating criminal, administrative or civil responsibility*<sup>31</sup>.

Unlike the formulation used in the Law on Ministry System and by-laws of several ministries, the Law on the Cabinet of Ministers does not include a direct reference towards whom the Members of the Cabinet should be responsible. Nevertheless, this should not be considered to be an obstacle to solve the particular issue. The historically recognised concept regarding responsibility of Members of the Cabinet towards the Parliament<sup>32</sup> has not changed, i.e. neither the legislator, case-law, nor legal doctrine has recognised any significant amendments to the concept in this regard. On the contrary, this concept is established and substantiated also by judgments of the Constitutional Court (*Satversmes tiesa*) with direct indication to the *political responsibility* of the Cabinet of Ministers towards the Parliament<sup>33</sup>.

However, it is not clear whether the Parliament is the sole person to whom the Cabinet of Ministers is *politically responsible*. It is interesting that during revision of draft law No 143/Lp9 "Law on the Cabinet of Ministers", the legislator (Parliament) did not support the proposal of several members to supplement Article 4(1) of the draft law (regarding *political responsibility*) with words "towards the Parliament"<sup>34</sup>. This decision can be considered to be in line with the "pluralistic"<sup>35</sup> relationship model of responsibility where the *political responsibility* exceeds the "monolithic"<sup>36</sup> model of responsibility<sup>37</sup>. Although the responsibility of the Cabinet of Ministers towards the Parliament is not denied, at the same time the Parliament is not determined as the sole person towards whom the Cabinet of Ministers (members) should undertake *political responsibility*. The above is especially referable to ministers by taking into account their relations with the Prime Minister, who is *politically responsible* for the work of the Cabinet of Ministers in general and who is entitled to dismiss each minister from position, as well as in relation to political parties who under

31 Law on the Cabinet of Ministers

32 It was also recognized by deputies of the *Satversmes Sapulce* (see for example transcript of *Satversmes Sapulces 17.metting, IV session, i.e. Satversmes Sapulces IV sesijas 17.sēdes stenogramma. TNA elektroniskais izdevums: Latvijas Satversmes Sapulces stenogrammu izvilkums (1920–1922). Latvijas Republikas Satversmes projekta apspriešana un apstiprināšana. 392.-401*)

33 E.g. 25.11.2010. Judgment of the *Satversmes tiesa*, Case No 2010-06-01, paragraph 16.2., and 11.01.2011. Judgment of the *Satversmes tiesa*, Case No 2010-40-03, paragraph 10.2.

34 Summary of legislative proposals for Law on Cabinet of Ministers, second reading, i.e. Priekšlikumu apkopojums likumprojektam Nr.143/Lp9 „Ministru kabineta iekārtas likums”: 2.lasījums. Available:<http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/3975741B215D4963C22573AA00324155?OpenDocument> [accessed on 08.02.2014]

35 Taking into account the dependence of various persons' mutual relations and interests, a person is responsible simultaneously towards several other persons, in order to avoid offending the person towards whom the person is responsible under norms of law, that is, not to offend the person who has delegated this person to perform office duties and/or impose sanctions (release from the office) under norms of law.

36 A person is responsible only towards the person who has delegated this person to perform office duties and/or impose sanctions (release from the office) under norms of law.

37 M. Bovens, 'Public accountability'. In: *The Oxford Handbook of Public Management* (USA: Oxford University Press, 2005) 196.-199

coalition (cooperation) agreements delegate minister and undertake responsibility for his managed sector and are respectively entitled to dismiss the minister from the position<sup>38</sup>. Moreover, it should be acknowledged that the Cabinet of Ministers is indirectly responsible towards citizens of Latvia<sup>39</sup>, which has been confirmed also by the Constitutional Court<sup>40</sup>.

With regard the State President, the concept of *political responsibility* is used in the Constitution. It is interesting to note that instead of indicating the President's *political responsibility* the concept has been used to indicate President's *political non-responsibility*. Namely, the above can be referred to Article 53 of the Constitution that is expressed as follows:

**„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”<sup>41</sup>.**

This formulation causes uncertainty in theory and practice because the negated verb “shall not be borne” may lead to an opinion that the President should be considered to be a *politically non-responsible* official. Such conclusion can be found even in the case-law of the Constitutional Court<sup>42</sup>. Nevertheless, it should be stressed that the mentioned formulation is included in relation to contrasignation<sup>43</sup> mechanism and because of the Constitutional Assembly (*Satversmes Sapulce*)<sup>44</sup> who followed traditions of the 20<sup>th</sup> century constitutional parliamentary republic. Actually, the President is a *politically responsible* official<sup>45</sup> and this has been recognised by the Constitutional Assembly<sup>46</sup>, as well as the legal doctrine, including one of the most prominent Latvian legal scientists Kārlis Dišlers (1878 – 1954), who does not limit this by cases when the President independently issues orders (Article 48 and 56 of the Constitution), but links this to performance of duties and release from a position<sup>47</sup>.

38 It is prescribed in several Cooperation Agreements on forming the Cabinet of Ministers, which were concluded between political parties (see for example *Ministru kabineta veidojošo Saeimas frakciju sadarbības līgumu 4.6. un 4.5.punktu Ministru kabineta sastāviem laika periodā no 2006.gada 7.novembra līdz 2011.gada 24.oktobrim*. Available: <http://www.mk.gov.lv/lv/mk/vesture/> [accessed on 08.02.2014])

39 E.g., E. Levits, ‘Normatīvo tiesību aktu demokrātiskā leģitīmācija un deleģētā likumdošana: teorētiskie pamati’ [2002] Likums un Tiesības, 4.sējums, Nr.9 (37) 261.-268

40 E.g. 07.04.2009 Judgment of the Satversmes tiesa, Case No 2008-35-01, paragraph 13.

41 Constitution of Latvia (*Satversme*)

42 E.g. Political non-responsibility of the President is noted in 16.10.2006 Judgment of the Satversmes tiesa, Case No 2006-05-01, paragraph 15.3.

43 In theory, signing of the President’s orders by other officials is denoted as “contrasignation” (see K. Dišlers, ‘Latvijas valsts varas orgāni un viņu funkcijas’ (Rīga: TNA, 2004) 139).

44 It is the first elected parliament of the Republic of Latvia, which drafted and adopted *Satversme* (constitution).

45 K. Dišlers, ‘Latvijas valsts varas orgāni un viņu funkcijas’ (Rīga: TNA, 2004) 139.-140; A. Strupišs, ‘Parlamentārisma un prezidentālisma dilemmas’. In: *Satversmes reforma Latvijā: par un pret*, ekspertu seminārs: Rīga, 1995.g. 15.jūnijs, Sociāli ekonomisko pētījumu institūts „Latvija” (Rīga: N.I.M.S., 1995) 50

46 *Satversmes Sapulces IV sesijas 17.sēdes stenogramma*. TNA elektroniskais izdevums: *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*. Latvijas Republikas Satversmes projekta apspriešana un apstiprināšana. 401

47 K. Dišlers, ‘Latvijas valsts varas orgāni un viņu funkcijas’ (Rīga: TNA, 2004) 140

### III. THE CONCEPT OF POLITICAL RESPONSIBILITY IN THE LATVIAN CASE-LAW

In its judgments in cases No 2010-40-03, 2010-06-01, 2008-35-01 and 2006-05-01 the Constitutional Court has directly (by words) used the concept of *political responsibility*, and in cases No 2012-03-01, 2011-18-01 and 03-05(99) it has been used within the scope of Constitutional Court hearings and thus included in transcripts of these hearings. In addition, in the mentioned case No 03-05(99), as well as several other cases, e.g. No 2008-03-03 and 03-04(98), the Constitutional Court judgments assess the *political responsibility*, without using this concept directly (by words), but formulating findings that can be referred to it.

It is interesting that almost all these cases (except case No 2008-35-01) relate *political responsibility* with the responsibility of the Cabinet of Ministers (Government) towards Saeima (Parliament). For example, case No 2010-40-03 concludes that Article 59 of the Constitution includes “*political responsibility of the government towards the parliament*”<sup>48</sup>, case No 2010-06-01 indicates that “*The Cabinet of Ministers must bear political responsibility for the prepared draft of the state budget*”<sup>49</sup>, and case No 2006-05-01 assesses the responsibility of President, Parliament, and Cabinet of Ministers in executive power and it concludes that the Cabinet of Ministers can bear *political responsibility* for enforcement of all its scope of power in the field of the executive power, if the state administration has been subjected to it and legal mechanisms are available to it to ensure due operation of state administration institutions. At the same time it has been concluded that the Parliament can release the Cabinet of Ministers from *political responsibility* for the scope of authority<sup>50</sup> delegated to the so called independent state institution<sup>51</sup>. Thus the case-law specifies that word “responsible” in Article 4(1) of the Law on the Cabinet of Ministers includes meaning of the *political responsibility* in it.

Moreover, the case-law of the Constitutional Court eliminates the deficiency in regulatory enactments because it allows referring the concept *political responsibility* to the Parliament (its members), which directly is not prescribed. Aforementioned can be concluded by assessing court judgments in cases No 2008-35-01 and No 2010-06-01. Namely in Paragraph 20 of the 07.04.2009 judgment in case No 2008-35-01, the Constitutional Court indicates: “*obligation to assess norms of law which are being voted for is an issue of political responsibility*”<sup>52</sup>. By analysing respective judgment more carefully, it can be concluded that the given case understands the *political responsibility* to be the obligation of the Parliament (members) to assess norms of law and to vote (adopt a decision) on the basis of appropriate information thus avoiding adoption of unjustified decision. Furthermore, by carefully analysing paragraph 16.1 of the 16.10.2006 judgment in case No 2006-05-01 it is possible to conclude that the Constitutional Court considers that the Parliament bears *political responsibility* for operations of independent state institutions.

48 11.01.2011. Judgment of the Satversmes tiesa, Case No 2010-40-03, paragraph 10.2.

49 25.11.2010. Judgment of the Satversmes tiesa, Case No 2010-06-01, paragraph 16.2.

50 16.10.2006 Judgment of the Satversmes tiesa, Case No 2006-05-01, paragraph 11 and 16.1.

51 Institutions that perform state administration functions, but are not traditionally – institutionally, functionally – subordinated to the Cabinet of Ministers, and operate on the basis of a separate law. Their managing officials and the Parliament undertake political responsibility for the operations of these institutions.

52 07.04.2009 Judgment of the Satversmes tiesa, Case No 2008-35-01, paragraph 20

Department of Administrative Cases of the Supreme Court has used the concept of *political responsibility* in several decisions also, recognising minister's *political responsibility* for the field delegated to him<sup>53</sup>. Moreover, in case No SKA-426/2011 this concept has been used by a reference to a previously adopted decision (No SKA-381/2010), thus the court case-law has established a uniform usage of the concept *political responsibility*.

Considering the characteristic of the concept *political responsibility* and its usage court still has an opportunity to develop its understanding even further.

## CONCLUSION

In the present paper the author formulates the following conclusions:

1. Researchers variously define the *political responsibility*, i.e. it can be understood as retrospective responsibility (assessment of the past, imposing sanctions), as well as prospective responsibility (activity directed at future, performance of duties); it can be recognised as a category that reflects persons' mutual relations, as well as a form of emotional reaction – attitude.
2. The concept *political responsibility* is used in several Latvian legal acts, both effective and ineffective, as well as in case-law. Most often, it has been referred to Members of the Cabinet by prescribing responsibility for respective sector, ministry's work and performance of obligations, as well as it is linked with expressing distrust. Nevertheless, the concept *political responsibility* is used without a particular explanation – definition. The case-law of the Constitutional Court stresses that the *political responsibility* of the Cabinet of Ministers derives from Article 59 of the Constitution, although this norm, unlike other norms and legal acts, including the Law on the Cabinet of Ministers, does not contain this concept grammatically;
3. The concept *political responsibility* in the Latvian legal acts and case-law is mainly used to describe proper fulfilment of obligations (duties), accounting for respective sector (ministry) and losing a position in the broadest meaning of this word, including non-acquisition of a position or withdrawal / revocation / dismissal from a position. Such use of the concept corresponds to several researchers' understanding of the retrospective and prospective *political responsibility*;
4. The case-law eliminates deficiency in the regulatory enactments because it allows referring the concept *political responsibility* to the Parliament (members) and provides opportunity to fill its content by the proper fulfilment of obligations specified in the norms, observing the oath, elections, dismissal or revocation, as well as other elements featuring the concept *political responsibility* that have been recognised in scientific research works and referred to other subjects under the legal acts and case-law of Latvia.

53 28.06.2010. Judgment of the Department of Administrative Cases of the Supreme Court, Case No SKA-381/2010, paragraph 12 and 08.07.2011. Judgment of the Department of Administrative Cases of the Supreme court, Case No SKA-426/2011, paragraph 11

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## HOW CAN LEGAL DISCOURSE BENEFIT FROM PHILOSOPHY? A REMARK ON THE *LAUTSI* CASE

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**Abstract.** The *Lautsi case* was definitely one of the most significant and controversial cases adjudicated by the European Court of Human Rights within last years. In this paper, I recall the case in order to formulate a thesis concerning the necessity of philosophical reflection in legal discourse. In my opinion it is noticeable that traditional legal methodology is, more and more frequently, not sufficient to cope with legal predicaments and must be supported by additional tools in order to become effective and self-conscious. Legal texts offer us only “thin concepts”, whereas in legal discourse sometimes we are in need of “thick conceptions”. The *Lautsi case* reveals that rules of legal interpretation often need to be supplemented by claims that are more philosophical than legal.

**Keywords:** *Lautsi case*, state neutrality principle, political philosophy, liberalism, European Convention of Human Rights

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### INTRODUCTION

It is beyond doubt that there are significant relations between law and philosophy. Both disciplines are interested in similar concerns and issues. Philosophical researches, as well as legal analyses, make use of notions such as norm, rule, responsibility, guilt, morality, rights, duties, meaning etc. In order to resolve emerging issues, both disciplines employ theories of interpretation, argumentation and conceptual analyses. It seems to be a commonly known fact that legal and philosophical discourses share (to some extent) interests and methods, however the significance of this fact is not appreciated enough. In my opinion most of legal theorists and practitioners underestimate the potential benefits of exploiting philosophical achievements in legal discourse. In this paper I argue why it is a mistake.

In my consideration I will focus on an example that has caused a lot of trouble to legal discourse within last years. The example that I have in mind is the case of *Lautsi and Others v. Italy* (*Lautsi case*)<sup>1</sup>, one of the most significant and controversial cases adjudicated in the history of the European Court of Human Rights (ECHR). In the first part of the paper, I recall the case in order to explain the crux of the complications for the legal reflection. In the second section I will describe the key points of the philosophical debate concerning state neutrality. Finally, in the concluding part I will show how philosophical achievements regarding the concept of neutrality can develop the perspective on the problem.

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1 *Lautsi and Others v. Italy* [2009], ECHR, application no. 30814/06 (2010) 50 EHRR 42; *Lautsi and Others v. Italy* [2011], ECHR, application no. 30814/06 (2012) 54 EHRR 3.

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*The Lautsi case* concerns, specifically, the issue of the presence of religious symbols in state-school classrooms and, more broadly, the problem of an adequate understanding of a state neutrality principle. The applicant in the case, Mrs. Soile Lautsi, asked school governors to remove the crucifix that was displayed in the classroom. She acted on behalf of herself and her two children attending the school. According to her argumentation, the presence of crosses in public places contradicts the duty of the state to be neutral and secular. However, in Italian schools there is a very old tradition of displaying Catholic symbols in classrooms, therefore, the request was refused, firstly by school governors, and secondly by national administrative courts (the Veneto Administrative Court and the Supreme Administrative Court). Mrs. Lautsi decided to appeal to the ECHR arguing that Italy contradicts the European Convention of Human Rights, namely, by breaching applicant's right to raise and educate her children in conformity with her own convictions (guaranteed by the Article 2 of Protocol No. 1), and by violating her freedom of thought, conscience and religion (provided by the Article 9 of the European Convention). The case was passed, firstly, by the Chamber (the Second Section) of the ECHR on 3 November 2009, and then, by the Grand Chamber of the ECHR on 18 March 2011. The most puzzling fact about the *Lautsi case* is the striking disparity between these two judgments. Two instances of the ECHR differed deeply in their understanding of the state neutrality principle and duties that follow from it.

In 2009 the Chamber of the ECHR stated that Italy was in violation of the European Convention. The Court held that the display of crucifixes in classrooms constitutes an infringement of the freedom of religion taken together with state's obligations derived from the neutrality principle. The argumentation was based on recognizing the principle of educational pluralism and its implications for state neutrality. *The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought*<sup>2</sup>. The display of religious symbols, such as crucifixes, violates freedom of religion, which should be conceived as a negative freedom<sup>3</sup>. According to the Court, the particular arrangement of school environment may constitute pressure on pupils who are not Christians<sup>4</sup>. The state support for one religion in this case cannot be justified<sup>5</sup>.

Surprisingly, only two years later, in the final decision in 2011, the Grand Chamber passed an opposite judgment. According to this settlement, there has been neither infringement of personal freedom nor violation of any state's obligation in the case. The Grand Chamber asserted that the neutrality principle applies to *acting* rather than *being* of the state<sup>6</sup>. However, in order to act, a state always must balance and choose between different viewpoints, and for this reason it can never be truly neutral. The display of crucifixes in public schools, at the same time, does not threaten the freedom of religion, since crucifixes are *essentially passive* symbols<sup>7</sup>. Finally,

2 Lautsi and Others v. Italy [2009]... p. 56.

3 Lautsi and Others v. Italy [2009]... p. 47.

4 Lautsi and Others v. Italy [2009]... p. 50.

5 Lautsi and Others v. Italy [2009]... p. 50-52.

6 Lautsi and Others v. Italy [2011]... p. 71.

7 Lautsi and Others v. Italy [2011]... p. 72.

according to the Court, the presence of religious symbols may be justified by reference to tradition and common good.

The feeling of discrepancy between two judgments of the ECHR even emerges when we realise that the first one was held unanimously (by seven judges) and the second one - almost unanimously (by votes fifteen to two).

The puzzlement of ECHR's total reversal was afterwards widely analysed in legal literature<sup>8</sup>. Theorists speculated about the reasons for the Court's final decision. Some authors defended the standpoint of the first instance and its 'strict' understanding of neutrality principle; others maintained that the second judgment was better justified and that duties imposed by neutrality are 'softer'. However, the most intriguing is the fact that the vast majority of theorists assumed that at least one of the judgments must have been flawed since judges had failed to recognize the appropriate meaning of the text of European Convention.

I argue that attempts of most legal theorists to explain the puzzlement clearly miss the target. In my opinion judges of ECHR faced a dilemma: on the one hand, they had to examine the conformity of the presence of crucifixes in public schools with the concepts of neutrality and freedom. On the other hand, the Convention provides only very general concept and no simple answer to this case. The concept of state neutrality is not sufficient to settle the controversy, judges were in need of a conception of state neutrality. In order to apply the principle, they required a detailed account of it. It is important to note that such detailed conceptions are subjects of philosophical interest. To show this, I turn now to the philosophical discussion concerning the issue of state neutrality.

The significance of state neutrality principle is one of the most discussed matters set against the backdrop of contemporary political philosophy. According to liberal thinkers, the neutrality principle constitutes one of the most important standards of modern liberal democracies. They claim that it should be conceived as a constraint put on the activities performed by public authorities; in this sense the principle is aimed at providing protection from the arbitrary use of state power. Contemporary disputes concerning state neutrality principle cover the most important elements of each conception of neutrality regarding: (1) the character of the principle, (2) its rationale, and (3) the scope of its applicability.

The most important question that every conception of neutrality concerns is the (1) character of the principle<sup>9</sup>. There are three main answers to this issue developed in contemporary liberalism.

8 W. Brzozowski, glosa do wyroku Wielkiej Izby z 18 III 2011 w sprawie *Lautsi v. Włochy*, nr skargi 30814/06, [2011] 11 Państwo i Prawo, 121-126; M. Piechowiak, 'Negatywna wolność religijna i przekonania sekularystyczne w świetle sprawy *Lautsi przeciwko Włochom*', [2011] 106 Przegląd Sejmowy, 37-68; P. Bała, A. Wielomski, glosa do wyroku Europejskiego Trybunału Praw Człowieka z dnia 3 listopada 2009 r. w sprawie *Lautsi przeciwko Włochom* (skarga nr 30814/06), [2011] 106 Przegląd Sejmowy, 158-170; P. Borecki, D. Pudzianowska, glosa do wyroku ETPC z 3 XI 2009 w sprawie *Lautsi v. Włochy*, skarga nr 30814/06 [2010] 4 Państwo i Prawo, 124-129; S. Langlaude, 'Lautsi v. Italy: Coercion and Lack of Neutrality in the Classroom' [2012] 11 Queen's University Belfast Law Research Paper; B. Peters, 'Case Analysis - Crucifixes in Italian Classrooms: *Lautsi v Italy*' [2011] 6 European Human Rights Law Review 86-92; J. Temperman [editor], 'The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom' (Leiden/Boston: BRILL/Martinus Nijhoff, 2012).

9 B. Ackerman, 'Social Justice in the Liberal State' (New Haven, London: Yale University Press 1980); A. Patten, 'Liberal Neutrality: A Reinterpretation and Defense' [2012] 20 Journal of Political Philosophy, 249-272; W. Kymlicka, 'Liberal Individualism and Liberal Neutrality' [1989] 99 Ethics, 883 - 905.

According to the first of them, the requirements imposed by the principle should apply to the aims of the action, namely a state of affairs that an agent intends to realise; one violates the principle when he aims at improving the social situation of any moral or religious worldview in comparison with others. Therefore, the responsibility for one's actions is limited to those effects that can be ascribed to him. On the contrary, the next answer states that this responsibility should be wider. All effects, both intentional and unintentional, should be taken into account, because even involuntary actions of public authorities may improve (or worsen) the social position of some worldviews. Hence, the duty of the state is to restrain from doing anything, that may in effect promote or undermine any particular worldview. According to the third answer, neither aims nor social effects are of importance here. The justification is the most significant aspect of an action and it should be juxtaposed to the requirements of neutrality. Two important postulates are derived from this idea. Firstly, no action performed by public authorities can be arbitrary; it should always be taken on the basis of reasons that speak in favour of it. Secondly, the scope of permissible reasons for public authorities is limited to those of them, that are neutral.

The second issue on which philosophical discussions have focused concerns the (2) rationale of neutrality principle<sup>10</sup>. Why should public authorities act neutrally? There are different reasons for admission of the standard and we should be aware that these rationales support different depictions of the principle<sup>11</sup>. Some thinkers claim that the idea of epistemic scepticism is the most adequate justificatory ground. They say that we do not have epistemic access to the reliable knowledge about the good. In the world there is a multitude of different conceptions of the good, and at the same time, it is impossible to find a common denominator for the disagreements between various worldviews. Therefore, the most reasonable answer is to stay neutral toward moral disagreements. Other theorists point to the individual freedom as the most promising rationale for neutrality. From the premise that people are different and pursue different conceptions of the good, they deduce that each person should be treated as the best judge of what is good for him and for his interests. The state should honour the free choice of every citizen so far as he does not violate other people's freedom. The state is neutral only if all conflicts that may occur between the autonomy of persons and acting for one's good are settled in favour of individual liberty. Finally, many contemporary thinkers are adherents of so-called principle of equal concern and respect. Pursuant to the principle the validity of neutrality principle is a consequence of the fact that each citizen possesses equal moral status. Public authorities are obliged to respect citizen's dignity, being aware that this dignity is equal with regard to every citizen. Therefore, actions performed by public officials are neutral only if they are aimed at (or based on) values, which may be acknowledged by every reasonable person, regardless of his private beliefs and worldview.

At last, every decent conception of neutrality has to describe the (3) scope of application of the principle. We can formulate two general answers with respect to the issue. On the one hand, it may be claimed that the demands of neutrality should guide all political actions performed by public authorities. This 'wide view' seems to be very consistent, as the conformity with the principle is

10 C. Larmore, 'The Morals of Modernity' (Cambridge, New York, Cambridge University Press 1996); S. Caney, 'Consequentialist Defenses of Liberal Neutrality' [1991] 165 *The Philosophical Quarterly* 457-477.

11 J. Waldron, 'Liberal Rights. Collected Papers 1981-1991' (Cambridge: Cambridge University Press 1993) 143-169.

required with respect to all political questions<sup>12</sup>. On the other hand, it is argued that the scope of the application of the principle should be limited. There are two major visions of the 'narrow view'. The author of the first one is J. Rawls<sup>13</sup>. In 'Political Liberalism' Rawls introduced a distinction on fundamental and non-fundamental political matters. The former covers constitutional essentials and matters of basic justice, the latter concerns other political issues, such as: most tax legislation, laws protecting the environment, funds for museums and the arts, etc. According to Rawls, the requirements of neutrality should cover only fundamental matters. The second vision of the narrow view is from J. Raz<sup>14</sup>. In his opinion public authorities should be neutral solely with respect to laws and policies that are coercive. However, at the same time the state can promote some conceptions of the good and discourage others by non-coercive policies and means. For example the state can use subsidies, advertising, and even taxes to convince citizens to choose more valuable options.

## CONCLUSION

Coming back to the problem concerning the *Lautsi case*; in my opinion the case is a very good example of showing in what way legal discourse can benefit from philosophical analyses. Two issues should be addressed here.

Firstly, we can see that traditional tools of legal conceptual analysis nowadays are getting more and more frequently insufficient to settle legal predicaments. In the *Lautsi case* a fair settlement could not be easily recognise in meaning of words and concepts of the European Convention. This is the main reason why two instances of the ECHR passed two totally different judgments. To reach an adequate and fair judgment in the case, concepts such as state 'neutrality' and 'impartiality' had to be supplemented by additional considerations. In this sense, legal texts offered only 'thin concepts', whereas judges were in the need of "thick conceptions". Such conceptions, primarily but not only with respect to constitutional issues, are developed in philosophical discourse. In this way, philosophical achievements may support legal discourse and help it to become more self-conscious.

Secondly, if we accept the thesis concerning the need of supporting legal methodology with philosophical analyses and that philosophical conceptions can improve legal discourse, then we should also change the way of seeing and discussing legal issues. As was said above, the problem of the ECHR's reversal was discussed in legal literature and most of the theorists (especially in Polish literature) conclude that at least one of the judgments passed in the *Lautsi case* must have been flawed. The assumption that stands behind the dispute is similar to Dworkinian 'one right answer' thesis. Parties to the dispute agree that there exists only one adequate answer, they just differ with respect to the content of this answer. In my opinion, such attitude is a mistake. The case reveals that there is no simple one "appropriate meaning" of neutrality that underlies the text of the Convention. If we agree that one legal concept may be developed into different conceptions, then we have to accept that there may be more than one right answer to a legal case.

12 J. Quong, 'Liberalism without Perfection' (Oxford: Oxford University Press 2011) 256-289.

13 J. Rawls, 'Political Liberalism' (New York: Columbia University Press 1996) 227-233.

14 J. Raz, 'Morality of Freedom' (Oxford: Oxford University Press 1986) 417-419.

Summing up the *Lautsi case*, I claim that both judgments passed in this case were justified and they are in conformity with law. They made use of the same concept, however they employed radically different conceptions. The first one is defensible on the ground of a conception based on the neutrality of effects supported by the ‘wide view’ of the scope of the principle. Definitely, the presence of crucifixes in public classrooms is non-neutral according to this conception of neutrality. It constitutes better grounds for acquiring a Catholic worldview than any other. Pursuant to the ‘wide view’ of the scope of the principle, issues such as an arrangement of school classrooms also ought to be guided by requirements of neutrality. On the other hand, the second judgment of the ECHR is compatible with the conception of neutrality which evaluates one’s reasons for action (neutrality of justification) or opts for the ‘narrow view’ of the scope. According to this conception, a conduct may lead eventually to non-neutral situation on the condition that it was justified neutrally. In this sense, the reference to Italian tradition may constitute a neutral justification.

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## RIGHT OF EMPLOYEES TO INFORMATION ABOUT EMPLOYER'S OPERATION\*

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**Abstract.** This paper discuss the role of information for employees and employers in the context of European legislation concerning information of employees on the national level (work councils) and in Community-scale economic organizations (European Works Councils, employee representation in European Company and European Cooperative). On the basis of analysis of codes of good practice of selected companies article discuss also the approach of companies towards information of employees.

**Keywords:** information, employee, confidential information

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### I. INTRODUCTION

With the development of technology, quality and availability of information increases. The development of technology also makes the information gains in importance. In the era of a knowledge-based economy<sup>1</sup> information is crucial for the enterprise. Possession or lack of appropriate information at a suitable time may affect economic performance and determine achieving economic goals.

The phenomenon of the growing importance of information is reflected in legislation. The provisions concerning information can be found in virtually all areas of law, including labour law. This article concerns obligations of employers, deriving from European legislation, to provide information to employees on the national level, as well as in Community-scale economic organizations. The article also addresses the issue of protection of confidential information of employers.

### II. EMPLOYEE INFORMATION

The European law introduced a number of regulations requiring employers to provide information to employees. Originally they were partial regulations concerning information of employees in case of specific events like collective redundancies<sup>2</sup> or transfer of undertaking<sup>3</sup>. Along with the progressive equating social and economic integration objectives (*cohésion*), more comprehensive regulations in informing employees were introduced, \*including specifying the rights of

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1 OCDE/GD(96)102 "The Knowledge – Based Economy" (Paris: OECD 1996) p 46.

2 Council Directive (EC) 98/59 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L 225, 12.8.1998, p. 16–21.

3 Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20.

employees in economic organizations operating in at least two EU countries<sup>4</sup> and afterwards, the general conditions of informing and consulting employees on a national level<sup>5</sup>.

Employees' right to information about the employer's business is part of the participation of the employees in the management of the company<sup>6</sup>. Transmission of information to employee representatives, even when is not associated with formal right of employees to give consent, or even opinion about intended action of employer, has an impact on its activities. Informing has also instrumental function toward other forms of employees' participation - consultation and co-decision. Transfer of information is a prerequisite and a starting point for carrying consultations and reaching an agreement.

Employees' right to information and consultation are the standards of European law. They are guaranteed in the number of fundamental EU documents, including Treaty on European Union as amended by Amsterdam Treaty of 1997<sup>7</sup>, Community Charter of the fundamental social rights of workers of 1989<sup>8</sup>, Charter of Fundamental Rights of the European Union, which is now an attachment to the Lisbon Treaty of 2007<sup>9</sup>. In the European legislation process of forming representations of employees and developing their participatory rights continues.

The basic idea of promoting solutions which implies employee participation, including their information rights, is that employee participation serves both the interests of employees and the employers. Building a knowledge-based economy, in which a greater commitment and independence of employee is needed, requires taking into account the viewpoint of employees in matters relating to the business for the benefit of the company. This fact is recognised by the researchers of human resources management<sup>10</sup>. The idea of employee participation is justified on ethical, political, economic and social grounds. Despite studies do not give a clear answer to the question of how

- 4 European Parliament and the Council Directive (EC) 2009/38 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) [2009] OJ L 122, 16.5.2009, p. 28–44 (EWC Directive); Council Directive (EC) 2001/86 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294, 10.11.2001, p.22–32 (SE Directive); Council Directive (EC) 2003/72 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [2003] OJ L 207, 18.8.2003, p. 25–36 (SCE Directive).
- 5 European Parliament and the Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80, 23.3.2002, p. 29–34.
- 6 Participatory solutions can be classified according to forms (degrees) of participation. Information unrelated to the additional power to influence the decision-making process is the weakest form of participation. Higher form of participation rights are advisory and consultancy powers of employee representations (cooperation). The highest, most developed and most rare form of participation is co-decision, which is to give the workers' representatives decisive voice in the decision making process in the company. J. Wratny, „Partycypacja Pracownicza. Studium zagadnienia w warunkach transformacji gospodarczej” (Warszawa: IPISS 2002) 26-27.
- 7 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340, 10.11.1997, p. 1–144.
- 8 Community Charter of the fundamental social rights of workers, adopted at the European Council meeting held in Strasbourg on 9 December 1989.
- 9 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon [2007] OJ C 306, 17.12.2007, p. 271–271.
- 10 M. Armstrong, “Armstrong’s Handbook of Performance Management” (London: Kogan Page 2009) 33.

employee participation affects the economic performance of the company<sup>11</sup>, it is indicated that a greater involvement of employees in the work, increase of efficiency and strengthening social peace are benefits of participation.

Employees' right to information about the employer's business is performed in principle by their representatives, and only in the absence of representatives, information is provided directly to the employees<sup>12</sup>. The employee representatives entitled to receive information includes especially European Works Councils<sup>13</sup>, works councils, employee representation in European Company (*Societas Europaea*, SE) and European Cooperative Society (*Societas Cooperative Europaea*, SCE). The scope of the employees' representatives access to information concerning the activities of companies is set by regulations establishing these employee representatives or agreements with employer concluded under these regulations. The information to which access was granted to employees is wide and indeterminate. For example, European Works Councils can demand the following information that the company is obliged to provide: information on the structure, economic and financial situation, probable development, production and sales, situation and probable trend of employment; investments; substantial changes concerning organization; introduction of new working methods or production processes; transfers of production; mergers; cut-backs or closures of undertakings, collective redundancies.

The scope of those information generally includes the entire range of the company operation. Such a broad scope of information is justified by the employees interest in obtaining information concerning the company. Those information enable employees to know the situation and perspectives of the employer and on this basis take up decisions about their future career path.

### III. PROTECTION OF EMPLOYER'S INFORMATION

It should also be noted that from the point of view of the employer, the information is part of the company and its resource<sup>14</sup>. The function of information is mapping of reality and providing data necessary to make decisions, but at the same time information itself can also be used as a company's trading good. Protection of confidential information of the company was reflected in

- 11 See i.a. A. van den Berg, Y. Grift, A. van Witteeloostuijn "Works councils and organizational performance: the role of top managers' and Works councils' in bad vis-à-vis good times" [2011] 2 Journal of Labour Research 136-156; P. Laroche, H. Wechtler "The effects of Labour unions on workplace performance: New evidence from France", [2011] 2 Journal of Labour Research 157-180.
- 12 e.g. art. 7 section 6 Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20.
- 13 In 2013 there were 1048 EWCs functioning, European Trade Union Institute, EWC database, 11/2013, [http://www.ewcdb.eu/documents/freegraps/2013\\_11\\_EN.pdf](http://www.ewcdb.eu/documents/freegraps/2013_11_EN.pdf), access on 8.03.2014.
- 14 As classic economy considered material resources such as land, financial means, in the 70s Twentieth century information was raised to the rank of resource, K. Materska, "Rozwój koncepcji informacji i wiedzy jako zasobu organizacji" in: "Od informacji naukowej do technologii społeczeństwa informacyjnego" ed. B. Sosińska-Kalata, M. Przasztek-Samokowa, (Warsaw Nauka-Dydaktyka-Praktyka 2005). Information as a resource is a subject of new discipline Information Resource Management (IRM). The approach presented by the IRM assumes that there is a large enough similarities between information resources and material resources, that it is reasonable to use the generally accepted framework for the management of material resources for the management of information.

the international law<sup>15</sup>. Standards relating to various aspects of information security are becoming more extensive in the legal systems of modern states.

The European legislator, granting employees certain rights to information, also notes the need to safeguard the resource of information of the employer. In this regard, regulation relating to works councils, European Works Councils, and employee representatives in the SE and the SCE is very similar. The pursuit of protection of the information concerning the employer is manifested in the possibility of impose confidentiality duties on employee representatives in regard of certain information<sup>16</sup>. Information provided to employee representatives with confidentiality clause may serve them in the course of the consultation or can form the basis for decisions making in directing their further actions. Other instrument to protect information of the employer is the possibility to refuse to provide some information, which generally are covered by information duty<sup>17</sup>. This concerns especially sensitive information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them. The scope of information to employees is therefore dependent not only on the range of issues which, under the laws or agreements, have been recognized as a matter of information, but also the sole decision of the of the employer. Under the provisions of national legislation, the decision of refusal to provide information may subject to prior administrative or judicial authorisation.

Despite these guarantees, in practice, there are obstacles to the effectiveness of information. One of the major of them is too late issuing of information to employees<sup>18</sup>. Provisions on information indicate that the information should be communicated early enough to enable employee representatives to familiarize themselves with the information and at least giving opinion about intended actions. Only then it is possible to take into account the voice of employees in decision-making. However, the practice shows that often transfer information to employees takes place after the decision is already made. In such a case information not aims to the actual implementation of participatory rights of workers but it is merely fulfilment of formal obligations. Another obstacle in the effective carrying out information process is the poor quality of information provided to employees<sup>19</sup>. The information is too general to respond to the issues under discussion or is given in a form that requires specialist knowledge, what in consequence forces cooperation with experts, what not always is possible, and what makes the whole procedure money and time consuming. The provisions of the above-mentioned directives are the minimum standards, in the same time they set a possibility to conclude agreements between the employers and employees concerning frame of cooperation tailored to the conditions in the particular company. Reference to the separate agreements of the social partners should be assessed positively, however the role of minimal standards is crucial in front of deficiency of social dialogue.

15 For example in recent decades in the international law there was introduced regulation concerning the protection of the information as intangible goods, see WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) OJ L 336, 23.12.1994, p. 214–23.

16 See art. 8 of EWC Directive, art. 8 SE Directive, art. 10 SCE Directive.

17 See art. 8 sec. 2 EWC Directive.

18 See *Fujitsu Siemens*, Case C-44/08 [2009] OJ C 107, 26.4.2008; *Junk v Kühnel*, Case C-188/03 [2005] ECR I-00885.

19 According to survey among members of EWC vast amount of them estimated information given to EWC as inadequate, R. Jagodziński, N. Kluge, J. Waddington, (ed.) "Memorandum. European Works Councils", (Brussels: ETUI-REHS 2008) 22-25.

#### IV. INFORMATION OF EMPLOYEES AND CODES OF GOOD PRACTICE

Independently of the regulation of European law regarding information of employees, some companies decides to implement so called codes of good practices (codes of conduct), in which they regulate at least some aspects of information of employees and protection of confidential data. Codes of good practice are not legally binding. They are voluntarily adopted by the company as part of creating its organizational culture and its corporate governance therefore there are not homogeneous<sup>20</sup>. Codes of good practice often include provisions characteristic to social responsibility of business. It is worth to notice that transferring to employees information on changes in the business operations of the employer, which may result in changes in employment, is recommended by standards of ISO referring to social responsibility<sup>21</sup>. What is more, transparency is one of the fundamental ideas of social responsibility of business.

Analysis of codes of good practice in selected enterprises shows<sup>22</sup> that all contain provisions concerning the protection of confidential information of the employer, but only small part of codes contains some provisions regarding employees right to information about employer's operation. Such provisions, if already existing in the codes of good practice, are limited to a declaration of respect for applicable laws in this regard. It shows that access to information concerning business operation is sensitive issue from the employer's point of view and that employers are reluctant in undertaking obligations concerning information of employees. In the context of information available to workers entrepreneurs see first of all a threat against which they need to protect.

In addition, most of the analyzed codes of good practice do not define the concept of confidential information, although it might seem that this should be the starting point for any further regulation relating to the protection of the information, especially that a code of good practice is a document tailored to the needs of a particular enterprise.

This situation is influenced by the characteristics of information as such. It is difficult to define information, and often there are difficulties in recognizing the scope of information in the company due to dynamic change of information resources. There are number of doubts in defining the value of information and disposers of information. Those characteristics of information affects legal regulation of it.

#### V. CONCLUSIONS

European legislation lead to social progress and was important step toward the development of information rights of employees. It was possible, mainly due to the minimum standards laid down in European law. Regardless of the trend of empowering employees participation European law recognizes the problem of the meaning of information for businesses and provide guarantees for the protection of certain information relating to the employer.

20 M. Weiss "Reinventing Labour Law?" in "The idea of Labour Law", G. Davidov, B. Langville (ed.) (Oxford:Oxford University Press 2011) 46-56.

21 International Standard "Guidance of social responsibility", ISO 26000:2010 (E).

22 More than ten of codes were analyzed, from the different branches of business.

The issue of providing employees with information about the employer's business is an example of permeation of law, economics and social sciences. This is due to the function of the information – it is an emanation of participation of employees in the management and gives individual employee grounds for decisions crucial to their professional life. In the same time information is an element of enterprise and as such need to be protected.

Presented analysis of selected codes of good practice shows, that information is sensitive issue to employers, who are afraid of loss of important good. Such threats are understandable, especially when it will be taken into account that in many cases removing the effects of disclosure or loss of important information is not possible and enforcement of liability in such cases is associated with a number difficulties, especially with evidence and valuation of loss.

In view of continuous increasing importance of information, and the amount and availability of it, as well as the development of technical measures related to the processing of information, it seems that legal regulation concerning these issues will be developed and more complex.

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7. OCDE/GD(96)102 “The Knowledge – Based Economy” (Paris: OECD 1996) p 46
8. P. Laroche, H.Wechtler “The effects of Labour unions on workplace performance: New evidence from France”, [2011] 2 Journal of Labour Research 157-180.
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## THE JUNCTION OF FINANCIAL ACCOUNTING AND TAX LAW AS AN EXAMPLE OF ECONOMICAL AND LEGAL DISCOURSE

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**Abstract.** The article seeks to emphasize financial accounting importance to tax law. As the fundamental financial accounting equation presupposes the legal nature of financial accounting (importance of legal relations), financial accounting shall also become a core subject-matter of law science. Despite the contradictory case-law examples, analysis of fundamental financial accounting equation, Generally Accepted Accounting Principles, financial accounting methods reveals that legal regulation of corporate income tax could gradually implicate more financial accounting norms and minimize differences between calculating result in financial accounting and for taxation purposes.

**Keywords:** corporate income tax, financial accounting, fundamental financial accounting equation, tax base

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### INTRODUCTION

Law professor A. Peczenik states that scientists must select elements from different disciplines and connect them in a way that they will serve for new purposes. However, should economics and law be integrated in one substance? On the other hand, should the research of economics and law be separated and reserved into core subject-matter and managed by specialists, since the phenomenon of economics and law are becoming more and more complicated. Despite that, a more profound question would be, what we can reach from the merging of economics and law? The answer to this question is based on the analysis of two concrete categories – tax law and financial accounting.

The object of this article is the correlation between financial accounting and tax law based on the systemic review of the Law on Corporate Income Tax, business accounting standards framed by The Authority of Audit and Accounting, scientific literature, Tax dispute settlement institutions case-law and practical experience. This article aims to reveal the aspects of financial accounting and tax law relationship. With reference to the purpose of this article, there are raised such tasks:

- 1) to define financial accounting as a category of economics and disclose its legal nature;
- 2) to answer the question why research of financial accounting is necessary for tax law using concrete taxes examples;
- 3) to reveal research methods, sources, principles of financial accounting and to explain how they could be applied in tax law;
- 4) to identify fundamental theoretical and practical problems of the application of financial accounting standards in tax law.

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The main body of this article seeks to emphasize financial accounting importance to tax law. As a consequence, the article is summarised by brief accumulative conclusion.

## FINANCIAL ACCOUNTING AS A PHENOMENON OF ECONOMICS AND LAW

Foreign scientists recently have given more attention to problematic questions of corporate income tax connection with financial accounting, and have also emphasized financial accounting importance to tax law<sup>1</sup>. However, despite the fact that there are some publications which assess transactions for financial accounting and taxation purposes in practical view in special press, there is not any scientific research on corporate income tax connection with financial accounting in Republic of Lithuania. This is way it is important and necessary to disclose this core subject-matter in scientific view.

To sum up scientific literature of economics, the definition of financial accounting could be<sup>2</sup> – a field of accounting that treats money as a means of measuring economic performance instead of as a factor of production. It encompasses the entire system of monitoring and control of money as it flows in and out of an organization as assets and liabilities, and revenues and expenses<sup>3</sup>. In other words, financial accounting is necessary for the preparation of financial statements for decision makers, such as stockholders, suppliers, banks, employees, government agencies, owners, and other stakeholders. Financial accounting gathers and summarizes financial data to prepare financial reports such as balance sheet and income statement for the organization's management, investors, lenders, suppliers, tax authorities, and other stakeholders<sup>4</sup>. Financial accounting theory accents two gradual categories asset → ownership or ownership → asset. These categories disclose that asset which is recognized in financial accounting must always have an owner. As a consequence, axiom is defined as an asset which is equal to ownership and this relationship is described by scientists as the fundamental financial accounting equation<sup>5</sup>. This equation must remain in balance and for that reason modern financial accounting system is called a dual-entry

- 1 For example, D. Nerudova, 'The international reporting standards and taxation system: connection or disconnection?' [2011] 16 *Economics & Management*, 79; J. M. Poterba; N. S. Rao; J. K. Seidman, 'Deferred tax positions and incentives for corporate behavior around corporate tax changes' [2011] 1 *National Tax Journal* 30; M. Bebeselea; C. P. Mitran, 'Autonomy and interdependence between accountancy and taxation' [2010] *Proceedings of the 4th World Congress on the Advancement of Scholarly Research in Science, Economics, Law & Culture* 41 – 45.
- 2 For example, C. M. Ducu; T. D. Enache; P. Stefan, 'Managerial accounting vs financial accounting in the knowledge society' [2013] 2A *Universitatea "Constantin Brâncoveanu"* 421; P. Baskerville 'What is the difference between a bookkeeper and an accountant?' 2 at <http://www.saylor.org/site/wp-content/uploads/2011/12/BUS103-DIFFERENCEBOOKKEEPERACCOUJNTANT.pdf>; R. Kanapickienė; K. Rudžionienė; B. Jefimovas, 'Financial accounting' (Vilnius: Vilniaus universiteto leidykla, 2008) 13; V. Lakis *et al.* 'Financial accounting theory and practise' (Vilnius: Vilniaus universiteto leidykla 2009), 12; *BusinessDictionary.com* at <http://www.businessdictionary.com/definition/financial-accounting.html>
- 3 *BusinessDictionary.com* at <http://www.businessdictionary.com/definition/financial-accounting.html>
- 4 *Ibid.*
- 5 C. S. Warren; J. M. Reeve; J. E. Duchac, 'Financial accounting' (Mason (Ohio): South-Western (Thomson) 2007) 54; J. Bukevičius *et al.* 'Accounting for managers' (Kaunas: Technika 2009) 33; L. Goldberg, 'The exposition of fundamental accounting procedure' [2002] 2 *Accounting Review* 280 – 281; N. Vanzante, 'Using the Basic Accounting Equation to Help Students Understand Differences Between the Cash Basis and Accrual Basis' [2013] 2 *Management Accounting Quarterly* 35.

system. This means that every transaction that is recorded in financial accounting records must have at least two entries; if it only has one entry the equation would necessarily be unbalanced<sup>6</sup>. From the fundamental financial accounting equation it can be seen that what the business owns (assets) equals what it owes both creditors (liabilities) and the owners (equity): a) the business owes creditors for loans made and other obligations to pay for goods or services; b) the business owes the owner for any money or other assets that the owner invests in the business; c) the business also owes the owner the profit that is realized from business operations<sup>7</sup>. The fundamental financial accounting equation was researched by scientists of economics. On the other hand there is not revealed in scientific literature that nature of the fundamental financial accounting equation is based on legal relations. If an asset is not an object of legal relations (there is not ownership of this asset), than the fundamental financial accounting equation can not be recognized. The conclusion

**Asset = Ownership**



**Asset = Liabilities + Owners' Equity**

**Liabilities = Asset – Owners' Equity**

**Owners' Equity = Asset – Liabilities**



**Legal relations**

**TABLE 1**

of the last sentence is based on the systemic review of financial accounting theory, legal regulation of financial accounting elements and practise. Consequently, the fundamental financial accounting equation presupposes the legal nature of financial accounting. According to the legal nature of financial accounting, analyzed core subject-matter of economics (financial accounting) must also become a core subject-matter of law. Importance of legal relations in financial accounting and its fundamental equation is disclosed in table 1.

Table 1 discloses that according to the fundamental financial accounting equation ownership consists of owners' equity and liabilities – asset is equal to sum

of liabilities and owners' equity. What is more, deduction of owners' equity from asset means liabilities and deduction of liabilities from asset means owners' equity. Common feature of all these operations are legal relations – asset must be an object of ownership.

Financial accounting as an object of law the most important influence provides to finance and tax law. For example, one of the financial law institute is legal regulation of state budget process. How to value revenue or costs of state budget without financial accounting (financial statements)? Moreover, tax could be described as a pecuniary obligation in respect of the state imposed on the taxpayer by the tax law<sup>8</sup>. Beginning of tax obligation shall mean a counting of tax base for which evaluation are necessary the basis of the legally valid documents which must contain all the mandatory requisites of financial accounting documents provided for by the legal acts that regulate financial accounting. In other words, financial accounting is a legal basis for calculating taxes and appropriate execution of tax obligation. In addition to this, as the following analysis

6 MoneyInstructor.com at <http://content.moneyinstructor.com/1435/accounting-transaction.html>  
 7 *Ibid.*  
 8 According to Article 2 subsection 18 of Republic of Lithuania Law on Tax Administration No IX-2112 [2004] tax obligation shall mean a taxpayer's duty under the tax law to calculate the tax correctly, pay the tax and related amounts to the budget in due time and perform all other duties related to the calculation and payment of taxes.

declares, financial accounting rules can be used for recognising income and costs as well as tax law norms (corporate income tax example). *Inter alia*, tax investigation shall mean monitoring the tax payer's activities by the tax administrator, which includes an analysis of tax returns, customs declarations, documents and any other information available about the tax payer, also visiting taxpayers, controlling their activities with a view to identifying and eliminating any deficiencies and contradictions in respect of the calculation, declaration and payment of taxes. In this view, financial accounting could be described as an instrument of taxpayer control for purposes of tax investigation. Consequently, these arguments express meaningful point why research of financial accounting is necessary for tax law.

To sum up the theme 'Financial accounting as a phenomenon of economics and law', it is purposeful to clarify the definition of financial accounting in law science view: entire legal norms which regulate monitoring and control of money as it flows in and out of an organization as asset, liabilities, equity, income and costs.

#### COMPARATIVE ANALYSIS OF CORPORATE INCOME TAX AND FINANCIAL ACCOUNTING LEGAL REGULATION

The trend is observed that rules of corporate income tax especially on recognition of income and costs depends on legal regulation of financial accounting. For example, the taxable profit is derived from the accounting result, amended for tax purposes in Bulgaria<sup>9</sup>. For tax purposes in Netherlands, profits should be determined according to 'sound business practice', a concept that has mainly been developed in case law. One of its requirements is the use of consistent financial accounting methods<sup>10</sup>. Taxable income (taxation with corporate income tax) is calculated based on the income computed according to the financial accounting rules and is adjusted for several items for tax purposes in Slovakia<sup>11</sup>. The taxable base is calculated following financial accounting principles for business in Slovenia<sup>12</sup>. The same junction of financial accounting and corporate income tax can be seen in Lithuania. According to Article 4 of Republic of Lithuania Law on Corporate Income Tax<sup>13</sup> the tax base of a Lithuanian entity shall be all income earned in the Republic of Lithuania and foreign states which is sourced inside and outside of the Republic of Lithuania. Income from activities carried out through permanent establishments of Lithuanian entities in a state of the European Economic Area or states with which the Republic of Lithuania has concluded and brought into effect a treaty for the avoidance of double taxation shall not be attributed to the tax base of the Lithuanian entities where, in accordance with the prescribed procedure, income from activities carried out through these permanent establishments is subject to corporate income tax or equivalent tax in those states. What is more, the income of a Lithuanian

9 European Commission, 'Taxation trends in the European Union: Data for the EU Member States, Iceland and Norway. 2013 edition' (Luxembourg: Publications Office of the European Union 2013) 59 at [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/gen\\_info/economic\\_analysis/tax\\_structures/2013/report.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2013/report.pdf)

10 *Ibid.*, 123.

11 *Ibid.*, 139.

12 *Ibid.*, 143.

13 Republic of Lithuania Law on Corporate Income Tax No IX-675 [2001].

entity shall also include the positive income of its controlled foreign entity or part of such income. Positive income shall mean all income or a part thereof, received by a controlled entity, registered or otherwise organised in the states or zones included in the list approved by the Minister of Finance, included in the income of a controlling entity of Lithuania in proportion to the number of the shares (interests, member shares), votes or rights to the profits of the controlled entity held by the Lithuanian entity. It should be noticed that despite the fact that legislator entitles mentioned income as a tax base, these income should be identified as an object of corporate income tax. Tax object is an element which is taxed, tax base should be described as a value by which payable amount of tax must be paid to the budget. Tax base of corporate income tax should be described as a taxable profit. According to Article 11 of Republic of Lithuania Law on Corporate Income Tax for the purpose of calculating taxable profit of a Lithuanian entity, the following shall be deducted from income: 1) non-taxable income; 2) allowable deductions; 3) limited allowable deductions. It is important to mention that result in financial accounting (accounting result in profit/loss report) must be corrected for the purpose of calculating corporate income tax. Rules how to fill annual tax return of corporate income tax PLN204 is based on correction principle from result in financial accounting to taxable result. The taxable profit is derived from the financial accounting result, amended for tax purposes in Lithuania as the same principle inherent in Bulgaria, Netherlands, Slovakia, Slovenia and other countries. Thereby, corporate income tax is an example which illustrates why research of financial accounting is necessary for tax law.

The question can be raised why despite the fact that the same principles are used making financial statement and calculating corporate income tax result in financial accounting and taxable result is different? The answer is that although principles are the same but the different purposes of financial accounting and taxation determines that rules of income and costs are not always the same. In addition to this, courts also declare that not all rules of income and costs in financial accounting are the same in taxation. For example, Supreme administrative court of Lithuania<sup>14</sup>; Commission on Tax Disputes under the Government of the Republic of Lithuania<sup>15</sup> declared that financial accounting recognition rules of transactions are not applicable in taxation. However, Supreme administrative court of Lithuania in another decision<sup>16</sup> stated that costs are recognized using the same principles in financial accounting and taxation and also Supreme administrative court of Lithuania<sup>17</sup> declared that income are recognized using the same principles in financial accounting and taxation. However, it should be noticed that the purpose of financial accounting is to show fair and true view of companies activities and financial situation while the purpose of rules which regulates corporate income tax is to gain income to the budget. As a consequence, some regulations of tax law are allowed to be used by Business accounting standards and on the other hand some Business accounting standards rules

14 *Supreme administrative court of Lithuania* in 2011 June 13 decision in administrative case No. A575–872/2011 [2011].

15 *Commission on Tax Disputes under the Government of the Republic of Lithuania* in 2010 January 22 solution No. S-22(7-396/2009) [2009].

16 *Supreme administrative court of Lithuania* in 2005 March 18 decision in administrative case No. A10 - 315/2005 [2005].

17 *Supreme administrative court of Lithuania* in 2012 February 17 decision in administrative case No. A602-1161/2012 [2012].

are acknowledged by tax laws. For example, Republic of Lithuania Law on corporate income tax determines limited allowable deductions and non-allowable deductions which could be deducted calculating result in financial accounting. However, scientific research discloses that conditions to recognize income from the sale of goods of operating activities should be the same for financial accounting and corporate income tax purposes. The main argument for the last sentence is accrual principle<sup>18</sup> which is the basic for rules of income and costs for calculating corporate income tax and result in financial accounting<sup>19</sup>. However, the problem is that courts in the same situations express different opinion. Commission on Tax Disputes under the Government of the Republic of Lithuania in 2010 January 22 d. solution No S-22(7-396/2009) explained that norms of financial accounting should be used for financial statement purposes but not for taxation. Despite that, Commission on Tax Disputes under the Government of the Republic of Lithuania in 2012 July 27 solution No S-128 (7-73/2012) declared that rules of financial accounting must be applied for taxation on corporate income tax purpose – income from the sale of goods shall be recognized when the goods have already been sold and the amount of revenue can be measured reliably. Immovable property was sold to other company in both cases (the same practical situation). Conception of accrual principle presupposes that in both cases norms of financial accounting should be applied in calculating corporate income tax base. Mentioned principle is not the only argument for such conclusion. The second fundament<sup>20</sup> used the same for calculating financial accounting result and corporate income tax base is matching-principle which means that when record income is recognized, also should be recognized at the same time any costs directly related to the income. If there is a cause-and-effect relationship between income and costs, they must be recorded in the same accounting (and also taxable) period. Thirdly, the entity<sup>21</sup>, the periodicity<sup>22</sup>, substance over form principles<sup>23</sup> fortify the junction of financial accounting and corporate income tax in the view that business accounting

- 18 According to Article 7 subsection 1 of Republic of Lithuania Law on Corporate Income Tax and 1st Business accounting standard “Financial statements” No. 1 [2003] Article 37 the accrual principle of financial accounting and corporate income tax means that economic transactions and other events are recorded in financial accounting and are recognized for taxation purposes when they occur and are presented in financial statements and in annual tax return of such periods, irrespective of the receipt or payment of cash. Under the accrual principle income is recorded when earned.
- 19 Income from the sale of goods shall be recognized for financial accounting and taxation purposes when the goods have already been sold and the amount of revenue can be measured reliably. Goods are sold when all the following conditions have been satisfied: 1) the selling entity has transferred to the buyer the risks and rewards of ownership of the goods; 2) the entity retains neither continuing managerial involvement nor effective control over the goods sold; 3) it is probable that the economic benefits associated with the transaction will flow to the entity and the amount of revenue can be measured reliably; 4) the costs related to the sale transaction can be measured reliably. What is more, only that portion of expenses of the previous and reporting periods that is related to the income earned during the reporting period is recognised as costs.
- 20 According to financial accounting and corporate income tax regulation.
- 21 A business or an organization and its owners are treated as two separately identifiable parties. This principle states that the activities of a business entity will be kept separate from the activities of its owners and any other business entities.
- 22 Each financial accounting entry and taxable transaction should be allocated to a given period, and split accordingly if it covers several periods.
- 23 The entity is accounting for items according to their substance and economic reality and not merely their legal form. What is more, in respect of taxes (corporate income tax), the content of the activities carried on by the participants of legal relations shall take precedence over their form.

standard norms of recognizing income from the sale of goods of operating activities should be the same for financial accounting and corporate income tax purposes.

*Inter alia*, like principles also financial accounting research methods could and should be used for the legal researches of corporate income tax. Firstly, deductive method – concrete applications or consequences are deducted from general principles. Mentioned accrual principle which is basic in both financial accounting and corporate income tax is a clear example of this method<sup>24</sup>. Secondly, inductive method by which theories or principles are disclosed from analysis of separate facts, examples. Comparative research of concrete examples of recognition costs and income for financial accounting and taxation purposes, analysis of facts presented in scientific literature<sup>25</sup> reveals that the prudence principle is declarative, ‘hollow’ and small-practical postulate for both mentioned purposes. Thirdly, pragmatic method which emphasizes coherent relationship between theory and practise. Last method is illustrated by an example of bitcoins taxation in the following analysis. What is more, scientific literature on problems of financial accounting should also be used for clarification of corporate income tax norms, for example, explanations about accrual principle application and its positive aspects comparing with cash accounting principle should be meaningful to argue why cash accounting principle should be absolutely vanished from Law on corporate income tax<sup>26</sup>.

Mentioned problem of different opinion about application of financial accounting norms in tax law expressed in case-law in the same situations is not the only one problematical question. Theoretically the question could be raised if fundamental financial accounting equation could be applied in tax burden of corporate income tax and called as fundamental corporate income tax equation? According to research in this article an answer could be positive. Moreover, there are various practical problems how concrete transaction should be taxed on corporate income tax – solution of the problem usually could be given by research of financial accounting rules. For example, how to tax bitcoins<sup>27</sup>? The answer is given according to financial accounting norms. In registering economic transactions and other events in financial accounting the greatest attention shall be paid to their substance and economic nature, rather than just formal presentation requirements. As a consequence, bitcoins could be registered in financial accounting as cash equivalents which should be shown in current assets article according to 2nd Business accounting standard „Balance sheet“<sup>28</sup>. In financial accounting, the income from the sale of bitcoins is recognized as the amount derived from deduction of purchase price from sale price. Subsection 3

24 Because of the same principle concrete rules of income and costs for calculating corporate income tax and result in financial accounting should be the same.

25 For example, H. Hoogervorst, ‘The Concept of Prudence: dead or alive?’ [2012] FEE Conference on Corporate Reporting of the Future 2 at <http://www.ifrs.org/Alerts/PressRelease/Documents/2012/Concept%20of%20Prudence%20speech.pdf>; M. Moore, ‘International accounting standards and the true and fair view’ [2013] 10 The financial reporting council 23 – 26.

26 Because accrual principle reflects more precise income and costs recognition than cash accounting principle. I. J. Pettersen.; K. Nyland, ‘Reforms and accounting system changes: A study on the implementation of accrual accounting in Norwegian hospitals’ [2011] 3 Journal of Accounting & Organizational Change 239, 240, 242, 245; P. L. Vesterdorf, ‘Capital Gains Taxation of Share Profits and EU State Aid Regulation’ [2010] 4 European State Aid Law Quarterly 741.

27 Bitcoin is a digital currency which uses peer-to-peer technology to operate with no central authority or banks.

28 No. 1 [2003].

of article 57 of Law on Corporate Income Tax states that for the purpose of calculating corporate income tax, an entity may use the universally accepted methods of recognising income and costs as well as methods of measuring inventories unless this Law provides otherwise. For the purpose of corporate income tax, the sale of bitcoins (as taxable income) shall be recognized as the amount derived from deduction of purchase price from sale price.

By giving this practical example, it could be revealed that junction of financial accounting and corporate income tax should not become a boiled frog phenomenon<sup>29</sup>. Legal regulation of corporate income tax could gradually implicate more financial accounting norms and minimize differences between financial and taxable result.

## CONCLUSION

Different opinion about application of financial accounting norms on taxation on corporate income tax expressed in case-law when *ratio decidendi* is almost the same could be evaluated as tentative question – apply or not apply legal regulation of financial accounting for execution of appropriate tax burden? The systemic review of the fundamental financial accounting equation, accrual, matching and others principles, deductive, inductive and pragmatic methods, scientific literature disclose that an answer to the previous questions should be positive.

It should be noticed that financial accounting rules *de facto* usually should be a key to answer the question how to tax on corporate income tax transactions which are not *expressis verbis* regulated by Law on Corporate Income Tax.

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<sup>29</sup> Changes which are slow and gradual can be hard to notice even if their ultimate impact. C. Freeland, ‘The rise of the new global super-rich’ at [http://www.ted.com/talks/chrystia\\_freeland\\_the\\_rise\\_of\\_the\\_new\\_global\\_super\\_rich.html](http://www.ted.com/talks/chrystia_freeland_the_rise_of_the_new_global_super_rich.html)

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## THE VALUE OF CONFLICTOLOGY FOR THE RESEARCH IN THE FIELD OF CIVIL PROCEDURE AND ALTERNATIVE DISPUTE RESOLUTION

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**Abstract.** The paper touches upon the problem of application of conflictology or conflict resolution studies achievements in such a specific field of law as civil procedure and alternative dispute resolution methods. It is becoming more important to make a legal research not only by scrutinising the effective legislation and interpreting legal rules, but by integrating the results of other social sciences into such research. Making interdisciplinary study allows exceeding the borders of any of single social science, and, therefore discovering new prospects and potential in exploration of some part of social reality.

Conflictology is basically understood as a field of science, exploring the problems of genesis, development and resolution of various conflicts. The possible value of integrating some of the achievements of conflictology into legal science can hardly be overestimated. As it is ordinarily declared that the main target of law is to regulate social relations with the usage of specific methods, it is clear that the effectiveness of this regulation to some extent depends on the comprehension of such phenomena as “conflict”, “dispute” and “contradiction”. As conflicts are immanent in social life, it appears vital for lawyers to understand their nature, so that they could in some cases prevent their emergence or manage them with more efficiency.

Application of conflictological achievements is important for using in all civilised dispute resolution methods, beginning with such adversarial procedures as public litigation or arbitrage, and ending with conciliatory negotiation or mediation. Comprehension of the factors, which caused a legal conflict, understanding the structure of this conflict and its development can allow disputants to find a mutually beneficial solution (“win-win” solution), better satisfying their interests. Such solution can be found both in court and out of court. As every conflict has its specific features, it is valuable to be aware of different techniques of conflict management, applicable to a concrete situation. These techniques determine the efficiency of entire procedure, but can hardly be legally formalised. A good example, which draws more and more attention of legal society, is mediation. The scopes of legal regulation of this procedure are ordinarily limited by its definition (rarely precise), basic principles and organisational moments (initiating and finishing). The general inner part remains out of statutory regulation. This example, which is not the only one, shows that in many cases the best legal result can be achieved only with the help of methods, introduced by other studies, including conflictology.

**Keywords:** conflictology, conflict resolution, mediation, litigation

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### INTRODUCTION

One of the trends of modern science is the increasing differentiation of the directions of research and, therefore, further specialisation of researchers on a particular issue related to a narrow scientific area. On the one hand, we can talk about this trend as a natural development of science, taking place

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due to a significant increase in the accumulated scientific knowledge. To be equally competent in different areas under such conditions becomes practically impossible. In many ways, this explains the lack of modern scientific world “universal geniuses”. On the other hand, such a specialisation may lead to «closing» of researchers in their own problems, when they begin operating on the principle «know everything about nothing». In addition, each branch of science partially uses its own methodology that leads to the consideration of a subject just from the standpoint of a discipline the researcher works in. Such a consideration can be too one-sided. In this regard, it is becoming increasingly important to conduct comprehensive research, in which a representative of one scientific discipline uses in his work the results, made and proven in other areas of science. Moreover, this approach allows looking much broader at the problems being investigated. Such complex research lets researchers representing the different spheres of social science to develop common approaches to the understanding of the same problems, and, more than that, sometimes learn to talk to each other in the same professional language.

The above said is particularly relevant for legal science, which is mostly based on the definitions. Some of the definitions are in general use, but get a specific meaning in the legal vocabulary, though some of them are exclusively legal. In this case divergence in understanding of such definitions is typical even of the representatives of different legal areas, not to mention the cooperation with other branches of social science. Therefore cooperation in this field can lead to real convergence.

But the importance of integrating the results of other social studies into legal research is not limited only by the unification of scientific language. In many cases practising lawyers inevitably face situations, for better resolution of which they need skills and knowledge from other fields, for instance psychology or sociology. In this regard, purely legal education may not be enough. That is why there has always been a trend to the active exchange of ideas and results between different social studies. There are some complex areas in law, which have emerged and «held their positions» on the border line with other branches. For example, legal psychology, philosophy and sociology of law. One of the disciplines, which gradually attracts the attention of lawyers is conflictology.

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Conflictology or conflict management is usually understood as a social discipline investigating the nature of conflicts at the different levels, the preconditions of their emergence, mechanism of development of conflictogenic situations, participants of conflicts, the negative and positive consequences of conflicts, their social functions, the ways and methods for their prevention, management and resolution. The title itself indicates that the central subject of the discipline is the conflict. The main purpose of conflictology is to generate both the theoretical ideas about conflicts and practical approaches to facilitate their efficient management and settlement according to a particular situation.

In Russia conflictology is often declared to be an independent science, which gathers the results of other social studies in their investigation of the phenomenon «conflict». Although conflicts became the target subjects for many branches of science, including philosophy, political

science, pedagogics, law, biology, there are two of them which have had the biggest impact on the establishment and further separation of conflict management – psychology and sociology<sup>1</sup>. The inception of conflictology is always connected with the names of two outstanding sociologists of the twentieth century: Ralf Dahrendorf<sup>2</sup> and Lewis Coser<sup>3</sup>. Practically their main achievement was the acknowledgement of the conflict as a phenomenon immanent to social life, which causes not only negative, but also positive consequences. Since that time science started treating conflicts as a natural part of our life and its purposes shifted from the useless struggling with conflicts to thorough comprehension of their nature and implementation of the newly got knowledge in practice.

Since law in many aspects has to deal with conflict situations, the achievements of conflictology can be useful for various areas of legal science. Growing interest to these problems resulted in the number of works devoted to legal conflictology, concentrated on the conflicts, which have some legal elements or consequences<sup>4</sup>. The awareness of basic conflict management ideas is especially important for those researchers who work in the sphere of civil procedural law and alternative dispute resolution, especially mediation. In this case it is important to notice, that although the term «alternative» gathers a wide range of dispute resolution methods, emphasizing their private nature in opposition to public litigation, this relatively modern for contemporary Russia area is ordinarily related to the scientific subject of civil procedure. It seems expedient to talk about the formation of a whole system of legal dispute resolution methods including litigation, which all are alternatives to each other. This approach is proved by the gradual substitution of the term «alternative» for «appropriate» dispute resolution<sup>5</sup>. So, on what basis can these methods be classified with the help of conflictology?

According to the conflictological point of view all the methods of conflict resolution can be divided into three groups: strength-based, right-based and interest-based<sup>6</sup>. A war, when the participant becomes a winner due to his military superiority, is a classic strength-based method. Since it is the subject of international law we are more interested in the other two groups.

The right- based methods can be characterised by the participation of a third neutral party, who is empowered to make a decision binding for disputants, which resolves the conflict relying on legal rules. The classic examples are litigation and arbitration. These procedures are mostly adversarial. They necessitate the win of one participant and the loss of another. That is why a special idiom «zero-sum game» is used to emphasize the nature of these procedures.

The interest-based methods can also be called consensual as their general feature is the possibility of the parties to settle the dispute themselves relying on a mutually beneficial

- 1 Гришина Н. В. Психология конфликта. 2-е изд. – СПб.: Питер. 2008. 40 [Grishina N. The Psychology of The Conflict]
- 2 See: Дарендорф Р. Элементы теории социального конфликта // Социологические исследования 1994. №5. 142 – 147. [Dahrendorf R. The Elements of The Social Conflict Theory]
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agreement. Both participants make concessions, which leads to the absence of loser after the procedure usage. As a result there is an opposite idiom for such methods – «win-win game». There are two wide-spread consensual methods – negotiation and mediation, separated according to the presence or absence of the third party – mediator, facilitating the disputants in resolving their conflict.

The achievements of conflictology can be applicable for both right-based and interest-based procedures. In the first case they mostly have theoretical value, which allows more profound understanding of the conflict resolution mechanism from the perspective of law. As for the second case the practical importance of conflict management ideas is difficult to be overestimated. It particularly relates to mediation, as the success of this procedure largely depends on the effectiveness of mediator's actions. It is necessary to take into consideration that mediator doesn't have the same authority towards disputants as for example the judge. The purpose of mediator is to identify the parties' interests hiding behind their positions in the conflict. So he actually operates exclusively by asking right questions and behaving competently from the psychological viewpoint. Despite the fact that mediation has become the subject of statutory regulation in majority of countries all over the world at the moment, the scopes of formalisation are restricted to organisational issues at the initiation of the procedure and its completion. The inner process can hardly be regulated, which means that the mediator should act relying upon psychological and conflictological methods and skills. In this context, basic theoretical knowledge of conflict resolution is very important and, therefore, is included into the training courses for professional mediators along with the Harvard method of negotiation, which is often considered to become the unifying beginning for mediation in different countries<sup>7</sup>.

Now it is necessary to observe some basic achievements of conflictology, which can be useful for legal research and practice. As the author of this paper specialises on mediation, we will try to show the applicable ideas generally in this context.

The basic concept of conflictology is «conflict», derived from the Latin *conflictus* – collision. The word «conflict» is customary for most people, which significantly dilutes its content. From this point of view conflict belongs to the lexical series including such words as «fight», «clash», «battle», «conflict», indicating the presence of participants with opposing interests. Although science has traditionally been trying to delimit the volume of the word and make it more specific, it should be noted that no conventional definition of conflict has been produced yet. These failures largely determined the refocus of the researchers' attention from generating the universal theories to the development of the practical aspects of working with different kinds of conflicts. However, the basic features common for every conflict, which are shared by the majority of specialists, have been worked out<sup>8</sup>.

Firstly, it is the **bipolarity**, which means the existence of the opposing interests of the parties. So, every conflict is based on some contradictions, which are the preconditions of a conflict situation.

7 See: Фишер Р., Юри У., Паттон Б. "Переговоры без поражения: Гарвардский метод" (Москва (Эксмо) 2010) [R. Fisher, W. Uri, B. Patton Getting to Yes: Negotiating Agreement without Giving in].

8 Гришина Н. В. Психология конфликта. 2-е изд. – СПб.: Питер. 2008. 23 - 24 [Grishina N. The Psychology of The Conflict].

The presence of contradictions is a prerequisite of any conflict, but not every contradiction entails a conflict

Secondly, conflict necessitates **active opposition** of the parties, in which one of them initiates the conflict, while the second one by his actions confirms its participation. The parties of the conflict must **consciously** participate in it.

The third feature, which is not as conventional as the previous two, requires the **presence of parties** (subjects) realising the existence of the conflict and their participation in it. It is also typical of intrapersonal conflict in which subindividuals take part. So, conflict is impossible without the participation of individuals or social groups.

*Thus, conflict can be generally defined as an active and opened collision between parties (peoples, groups, or states), realising the existence of this collision and consciously participating in it, which is based on their contradictory interests.*

There are different approaches to the classification of conflicts. Depending on the position of the parties involved in the conflict, they can be divided into intrapersonal, which affect the internal contradictions of a single person, and social developing between at least two people. Intrapersonal conflicts do not matter much for jurisprudence, while social conflicts can be divided into interpersonal, intergroup, interstate, etc. Depending on the sphere of their emergence and development social conflicts are divided into family, household, labour, housing, etc. This classification is very important for all methods of dispute resolution. For example, it can be the basis for separation of the competence between state courts within the judicial system, or it can determine the kinds of cases which can be decided by the arbitrage. As for mediation, this classification predetermines the entire mediator's behaviour in a process. For example, psychological approach towards family cases especially connected with divorce and common children, will differ from the approach beneficial in business conflicts. That is why it is a common practice in mediation centres to distribute disputes among mediators according to their specialisation.

Another important thing is the structure of conflict. It is always divided into elements<sup>9</sup>. Each of the elements makes every conflict unique and differs it from other conflicts.

**Parties (participants) of the conflict.** The specific feature of mediation is the equal volume of procedural rights of all parties whose interests are affected by the procedure. Unlike litigation, where the role and legal status of people involved in the consideration of the case are determined on the basis of their connection with the considering legal dispute, mediation has no division into the parties and third parties. For this reason, it is crucial to diagnose the conflict situation correctly. It is also important to give the participants a preliminary assessment that determines a model of interaction with them. It is particularly important to identify and take into account the interests of all parties. Otherwise even a formation of a mediation agreement is likely to result in other conflicts. In this case it is essential to establish the range of persons who are to be involved into procedure as the participants of the conflict.

**Conditions of the conflict,** which are usually understood as the circumstances or factors that determine the characteristics of a conflict. Conditions of the conflict can be divided into related

<sup>9</sup> Op. cit. 182.

to occurrence and to the conflict progress. The first group of conditions are classified as external features of a conflict situation, while the second group - external conditions in which the conflict developed. It is important to realise that every conflict matching the selected common features is deeply individual. Therefore, even the presence of the “objectively conflictogenic situations” does not mean that a conflict will arise because sometimes the interpretation of the conditions by the potential participants in the conflict is more important.

**Subject of the conflict** is something that underlies the mutual claims of the parties. The position of the parties often indicates the subject of the conflict. It should be taken into consideration that the subject does not always reflect the real interests of the parties, which may be not clear for parties themselves or being deliberately covered. This is the mediator’s target to find the interests of the parties and try to shift them from their positions on this basis.

**Conflict interactions** which are the connected actions of the participants involved in the conflict. The way, parties act in the conflict, can be very important. Sometimes mediator face the so called «difficult clients», actively counteracting him or other participant. This can force mediator to use special techniques or even escape the procedure, as he doesn’t have to bring the parties to an agreement if they do not want to. The opposite situation when parties are active and constructive can lead to the mediator’s role of «a passive listener». Unlike mediation right-based methods are not so dependent on party’s activeness, therefore a decision on the case resolving it from the position of legal rules must be made practically regardless from their behaviour. Actions may result in either an escalation of the conflict or its remission. Sometimes the mere presence of a mediator facilitates the process of negotiating.

**The result of the conflict** is an ideal concept for the parties of what they would like to get at the end. It should be understood that the result is expressed in the positions of the parties which initially are mutually exclusive. To achieve agreement, the parties need to re-evaluate the result of the conflict, basing on their interests.

As elements discover the static structure of the conflict, it is also important to understand its dynamics. There are four stages which are usually singled out.

1. **The emergence of objective conflictogenic situation.** There are many situations which can be considered as objective conflictogenic, however, as it has already been said before, such situations are just the preconditions of the conflict.
2. **Comprehension of the situation as a conflict.** At this stage the objective conflictogenic situation is estimated by the prospective participant as a conflict. After this stage parties move on to an active collision.
3. **Conflict interaction or the conflict itself.** Connected but contradicted actions, directed to satisfy the participants’ interests and to reach the subject of the conflict. Such interaction can be based on one of the strategies, including dominance, avoidance, accommodation, cooperation or compromise.
4. **Conflict resolution.** Settling conflict from the positions of strength, right or interest.

## CONCLUSION

The main purpose of this paper was to show some basic theoretical ideas, worked out by such a specific and complex area of social research as conflictology. This specific field is not as popular as, for example, psychology or sociology, which surely have played the great roles in the emergence and further development of the new discipline. Still the prospects of conflictology are not estimated and comprehended yet. The world, which is changing every day, with its tendencies towards further globalisation and mixture of different societies requires the new approaches to management and resolution of various kinds of conflicts. There is hardly any doubt that professionals specialising in this area will be extremely needed at all the time. And it is important to realise that lawyers can be in the front part of this trend. Legal theory and legal practice historically deal with conflict situations. The law is one of the basic social regulators which is able to provide harmonious and civilised conflict settlement. It is becoming even more relative with the gradual formation of the dispute resolution systems both at the national and international levels.

It seems that conflictology can be useful for all representatives of legal profession. That is why such educational course at law faculties would allow students to see some legal problems from different point of view. It can encourage them to choose the appropriate procedure for resolution of a particular dispute according to its specific characteristics. Conflictology is especially important for those lawyers, who are occupied as professional mediators or negotiators, as these activities are generally based on the theoretical approaches towards conflicts. And it is actually significant for those who make their research in the fields of law, as it provides us with the great volume of theoretical and empirical material in the field of collisions, disputes and contradictions.

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## BEHAVIOURAL ECONOMICS: AN UNDISPUTABLE INSTRUMENT TO BUILDING BETTER LEGAL SYSTEMS

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**Abstract.** The lives of economic agents are sequences of decisions, some small and almost insignificant, others larger and with far more relevant consequences, which tend to end in the act of choice. The human decision from the standpoint of economic theory is the subject of this paper. Throughout it, the author shall seek to explain why she believes that both fields of analysis (law and economics) should adopt a more realistic prospect of the decision maker, one that allows the depth and the density that characterize the human subject, without which any theory about how it handles its decision-making process will inevitably become impaired. At the same time, the need and urgency for an interdisciplinary approach to human behaviour shall be discussed, alongside with an hypothesis to why it hasn't been seriously implemented in the past.

Starting from a characterization of the *homo oeconomicus* as it was designed by the neoclassical school of economic thought, the author will then compare the formal perfection of this ideal model of subject-maker to the deeper, flawed and inconsistent *behavioural man*, seeking the roots of the latter's impure rationality in the already robust research field of behavioural economics. Secondly, the variables of the human decision-making process with greater impact to the normative systems, in particular to the legal system, shall be analyzed from the standpoint of a non-traditional economic analysis of law, one that incorporates the approach developed within the behavioural law and economics' field, that is, one that already incorporates a vision of human behaviour that is tainted with the myth of full rationality and its supposed benefits.

**Keywords:** human behaviour, decision-making process, heuristics, rationality, economic analysis of law

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### 1. INTRODUCTION: HOW BEHAVIOURAL ECONOMICS HAS BECOME FUNDAMENTAL TO ECONOMIC SCIENCE AND DERIVED SCIENCES

The launch to the spotlight of behavioural economics (henceforth, BE) and the new perspective of human behaviour and, in particular, of the decision-making process, was due, at an initial stage, to what became known as the "biases and heuristics program". This research program, which was the responsibility of AMOS TVERSKY and DANIEL KAHNEMAN, led to the creation of a framework of analysis and sorting of empiric evidence related to several aspects of choice and human decision

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from which a major conclusion would flow: that the agents systematically deviate from the model of the rational maximizer set forth by neoclassical economics<sup>1</sup>.

This conclusion, however, did not lead, at first, to a change in the normative behavioural referential of the economic agent as framed by the neoclassical school, and thus behaviours that deviated from that benchmark would be labeled as “errors”, “deviations”, or “anomalies”. As a matter of fact, although TVERSKY e KAHNEMAN’s research program was born with the goal of utilizing empirical evidence to bestow descriptive consistency and depth to the economic theory of decision as it was presented by the neoclassics, it was still in the model created by the latter – *in particular, in the presupposition of pure rationality* – that its precursors based their definition and qualification of the tendencies observed in human behaviour<sup>2</sup>. The partial inconclusivity of the foundational program of KAHNEMAN and TVERSKY was the object of great criticism pointing out to its inability to build an alternative theoretical model, which, in turn, would make it impossible for BE to establish itself a predictive model of human behavior<sup>3</sup>.

After its initial stage, BE continued to what was essentially the deepening of knowledge on human behaviour, mainly through the underlining of the importance of context. Context would indeed allow for an explanation for some behavioural variations observed in the decision-making process, suggesting the adaptability of agents as a function of the environments in which decisions are adopted. In that sense, in a second stage of the evolution of BE, the main hypothesis put forth was that the notion of rationality was inextricably related to the agent’s ability to adapt his/her decision-making process to context, that is, to information which is presented by that context. For instance, the perception about the probability of detection of a law-breaking behaviour may variate in function of the context in which the decision of abiding or not the legal norm takes place – a conclusion of obvious importance to economic analysis of law. In contexts in which excessive optimism prevails, the subjects will tend to underestimate the probability of detection of their defaulting behaviour; however, certain changes to the context in which the agents make their decision may alter substantially their perception about the probability of detection in general, thus influencing their perception about the individual probability of detection (the salience of cases of detection or the larger frequency with which they are presented are factors that trigger another behavioural feature that produces a behaviour of opposite sense to *optimism*

- 1 See D. KAHNEMAN / A. TVERSKY, “Subjective Probability: A Judgment of Representativeness” [1972], 3/3 CP, pp. 430-454; “On the Psychology of Prediction” [1973] 80/4 PR, pp. 237-251; “Prospect Theory: An Analysis of Decision under Risk” [1979] 47/2 *Econometrica*, pp. 263-292; “Choices, Values and Frames” (Cambridge: 2000), *passim*.
- 2 See C. CAMERER / G. LOEWENSTEIN, “Behavioral Economics: Past, Present, Future”, in “Advances in Behavioral Economics”, C. CAMERER/G. LOEWENSTEIN/M. RABIN (eds.), (New York and Princeton: 2004) p. 3.
- 3 See R. POSNER, “Choice, Behavioral Economics and the Law” [1998] 50/5 SLR, pp. 1551-1575 (as well as the answer from C. JOLLS/C. SUNSTEIN/R. THALER, “Theories and Tropes: A Reply to Posner and Kelman” [1998] 50/5 SLR, pp. 1593-1605. See also G. MITCHELL, “Taking Behavioralism too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law” [2002] 43/5 W&MLR pp. 1907-2021; R. PRENTICE JR., “Chicago Man, K-T Man, and the Future of Behavioral Law and Economics” [2003] 56 VLR, pp. 1663-1777; T. ULEN, “The Growing Pains of Behavioral Law and Economics” [1998] 51 VLR pp. 1747-1763. J. L. COHEN/W. T. DICKENS, “A Foundation for Behavioral Economics” [2001] 92/2 AER, pp. 335-338; J. RACHLINSKI, “The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters” [2002] 85/3 CLR, pp. 739-766; A. HILLMAN, “The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages” [2000] 85 CLR pp. 733-734.

*bias* - the heuristic of availability, under which the agents tend to overestimate the probability of detection)<sup>4</sup>.

The notion of adaptability of subjects to the context in which their decisions are produced indeed added important layers to the texture of human rationality, namely by drawing attention to the relevance of *procedural rationality*, leaving the path open to the extension of the concept of rationality and suggesting that, after all, behaviours observed in reality are evidence of a different type of rationality, different from the one that results from the model idealized by the neoclassics, but *not necessarily less rational*. After that, a new model, initially proposed by SIMON<sup>5</sup>, and, in the most recent decades, developed by GIGERENZER and his followers<sup>6</sup>, would arise.

From the perspective brought by SIMON to the decision-making process follows that decisions adopted by limitedly rational agents (*boundedly rational agents* or *cognitively challenged agents*) involve decision-making processes of a non-optimizing nature as a consequence of both (i) the cognitive constraints of the agent and (ii) the constraints which are external to the subject but which are present in the decision-making context<sup>7</sup>. SIMON calls the attention to the circumstance that, in the decision-making process, two different but complementary variables have to be ascertained: on one side, the cognitive constraints of the agent, and on the other side, the structures of the environment in which the decisional process takes place. Integrating these two elements in the equation, it is possible to argue the hypothesis that even minds that are called to decide under constraints of resources at several levels may be well succeeded in being *proceedingly rational*, that is, in adapting the decisional process to the characteristics of the environment in which it takes place, simplifying the mechanisms of decision<sup>8</sup>. It is, therefore, from the symbiotic connection between internal constraints and external constraints that this other type of rationality is born. The models of limited rationality that would be built in the shadow of the notion put forth by SIMON therefore describe *how* a decision is produced and not *the* decision produced.

The concept of limited rationality created by SIMON served as source of inspiration to the analysis carried out by GIGERENZER in the scope of the programme "*fast and frugal heuristics*". The type of decision-making process described therein, born from the idea that constraints faced by the subject in the flow of that process should be recognized but *do not lead to irrational decisions* aims to demonstrate that limitations of knowledge and computational abilities do not necessarily constitute a downside of the human decision-making process. In fact, according to GIGERENZER, the subject can be well succeeded in the decision-making process even having to deal with the constraints inherent to it by making use of simple but effective heuristical rules, adapted to the

4 C. JOLLS, "On Law Enforcement with Boundedly Rational Actors", in "The Law and Economics of Irrational Behavior", F. PARISI / V. SMITH (eds.), (Stanford: 2005), pp. 273-278. These two behavioural traces compromise Becker's theory that it is enough to prevent non-abiding behaviours that the cost of violating the law is bigger than the benefit incurred from its violation - see G. S. BECKER, "Crime and Punishment: An Economic Approach" [1968] 76/2 JPE, pp. 169-217.

5 H. SIMON, "Rational Choice and the Structure of Environments" [1956] 63/2 PR, pp. 129-138.

6 See G. GIGERENZER/R. SELTEN, "Rethinking Rationality, in "Bounded Rationality – The Adaptive Toolbox", G. GIGERENZER / R. SELTEN (eds.), (Massachusetts: 2001) pp. 1-12, especially pp. 4-6.

7 For instance, the lack of time has an impact on the decision-making process if this is a new one and may not constitute a problem if the required decision is familiar.

8 H. SIMON, "Rational Choice and the Structure of Environments" [1956] 63/2 PR, pp. 129-138.

environments in which they are used. Heuristics basically prove that simplicity may guarantee fast, frugal and correct decisions: depending on the context presented, and the brain mechanism it activates, different responses may be obtained without the ones diverting from the pattern of traditional rationality being considered as cognitive illusions or behavioural deviations<sup>9</sup>.

The vision underlying GIGERENZER's program thus argues that the psychological mechanisms that used to be considered as deviants should, in contrast, be considered as adaptive solutions in certain types of environments allowing the agents to act in an efficient way, in a short time, with scarce information and using the cognitive resources available<sup>16</sup>. Briefly, it suggests *a correspondence between the environment and the cognitive-psychological capacities*, which is considered to be a product of adaptation. Thus, heuristics are not evaluated in terms of rationality or irrationality but rather in terms of efficiency: they do not constitute universal strategies of decision translated into decisional algorithms of generic objects, but rather strategies with a specific domain of application united in an *adaptive toolbox* with multiple tools<sup>10</sup>.

The place of emotions in this description of the decision-making process hasn't been forgotten, as their relevance as anticipation mechanisms of the actions' consequences is duly recognized - a circumstance which is alluded in DAMÁSIO's somatic marker hypothesis<sup>11</sup> - but also as guides and regulators in the decision-making process taking into account its influence over cognitive processes (such as attention, learning and memory) and physiological activities (such as respiration and nourishment). Overall, emotions work as instruments of focusing the subject's attention to the informative elements which are more relevant to a particular environmental structure, thus constituting a powerful mechanism to the development of adequate answers to specific environmental structures<sup>19</sup>. Rationality is not, therefore, just a product of the analytical mind, but also of the emotional, affective and experiential mind.

From this perspective, the efficiency of human reasoning depends upon the set of instruments that serve it, as well as on the agent's capacity to select strategies depending on their adequacy to a certain environment, which is obtained through feedback. The ability to make a correspondence between each environmental structure and an heuristic of adequate structure depends on a particular type of rationality that allows the construction of heuristical rules that are simultaneously fast, simple and rigorous because they explore each environment's structure of information in an efficient way, and because it adapts through different contexts and temporal moments, dismissing characteristics such as consistency and coherence in favour of the symbiosis with external environmental variables in which the decision takes place. It is, in sum, an *ecological rationality*. Accordingly, the central feature of GIGERENZER's perspective – *“the adaptive toolbox of fast and frugal*

9 G. GIGERENZER, “On Narrow Norms and Vague Heuristics: A reply to Kahneman and Tversky” [1996] 103/3 PR, pp. 592-596.

10 G. GIGERENZER/R. SELTEN, “Rethinking Rationality, in “Bounded Rationality – The Adaptive Toolbox”, G. GIGERENZER / R. SELTEN (eds.), (Massachusetts: 2001), pp. 7-9; J. RIESKAMP/R. HERTWIG/P. TODD, “Bounded Rationality: Two Interpretations from Psychology”, in “Handbook of Contemporary Behavioral Economics: Foundations and Developments”, M. ALTMAN (ed.), (New York: 2006), p. 227; A. SADRIEH *et al.*, “Is There Evidence for an Adaptive Toolbox?”, in “Bounded Rationality – The Adaptive Toolbox”, G. GIGERENZER/R. SELTEN (eds.), (Massachusetts: 2001), pp. 93-94.

11 A. DAMÁSIO, “O Erro de Descartes – Emoção, razão e cérebro humano” (Mem Martins: 1994), *passim*.

*heuristics*” - is a construction of markedly darwinistic inspiration, even substantiating, for the author, a “*darwinian metaphor for the process of decision*”: firstly because as evolution does not follow a systematic and coherent plan, the toolbox is composed of diverse instruments, each one playing a role, or at least, having a specific operational purpose; secondly, because the instruments that compose it – heuristics – are not rational or irrational *de per se*, they are so by reference to the environment in which they are supposed to operate, just as adaptations are functionalized to a certain context<sup>12</sup>.

GIGERENZER’s program starts with the assumption that there is an adaptive reason underlying the behaviours evidenced by the agents in the unravelling of the decision-making process, namely in what concerns the strategies for processing the information used in the conduction of decision-making processes, *maxime*, heuristics. The adaptive virtualities of those simplifying formulas do not mean, however, that human beings should dismiss more complex formulas of information processing, natural as well as artificial, which, in certain circumstances, may prove to be more adequate than heuristics. However, it does mean that, in the greater part of the decision-making processes, that is not the method they use<sup>13</sup>. That is, the added value that seems to justify the survival of heuristics, even when they produce results that are frequently inadequate, is the facilitation that they introduce in the decision-making process, making it operative even in situations of uncertainty and complexity – something that evolution seems to have privileged in detriment of the rigor of results. It is certain that, especially in those situations, the margin of error that accompanies them may be high, but, even so, they present the advantage of *allowing the decision*, when in its absence it might never take place.

What the ecological rationality hypothesis adds is, therefore, a new notion of what the efficient decision-making process is, in which it is no longer the product of a pure rationality and starts being the result of an adaptive conjugation between cognitive instruments and environmental structures, and in which the rationality stops being a decision mechanism contained in a black box and evaluated only in terms of outcome, acquiring a denser structure featuring an “*adaptive toolbox*”<sup>14</sup>. After that, the theory of ecological rationality is apt to produce a change of paradigm in the economic decision theory, as it is able to produce explanations for a significantly higher quantity of behaviours than those that had hitherto explanation, namely to the category of behaviours considered “*anomalies*” and that now become integrated in the theoretical explanatory model.

This hypothesis thus supplies a normative pattern of efficiency for the decision-making process, establishing what ought to be the adequate decision-making process taking into account

12 G. GIGERENZER, “Is the Mind Irrational or Ecologically Rational?”, in “The Law and Economics of Irrational Behavior”, F. PARISI/V. SMITH (eds.), (Stanford: 2005), p. 41; G. GIGERENZER/R. SELTEN, “Rethinking Rationality, in “Bounded Rationality – The Adaptive Toolbox”, G. GIGERENZER / R. SELTEN (eds.), (Massachusetts: 2001), p. 48.

13 And this is so because the strategies of simplification have proved, along time, to be adequate strategies to the processing of information – in many situations *more adequate* than strategies with higher informative load. For further reading on this matter see P. M. TODD, “Fast and Frugal Heuristics for Environmentally Bounded Minds”, in “Bounded Rationality – The Adaptive Toolbox”, G. GIGERENZER / R. SELTEN (eds.), (Massachusetts: 2001), pp. 56-57; A. SADRIEH *et al.*, A. SADRIEH *et al.*, “Is There Evidence for an Adaptive Toolbox?”, in “Bounded Rationality – The Adaptive Toolbox”, G. GIGERENZER/R. SELTEN (eds.), (Massachusetts: 2001), pp. 85-88.

14 G. GIGERENZER/D. GOLDSTEIN, “On Narrow Norms and Vague Heuristics: A reply to Kahneman and Tversky” [1996] 103/3 PR, pp. 650-659.

the cognitive capacities of the agents and the environmental structures in which decisions are processed. In face of the preceding, an undeniable finding is prone to cause some perturbation: in spite of the normative potential that BE presents, it has not replaced the neoclassical theory of decision as a referential to the concrete drawing of institutions, namely the legal ones<sup>15</sup>.

## 2. THE RELEVANCE OF A MULTIDISCIPLINARY APPROACH TO ECONOMIC SCIENCE AND DERIVED SCIENCES SUCH AS ECONOMIC ANALYSIS OF LAW

The amount of relevant information that may be collected from a multidisciplinary survey of the real causes of human behaviour suggests the corresponding utility in the construction of a theory of decision that intends to reproduce in its explanation a vision, even though approximate, of behavioural reality. On the other hand, the evidence collected along the path already taken by BE reveals the importance of a multidisciplinary approach to the study of human behaviour. These findings lead us to equate why, if the neoclassical paradigm of *Homo oeconomicus* is far from reality, does mainstream economics – and derived disciplines – still accept it and teach it.

The methodology adopted by mainstream economics includes a set of principles with marks of behaviourism, of logic positivism, of instrumentalism, of conventionalism, whose guidelines McCLOSKEY defines in the following terms: (i) the predictive power is the ultimate goal of science; (ii) only the observable implications (or predictions) of the theory count to establish its veracity; (iii) observation implies the conduction of objective experiments that may be reproduced; (iv) a theory is only considered false if one of its experimental implications is proven false; (v) objectivity must be assured – subjective observation, or introspection, does not equal scientific knowledge; (vi) the expression adopted should be preferentially mathematical; (vii) introspection, esthetics and meta-physical preferences of the scientist may contribute to the discovery of a hypothesis but may not be part of its justification; (viii) the role of methodology is to distinguish scientific knowledge (positive) from non-scientific (normative); (ix) a scientific explanation for an event supplies a cover law for that event; (x) evaluative considerations are prevented from scientists; (xi) it is not possible to establish judgements of certainty from prepositions related to the world of facts. The curious fact about the designing of this scientific method, that MACCLOSKEY points out, resides in the circumstance of its own laws being the result of an “*unscientific method*” in that they are more the product of an introspective revelation than the result of a process of evaluation and ponderation by the economists that adopted it, being its own adoption, never justified and only proclaimed, thus qualified as an unconveivable *leap of faith*<sup>16</sup>.

In fact, mainstream economics’ methodology authorizes the utilization of unrealistic presuppositions about the subjects’ behaviour and the verification of discrepancies between the conceived model and real individuals’ behaviours. Following this line of reasoning, FRIEDMAN proposed that, when economic science elaborates behavioural propositions about individuals, these do not need to be correct or rigorous as long as the information obtained about the aggregate’s behaviour (such as prices and quantities) behaves “*as if*” those propositions were correct. The results, much more than

<sup>15</sup> In this sense, and criticizing the fact, see N. BERG, “Normative Behavioral Economics” [2003] 32 JSE, pp. 411-427.

<sup>16</sup> D. McCLOSKEY, “The Rhetoric of Economics” [1983] 21/2 JEL, pp. 485-487.

presuppositions, take the fundamental place in theoretical construction, so that as long as the model turns out true in terms of aggregated results, there is no motive to imprint realism to the presupposition of individual behaviour<sup>17</sup>.

From the description just given about FRIEDMAN's methodological perspective it follows its distinct positioning as "*policy-oriented economist*", to whom only the predictive success of a theory is important, independently of the realism of the presuppositions in which it stands – a finding that, on its turn, recalls SIMONS's claim that positive political economy was sculpted by the pressure of the demand from political agents interested in obtaining advice about the way they should conduct public policies<sup>18</sup>.

Mainstream economics thus seems to have used a reasoning shortcut in establishing a series of axioms about human behaviour without testing them empirically<sup>19</sup>. That depuration of elements that might introduce lack of linearity to the model was, in our opinion, the result of a conscious process, in the scope of which that amputation of human condition features was understood as a lesser evil taking into account the contribution that was intended for the operationalization of the constructed model – to the model of what ideal individual behaviour *should be*<sup>20</sup>.

From this perspective follows the functionalization of the methodological defense of irrationalism to the demonstration of the validity of FRIEDMAN's prescriptive thesis. In fact, by "forgetting" all real behaviour and ascribing the agents of his ideal model a purely rational and maximizing behaviour, FRIEDMAN takes the necessary step for the resulting aggregate of that maximizing rational behaviour to be that free choices made by those agents would lead to an efficient global equilibrium. This ideal model serves, in turn, the purpose of demonstrating the utility of the market in the promotion of general well-being.

As for law and economics, the utilization, to these days, of the neoclassical model of agent is, in our opinion, a product of inertia and of scientific reverence to mainstream economics and especially to the Chicago school of thought which has widely influenced western economic thought since the second half of the XXth century.

<sup>17</sup> M. FRIEDMAN, "Essays in Positive Economics", (Chicago: 1953), pp. 13-23.

<sup>18</sup> SIMON calls the attention to the fact that economical sciences have incurred in the fallacy that only scientific knowledge able to produce immediate nourishment for public policies should deserve attention – a circumstance that would explain the subordination and marginalization of the theory of decision in the context of economic sciences and. The purpose behind the construction of the neoclassical model of human behaviour would thus have been to supply the political agents with the economic model necessary to sustain certain public policies - see H. SIMON, "Rational Decision Making in Business Organizations" [1979] 69/4 AER p. 494, where the author states the following: "*But regardless of the motives of the climbers, regardless of real world veridicality, there is no question but that positive political economy has been strongly shaped by the demands of economic policy for advice on basic public issues.*"

<sup>19</sup> S. MAITAL, "Reclaiming Moral Sentiments: Behavioral Economics and the Ethical Foundations of Capitalism", in *Handbook of Contemporary Behavioral Economics: Foundations and Developments*, M. ALTMAN (ed.), (New York: 2006), p. 212.

<sup>20</sup> Cfr. R. FRANTZ, "Intuition in Behavioral Economics", in *Handbook of Contemporary Behavioral Economics: Foundations and Developments*, M. ALTMAN (ed.), (New York: 2006), p. 54; S. LEWIN, "Economics and Psychology: Lessons for Our Own Day from the Early Twentieth Century" [1996] 34/3 JEL, p. 1300.

### 3. CONCLUSION

Economic theory can hardly someday attain absolute certainty of its predictions. That impossibility should not, however, lead to inertia or to the functionalization of economic models to political doctrines. Once we abandon the search for absolute certainty about reality, it is still possible to argue that knowledge evolves on the critical exam that each new hypothesis is subjected to, compared to the previous ones, turning knowledge evolutionary instead of definitive, flexible instead of dogmatized and having as a goal the comprehension and representation of reality, and not the construction of ideal systems that are hardly linked to the latter. Also, it is fundamental to understand that a theory should be built from whichever types of knowledge are necessary according to the subject thereof and that disciplines that can help to describe and understand the studied phenomena should not be excluded from that process. The evolution of BE, and the way it has contributed – with all the disciplines it integrates, from psychology to evolutionary biology - to the deepening of economic theory of decision, are examples thereof. Also, since human behaviour is central to legal research, the conclusions stemming from the analysis conducted by behavioural economics should be studied in the field of economic analysis of law.

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## ECONOMIC ANALYSIS OF COMPETITION LAW – FROM LAW IN BOOKS TO LAW IN ACTION

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**Abstract.** „A lawyer who has not studied economics ... is very apt to become a public enemy.”<sup>1</sup> This standpoint of Justice Brandeis, once read for the first time, seems to be very controversial. However, if we analyze it deeply, we will discover its important meaning. It will show us that in many cases a pure legal reasoning, deprived of economic methods of evaluation, may limit efficiency of legal provisions and lead to detrimental effects on the market and its participants.

The aforementioned standpoint finds its confirmation in the area of competition law, where the principles of economic efficiency often form the basis of legal reasoning. When we refer to the American system of antitrust law, which from the late 60's uses economic analysis as a basic mechanism in the application of legal provisions, we have no doubts that economic approach to antitrust law constitutes its natural component. Nevertheless, when we analyze the same issue from the European perspective, the economic analysis still seems to be a novelty rather than a standard. Recent development of “law and economics” in the European Union (EU) illustrate reluctance of many courts towards the application of its mechanism and limited access of individuals to the economic methods of legal analysis. While the reasons for such approach may be often justified, the question is if the European competition law may achieve full efficiency without development of economic method.

Taking the aforementioned into consideration, the following article tries to determine if the recent development of economic analysis in the area of European competition law allows increasing its efficiency and guarantees better protection of market against anticompetitive behaviors. By reference to the practice of the European Commission, national competition authorities and the case law of Court of Justice of the European Union, the author tries to determine significance of economic analysis in the area of antitrust law. Moreover, by reference to the specific problem of competition law, i.e. private actions for damages, it aims to establish if without enhancement of economic methods, development in the area of private enforcement is possible. The main goal of the undertaken reasoning is to answer if economic analysis is the necessary element of effective system of competition law enforcement and a mechanism guaranteeing the best possible application of antitrust law provisions.

**Keywords:** competition law; law and economics; economic analysis; private enforcement

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<sup>1</sup> Justice Brandeis, *The Living Law*, Illinois Law Review (1916) (Law and Economics, preface).

## INTRODUCTION

While the relationship between legal provisions and economy has been recognized in the legal doctrine for ages, it was only in XXth century when the economic approach to the analysis of law started to play its important role. The reason for that was the fact that despite the evident interplay between the application of legal provisions and economic consequences of such practice, it was hard to establish how by the use of economic methods it could be possible to determine the efficiency of law and its enforcement. The response to this question was given by the American scholars in the early 60's<sup>2</sup>. By the reference to the economic methods of analysis, they tried to predict behavior of individuals governed by law. Moreover, they aimed to identify limitations of legal acts, which often struggled to provide appropriate response to the difficulties of the market. Finally, by the use of economic methods of evaluation, they tried to respond to one of the most fundamental questions of legal practice: "how to increase the efficiency of law and its enforcement?".

The aforementioned movement, commonly known as "law and economics", significantly modernized the debate on the analysis of law. The most common methods of legal reasoning, such as empirical, historical, sociological or comparative approach, were enriched by new and innovative solution, which despite its complexity, allowed to give an answer to the previously unresolved problems. By assuming that people are more or less rational in their social interactions<sup>3</sup>, the "law and economics" permitted to broaden the scope of legal reasoning and take into account specificity of individuals' market behavior. Moreover, by reference to such concepts as economic efficiency, proper distribution of income or consumer welfare, the "law and economics" permitted to transform the analysis of law from purely legal task to complex reasoning, taking into consideration economical consequences of application of legal provisions. As a result, the application of law moved from "law in books" to "law in action" and durably changed the legal analysis in these areas of law, where interaction between law and economy had particular meaning, i.e. competition law, contract law and company law.

### 1. ORIGINS OF ECONOMIC ANALYSIS IN THE AREA OF ANTITRUST LAW

The origins of „law and economics” in the area of competition law may be found in the American system of antitrust law, where the economic methods of legal analysis were introduced for the first time in the late 60's. Thanks to the reform of competition law enforcement system and development of US Supreme Court's case law, the economic methods of legal analysis started to play not only a role of theoretical concept popular among scholars<sup>4</sup>, but became important mechanism in legal evaluation.

From the late 60's, the American antitrust agencies responsible for competition law enforcement, i.e. Federal Trade Commission (FTC) and Antitrust Division of Department of Justice (DoJ), started to use economic evaluation in order to analyze antitrust cases. The goal of such reform was

2 R. A. Posner, *Values and Consequences: An Introduction to Economic Analysis of Law*, in: *Chicago Lectures in Law and Economics*, edited by Eric A. Posner. Foundation Press, 2000, p. 1.

3 *Ibidem*, p. 3.

4 See in particular Chicago School and Harvard School of "law and economics".

to ensure “greater capacity for economic analysis needed both in terms of the development of specific cases and in the development of an overall program that made economic sense.”<sup>5</sup> As a result, antitrust agencies started to refer to different economic factors, such as market share, competitive effects or efficiency gains, in order to interpret competition law provisions and develop their policies. As an example, we can give first Merger Guidelines from 1968, based on economic rather than legal principles<sup>6</sup>. Moreover, antitrust agencies, while searching for proof of infringement, determining significance of violation or establishing the level of fines, were more and more keen to replace pure legal reasoning by the “law and economics” approach. In consequence, the importance of economic analysis, as well as number of economists employed within antitrust agencies significantly increased. Just to illustrate it can be said that while at the beginning of 70’s each of the antitrust agencies was employing only one economic expert responsible for the analysis of antitrust cases, nowadays the number of economic staff is about 70 persons for each agency. And as a former Director of Antitrust Division of DoJ, Charles James, stated: “Economists are an integral part of our investigations from beginning to end, and it is impossible for me to imagine the Department operating without them [...] Economists are involved not just in the decision-making functions of the Department, but in all phases of our inquiries.”<sup>7</sup>

In parallel to the reform introduced within the national competition authorities, also the US Supreme Court changed its attitude towards this method of legal analysis. As it is underlined, the previous standard to interpret Sherman Act<sup>8</sup> in light of a set of changeable social and political goals was replaced by the economic approach, allowing to ensure efficiency of the market and protection of consumer welfare<sup>9</sup>. The Supreme Court’s desire to bring the meaning of antitrust law provisions in line with modern understanding of competition<sup>10</sup>, found its confirmation in its judgments from the early 70’s. As an example, we can give the Supreme Court’s ruling in the case *Continental T.V., Inc. v. GTE Sylvania, Inc.*<sup>11</sup>, in which the Court allowed for non-price vertical agreements restraining competition under the condition that they bring “pro-competitive effects”. Its goal was to move from purely legal interpretation of Sherman Act, clearly stating that any contract, combination or conspiracy in restraint of trade shall be prohibited<sup>12</sup>, to more practical approach, taking into consideration economical effects of certain practice. This line of interpretation was continued by the US Supreme Court in the next decades, and led to establishment of so-called “more economic approach” to the analysis of antitrust law provisions.

5 T. E. Kauper, *The Role of Economic Analysis in the Antitrust Division Before and After the Establishment of the Economic Policy Office: A Lawyer’s View*, *The Antitrust Bulletin* 29, no. 1 (1984), p. 111.

6 D. H. Ginsburg, E. M. Fraser, *The Role of Economic Analysis in Competition Law*, p. 6, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1610189](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1610189)

7 Charles A. James, *Antitrust in the Early 21st Century: Core Values and Convergence, at the Program on Antitrust Policy in the 21st Century*, available at: <http://www.justice.gov/atr/public/speeches/11148.htm>.

8 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1987)).

9 D. H. Ginsburg, E. M. Fraser, *The Role of Economic Analysis ...*, p. 22.

10 Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 *Harvard Journal of Law & Public Policy*, 2010, p. 217-218.

11 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

12 See Section 1 of Sherman Antitrust Act: “any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine.”

The aforementioned reform of the American system of antitrust law durably modernized the role of “law and economics” in the analysis of competition law provisions. Nowadays, the American approach to antitrust law is hard to imagine without such concepts as “economic efficiency”, “consumer welfare” or “rule of reason”. Moreover, the role of economists in the application of legal provisions may not be undermined, and their influence on the interpretation of legal provisions is often crucial. Finally, development of “law and economics” in the area of US antitrust law showed, that in order to effectively enforce competition law, its analysis may not be limited to purely legal reasoning, but the antitrust agencies, courts, as well individuals, shall be provided with the effective mechanisms of economic method.

## 2. EUROPEAN COMPETITION LAW AND ECONOMIC ANALYSIS.

The history of development of economic analysis in the area of European competition law is relatively young and dates back to the beginning of 1990’s. Thanks to the reforms started in the last decade of XXth century, and continued until today, the European system of competition law, previously based on a pure legal reasoning, started to make more and more space for the economic methods of legal evaluation. In consequence, in the course of last 20 years the European Union succeeded to develop “more economic approach” to antitrust law and established modern system of application of competition law provisions.

### a) The reasons for development

Several factors may be determined as creating grounds for development of economic analysis in the area of European antitrust law. Among the most important we shall evoke changes in the European legislation, development of CJEU case law, reforms introduced within the European Commission, and the need of convergence with American system of antitrust law. All these elements marked the European debate on “law and economics” and led to development of “more economic approach” to the analysis of European competition law.

The first factor concerns introduction of new laws, which obliged European and national competition authorities to refer to the economic methods of legal analysis in order to apply new dispositions. As the main examples of new regulations, we can evoke Council Regulation No 4069/89 on mergers<sup>13</sup> and Council Regulation No 1/2003 on the reform of application of EU competition law<sup>14</sup>. Both instruments, not only granted new powers to competition authorities, but also, forced them to use new methods of legal analysis in order to achieve set objectives.

The Merger Regulation, adopted for the first time in 1989 and subsequently modernized in 2004<sup>15</sup>, introduced to the European law a mandatory control of mergers having the European dimension. Foreseen as the measure allowing to protect the internal market against anticompetitive

13 Council Regulation (EEC) No 4069/89 of 21 December 1989, OJ C 197, 14.7.1999, p. 2.

14 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

15 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1–22.

effects of mergers, the aforementioned regulation obliged the Commission to refer to economic methods of analysis in order to evaluate operations notified by enterprises. The pure legal reasoning had to be replaced by economic evaluation of mergers, involving detailed analysis of market's structure, conditions of merger and its eventual effects on competition. As a result, the previously dominant structural approach, limited to the analysis of current situation of the market and number of competitors, was replaced by the effects-based approach, aiming to determine, by the use of economic methods, the influence of specific merger on competition.

The second of the evoked instruments - Regulation 1/2003, not only granted important powers to national competition authorities and decentralized the European system of competition law enforcement, but also, overhauled the method of evaluation of anticompetitive behaviors<sup>16</sup>. The previously existing system of *ex ante* notification, requiring enterprises to notify the agreement to the EC in order to assess the lack of anticompetitive effect, was replaced by the system of *ex post* analysis, conducted by national courts and competition authorities. Instead of the complex legal reasoning performed by the Commission prior to the conclusion of the agreement, the Regulation proposed the system of exemptions from anticompetitive agreements and analysis based on the "rule of reason". Moreover, due to the character of conditions for exemption, such as improvement in the production or distribution of goods, promotion of technical or economic progress, or positive effect on consumer welfare, the structural approach was replaced by the effects-based approach. The goal of such change was not only to increase the efficiency of competition law enforcement, but also, to bring the application of antitrust law in line with the need of market's efficiency.

Another factor that influenced development of economic analysis in the area of European competition law was the case law of CJEU. From the late 90's, the Court started to clearly express the need for the increased importance of economic evidence in competition law cases. In its judgments in *GE/Honeywell* case<sup>17</sup>, *Airtours* case<sup>18</sup>, *Schneider Electric* case<sup>19</sup> and *Tetra Laval* case<sup>20</sup>, the Court claimed that the Commission's decision on violation of European competition law shall be based on economic reasoning and that economic evidence needs to be provided as a proof of eventual infringement. As the Court stated in its press comment to *Tetra Laval* ruling: "*The fact that the Commission enjoys discretion in economic matters does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature, especially in the context of a prospective analysis*".<sup>21</sup>

The aforementioned standpoint of the CJEU was followed by the Commission. In October 2002, the former EU Commissioner Mario Monti stated: "*We are increasingly confronted with the need to investigate complex cases, which require in-depth fact-finding and rigorous economic and/or*

16 A. Pera, *Changing Views of Competition, Economic Analysis and EC Antitrust Law*, European Competition Journal, Volume 4, Number 1, June 2008, p. 127-168(42).

17 Judgment of the Court of First Instance, Case T-209/01, *Honeywell International Inc. v. Commission*, 2006 O.J. C48/26.

18 Judgment of the Court of First Instance, Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II-2585.

19 Judgment of the Court of First Instance, Case T-310/01, *Schneider Elec. v. Commission*, 2002 E.C.R. II-4071.

20 Judgment of the Court of First Instance, Case T-5/02, *Tetra Laval v. Commission*, 2002 E.C.R. II-4381.

21 L.H. Roller, *Economic Analysis and Competition Policy Enforcement in Europe*, in P. A. G. van Bergeijk and E. Kloosterhuis (eds.), *Modelling European Mergers*, Cheltenham: Edward Elgar, 2005, p. 13.

*econometric analysis. The CFI Judgments confirm this need. We are therefore discussing measures aimed at further strengthening the economic expertise capabilities of the Competition DG.*<sup>22</sup> As a result, the EC has undertaken steps towards introduction of economic analysis into its decision-making process. In July 2003, it announced the appointment of Chief Competition Economist, and three months later he took up his function.

The Chief Competition Economist may be compared to the economic expert of FTC and Antitrust Division of DoJ. Its main functions are support, economic guidance and methodological assistance to the working groups of the EC dealing with the antitrust cases. Moreover, the Chief Competition Economist provides the Commission with his independent opinions on certain cases and participates in development of EC's policies in the area of antitrust law. Consequently, it can be stated that the role of Chief Competition Economist is not only limited to the evaluation of antitrust cases and economic analysis of particular issues, but also, affects development of Commission's policies in the area of competition law.

The last factor that led to development of economic analysis in the area of European competition law resulted from the need of convergence with the American system of antitrust law. First, it was determined by the increasing cooperation between the EC and American antitrust authorities on cases of competition law violations. The above forced the Commission to refer to economic methods of analysis, being regarded as a standard in the American system of antitrust law, in order to reduce potential differences between the two jurisdictions<sup>23</sup>. Secondly, economic analysis was seen by the EC as a mean to justify its eventual decisions before the American antitrust authorities. Taking the example of *Boeing/Mc Donnell Douglas*<sup>24</sup> and *GE/Honeywell*<sup>25</sup> decisions, questioned by the American antitrust authorities as protecting rather competitors than competition, the EC argued that different conclusions of the European and American antitrust authorities were not a result of varying interpretation of legal provisions, but different economic evaluation of cases<sup>26</sup>.

As we can see from the above, several factors led to development of economic analysis in the area of European competition law. Despite its different nature i.e. legal, economical or political, all of them led to important change in the European approach to competition law. The previously dominant structural approach, was replaced by the "effect-based" approach, taking into consideration need of economic efficiency, consumer welfare and the specificity of the market. Moreover, changes introduced at the EU level led to modification of national practice of competition law application. Most of the Member States decided to introduce economics methods of legal analysis, and following the Commission's example, appointed economic experts within their organization structure. In consequence, the process of economization of competition law gained the European

22 Speech by Commissioner Mario Monti, *EU Competition Policy*, at Fordham Annual Conference on International Antitrust Law and Policy, New York, 31 October 2002, available at: [http://europa.eu/rapid/press-release\\_SPEECH-02-533\\_en.htm?locale=pl](http://europa.eu/rapid/press-release_SPEECH-02-533_en.htm?locale=pl)

23 See D. Neven, L. H. Röller, *On the Scope of Conflict in International, Merger Control*, Journal of Industry, Competition and Trade, December 2003, Volume 3, Issue 4, p. 235-249.

24 Commission decision of 30 July 1997, *Boeing/McDonnell Douglas*, Case No IV/m.877 (1997).

25 Commission decision of 3 July 2001, *General Electric/Honeywell*, Case No. COMP/M.2220. (2004).

26 A. Pera, *Changing Views of Competition, Economic Analysis and EC Antitrust Law*, European Competition Journal, Volume 4, Number 1, June 2008, p. 127-168(42).

dimension and led to establishment of the new, “more economic approach” to the European and national antitrust law.

## b) The role of economic analysis in the European competition law

The economic method of legal analysis plays important role at several stages of application of antitrust law provisions. It can be observed at the stage of monitoring of the market, evaluation of enterprises’ behavior and formulation of antitrust policies. For this reason, some legal scholars argue that: *“currently it is hard to imagine non-application of economic analysis while dealing with the competition law cases.”*<sup>27</sup>

The first area in which economic analysis has particular importance is the *ex ante* control of the market by antitrust authorities. It consists of monitoring of the market, in order to detect the eventual anticompetitive behaviors. By the application of several economic indicators, such as market structure, market power, barriers to entry, variation of prices or division of distribution of goods, competition authorities aim to determine the existence of potential problem to the competition. Moreover, thanks to the economic methods of evaluation, they are able to assess the influence of certain practices on competition, without the necessity of being exclusively dependent on complaints coming from private parties. As a result, the probability of detection of antitrust infringement is significantly increased.

Secondly, the economic analysis has significant meaning at the stage of evaluation of antitrust cases. First, it allows competition authorities to “frame” the case and define the market. At this stage, economic analysis consists of providing information about the structure of particular market, position of competitors, structure of demand and strategies employed by different undertakings. The goal of this preliminary stage is to enable competition authority to allocate certain practice within the whole market structure. Secondly, economic analysis is crucial to evaluate behavior of certain enterprise and determine its effect on competition. This stage is more complex and requires specific economic knowledge in order to determine actual or potential influence of certain practice on the market. It consists of empirical analysis of evidence being in the possession of competition authority, as well as application of economic tests in order to assess it, e.g. SSNIP test. Depending on the case, the goal of competition authority is to answer if certain merger does not reduce competition on a market, certain agreement or concerted practice does not prevent, restrict or distort competition, or if the abuse of dominant position by specific enterprise does not affect the trade between Member States. Moreover, while providing the evidence of anticompetitive behavior, competition authorities refer to economic method in order to evaluate economic consequences of certain practice. Because, as former DG Competition in the European Commission, Alexander Italianer, has stated: *“When we prove our cases we do not do it to an economic standard, but to a legal one. However, the key point here is that we are in fact using economic analysis to support the construction of legally robust cases.”*<sup>28</sup>

<sup>27</sup> C. Bongard (and others), *Instrumenty ekonomiczne w prawie konkurencji*, Bonn/Warszawa 2007, p. 6.

<sup>28</sup> Speech by A. Italianer, *The interplay between law and economics*, speech pronounced on 8 December 2010 in Brussels during Charles River Associates Annual Conference, available at: [http://ec.europa.eu/competition/speeches/text/sp2010\\_09\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2010_09_en.pdf)

Finally, the economic analysis affects the formulation of European competition policies and the practice of application of competition law provisions. It results directly from the role awarded to Chief Competition Economists, which according to its mandate, is responsible not only for the economic evaluation of cases, but also, contributes to the general policy of the EC in the area of antitrust. As a result, Chief Competition Economist participates in formulation of different guidelines, block exemptions and general policy instruments, which determine the practice of application of competition law provisions by courts and competition authorities. As the examples of such mechanisms, we can evoke Horizontal Merger Guidelines<sup>29</sup>, the Transfer Technology Block Exemption Regulation<sup>30</sup> or Rescue and Restructuring Guidelines in the field of state aid<sup>31</sup>. The goal of all of the aforementioned documents was to increase the efficiency of competition law and provide rules being economically sound and applicable in a large set of varying circumstances<sup>32</sup>.

In view of the above we can state that economic analysis is present at all stages of application of antitrust law, i.e. formulation, monitoring and application. Its importance is constantly growing and as Alexander Italianer has stated: *“The interplay between law and economics has never been greater. Competition cases are an intricate combination of legal arguments backed by solid economic analysis.”*<sup>33</sup> Nevertheless, the question that still needs to be answered, concerns the influence of economic analysis on the enforcement of antitrust law. It shall be determined, if economic analysis is the essential element of the competition law enforcement and a method guaranteeing its full efficiency.

### 3. ECONOMIC ANALYSIS AND THE EFFICIENCY OF COMPETITION LAW ENFORCEMENT

The enforcement of European competition law may be divided between public and private system of enforcement. A main goal of public system, governed by the EC and national competition authorities, is detection of anticompetitive behaviors and punishment of violations of antitrust law. Whereas private system aims to compensate the victims of competition law infringements, by allowing individuals suffering antitrust injury to initiate actions for damages. And while both mechanisms have the same subject of legal analysis, i.e. anticompetitive behaviors of market participants, the applied method significantly differs.

Public system of competition law enforcement is strongly dependent on the economic method of legal analysis. It is particularly important at the stage of *ex ante* control of the market, gathering the proof or violation or finally calculating and imposing fines. In contrast, the role of economics in private actions for damages is still limited. First of all, it concerns the difficulties with application

29 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, p. 5-18.

30 Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (Text with EEA relevance), OJ L 123, 27.4.2004, p. 11–17.

31 Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty, Official Journal 244, 01/10/2004 P. 0002 – 0017.

32 L.H. Roller, *Economic Analysis and Competition Policy Enforcement in Europe*, in P. A. G. van Bergeijk and E. Kloosterhuis (eds.), *Modelling European Mergers*, Cheltenham: Edward Elgar, 2005, p. 17.

33 Speech by A. Italianer, *The interplay between law and economics*, speech pronounced on 8 December 2010 in Brussels during Charles River Associates Annual Conference.

of economic methods at the stage of proof gathering. Secondly, it refers to the calculation of damages. As a result, as the national experience in the enforcement of European competition law shows, private method still suffers to constitute an important alternative to the public system of enforcement, and plays only limited role in the application of antitrust law provisions.

Referring to the first area, in which the efficiency of private enforcement is significantly limited due to a lack of economic methods of analysis concerns gathering the proof of violation. While the Commission and national competition authorities often use the economic expertise in order to determine the existence of anticompetitive behavior, private parties are deprived of such possibility. Despite the fact that the EC often argued in favor of the expert witnesses in civil lawsuits initiated by victims of competition law infringements<sup>34</sup>, most of the Member States still do not recognize expert opinions as a proof admissible in antitrust proceedings. Such situation causes important limitation to the European system of private enforcement and significantly reduces its efficiency. The reason is, in competition law cases, often involving complex economical issues, the individuals do not have enough knowledge and experience to prove the violation of their rights. Moreover, the problem is aggravated by the fact-intensive nature of competition law cases and strong information asymmetry between the accused enterprises and individuals initiating private actions. For these reasons, the EC argued that: *“given the complexity of damages actions for infringement of antitrust law, use of expertise in court is particularly important to ensure efficient proceedings.”*<sup>35</sup>

The second area, in which the importance of economic analysis for the efficiency of competition law enforcement may be observed, concerns calculation of damages. While the public authorities use economic methods in order to evaluate fines imposed on enterprises committing infringements, private parties and national courts still struggle to properly determine the amount of damages by the use of economic methods. The construction of damages allows to compensate individuals suffering loss due to the anticompetitive behavior of particular enterprise, however, in order to obtain such recovery, individuals are obliged to determine the precise amount of damages. In the opinion of the Commission, such exercise may often become excessively difficult or even impossible task for private parties claiming for damages<sup>36</sup>. That is because, individuals confronted with the issue of calculating damages are obliged not only to confirm the existence of loss, but also, to compare their economic situation with the hypothetical scenario of the competitive market. As a result, due to the lack of specific economic knowledge and limited number of proofs, the above task becomes very hard to achieve. In order to respond to this difficulty, the EC published in June 2013 Communication<sup>37</sup> and Practical Guide<sup>38</sup> on quantifying harm in antitrust damages actions. Nevertheless, despite the innovative character of these documents, their practical significance is still limited. Non-binding and purely informative character of these documents, as well

34 See for example Green Paper - Damages actions for breach of the EC antitrust rules, COM(2005) 672, 19.12.2005.

35 Green Paper - Damages actions for breach of the EC antitrust rules, COM(2005) 672, 19.12.2005, opinion 35.

36 See p. 2.3 of the Green Paper.

37 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, Official Journal of the European Union, 2013/C 167/07.

38 Practical guide quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the functioning of the European Union, Strasbourg, 11.6.2013, SWD(2013) 205.

complexity of their economic substance, make national courts rather reluctant to refer to their provisions. As a result, the individuals still struggle while faced with the necessity of determining level of claimed damages, what significantly reduces the efficiency of private actions.

The aforementioned comparison between public and private enforcement illustrates that lack of economic methods of analysis, or difficulties with their application, may significantly decrease the efficiency of competition law enforcement. While public method, strongly based on economic evaluation, confirms to be efficient way of detection and prosecution of anticompetitive behaviors, private actions still struggle to gain importance in the execution of competition law provisions. Obviously, there are several other factors limiting the efficiency of private enforcement, such as costs of proceedings, limited access to proofs of violation or lack of flexible discovery rules, nevertheless, the limited role of economic analysis in private proceedings leads to important difficulties with the enforcement of antitrust law by individuals.

#### 4. CONCLUSION

As the aforementioned analysis illustrates, the role of economics in the analysis and enforcement of European competition law significantly increased in the course of last 20 years. The process initiated at beginning of 90's has mirrored the American experience with "law and economics", and through the reform of competition authorities and development of courts' case law, the "more economic approach" to the European competition law was established. The new methods of analysis and interpretation replaced previously purely legal approach to antitrust law, and the structural approach left space to the effects-based approach. As a result, the application of antitrust law moved from the "law in books" to "law in action", and started to take into consideration not only legal meaning of competition law provisions but economical and practical results of their application.

Nevertheless, as the European experience also shows, the aforementioned reform is far from being done. National courts are still reluctant to refer to economic methods of legal analysis. Individuals are often deprived of the possibility to refer to expert witness in order to prove competition law infringement and defend their rights in court. Finally, national competition authorities are still gaining experience in the application of economics methods. Therefore, the future of economic analysis in the area of European competition law is still on open question, and further steps need to be undertaken by the European Commission and national competition authorities. What is particularly crucial is development of economic analysis in the area of private enforcement, which still struggles to guarantee proper protection of individuals against competition law infringements. Only in this case, the efficiency of a whole system of competition law may be achieved and economics may become a real added value to the application of antitrust law provisions.

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## ARTISTIC VALUE AS A LEGAL PROBLEM: THE CASE OF CONTEMPORARY LITHUANIA

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**Abstract.** In literary theory, “artistic value” is one of the most widely debated terms. While for some purposes (e. g., in more sociological theories) it can be broadly taken to be reflected in the reception of a literary work, the most profound thinkers and theorists tend to admit that a certain unpredictability is in the very nature of art, and some of its functions are essentially unexpected. However, “artistic value” is also implied in the Lithuanian legislation defining the relationships of the artists and the state, and employed as a criterion in literary competitions for public money (generally in the form of either state subsidies for publishing or state-funded literary prizes), and as such it needs more accountability and a less fuzzy definition than academic theories can afford.

The presentation first reviews the main trends of defining the function or “value” of the art in major literary theories and identifies three possible sources from which the value can stem: author-genius, language itself, and social context. Next, the presentation examines the Lithuanian Law of the Status of Artists and Their Organisations to see what definition of value is implied in it. At first sight it seems like the Law mainly deals in categories and criteria of the social context, but on closer examination it appears that so much power and so little accountability is granted to the artists’ unions, that it is almost possible to say that the real concept behind the Law is the romantic one, in which an author is genius and the best judge of his own work.

**Keywords:** artistic value, legal definition, literary theories, law

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### INTRODUCTION

The concept of “artistic value” or “value of art” is one of the most problematic in the theories of literature and art and in any serious study of the field. However, in most cases it remains a theoretical and academic problem to be pondered by the small group of people dedicating their professional lives to study of literature and hardly influencing societies and states, at least not directly. The problem only becomes practical in situations like in present-day Lithuania, where there exist special laws to define a special position of artists in the state and where “artistic value” is used as a criterion to distribute public money to support the arts: who is to be the judge on that criterion if the more a person is involved in theoretical debates and discussions on the topic, the more likely they are to confess that they have no idea what it is?

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While a detailed review of the debate lasting several centuries at least (if not from the beginning of art itself) would definitely be beyond the scope of this paper, it is not impossible to outline the main focal points with only limited examples.

## CONCEPTS OF THE VALUE OF ART

One of the very captivating concepts is the romantic “genius”, which places the power of artistic work squarely with its source, the author. One of the most profound and influential discussions of this concept can be found in *Biographia Literaria* by Samuel Taylor Coleridge<sup>1</sup>, originally published in 1817. At the core of this concept is the idea that the genius-author is the best judge of his own work: even if it is not acknowledged or valued by others, the genius knows that he is genius and that his work is worthy, and this knowledge provides him with “calm and tranquil temper in all that relate[s] to themselves. In the inward assurance of permanent fame, they seem to have been either indifferent or resigned with regard to immediate reputation.”<sup>2</sup>

The concept is, of course, very attractive to artists themselves, in fact, it lasted throughout Modernism when it was further reinforced by some of the ideas of the emerging psychoanalysis, especially some of the work of C. G. Jung (rather than Sigmund Freud). But it is not very conducive to any debate: if all judgement of the value of an author’s work is placed within the author, what arguments could possibly be employed by anyone else? In fact, the concept of the genius was eventually perceived as such conceit that in 1967 French theorist Roland Barthes published an essay with an eloquent title “The Death of the Author”<sup>3</sup>, in which he argues to reduce the author to “a scriptor” who merely produces the text, and placing the real source of a creation with the language itself. This leads to an understanding of artistic creation as an “open” process in which no final meanings or values are assigned indefinitely, and interpretation is ceaseless. The focus on the language pre-dates Barthes, it is to be found in the British “New Criticism” and in the Russian Formalism of the early 20th century, which were among the first to separate the work from the author and to view literature as a particular use of language, from which they derived its value. Barthes himself finished by focusing on the reader - “the birth of the reader must be at the cost of the death of the Author”<sup>4</sup>. To that, another famous French theorist Michel Foucault responded with an essay called “What Is an Author?”<sup>5</sup>, in which he defined an “author function” as a primarily social construct.

This is, of course, a much more productive venue. The value of art can be considered a social phenomenon, a certain median of judgements of many different readers. The sociological or marxist-based theories of literature have elaborated on all the possible social criteria of those judgements. Probably the most prominent of these is Pierre Bourdieu’s ideas expressed in *The*

1 S. T. Coleridge “*Biographia Literaria*” (Project Gutenberg 2004), Chapter II, online <http://www.gutenberg.org/files/6081/6081-h/6081-h.htm> accessed at 08/03/2014.

2 Ibid.

3 R. Barthes “The Death of the Author” [1967], online [www.deathoftheauthor.com](http://www.deathoftheauthor.com), accessed at 08/03/2014.

4 Ibid.

5 M. Foucault “What Is an Author?” [1969], online <https://wiki.brown.edu/confluence/download/attachments/74858352/FoucaultWhatIsAnAuthor.pdf>, accessed at 08/03/2014.

Field of Cultural Production<sup>6</sup>: Bourdieu discusses the “literary field” which, on the one hand, is nothing but a product of social context, and its “agents” merely perform the roles defined by that context, but at the same time, it is a field of “inverse economy”, where the “loser wins”, and thus is, in a large part at least, autonomous from the general fields of economic and political power. Inside the field, the agents are “taking positions”, and the only value of art to speak of comes from the social acknowledgement of that value, and some agents have more weight in that acknowledgement than the others.

Bourdieu’s “positions” and other complexities of concepts and terminologies, while difficult to grasp, are really helpful in explaining the old problem of social theories of art: how come the “most valuable” art is not always the same as the most popular? But there remains one more theoretical trend to acknowledge.

The trends discussed so far isolated as their main focus a certain aspect of literature: author, medium (language), social context. But the most profound thinkers who try to understand the nature of art, like George Steiner in his *Real Presences*<sup>7</sup>, while acknowledging the importance of each of these, but also attempting to integrate them all and see the “whole picture”, often reach the following conclusions. First, art is a process of communication, even if that communication is only imagined, like when a work is never made public - it is still written with a vision of an addressee in mind. Second, that communication is deeply personal and irreducible - Steiner points out that our inability to express the experience of a work of art is so profound that the only possible “replies” to works of art produce new works of art in their own right. And third, following from second, is that there always remains an element of mystery in how art works on us. If “mystery” seems too esoteric, one could also fall back on art sociologist Vytautas Kavolis’ idea: art can fulfill a number of functions in the society, and it is often created with a particular function in a particular society in mind, however, the value of the art that endures longer than its own social context stems from its potential to adjust and start fulfilling new, previously unforeseen and unexpected functions.<sup>8</sup> In other words, if one is to speak of art in the broadest possible way, one must admit that the very nature of art is to be surprising, unexpected and to do something more or different than could be predicted in advance.

Which is exactly what laws do: they try to include and foresee as many various instances of their application as possible, which they never fully succeed to do, of course, which is why we still have lawyers. What happens, then, if one attempts to write a law defining the relationship between the state and art?

#### THE LITHUANIAN LAW REGARDING ARTS

The law that is supposed to do that in Lithuania is called the Law of the Status of Artists and Their Organisations<sup>9</sup>. The best and most detailed analysis of all the circumstances of how the Law

6 P. Bourdieu “The Field of Cultural Production” (Polity Press 1993).

7 G. Steiner “Real Presences” (Chicago: The University of Chicago Press 1989).

8 V. Kavolis “Meno sociologija. Socialiniai ir ekonominiai menų aspektai” [2007] Baltos lankos nr. 27, pp. 152-170.

9 Lietuvos Respublikos meno kūrėjo ir jų organizacijų įstatymas (Lietuvos Respublikos meno kūrėjo ir meno kūrėjų organizacijų statuso įstatymas) (Žin., 1996, Nr. 84-2002; 2004, Nr. 153-5573; 2010, Nr. 137-7002).

was conceived can be found in the relevant chapters of Loreta Jakonytė's monograph *Rašytojo socialumas*<sup>10</sup>. She begins with 1989, when the Lithuanian Writers' Union was deliberating whether to break away from the Soviet Writers' Union. Already then some voices of concern were raised over the financial situation and what would become of it if the ties with the state, even if otherwise quite unfriendly one, were broken. These voices did not prevail at first, and the Lithuanian writers were among the first to leave the Soviet Writers' Union, just as their compatriots were among the first to leave the Soviet Union itself. The initial years of the Independence, according to Jakonytė, were exuberant: the writers held very optimistic beliefs about how they were going to make a living in the new state - essentially, they believed that free market would work in their favour, that people would buy their books on their own, without any interference from the state. When that did not happen - when the free market turned out to favour "trashy" and "commercial" novels instead of the serious work that the Union members believed themselves to be creating - and when the general exuberance subsided, leaving room for more pragmatical thinking, the writers led all the other artists' unions to lobby for legislation that would assure state support for arts and culture. The result of that lobbying, which in a way still continues today, was the Law mentioned above - there have been four versions so far, and possibly more are to be expected in the future, as many are still not satisfied with it.

The current version of the Law avoids formulations like "artistic value" and "artistic maturity", which were used in earlier versions. It defines several key terms: "an artist" is someone who engages in artistic creation and produces works of art, for which the status of the artist is granted - legally, someone who produces art but is not granted the status is not an artist. Additionally, a special distinction is made for "a professional artist", whose work is "original, highly skilled and of great artistic achievement" (this is the closest the current version of the Law comes to actually mentioning artistic value) and "acknowledged as such by professional art valuers". Other articles of the Law seem to indicate that only "professional artists" can be granted the special status. In order to be a "professional art valuator", one needs a university degree, a knowledge of culture and art and a public demonstration of that knowledge in various publications at home or abroad.

There are seven grounds on which the status of the artist can be granted. First, if a person's work of art is an object of study and discussion of the professional art valuers - the Law stipulates a "positive evaluation". Second, if the person's work is included in the curricula of schools and universities. Third, if the person's work has won a prize in Lithuania and abroad. Fourth, if the person's work has been acquired by museums or galleries abroad - this, of course, relates to visual arts, and the seventh ground stipulates the same for performing arts; nothing is said exclusively for translations of literary works into foreign languages, but that would be a logical assumption. The fifth and the sixth grounds are more curious. The person does not even have to create works of art: he or she only has to produce publications on art for 5 years or more, acquire a PhD in an appropriate field, or teach art-related courses at a university. Essentially, there is hardly any "professional valuator of art" who would not also be eligible to the status of the artist.

10 L. Jakonytė, *"Rašytojo socialumas"* (Vilnius: Lietuvių literatūros ir tautosakos institutas 2005), pp. 84-105.

The status is granted either by an organisation of artists to its members (in practice, automatically to anyone who joins, and to anyone who was already a member when the Law was passed), or else, by a special Council to which all the artists' unions delegate their representatives. The status is only approved by the Minister of Culture. The Law gives no grounds (other than failing to produce the right paperwork) on which the Minister could veto the decision of a union or the Council.

The status can also be lost on three grounds. First is easy - when the status was granted on the false grounds in the first place because the candidate produced false documentation regarding his or her work. Second is also quite common-sense: in court-proven cases of plagiarism. It is the third that seems most curious: "when the distribution of the results of the artistic work of the artist are not observed in the development of the culture of the society". This is full of loopholes: "not observed" by whom? what is "the distribution of the results" and who is in charge of that distribution? how does one define "the culture of the society" and especially its "development"? The data collected for a large-scale study of the politics of taste in contemporary Lithuanian literature indicates that 45% of the works of fiction that were published with financial support from the state do not meet the criteria for the status of the artist - they are not analysed in academic publications, they do not receive literary prizes, they are not included in the curricula of schools, they are not translated into foreign languages; furthermore, they are hardly ever borrowed from the libraries. Should all of their authors lose the status of the artist? The problem is, even if the Law were interpreted that way and their status were questioned, the expert to be called upon, according to the Law, is the Association of the Artists' Organisations, which is the one organisation uniting all the individual artists' unions which generally represent different fields of art (e.g., writers, visual artists, filmmakers, etc.). The Association or the smaller unions are also granted with more powers - to advise the state on any decision or legislation related to the arts, to receive state funding for their activities, to observe the situation of the distribution of the arts and the social situation of the artists - without a more detailed explanation of how such observation is supposed to be carried out and accounted for. Accountability, in fact, is what is sorely missing from the Law: the state is obliged to provide the funds for the various purposes related to the arts, but the unions or the Association are not fitted with any guidelines or mechanisms of reviewing their activities, which are all supposed to be related to distribution and promotion of "highly-skilled" artistic creation. The only accountability, not in the Law but in additional acts regarding the actual distribution of money (e.g., in state grants or in subsidies for publishing), is financial: the money is to be used to the purpose for which it was granted, and if e.g. the book is not published, the money has to be returned. However, once the book is published, the state does not ask if it made any impact - this is the concern of the unions and the Association, who are the sole judges on what the impact consists of and how it is observed.

## CONCLUSION

So all the state does, really, is hand out money, and the rest is for the artists to agree among themselves. But the real question is, can the state do anything else?

The language of the Law seems to suggest that the approach to art and its value adopted in it is the sociological one - the quality of art is judged and defined by various social factors and tokens of

appreciation, like the prizes or the “professional valuations”. However, almost all of the tokens are handed back to the institutionalised artist organisations to divide among themselves. It is in line with the Bourdieu’s theory that the field of arts or literature is an autonomous one in every respect except the financial one. But if the examples analysed by Bourdieu indicate the financial dependence of the literary field on the society at large, and that implies various negotiations and compromises that the artists have to achieve to access the funds, in the Lithuanian case it seems like the dependence is solely on the state with no accountability for what the field contributes to the wellbeing of the state.

This is, of course, an exaggeration and a simplification, especially if we bear in mind the “mystery” or “surprise” element in art, which cannot really be accounted for, not in administrative terms. But more light might be shed on the arrangement if one also looks at the “privileges” granted by the status of the artist. There are hardly any. The only practical advantage is the eligibility to the Artists’ Social Programme, which provides very small additional social security to artists whose income is very small and inconsistent. In other words, it is only relevant to artists who fail to make a living from their creations and do not engage in any other work - and that is not a great majority of the artists whose work is read and acknowledged; in fact, the data mentioned before also indicates that there is no great distinction between the authors that are acknowledged by professional critics and the ones that are relatively widely read by the society at large. And the Programme can only serve as a temporary solution when one falls on tough times, it does not provide a secure and permanent sustenance. Furthermore, the concept of the status predates the Programme, which only appeared in the latest version of the Law in 2011. So what does the status really stand for?

If one considers all the implications of the Law - that the artists are the best judges of each other’s art, that they can be represented by a single organisation, even that they require an exclusive social security programme, although any freelancer or contractor can fall on tough times because of the nature of their work - it seems that the concept of art and its value at the core of it is, in fact, not the sociological one in which the social context and a consensus of various opinions defines it, but the romantic one, in which the genius knows best what his work is worth, and can recognise the genius of a fellow artist. While blatant rejection of such concept would be simplistic in literary theory and especially in psychology of art and creativity, it was already shown in this paper that it is probably the least democratic way of judging the value of art: the author is not only an author but also an authority. All the state does is institutionalise that authority and... give money.

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## IN SEARCH OF THE LOST ECONOMIST IN EVERY COMMERCIAL LAWYER

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**Abstract.** This paper attempts to answer the old question about the relations between economics and law and the optimal standard of education that lawyers should be expected to have in the field of economics. The perspective I have chosen, however, is somewhat different from that which normally applies: the question is posed not from the point of view of law schools or even lawyers themselves, but from that of the markets. The first question that arises in this connection is whether law graduates have a sufficient knowledge of economics and — more importantly — whether they need it at all. The second question is whether the economic expertise possessed by those lawyers who are involved in creating regulations for the market allows them to do their job properly. The importance of finding answers to these questions is dictated by factors such as the increasing number of law graduates on the labour market and the all-too-transitional nature of law regulations. Old issues may be viewed quite differently when confronted with new factual circumstances. Indeed, the quality of a country's economy may in some measure depend on the extent to which these questions can be answered in the affirmative.

**Keywords:** Economics and Law, legal scholarship, standards of legal education, regulation of the markets.

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### INTRODUCTION

The discussion about the place of the social sciences in law departments and — more generally — about the relationship between the social sciences and law has been a long one. Scholars on both sides have spared no effort to promote their views both in theory and in practice. On the one hand, the arrival of a new brand of socio-legal researcher has been duly proclaimed as a fact of life. As Judge Posner has observed, “the doctrinalists – the traditionalists in academic law – [...] are being crowded by economic analysts of law, by other social scientists of law, by Bayesians, by philosophers of law, by critical legal scholars, by feminist and by gay legal scholars, by the law and literature crowd, and by critical race theorists, all deploying the tools of non legal disciplines”.<sup>1</sup> On the other hand, these “law and...” trends have come in for some hefty criticism. Judge Edwards quotes from a letter sent to him by a professor of law, who states somewhat bitterly: “I was warned that my law degree would not qualify me to teach history at a liberal arts college, as I hoped at the time I left law school. It never occurred to me that I might convert this law school to a liberal arts college instead. How naive of me”.<sup>2</sup>

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1 R. A. Posner, “Legal Scholarship Today” [1993] 6 SLR 1651

2 H. T. Edwards, “The Growing Disjunction between Legal Education and the Legal Profession: A Postscript” [1993] 8 Mich. L. Rev 2205

These two quite different views show that the subject is controversial to say the least and that the question which this issue poses is crucial, as it has the potential to reshape socio-legal reality as we know it. It is, after all, a question about who lawyers are and what they can and should do.

It is not my intention here to add yet another opinion of a general kind to this discussion on the need for social sciences in law. Indeed, it would be difficult and even presumptuous of me to argue with academics of such great renown. The task I have set myself is much more modest. By looking at the issue from a European perspective, I would like to examine the need for economic education in the lawyer's curriculum, as the answer we give to a particular question sometimes has to be changed owing to factual circumstances.

The first question which I would like to ask is: do law graduates need to have any knowledge of economics? Secondly, I would like to ask whether the economic expertise possessed by those lawyers who are involved in creating regulations for the market is sufficient for them to do their job properly? These questions therefore concern the desired standard of education that lawyers should have — not from the point of view of law schools or even from the point of view of lawyers themselves, but rather from the point of view of the markets.

#### A. LAW GRADUATES

The theoretical issue of educating lawyers in both disciplines — law and economics — is rather an awkward one. In discussing this question it might be as well to remember the old adage that no one can serve two masters. One cannot but be impressed when one hears about someone who holds a double Ph.D. in law and economics and who has had a thorough education in both fields. Although there will of course always be some extremely bright individuals who excel in both fields, these will inevitably be few in number and eventually one of these disciplines will be dominant in their work. Most people will be either good at one and bad at the other or — even worse — bad at both. This harsh reality is hardly conducive to any attempt to make an economist out of each and every commercial lawyer, especially in view of the fact that law is undeniably a separate discipline and a lawyer has a different job to do.

Be that as it may, it must nevertheless be said that economic education can be of use to graduates and that there is a place for it in the curricula of commercial law departments. This is due to three quite different and important factors which are: firstly, the specific nature of the work done by commercial lawyers; secondly, the transitional character of today's law and thirdly, the immense surge that we have witnessed in the number of law graduates.

Before further elaborating on these facts, it has to be said that the economics nowadays is different from the economics of the past, with much emphasis now being put on microeconomic empirical research<sup>3</sup> and — all in all — it is a source of knowledge that can be of direct use to people operating in the markets.

This fact is important given the specific nature of the lawyer's work, which has been admirably described by David Howarth, who compares the work done by lawyers to that done by engineers.<sup>4</sup>

<sup>3</sup> D. Colander, "What Economists Teach and What Economists Do" [2005] 3 JEE 252

<sup>4</sup> D. Howarth, "Is Law a Humanity (or is it more like Engineering)?" [2004] 3(1) AHH 12

He observes that “[l]awyers design social structures and devices in a way that parallels engineers’ designs of physical structures and devices. Contracts, companies, trusts, [...]”.<sup>5</sup> Indeed, to be a commercial lawyer is in no small way to be an engineer. However, to be a successful engineer, one has to know the materials one is working with, the tools one uses and the environment one is working in. A lawyer working with his client is the only person who can assess the efficacy, nay efficiency of any particular legal solution. He offers the means whereby an entrepreneur is able to pursue his economic goals. All in all, although the economic goals are chosen by the entrepreneur, the best and most effective legal means to achieve them should be known to the lawyer.

The second important point is that a business does not operate in a vacuum. It is firmly anchored in current legal and economic reality. It is also flooded by wave after wave of new regulations, as the law is now changing at an unprecedented pace. From a period of relative legal stability we have arrived at a period of permanent transition. A commercial lawyer should be in a position to say how new regulations will affect an entrepreneur and how he should adapt to a continually changing environment. In other words, the sheer dynamics of the system make it vital for the commercial lawyer to make correct assessments and recommendations.

The third reason why an education in economics is important is the fact that the labour market for lawyers has reached saturation point. Some law graduates who are unwilling or unable to pursue legal careers as barristers or prosecutors, for example, will simply have to find another way to make a living. Some will undoubtedly set up their own businesses or will work in various commercial entities. It would therefore be of great benefit to them to have some knowledge of economics. In this sense, the quality of a country’s economy is in large measure dependent on the quality of its educational system.

## B. LAWYERS AS REGULATORS

Having mentioned the constantly changing legal environment, it is high time we had a look at the other side of the barricade, i.e. at the master minds who are behind the changes in the law: lawyers acting as regulators. Here the question we must ask is whether they have enough knowledge to effectively reform the existing system.

The ever increasing volume of regulations that we have witnessed in recent years would seem to suggest that the answer is in the affirmative — or at least that that is what the regulators themselves believe. Regulations are multiplying at a tremendous pace and more and more social questions are being answered by means of law.

In this particular context it is worth noting a very interesting change that has been observed in connection with the subjects that are being chosen for Ph.D. theses in law. Professors van Gestel and Micklitz have pointed out that a great many of these subjects are policy driven<sup>6</sup>, meaning that Ph.D. students are trying to find answers to questions such as: how can this or that regulation be improved, how can it be more effective or how can it be changed? The worrying thing here is not only the fact that students who themselves have no real knowledge of facts and causes<sup>7</sup> feel the

<sup>5</sup> *Ibidem*

<sup>6</sup> R. van Gestel, H.-W. Micklitz, “Why Methods Matter in European Legal Scholarship” [2013] ELJ 10, 11.

<sup>7</sup> *Ibidem* 11

urge to give policy recommendations, but also — and even more so — the fact that they actually believe that their proposals can be implemented, if only because proposals of a similar kind are being implemented all the time.

It all seems so self-explanatory. Of course regulators have to regulate — otherwise they would be known by a different name — and the more the better: there are, after all, so many problems out there waiting to be solved. And, in theory, this is exactly the point at which the social sciences should enter the stage to play their role of guiding lawyers-turned-economists or economists-turned-lawyers towards the perfect crafting of regulations. There are, however, certain snags that regulators may come up against and one of these is the fact that the social sciences have their limitations.

As David Colander has observed in discussing the new perception of economics as a complex system, “[i]t also changes the way in which economists think of their role in policy. Specifically, it moves them away from an economics-of-control framework — a framework within which infinitely bright economists with full knowledge of the system design policy, to an economics-of-muddling-through framework — a framework within which reasonably bright economists with limited knowledge of the system provide inputs into a larger policy process.”<sup>8</sup> Putting this simply, “reasonably bright” people with “limited knowledge” are “muddling through” with the sole purpose of influencing our economic regulations — a state of affairs that can hardly be described as being reassuring.

There is more to it than this, however. A change in one regulation changes the equilibrium or the perspective of the whole system. It has a disruptive effect both on the system itself and on the way the system is perceived by the market. The crux of the matter is that changes take place on a regular basis. New regulations are issued all the time and they inevitably have a certain impact on the markets, be it large or small. The situation on the markets changes like a picture in a kaleidoscope, which is of no benefit to anyone. At this stage it is also impossible for any lawyer or regulator to have a decent knowledge of the system as a whole.

It is an open secret that all the predictions concerning the effects of a prospective regulation are to a certain extent pure guesswork. This is not because there are not enough committees, commissions or advisory bodies. The real issue is that no committee — however professional it might be — is able to predict all the consequences that a regulation will have on the market. There are four important reasons for this. Firstly — as I have already pointed out — there are limits to the amount of knowledge that can be obtained. Secondly, the markets are too diverse to be adequately researched. Thirdly, no one has enough time or money to carry out a thorough investigation of the matter. And, fourthly, the balance may be disrupted at any time by a new regulation which will set the kaleidoscope into motion once again. This obscurity as regards the effects of particular regulations is in large measure caused by the regulators themselves. The more regulations there are, the more difficult it is to create a new and effective regulation with a predictable outcome. To conclude, the answer to the second question is negative: the knowledge of the regulators is not sufficient to effectively change the system. The ability of today’s regulators to manage and change

8 D. Colander, “What Economists Teach and What Economists Do” [2005] 3 JEE 251

regulations from behind their desks is very limited owing to factual circumstances and the transitional nature of current laws.

There seems to be no good answer to this situation, which — as we have seen — presents quite a sombre picture: a constantly changing system of imperfect regulations which have an adverse effect on the markets; a set of tools with a limited capacity to solve the problem; a situation in which even a theoretically ideally crafted regulation can be caught up in the net of an imperfect system and so have its effects neutralized; a reality in which the efficacy of the regulator and his knowledge are severely limited. Given such a state of affairs it would seem that perhaps the best way to get round this difficulty it is to get to the core of the regulations, i.e. to the needs of the particular community in question. In other words, to turn towards some sort of the “new law merchant” as postulated by Professor Cooter<sup>9</sup>.

This is where economic research comes into its own: research structured in such a way as to decode the norms of the various commercial communities. Here there is a big role to be played by microeconomic, empirical research. Lawyers — who are the people with the means to create an appropriate wording and framework for such things — should conduct empirical and thorough research to decode the “new law merchant” — forging regulations that are consistent with the needs and practices of business communities — and should once and for all resist the urge to make the communities fit into artificially created legal frameworks.

## CONCLUSION

The need for a knowledge of economics and for economic research in law certainly exists. From the point of view of the markets it is of great importance both for graduates entering the labour market and — even more so — regulators, all of whom have to be able to come up with means to adequately serve the economic needs of the real world.

This knowledge is important because it can give commercial lawyers tools which will enable them to choose those legal structures that are most effective for their clients as well as enabling them to assess the impact and meaning of multifarious existing and future regulations.

As far as the regulators are concerned, it would seem that there is a flaw in the way in which the markets are currently being regulated. The knowledge that is available to the regulator is not sufficient for him to construct effective laws in these circumstances. What is needed is more economic research — and in particular empirical economic research — an attempt to find the ultimate “lex mercatoria”, together with a considerably diminished urge to regulate.

For these reasons the social sciences — and economics in particular — cannot be excluded from the domain of law.

9 Cooter R. D., “Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant”, [1996] 5 U. Pa. L. Rev 1647

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## PSYCHOLOGICAL ASPECTS OF APPLYING PRE-TRIAL DETENTION

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**Abstract.** Nowadays law is considered to be an independent science. However its origin and evolution has been influenced by a number of other systems. The sources of law can be found in morality, human virtues, traditions and principles of social order. Even now the law doesn't exist separately from other disciplines – it improves itself by implementing achievements and experience of other sciences such as philosophy, history, ethics, sociology, economics etc. Modern global interactions and information flows make it impossible for law to stay isolated from outward things.

With regard to criminal and criminal procedure law it should be noted that these branches of law also operate in close connection to all other areas of human activity. A special attention should be paid to its connection with the psychology discipline. The psychological knowledge is very important for jurists, especially judges, who make decisions by examining not only criminal case materials, but who also take into account the psychological features of participants of criminal proceedings. Any judicial sitting is a battlefield, where a wide range of psychological processes, moods and psychological factors are concentrated.

The paper is dedicated to a small stage in a pretrial process, namely, a court session, where the question on application of a security measure - arrest - to the suspect or accused person is considered. The aim of this work is to make a psychological analysis of a judicial sitting. One of these tasks is to determine what psychological factors and in what way may significantly affect the investigating judge decision-making process. A variety of theoretical and practical methods, different techniques of getting and processing the information are applied. Such research methods as deduction, analysis, comparison, observation and questionnaire are applied in work as well.

**Keywords:** pre-trial detention, psychological analysis, personality, survey, comparative research.

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### INTRODUCTION

The field of criminal and criminal procedure law operates in close connection to all other branches of knowledge. The author considers that strictly the science of psychology and its legal branch has the most comprehensive impact on criminal procedure law. If the law researches the offender as its subject, then the legal psychology is focused on the exploring the personality of the offender<sup>1</sup>. The procedure of qualification and investigation of criminal offenses includes not only the legal side, which should be obligatorily established, but also a number of psychological aspects, which play an important role in ensuring the objectivity and ascertaining the truth in criminal case. Each court hearing, where the question on application of pre-trial detention is considered, has its specific psychological and emotional atmosphere, which may influence the judge's attitude towards the court participants and generally affect the outcome of the court sitting.

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1 В.Л.Васильев, 'Юридическая психология. 3-е издание дополненное' (Санкт-Петербург: Питер 2000) 9

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## PSYCHOLOGICAL ANALYSIS OF JUDICIAL SITTING

Detention is considered to be the severest and the most invasive security measure that most of all restricts the human right to freedom. Negative emotions, which occur during the court hearing, may significantly affect the mental state not only of a person whose arrest is being decided, but also the person directing the proceedings, a lawyer or even a judge. The investigating judge has a dominating role in a judicial sitting. The judge is exactly that person who organizes the court hearing and after its completion makes the decision. He operates in conditions of severe time and information shortage. Thus, in addition to high legal qualifications, the investigating judge personality must be endowed with specific psychological knowledge, which helps him to comprehend the social and psychological peculiarities of an individuals' behavior and give the ability to keep emotional stability during the whole session<sup>2</sup>. His psyche should be very adaptive - it needs to be flexible to react to everything that happens in the courtroom, to withstand all external exposed factors to take a legal, justified and an equitable decision. Investigating judge faces a very difficult task, he needs to expose the suspect or accused person, reveal each participant's "true face" and make a decision, on the strength of his internal convictions based on a full, comprehensive and impartial examination of all the facts and according both to the law and his legal consciousness<sup>3</sup>.

Investigating judge's attention and its properties is one of the criteria which ensures the effectiveness of the hearing process management. While in the courtroom the investigating judge should hold the sustained attention and be concentrated on all the parties involved in the session. Attention means the judge's readiness to keep a particular mode of psyche during a certain time period<sup>4</sup>, perceiving the situation and atmosphere around him - both its verbal and non-verbal components. Moreover remembering the information is just as important to getting it. The investigating judge can be a good specialist, only if he has a well-trained memory and is able to reproduce the saved information at the right time. Latvian Criminal Procedure Law defines, that when considering the application of arrest, an investigating judge *inter alia* examines case materials<sup>5</sup>. The above mentioned provision obliges the investigating judge in good time to learn case materials, i.e. read the documents and keep in mind all the data contained therein. Usually a criminal case is handed over to a judge for a certain time before the court session begins. Sometimes this time interval can be stretched over several days. Apart from that the criminal case materials may also comprise many volumes. So, it is very important to remember the information the judge gets from the case for as long as possible in order to use it during the court hearing while communicating with other participants.

Examination of the criminal file also includes a thought process which essentially means the processing of the information being perceived. It consists of data analysis, synthesis and

2 М.И.Еникеев, 'Юридическая психология. 5-е издание. Предмет, методы, структура юридической психологии. Криминальная психология. Психология следственной деятельности' (Санкт-Петербург: Питер 2004) 313

3 Ibid 311

4 А.Иванова, Н.Косолапова, 'Юридическая психология: конспект лекций' Available at: [http://www.e-reading.co.uk/chapter.php/98174/11/Ivanova%2C\\_Kosolapova\\_-\\_Yuridicheskaya\\_psihologiya\\_\\_konspekt\\_lekcii.html](http://www.e-reading.co.uk/chapter.php/98174/11/Ivanova%2C_Kosolapova_-_Yuridicheskaya_psihologiya__konspekt_lekcii.html) [viewed 14 February 2014]

5 Saeima of the Republic of Latvia, Criminal Procedure Law [11 May 2005] Available at: <http://likumi.lv/doc.php?id=107820> [viewed 8 March 2014] Article 274 Part 1

generalization operations<sup>6</sup>. By coming to a courtroom, the investigating judge must be already prepared – he or she should understand the idea and perceive the significance of why the necessity to apply detention has been arisen. However the judge's thought process does not stop by the time the court session begins – it continues during the whole court sitting including the time the judge goes away to make a decision as well as the moment he comes back to announce it.

At the end of the session, the parties of the proceedings often begin to analyze what kind of impression the investigating judge left on them - whether they liked him or not, whether he was good or bad. Such a psychological portrait is constructed from those emotions, which the investigating judge invoked in other people. In turn, the emotions reflect the objective reality in experiences. They form a person's subjective attitude towards the objects and facts of the surrounding reality and they are due to satisfaction or dissatisfaction of important human needs<sup>7</sup>. Of course the parties' attitude towards the judge will largely depend on the fact in whose favor the decision is made. However, these emotions begin to form earlier than the decision is announced. Emotional processes occur at the same time people start engaging in interpersonal relationships, that is, at first sight, from the first word and from the first step. So, the attitude towards the investigating judge is significantly affected by such psychological components of his personality like speech and behavior. The investigating judge must be able to expose them to an emotional self-control.

Latvian legislation generally defines that in adjudging, a judge has to precisely fulfil the requirements of law, ensure the protection of rights, freedoms, honor and dignity of human beings, and be fair and humane<sup>8</sup>. Apart from that his main task is to control the observance of human rights in criminal proceedings<sup>9</sup>. The investigating judge is obliged to make legal and fair decision. It must be justified with concrete considerations based on case materials<sup>10</sup>. Arrest may be applied only if none of the other security measures can ensure that the person will not commit another criminal offence, will not hinder or will not avoid the pre-trial criminal proceedings, court, or the execution of a judgment<sup>11</sup>.

In order to ensure the duties imposed by legal acts, communicating with the participants of the sitting, the investigating judge must be particularly discreet and formal. The court sitting reproduces dramatic and tragic events of reality. It repeatedly reconstitutes different individuals' passions, hatred, evil and aggression<sup>12</sup>. To adjust the emotional expression the judge has to maintain general neutrality, impartiality and independence. Despite the investigating judge being the sole decision maker, he must not abuse his position and wreak his emotions. The ability to restrain emotions and feelings and to maintain mental stability and strength is one of the most important

6 Ю.В.Чуфаровский, 'Юридическая психология. Учебник. 3-е издание' (Москва: Издательство Проспект 2003) 147

7 Ibid 162

8 The Supreme Council of the Republic of Latvia, Law On Judicial Power [14 January 1993] Available at: <http://likumi.lv/doc.php?id=62847> [viewed 8 March 2014] Article 89 Part 1

9 Saeima of the Republic of Latvia, Criminal Procedure Law [11 May 2005] Available at: <http://likumi.lv/doc.php?id=107820> [viewed 8 March 2014] Article 40

10 Ibid Article 274 Part 5

11 Ibid Article 272 Part 1

12 М.И.Еникеев, 'Юридическая психология. 5-е издание. Предмет, методы, структура юридической психологии. Криминальная психология. Психология следственной деятельности' (Санкт-Петербург: Питер 2004) 313

characteristics of the investigating judge's personality that is a guarantor of fair and legal decision-making.

In the course of this work an anonymous survey within investigating judges was carried out with 19 respondents taking part in it. Most judges have acknowledged that the court atmosphere may cause them such emotional conditions as mental tension, stress, anger, frustration, antipathy, a feeling of pity, compassion and satisfaction too<sup>13</sup>. This indicates that the investigating judges tend to lose emotional resilience, tolerance and calmness in their work.

The management of a court session also embraces the observational method. Attention of the investigating judge is focused on each participant separately and at the same time on all of them. As for the attorney and initiator, a special judge's attention is concentrated on their professional skills. Admitting *a priori* that a lawyer and initiator are both specialists in their fields, the whole complex of legal-psychological characteristics of their personalities is assessed, such as ability to use legal terminology, brevity and accuracy in formulations, coherence, validity and argumentation of their speech, observances of etiquette clothing, behavior and respect towards other participants, emotional intelligence, reasonable restraint in expressing the feelings, etc.

The respondents also admitted that they have met such initiators and lawyers personalities, whose attitude towards the trial was apparently disrespectful<sup>14</sup>. The judges confessed that they had faced such cases when initiators looked negligent in their dress, didn't want to answer court questions or kept silent, because they were afraid of making mistakes. In regards to lawyers, the judges admitted, that they used to come to hearings without robe and concerning females – they used to be dressed “too sexy”. In addition the lawyers have happened to attend a hearing under the influence of alcohol, especially when on holiday on-call duty. Similarly, poor preparation for the hearing, weak position of the defense argument and formal referring to legal acts were mentioned as well. The judges also noted that both initiators and lawyers used to chew a gum during the court session, behave in aggressive and arrogant form, with ironic sarcasm, by insulting each other, etc. Thereby the author concludes that both initiator and advocate through their behavior, speech and appearance may leave a bad impression on investigating judge by offending his feelings as well as affect the process of making his own convictions. Despite that Latvian Criminal Procedure Law does not provide the opportunity for the investigating judge to consider the question on pre-trial detention and take into consideration neither the attorney's, nor the initiator's psychological characteristics and *a fortiori* base on them court decision, the results of the survey show that sometimes these psychological features or its demonstration may lead to changes in the judge's mind and, through it, indirectly affect the outcome of the court<sup>15</sup>. A survey carried out has shown that the procedure of considering the question on pre-trial detention is based not only on the rules of criminal procedure. This issue is bigger - it goes beyond the legal frames and covers a number of psychological factors, which sometimes seem to have a subjective nature.

13 T.Gordina, Survey-questionnaire 'Pre-trial detention' [Riga, 27.12.2013.-03.02.2014.] Annex I, not published, question No 6

14 T.Gordina, Survey-questionnaire 'Pre-trial detention' [Riga, 27.12.2013.-03.02.2014.] Annex I, not published, question No 2

15 T.Gordina, Survey-questionnaire 'Pre-trial detention' [Riga, 27.12.2013.-03.02.2014.] Annex I, not published, questions No 1,2,7

Opposite a defender or an initiator, whose personalities assessment is not required in considering the issue of arrest, the figure of the suspect or accused person is subject to a detailed analysis, moreover, its personality is taken into account when selecting a security measure. This statement comes both from practice and Latvian Criminal Procedure Law<sup>16</sup>.

The investigating judge gets the information about the suspect or convicted person from different sources. First of all it refers to a criminal case, which the judge receives before the court session begins. Case materials provide a reasonable basis for the investigating judge to form his own initial portrait of the suspect or accused personality - his character, way of life, interests and other features. When reading a criminal case, the investigating judge already starts preparing for the court session by pondering his behavior, preparing questions to the suspect or accused person, envisaging the possible options of backlash. The results of questionnaire show that all judges analyze and estimate the suspect's or accused's personality based on case materials<sup>17</sup>.

After that, the meeting with the suspect or accused person takes place. At this stage the investigating judge has the biggest potential to explore the suspect or accused personality in his or her presence, because both parties are getting involved in verbal and non-verbal contact, and even more - all the participants communicate with each other and in such way express their personalities. All the respondents have supported the fact of evaluation of suspect or accused personality during a court hearing<sup>18</sup>.

At the very first moment, when the investigating judge meets the suspect or the accused, observations and associations start forming in his subconscious. The judge pays great attention to the suspect's or accused person's appearance and clothing. The investigating judge pays an equal attention to the fact how and exactly what the suspect or the accused person tells at the court session. The important is speech's significative component, through which the information - its symbolic and semantic aspect is given, as well as the communicative component, through which the speaker transfers his emotions and feelings<sup>19</sup>. In cases when verbal or non-verbal means of communication do not correspond to the facts set forth in the criminal case, the discrepancy may be a sign of some facts concealment or even lying. Here the question arises: if such the contradiction is established, can the investigating judge rely on this person's promise not to commit another criminal offence, not to hinder or not to avoid or interfere the investigation, court, or the execution of a judgment in case he is released?

The results of the survey show that all judges pay attention to person's criminal records<sup>20</sup>. Possibly it implies that if a person has been previously convicted, this fact provides the judge a

16 Saeima of the Republic of Latvia, Criminal Procedure Law [11 May 2005] Available at: <http://likumi.lv/doc.php?id=107820> [viewed 8 March 2014] Article 244 Part 2

17 T.Gordina, Survey-questionnaire 'Pre-trial detention' [Riga, 27.12.2013.-03.02.2014.] Annex I, not published, question No 1, 3

18 Ibid question No 4

19 А.Иванова, Н.Косолапова, 'Юридическая психология: конспект лекций' Available at: [http://www.e-reading.bz/chapter.php/98174/11/Ivanova%2C\\_Kosolapova\\_-\\_Yuridicheskaya\\_psihologiya\\_\\_konspekt\\_lekcii.html](http://www.e-reading.bz/chapter.php/98174/11/Ivanova%2C_Kosolapova_-_Yuridicheskaya_psihologiya__konspekt_lekcii.html) [viewed 14 February 2014]

20 T.Gordina, Survey-questionnaire 'Pre-trial detention' [Riga, 27.12.2013.-03.02.2014.] Annex I, not published, question No 1, 5

reasonable basis for making an assumption that the person, whose arrest is to be decided, has a criminal propensity or has a tendency to commit new offences. Similarly, the majority of judges said they take into account the suspect's or accused person's age, marital status, the fact that the person is working or not, the fact of whether a person is officially employed or not, if it is listed in drug addiction or psychiatric records, the well-being and existence of a disease, addictions, the model of a person's behavior at the time of the offense, and almost a half of the judges take into account the fault recognition or non-recognition fact<sup>21</sup>. The latter aspect is highly debatable, the investigating judge shouldn't evaluate the evidence on the merits as well as decide the matter of guilt<sup>22</sup>. Although Latvian legislation defines that the admission of guilt can't affect the security measure, the survey results show the opposite, namely, that the investigating judges in deciding to issue the arrest warrant, however, pay attention to it, which in turn indicates its crucial role in the judge's decision-making process<sup>23</sup>. In addition to this, the survey results have shown that the investigating judges evaluate suspect's or accused's characterizing elements such as gender, age, education, occupation, social and material conditions, personal behavior, speech, facial expressions, gestures, character, temperament, etc<sup>24</sup>.

## CONCLUSION

Survey results led the author to some unexpected discoveries. Criminal proceedings are not only legal, but also a socio-psychological process. In choosing a security measure, investigating judges turn to the psychological main research object, i.e. personality. Legal relations, no matter how formal they are, will always have an impact by a human factor. There are interpersonal relationships at the very heart of legal relations and any individual contact or communication, even if it is a subject to legal rules and takes place in the legal space, is based on the fundamental psychology principle "sympathy-antipathy." Each participant of the court hearing manipulates and affects the investigating judge's emotions and feelings sphere. Despite the fact that the investigating judge's decision should be objective and based on the law, it includes the subjective moment as well. Investigative judges have recognized that emotional and mental overload, which can occur during the sitting, may affect the decision-making process both directly and indirectly<sup>25</sup>. It means that the investigating judges' confidence is influenced by several socio-psychological factors and any psychological nuance coming from an initiator, lawyer, suspect or accused party may "knock out" a judge from an emotional balance and thus affect the decision. Survey data show that some judges in stress conditions can't restrain emotions and maintain a neutral attitude towards the situation. This in turn means that most likely they are not applicable to their

21 T.Gordina, Survey-questionnaire 'Pre-trial detention' [Rīga, 27.12.2013.-03.02.2014.] Annex I, not published, question No 1, 5

22 A.Judins, 'Apcietinājums Latvijas kriminālprocesā. Pētījums' (Rīga: PROVIDUS 2011) 30

23 T.Gordina, Survey-questionnaire 'Pre-trial detention' [Rīga, 27.12.2013.-03.02.2014.] Annex I, not published, question No 1,5

24 Ibid

25 Ibid question No 7

work. To improve the situation, it would be desirable to develop and implement a special training for investigating judges (currently it is not available in Latvia<sup>26</sup>), in order to obtain additional psychology skills, which would help them to develop immunity from external exposure factors and allow judges to focus on the requirements of the law. This initiative was supported by most of the investigating judges<sup>27</sup>. It is worth noting that it is impossible to completely exclude subjective factor, because the investigating judge is just a man who tends to worry, be angry, be happy, and in any other way express his or her emotions. However, it is quite real to minimize undesirable consequences of the resulting emotions and feelings, and learn to rebuff the emotional effects techniques in judges' professional work.

It is hoped that the analysis of the results of the survey and court hearing, where the question on pre-trial detention is considered, as well as the conclusions drawn from them will help to develop recommendations for improving the administration of justice, increasing the appliers of the law qualifications, giving more importance to the knowledge of psychology and its place in legal area.

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T.Gordina, Survey-questionnaire 'Pre-trial detention' [Riga, 27.12.2013.-03.02.2014.] Annex I, not published.

26 Ibid question No 8

27 T.Gordina, Survey-questionnaire 'Pre-trial detention' [Riga, 27.12.2013.-03.02.2014.] Annex I, not published, question No 1, 9

## ANNEX I

### Questionnaire “Pre-trial Detention”

Statistics on respondents:

Number of Respondents 19

Summary of Results:

#### 1. Do you consider as disrespect to a court if:

A person directing the proceedings is improperly dressed during the court hearing or, for example, a defender participates in court without robe

Yes	11		57.9%
No	8		42.1%

You feel unpleasant smell from a defender or a person directing the proceedings

Yes	15		78.9%
No	4		21.1%

Informal, improper or unceremonious behavior of defender or a person directing the proceedings

Yes	17		89.5%
No	2		10.5%

Defender's or a person's directing the proceedings arrogant, sarcastic smirk or glance

Yes	10		52.6%
No	9		47.4%

#### 2. Based on your work experience, with what initiator or defender personality descriptive characteristics you have come across that would indicate their disrespect to a court?

- 1) Personally I have not faced such cases.
- 2) I have not observed deviations from norms of ethics
- 3) initiator is improperly dressed, defender's coming at the hearing without robe, being late at court, poor preparation for the hearing, weak position of the defence argument, formal referring to the articles of Criminal Procedure Law
- 4) Alcohol smell of counsel, gum chewing during the court hearing
- 5) I have faced with too sexy counsel clothing
- 6) There was no such incidents from initiator or defender.

- 7) Such situations have not occurred in my practice
- 8) I have not faced such situations
- 9) I have not dealt with such cases
- 10) Aggressiveness, generally low level of cultural behavior.
- 11) There were situations, when counsels came to a court under influence of alcohol. Especially while the output duties.
- 12) There were situations, when counsels took part in court hearing without robe, however such cases were just few.
- 13) haven't faced
- 14) there were no such cases
- 15) I can't answer
- 16) with ironic sarcasm of a defender and initiator, that often comes in a form of mutual abusive replies
- 17) initiator - not willing to answer court questions, sometimes arrogance, fear of making mistakes.  
Counsel - sometimes arrogance, desire artificially maintain the process in the stress ambience.
- 18) I have not faced such expressions

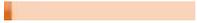
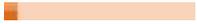
**3. Do you analyze and estimate suspect or accused personality on the basis of cases materials which are at your disposal?**

Yes	19		100%
No	0		0%
Total answers	19		

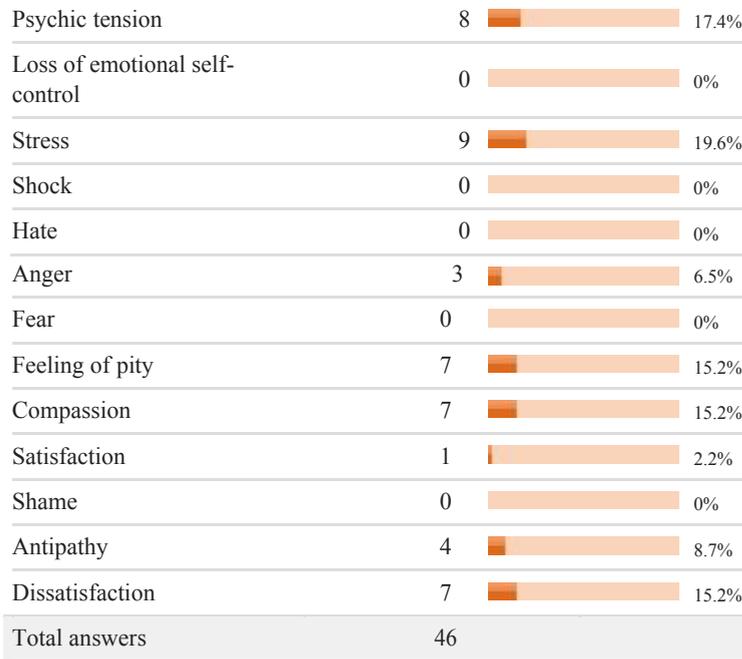
**4. Do you analyze and estimate suspect or accused personality during a court hearing?**

Yes	19		100%
No	0		0%
Total answers	19		

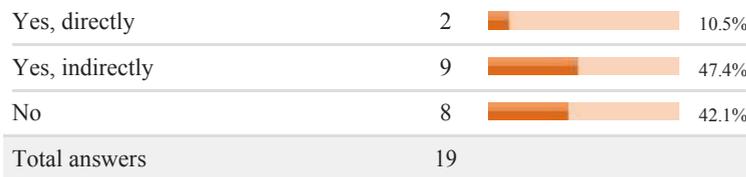
**5. When considering the question on pre-trial detention, do you take into account the following features of a suspect or accused personality: (multiple answers possible)**

Sex	4		2.1%
Age	12		6.3%
Marital status	15		7.9%
Education	4		2.1%
Occupation (professional identity)	7		3.7%
Fact that a person is employed or not	17		8.9%
Fact that a person is employed officially or not	10		5.3%
Social status	4		2.1%
Financial position	4		2.1%
Previous convictions	19		10%
Fact that a person was listed in drug addiction or psychiatric records in the past	7		3.7%
Fact that a person currently is listed in drug addiction or psychiatric records	17		8.9%
The existence of a disease (although it allows a person to be in custody)	13		6.8%
The model of person's behavior at the time when the offence was committed	14		7.4%
Behavior during the court hearing	7		3.7%
Person's speech, intonation	5		2.6%
Level of intelligence	5		2.6%
Fault recognition or non-recognition	8		4.2%
Facial expressions, gestures	2		1.1%
Temperament	2		1.1%
Existence of any addictions	9		4.7%
Character	5		2.6%
<b>Total answers</b>	<b>190</b>		

**6. Whether the atmosphere which rules at court hearing when the question on pre-trial detention is considered, may cause to investigating judge: (multiple answers possible)**



**7. What do you think, can the emotional and mental overload of hearing affect the decision-making process?**



**8. Is there any special training or retraining provided for investigating judges in the field of legal psychology?**



**9. In case of negative answer in paragraph 8, do you consider it necessary for your work to get such additional skills in the field of psychology? (answer is not mandatory)**

Yes	14		93.3%
No	1		6.7%
Total answers	15		

Explanation: The selected responses have been obtained by summing the respondents all answers to the question being marked. Each response ratio is obtained selected number of times to specific answer divided by the total amount of submitted answers.

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## THE NATURE OF MODERN COMPETITION LAW: BETWEEN LAW AND ECONOMICS

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**Abstract.** This article analyzes the interference problems of economics and law in the modern competition law. Competition - the basic mechanism of market relations - makes entrepreneurs compete with each other, thereby contributing to reduction of prices and improve the quality of products, meeting the needs of consumers, the economic recovery. Competition law, as no other form of public government interference in private affairs, is under constant fire from representatives of economic science.

The author examines various theories of the relationship between law and economics in the world, coming to the conclusion that the economic impact on competition law in individual countries is different and it certainly affects the functioning of the economic sphere competitive country or even region. U.S., EU and CIS countries are historically different regions in matters of establishment of competition law, and thus the economic impact is various. The author concludes that in the United States as the country with the most advanced competition law, preference is given to the economic component. At the same time, EU law authors hypothesize that the dominance of the legal level, that, according to the author, is not always justified. Yet, the author comes to the conclusion that flexibility instruments of competition policy of the EU, taking into account, its most diverse interests of the single market, the usefulness of the individual distortion of competition - mergers, acquisitions, some kinds of state - to enhance the competitiveness of the EU economy. In the CIS, in the region with developing competition law is very much different ratio of law and economics, current legislation often not reflected the achievements of economic science and the development is not as successful as in the EU or U.S.. In conclusion author states on a positive mutual influence of the economy and competition law and makes proposals to reform the existing competition law.

**Keywords:** competition, law, economy.

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### INTRODUCTION

Competition law - the main core of market relations. The need to ensure fair competition in life requires a well thought-out legal policy. Thus the ratio of economics and law in matters of competition has always been a hot topic. Modern world knows various approaches and attitudes to competition law, and also very different ratio of economics and law in this aspect. Critics of the main argument, and rightly point to a strengthening of the legal aspects of the regulation of competition.

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At the present stage due to difficulties in the formation of domestic market economy is the relevance of research questions its relationship with the right has increased substantially. Along with these recent events caused by economic recession that swept many countries require rethinking of problems in the functioning not only of the economic system, but also the question of the relationship of law and economics.

## 1. MAIN TRENDS IN COORDINATION OF LAW AND ECONOMICS IN COMPETITION LAW

Market competition intensifies economic activities internally, avoiding external coercion by the state. At the same time, when each economic agent makes an effort to ensure its own prosperity, and that society as a whole becomes richer. This approach avoids the state coercion, excessive concentration of resources and power in the bureaucracy that poses a serious threat to social progress. Thus, the specificity of the relation freedoms market economy is the right can be represented by the following formula: the right to focus only on the protection of relations existing between The economy spending subjects without interfering in their internal affairs, except for some of the prohibitions imposed on the abuse of the right, and the monopolization violation of the rights of other economic actors.

The market is not able to withstand the monopolistic tendencies. In terms of market forces inevitably arise monopolistic structures that restrict free competition, are unjustified privileges for a limited number of market participants. To support the extremely high prices, monopolists artificially reduce production. This calls for regulation of prices, say, product raw material monopolies, electricity and transport.<sup>1</sup>

Economic analysis of law involves three separate but interrelated elements. First - is the use of economic theory in order to determine the effect of legal rules. Second - attracting economic theory to determine the cost-effectiveness of legal norms to develop recommendations for their further use. Third - the use of economic theory in order to determine what should be the law. So, the first related to the theory of pricing, the second - with the economic theory of welfare, and the third - the theory of public choice<sup>2</sup>

Market as a highly complex sphere of interaction of buyers and sellers, producers and consumers, operates on the basis of price movements in the regulatory impact of institutional rules and regulations. Perfectly competitive market based on a set of principles and institutions such as private property, free enterprise and choice, self-interest as a motive power and competition. Competition is the main regulatory mechanism in a market economy. This force helps to establish some order in the market, guaranteeing the production of sufficient quality and sold at the equilibrium price of goods.

The legal system is designed to maintain internal order, use a system of standards for evaluating the quality of products and provide monetary system facilitates the exchange of goods and

1 Oliver Black - Conceptual Foundations of Antitrust. Cambridge University Press. 2010, P 232

2 Burrows P., Veljanovski C.G. Introduction: The Economic Approach to Law // The Legacy of Ronald Coase in Economic Analysis. 1981. Section 1.1. The Economic Approach to Law. Vol. II. P. 344–

services. This will increase the volume of commercial transactions committed significantly expand markets and achieve greater specialization in the use of material and human resources. But such specialization in turn means more efficient functioning of the economy.

#### “Success stories”: USA & EU competition law experience

Competition law is considered the birthplace of the United States, where it is traditionally referred to as antitrust law. U.S. Antitrust Law regulates relations not only related to the monopolization of the market, but the repression of unfair competition. It should be emphasized that, standing on the protection of “normal”, “bona fide» competitive relations, antitrust law protects the interests of the business, not for the “good manners” and “fair practices” in commercial and industrial operations, but only in order to preserve and maintain competition as the most important economic foundations of a market economy. After all, “good faith” competition leads to the ruin of the economically weaker competitors stronger. Therefore, it is submitted to the relative moral concepts such as “fairness”, “justice”, “good conscience” and “good manners”. It is also important: antitrust never set itself the task of combating the existence of large corporations as production and economic and legal associations of financial capital.<sup>3</sup>

Then compared, for example, U.S. antitrust law, regulation in Europe is performed more gently. In general competition law focused on the market behavior of companies. Less attention has been paid to the control over the structure of the market, i.e. market shares of specific companies. Recently, however, this issue began to be treated more carefully.

Single internal market of the European Union - is a unique inter-state space, which abolished the barrier function of the internal state borders, there are no national barriers to market relations, prohibited discriminatory restrictions on the movement of goods, services, capital, labor, legal and natural persons, reduced spatial factors and differences in economic performance.

This feature of EU competition law due to the fact that at the time the Treaty of Rome the world's major companies were American. To strengthen the position of European companies, the participating countries have expressed interest in the Treaty of powerful firms in the Common Market. At the moment this reason retains its relevance, since most of the major corporations located outside the EU.<sup>4</sup>

#### Competition law in post soviet area: law against economy?

As a result, over the past few years, competition law states - participants of CIS has undergone significant changes, due to the need to improve it with current economic realities and the need to meet new economic challenges, including the financial and economic crisis of 2009-2010. Thus, in a number of states - participants of the CIS adopted amendments to the national competition laws in accordance with international rules and regulations and best foreign practices in this area.

In the Republic of Belarus in accordance with international rules and regulations, foreign best practices in order to improve the anti-monopoly regulation and competition, as well as the

3 W Adams and JW Brock, *Antitrust Economics on Trial: Dialogue in New Learning* (Princeton 1991) p. 265

4 David S Evans. *Microsoft, Antitrust and the New Economy: Selected Essays* (2002), p 134

liberalization of economic activities of businesses and individuals in 2009 was adopted by the Presidential Decree "On some measures to improve antitrust regulation and competition . " The decree allowed to expand the powers of the competition authority to apply measures aimed at curbing monopolistic activity of economic entities that control or eliminate competition and to simplify administrative procedures antimonopoly control over economic concentration by setting thresholds on the appeals of legal persons for obtaining the consent of the antimonopoly body execution of transactions with shares in the statutory funds of economic entities.<sup>5</sup>

In 2009, the Russian Federation has adopted a "second antimonopoly package", which includes a number of federal laws providing for amendments to the Federal Law "On Protection of Competition", the Russian Federation Code of Administrative Offences and the Criminal Code of the Russian Federation. Adopted amendments aim to clarify the conceptual apparatus of the Law " On Protection of Competition", the expansion tool of combating cartels, control over the authorities, increasing thresholds for control of economic concentration, etc. These acts mostly prefer the legal aspects of competition law.

From 1 January 2009 the Republic of Kazakhstan, the Law of the Republic of Kazakhstan "On Competition», which is directly applicable law and regulations which combines the Laws of the Republic of Kazakhstan "On Competition and Restriction of Monopolistic Activity" and "Unfair Competition". The main innovations, specified in the Act are: defining the principles of fair competition , the list of grounds and forms of state involvement in business activities, the admissibility of cases agreements or concerted actions of market participants , extraterritoriality , exemption from liability in connection with active repentance , consideration of a group of persons as a single entity law, collegiality in decision-making by the antimonopoly body ; grounds for granting state aid and other<sup>6</sup>.

In sectors with large economies, tend to have a high level of concentration. Such a situation is characteristic for Moldova, covering areas such as fixed telephony, infrastructure, electricity, gas, water, air and rail transport, etc. The aim of EU policy in this area - the development of competition in the services provided by these agencies, and maintaining open access to the infrastructure for the effective charge. These issues tend to regulate and monitor the sector regulators.

Furthermore, the amount of state aid in the Republic of Moldova is very significant and is comparable in size with the same funds identified in Central and Eastern Europe ( for example, in Hungary in 2008, the amount of state aid amounted to 3% of GDP ) .2 According to the reports of the International Monetary Fund , charge state in the real economy in 2007 amounted to 2.5 billion lei, while in 2010 their volume was projected at a rate of 1.4 billion lei (118 million euros) , ie 3% of GDP in Moldova. It can be concluded on the growth of state aid the Republic of Moldova , that given the current economic and financial situation is alarming.<sup>7</sup>

The first authority in the country responsible for the conduct of antimonopoly policy was established in 1992 as the State Committee for Antimonopoly Policy and Support for Entrepreneurship

5 Наталья Агешкина - Конкурентное право, Минск, 2011, с 38

6 S. J. Reynolds. Competition Law in Kazakhstan: Priorities for Improvement. 2008. p. 97.

7 The Impact of the EU-Moldova on the Transnistrian Economy: Quantitative Assessment under Three Scenarios, 2013 BE Berlin Economics p. 56

of the Azerbaijan Republic. According to the decree of the president of Azerbaijan of 11 June 2001 about the formation of the Ministry of Economic Development, the committee was reorganized into the Department of Antimonopoly Policy of the Ministry of Economic Development. According to the decree of the president of 28 December 2006, the Department of Antimonopoly Policy of the Ministry of Economic Development was reorganized into the State Antimonopoly Service under the auspices of the Ministry of Economic Development. The activities of the State Antimonopoly Service are guided by antimonopoly and competition legislation. Currently, the new State Antimonopoly Service Competition Code is Code is soon to be adopted by Parliament, having already passed the first review.<sup>8</sup>

The provisions of the Azerbaijani antimonopoly and unfair competition laws are valid and effective in the territory of Azerbaijan Republic and are applicable to all legal entities and natural persons. These laws shall also apply to cases when agreements and contracts concluded between economic subjects, executive power and administrative bodies with natural persons and legal entities of foreign countries lead to direct or indirect prevention, restriction or distortion of competition within the Azerbaijani market. However, the antimonopoly regulations shall not be applicable to relationships resulting from the rights of economic subjects to inventions, trademarks and authorship with the exception of deliberate use of such rights with the aim of restriction of competition

## CONCLUSION

The analysis of the current state of the economy and law in competition law, both from the theoretical point of view and with respect to certain regions and countries led to the conclusion of the diversity of forms of relation of law and economics in a complex understanding of competition law . Successful examples of the development of competition law are undoubtedly the U.S. and EU. In these systems managed two very different areas as economics and law, preferring economy. Post-Soviet development, both the competition law and questions the relationship between economics and law are extremely complex. We can say that in Belarus and Russia more attention is given to law, law of Kazakhstan there is some relation of law and economics in good way. Undergoing great changes and competition law of Azerbaijan seems to us that it develops in a positive way, introducing the best achievements in the world of competition law. Sure, grand reforms are implemented in Moldova, where one of the goals is the integration in the European Union and, therefore, join the union, where there is a balance of law and economics in addressing competitive issues.

<sup>8</sup> More Common Ground for International Competition Law? - Josef Drexler, Warren S. Grimes, Clifford A. Jones - 2011 - Law

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## THE RESEARCH METHODS IN THE FIELD OF LAW AND ECONOMICS IN THE CONTEXT OF CORPORATE GOVERNANCE

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**Abstract.** The essence of the company is based on the achieving of profit - mentioned profit determined especially through economic instruments, while the law gives the appropriate form and structure. Currently, economics and law are inseparable and penetrate each other, and noteworthy example of this phenomenon is corporate governance. The research instruments used by the both fields serve one to each other. Although this apparent coalition of economics and law can cause a variety difficulties in the field of corporate governance.

It should be noted that corporate governance is based on the legal and economic institutions, which are involved in the political situation. Thus, the specific corporate governance concerns many of the social sciences, including psychology, sociology, ethics, etc. Due to the fact that corporate governance is the issue of an international character, its located in national legislation as well as supranational, setting general standards. Determination of these rules requires relevant research, not only in the legal sense, but also strictly quantifiable economic and sociological. Significant role is also analysis of codes of good practice, which are a set of legal and ethical principles.

The purpose of the paper is analyze the research instruments in the field of economics and law in the context of corporate governance. The task is to resolve the issue - is economics a science integrating with the law, warrants particular model solutions or merely suggests or constitutes the legal solution - in the aspect of corporate governance. Conclusively corporate governance requires alternative research methods, and even the deepest legal analysis of the regulations is not enough. Improving the law often requires the use of instruments and achievements of other disciplines, and in this aspect it is necessary to consolidate the scientific.

**Keywords:** corporate governance, economics, corporations, economic analysis of law

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### INTRODUCTION

One of the best definitions of corporate governance was introduced by A. Shleifer and RW Vishny - „Corporate governance deals with the ways in Which suppliers of finance assure that corporations themselves of getting a return on their Investment”<sup>1</sup>. Corporate governance is a vast subject matter does not within one field of discipline, and this multidisciplinary offers a wide spectrum for researchers. In recent years, the issue of corporate governance, which is supervision and control of joint stock companies, has become a popular research area, which is at the center

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1 A. Shleifer, R.W. Vishny, 'A Survey of Corporate Governance' [1997] *The Journal of Finance* Vol. 52, No. 2, 737

of representatives of various scientific disciplines, especially law and economics. The main aim of international discussion concerning corporate governance in a broad sense to indicate the proper selection of the legal and economical mechanisms, that influence the corporations functioning by optimizing principles, rules of decision-making and allocation of control rights, so that it is related to human and financial resources are used in the most economically efficient possible way<sup>2</sup>. Within the scope of corporate government a huge role has an economic analysis of law<sup>3</sup>. Particular significance is the fact that the theory of behavioral economics provides serving predicting people's reactions to the law and economics is the most useful part of the behavioral sciences to law<sup>4</sup>.

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Currently, economics and law in the field of company law are inseparable and intermingle, also research tools and theories employed by the two fields are used to each other. As is generally known legal research methodology is in constant development. In addition to traditional research methods should be mentioned other methods, unusual for the study of law, but relevant to the view of research into the law. The dimension of the subject it must be pointed especially the economic approach to law. In particular, it must be pointed research method based on the combination methods of humanities and science<sup>5</sup>. Over time, the theory of law assimilated many of the concepts from the field of economics, i.e. incentive effects, free-riding, regulatory capture, rent-seeking, etc. Economists later discovered that effective property rights and contracts are essential for economic growth and development. This caused the economy opened up for a legal concepts: insider-trading, reliance damages, third-part enforcers, etc. The wider use of economic theory, to evaluate the law and acknowledge the importance of the law for the analysis of the economy, has made the economics and law moved closer to each other<sup>6</sup>. One the constitutive concepts of corporate governance are economic concepts, such as - the theory of contracts, agency theory, transaction cost economics, property rights theory, asymmetric of information - one of the foundation of modern finance theory<sup>7</sup>.

In order to demonstrate connections between law, economics and related sciences will be presented several issues showing its correlations. It should be noted that the essence of the company is based on the achieving of profit. A shareholder wishing to make a profit entrust their capital company managed by managers. Profit depends on the attitude and ability of managers. The central problem in the field of corporate governance is the conflict among the agent and the

2 K. Oplustil, 'The instruments of corporate governance (corporate governance) in joint-stock company' (Warsaw: CH Beck 2010), 9-44

3 R. Cooter, T. Ulen, 'Law and Economics', (Warsaw: C.H. Beck 2009) passim

4 Id. 5

5 K. Kuciński, 'Methodology of economics. Dilemmas and Challenges' (Warsaw: Difin 2010), 15-98; see e.g.: Z. Hajduk, 'Methodology of science' (Lublin: Wydawnictwo KUL 2007); A. Grobler, 'Methodology of science' (Kraków: Wydawnictwo Znak 2006); J. Stelmach, B. Brożek, 'Methods of legal reasoning' (Kraków: Wydawnictwo Wolters Kluwer 2006)

6 J. Będowski, K. Metelska-Szaniawska, 'Law and Economics – Introduce' in R. Cooter, T. Ulen, 'Law and Economics', (Warsaw: C.H. Beck 2009) XVI-XXX

7 D. Dobija, I. Kołodkiewicz, 'Corporate governance. Handbook' (Warsaw: Wydawnictwo Wolters Kluwer 2011) 23-25

principal. According to the agency theory, the principal is the owner of the company (shareholder, investor) and the manager is the agent, conflicts between them arise due to: asymmetries of information, different objectives and different attitudes to risk<sup>8</sup>. The law gives here the general framework of the company and its activities. However, this economic tools allow to determine the profit, corporate governance aims to alleviate the existing asymmetry of information and result in the achievement of the overall economic benefit of the company<sup>9</sup>.

Use the economic perspective in this context enables notice that balance of interests of managers and shareholders can be achieved by legal regulations but also by external factors, i.e. utilization functioning of market forces Instruments attenuating this conflict have the economical connotation<sup>10</sup>. Legal regulations should be studied, whether they are cost-effective, taking into account the regulatory purpose. Therefore it should not necessarily mitigate shortcomings legislation. Legal norms often limit in these situations, economic freedom and its general and abstract character causes that contained in these particular situations does not always correlate to actual situation of the company. The resolution of conflicts of interests often best left to the market itself and arrangement by investors. Legislation can thus play an important role, especially when market forces aren't suitable<sup>11</sup>.

Economics provides consequences the policy for the effectiveness - efficiency. One of the main aims of conducting business are achieving of profits, and in particular their maximization. Lawyers are using efficiency principles to assist in achieving higher income for entrepreneurs and assist the legislature in making better laws in order to make the business better. When economic transaction maximizes profits of entities any alternative transaction cannot increase the profits on one side without reductions in other – it means that it is a kind of Pareto efficiency<sup>12</sup>.

One of the fundamental concepts in the field of corporate governance is the maximization. Maximization value for its shareholders is the primary objective of the company as well as objective of corporate governance<sup>13</sup>. Rating of the company cannot be realized only through the analysis of legal regulations, because the measure is its valuation. The valuation does not reflect the value of the company but highlights; confidence which express investors, belief in the good economic performance and its prospects for return on invested capital. Excellent directions are ratings of investor's confidence of the companies. Assessment of the company, as a research problem, will require the conduct the review on the basis of among others: econometrics, microeconomics, macroeconomics, business psychology, and finally on the analysis of regulations<sup>14</sup>.

8 K. Oplustil, 'The instruments of corporate governance (corporate governance) in joint-stock company' (Warsaw: CH Beck 2010) 12-39; J. L. Colley, J. L. Doyle, G.W. Logan, W. Stettinius, 'Corporate governance' (Warsaw: K.E. Liber 2005) passim

9 K. Keasey, M. Wright, 'Corporate governance: responsibilities, risks and remuneration' (Chichester: John Wiley & Sons 1997), 18-69.

10 D. Dobija, I. Kołodkiewicz, 'Corporate governance. Handbook' (Warsaw: Wydawnictwo Wolters Kluwer 2011), 330

11 C. Teichmann, 'Corporate governance – between the law and the market' in M. Cejmer, J. Napierała, T. Sójka, eds., 'European Company Law . Vol. III. Corporate Governance' (Kraków: Wydawnictwo Wolters Kluwer 2006) 37

12 R. Cooter, T. Ulen, 'Law and Economics', (Warsaw: C.H. Beck 2009) 5-19

13 D. Dobija, I. Kołodkiewicz, 'Corporate governance. Handbook' (Warsaw: Wydawnictwo Wolters Kluwer 2011) 28

14 Id. 331

Markets are regulated at the level of legal in two ways - by absolutely binding norm, which is statutory regulation and which constitutes hard law penalized by the state and by the soft law, which is complementary to the above provisions - code of good practice. It should be noted that codes of good practices are not penalized as hard law but is commonly used principle of comply or explain, then companies apply the rules or explain why they do not<sup>15</sup>.

For a full overview of all relations of the institutions of corporate governance should indicate the source of its operation, in them can be seen that not only the statutory law is a major regulatory role. The spheres regulation of corporate governance is a hard law - generally binding laws, particularly codes, law of the European Union in the form of directives, regulations and the recommendations of the European Commission's Rules, codes of best practices - called soft law, which is compulsory but provides guidance addressed to national legislators or directly to public companies, the OECD principles of corporate governance, codes prepared by non-governmental international organizations bringing together representatives of investors, representatives of science.<sup>16</sup> It should be noted that in order to develop the principles of corporate governance OECD is to create and develop a legal framework reflecting the economic characteristics of social, legal and cultural individual countries<sup>17</sup>.

In the context of cultural theory and practice of the field corporate governance is strongly influenced by the Anglo-Saxon concept, especially from the United States of America. There also were conducted the main empirical studies, and the solutions adopted there are treated as standards<sup>18</sup>. It is worth mentioning that corporate governance is based on the institutions of law - economic, involved in the political situation. Thus, the specific corporate governance affects many spheres social sciences, including psychology and many others. This status results especially because corporate governance is an international phenomenon, is supported by national legislation but also supranational level, setting general standards. Determination of these rules requires relevant research, not only in the legal sense, but also strictly quantifiable economic and sociological. Significant role is also analysis of codes of good practice, which are a set of legal and ethical principles<sup>19</sup>.

Issues concerning corporate governance constitutes specific source of legal and political discussion enriched by economic analysis. Important meaning is the economic analysis of law, which largely enables understanding of the mechanisms of management and control of the company<sup>20</sup>. It should be emphasize that in the field of corporate governance policy has an important role. One example of policy and of corporate governance concept is the creation of a European company. The purpose of its creation is to facilitate economic integration and political and social situation in

15 Id. 301, 330-331

16 K. Oplustil, 'The instruments of corporate governance (corporate governance) in joint-stock company' (Warsaw: CH Beck 2010) 54-88

17 See D. Dobija, I. Kołodkiewicz, 'Corporate governance. Handbook' (Warsaw: Wydawnictwo Wolters Kluwer 2011) 173-185

18 Id. 31-35

19 B. Tricker, 'Corporate governance: principles, policies, and practices' (Oxford : Oxford University Press 2012) 23-215

20 C. Teichmann, 'Corporate governance – between the law and the market' in M. Cejmer, J. Napierała, T. Sójka, eds., 'European Company Law . Vol. III. Corporate Governance' (Kraków: Wydawnictwo Wolters Kluwer 2006) 23-25

the EU. It should be noted that within the political interpretation takes into account the tendency to favor liquidity in the capital market, and the company does not control review by the supervisors<sup>21</sup>. Moreover, shall be indicated that the system of governance of the company is largely a reflection of the mechanisms of power in society, because the separation of powers within the company is an important element of corporate governance, exemplified by the political approach is also the question of the distribution of the proceeds of the supervisory board, where it is not market factors May of major importance, but the desire to dominate the majority shareholders, provided by subordination of a minority shareholders<sup>22</sup>.

## CONCLUSION

In conclusion it should be noted that the issue of corporate governance requires economic research, which allows specific scopes of certain terms, where the law is not able to specify. Research in economics and psychology must concern the sphere of the financial condition of companies and their standing in the eyes of potential investors. Make a profit requires cooperation in the arena of many fields of science. Often, a good investment is not only the one which brings good financial results but the one that has potential. In this aspect, legal methodology is powerless, and here comes into play psychology, economics, etc. The specified market mechanisms are well described and research by economics. Moreover, the legal standards often limit in these situations, economic freedom and its general and abstract character causes that contained in these particular situations does not always correlate to actual situation of the company. Therefore, it should be held that the resolution of conflicts of interests often best left to the market itself and regulations by stakeholders. Legislation can thus play an important role, especially when market forces fail<sup>23</sup>.

As Robert Cooter and Thomas Ulen said - it is expected that it will be progressing convergence of law and economics will be clarified in detail the analysis of private law, and further expansion of economic analysis of public law companies, the legislative process, bankruptcy etc. Will be increasing use of statistical methods in the law<sup>24</sup>.

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## THE SOCIETAL EFFECTS OF ENVIRONMENTAL DISASTERS IN INTERNATIONAL ENVIRONMENTAL REGULATION

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**Abstract.** The research projects deals with the experiences of the post-disaster regulation in international (and regional, as well) and domestic ways, especially focusing on the paradigm-shift of policies and rules being relevant in handling the environmental, political, societal and financial outcomes of the environmental disasters. The study aims to outline and emphasize, whether these follow-up measures and solutions can be applied in preventive ways in order to avoid the future and analogous disasters. The well-known environmental disasters (e.g. from Seveso to Fukushima, mainly Chernobyl) and their crisis-management technics provide essential examples and solution mechanism to the whole international community and countries, which are facing with the same challenges and threats according to their characteristics and their exposures to similar environmental threats (whether they are man-made or not). The model-like example of the post-Chernobyl regulations includes the adoption of the 1986 Convention on Early Notification of a Nuclear Accident and the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency; these legislation steps confirmed the reality and feasibility of the prompt and efficient follow-up measures (in the midst or before the end of the Cold War era) within the field of international law and state-to-state relations. This in-depth scrutiny outlines the societal challenges and impacts of the society affected by the environmental disasters.

**Keywords:** post-disaster regulation, resilience, prevention, *ex ante*, *post facto* measures

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### I. INTRODUCTION

The present study deals with the main characteristics and objectives of the post-disaster regulation in international – and regional, as well – context. It especially focuses on the paradigm-shifts of policies, principles and rules (adopted by the states in numerous rules), which are relevant in handling the environmental, political, societal and financial outcomes of the environmental disasters having transboundary effect. The study aims to outline and emphasize, whether these follow-up measures and solutions can be applied in preventive ways in order to avoid the future and analogous disasters. The well-known environmental disasters (e.g. from Seveso to Fukushima, mainly Chernobyl) and their crisis-management technics provide essential examples and solution mechanism to the whole international community and countries, which are facing with the same

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challenges and threats according to their characteristics and their exposures to similar environmental threats (whether they are man-made or not). This study categorizes the relevant bunch of legislation methods and objectives based upon the post-disaster regulation technics introduced by the states via multilateral ways.<sup>1</sup>

## II. SOCIETAL FINDINGS

Throughout the history of the mankind, the alteration and change in climate, biodiversity had also social and societal impacts on the population of the Earth.<sup>2</sup> Beyond these effects, several societal (namely political-based) hindrances intermitted the common thinking and efficient regulation on environmental “hot issues”. In Central and Eastern Europe, prior to 1989, the lack of democracy, transparency, NGOs and other organised interest groups, as well as the absence of requirements for preliminary environmental impact assessment had also been descriptive symptoms of the situation at the time. It is worth mentioning that the foundations of the present Aarhus-based system (so-called environmental or green democracy) were still absent from international relations. This was made worse by centrally-planned economy and industry and the existence of almost exclusively state-owned, megalithic plants (“industrial mammoths”), which were responsible for the greatest and heaviest pollution, while they were at the same time unactionable and badly as well as inefficiently managed by the state.<sup>3</sup> Furthermore, the scientific certainty regarding the impact of industry on the environment was also significantly lower and less proven as a consequence of under-developed scientific monitoring, poor assessment results and inferior scientific infrastructure. The shift towards democracy produced a need for environmental data and public participation in environmental matters, creating an ideal (and at that time, promising which desire has since fallen) political and legal backdrop for further progress. Yet, several questions were raised and left unanswered by the new democracies in the ensuing two decades. Adding to that, nowadays from the early 1990s, there is another *caesura* which can be observed, the difference between technology-based and market-based approach.<sup>4</sup> But those categories can be interlinked and both of them shall be interpreted in the same system, in the same political and ecological paradigm (none of them was a real part of the pre-1989 period).<sup>5</sup>

- 1 Therefore, the study does not explicitly analyse the methods of the single states in post-disaster situations due to the same fact that the multilevel and diversified state practices can emerge an unical and unified international instrument (by means of international negotiations and regulation) within the form of binding international treaties or non-binding other documents.
- 2 However, the level of interconnectedness and interdependency between the members of the society and the objectified environment was continuous till the industrial revolution in the 19th century. The activity of mankind had caused more and more (the increase was exponential) contamination and risks on the human and natural environment, as well.
- 3 According to Hill's apt remark, “the lack of private property rights meant the legal system was ineffective in terms of stopping pollution. One of the features of private property is the ability to stop other people from taking actions that damage your property [...] under socialism the lack of private rights meant individuals could not use the system to prevent harm to property.” Compare, P. Hill, ‘Environmental Problems after Socialism’ [1992] 12 Cato Journal, No.2, 328
- 4 Compare, D. Dudek – R. Stewart – J. Wiener, ‘Environmental Policy for Eastern Europe: Technology-Based Versus Market-Based Approaches’ [1992] 17 Columbia Journal of Environmental Law, No. 1, 1-52
- 5 On the specific CEE-issues within the context of space and geography, see, I. Hamilton, ‘Transformation and Space in Central and Eastern Europe’ [1999] 165 The Geographical Journal, No. 2, 135-144

The fractions of the main ages of the mankind meant and triggered new paradigms and philosophy relating to the co-existence, symbiosis of mankind and nature; thus, the evergreen (but, and it has to be admitted, periodically and intentionally new-born) concept on the rights of mankind for the exploitation of the surroundings. There is no need for going into further details to conclude that it was the key issue for the survival of human beings. The notion dealing with such issues is called *social resilience*, which had been come into the forefront in the very last decades, mutually considering and harmonizing the social changes, human need and balancing the economy-ecology contrast within the context of the existing environmental changes (whether they are man-made or the source is not proven).<sup>6</sup> Within the core context of social resilience, the vulnerability of human settlements has also undergone an in-depth scrutiny via the interdisciplinary methods of disaster-resilience connection in the relevant literature.<sup>7</sup>

In sum, the change in the ecosystem is continuous; however the real paradigm-shifts in societal demands toward environmental legislation (in municipal laws) or regulation (in international level, as well)<sup>8</sup> took place traditionally right after the disastrous effects of certain accidents to which this study is referring to in detail.

### III. SOCIETAL EFFECTS OF ENVIRONMENTAL DISASTERS RELATING TO THE REGULATION

The direct consequences of environmental disasters within the regulation technics are worth emphasizing and paying attention to their in-depth scrutiny. The *ex ante* (prior to the disasters, stipulated for prevention, precaution and to avoid disasters) and *post facto* (responsive regulation, stipulated to disaster-specific issues as a prompt reaction to disasters) *legislation of municipal law and regulation in international law* are not paradoxical and exclusive solutions on the sides of the law- and policymakers. It is clear and certain as well as reasonable demand that i) firstly, states have a duty to prevent disasters and environmental damage, degradation injury, so thus, to enact *ex ante* anticipatory measures; ii) secondly, they are also intended to establish *post facto* duties and financial obligation to mitigate any resulting damage and the extent of the harm through posterior measures. The ideal and linear way of regulation is twofold in this sense, *ex ante* and *post facto* methods (however, the emphases and aims, therefore the measures are different) are essential in each crucial field entailing (or exposed to) potential disasters.

In this respect, the role of regulation (in municipal law, legislation, as well) has come into the forefront of codification of environmental law, that should focus – according to *Veinla's* thought on state legislation – on the following main issues, which can subsequently be transformed into the role of codification of states on disasters:

- 6 For this theory and societal paradigm-shift, see, N. W. Adger, 'Social and Ecological Resilience: Are They Related?' [2000] 24 *Progress in Human Geography*, No.3, 347-364 and F. Berkes – J. Colding – C. Folke (eds.), 'Navigating Social-Ecological Systems. Building Resilience for Complexity and Change' (Cambridge: Cambridge University Press 2003) 1-416
- 7 See further, M. Pelling, 'The Vulnerability of Cities: Natural Disasters and Social Resilience' (London: Routledge 2003) 1-224
- 8 On the controversial role of positive rules of international instruments regarding specific environmental topics, see, P. Williams, 'Can International Legal Principles Play a Positive Role in Resolving Central and East European Transboundary Environmental Disputes?' [1994-1995] 7 *Georgetown International Environmental Law Review* 421-462

- a) *Why is the codification of environmental law necessary and what are its benefits?*
- b) *What goal to set for the codification of environmental law?*
- c) *What should the scope of the environmental code (or treaty – the author) be?*
- d) *What are the dangers of codification of environmental law? Answers to these questions form the conceptual basis for the environmental code (treaty – the author) and enable to develop a methodology for preparation of the draft code (draft treaty – the author) and identify the structural and essential cornerstones (main principles) of the future code (treaty – the author).<sup>9</sup>*

From the abovementioned categories, those questions raised by Veinla (thus, the main aims of environmental regulation) can be interpreted in *ex ante* and *post facto* regulation methods, as well.

## 1.

*Ex ante regulations* are typically i) impact assessment-based or ii) right-based, highlighting societal demands and claims by the states and the population, as well.

- i. The classical *impact assessment-based ex ante regulation aim* is attached to the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, which prescribe the model-like precautionary and preventive measures of environmental impact assessment of some activities (being relevant on environmental basis) at the very early stage of the potential dangerous (or environment-sensitive) activity to be introduced. Furthermore, such model-like measures include (articles 2-7 of the convention) the notification and consultation requirements, confirmation and participation by the affected countries, transmittal of information from the affected country to the country of origin, preparation of environmental impact assessment documentation, post-project analysis, which are all obligatory upon to the text of the convention.
- ii. Beyond the impact-based 1991 Espoo Convention, the other, thus the *right-based ex ante regulation aim* is significant within the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The 1998 Aarhus Convention (called the 'green democracy convention' with the three main pillars figured out in the title of the convention) provides opportunities to the general public and the potential affected parties to take part in decisions, processes and access to justice which can be considered minimum and efficient safeguards for prevention and precaution on the side of the potential damaged party. These rights ensure the necessary steps shall be taken in order to avoid the disaster in the affected parties.<sup>10</sup>

<sup>9</sup> Compare, H. Veinla, 'Codification of Environmental Law. Major Challenges and Options' [2000] 5 *Juridica International* 59

<sup>10</sup> An apt remark and quotation from Veinla proves the paradigm-shift character of the Aarhus Convention. The quotation is the following: „the importance of the Aarhus Convention is certainly not limited to the area of environmental protection – the Convention has a much broader function. The goal is to contribute to the implementation of open society principles and to ensure possibilities to control the activities of the state, local governments, and persons in private law who perform public functions. Exercising the rights defined in the Convention increases the responsibility of competent agencies and other person in decision-making, while the decisions made this way are clearer and better understandable as appropriate for open society.” See, Veinla: op. cit. 62

In sum, such impact assessment and right-based approaches shall be rated to the *ex ante side* of the regulation concerning disasters, including preventive, precautionary measures and disaster-risk-reduction as well as command-and-control regulation on the basis of the classification of legal-illegal dichotomy of means and measures aiming to avoid the environmental disasters or their injurious effects.

2.

*Post facto regulations* are linked to the occurred disasters and almost exclusively implement *follow-up measures* designed and framed to the concrete disaster. Therefore, the categorization of such exemplars is almost impossible; however, some common conclusions can be drawn. Such disasters raise concerns among the public and endanger the credibility, potency and competency of the law- and policymakers; thus the societal need is clear in managing the situation by means of disaster-damage-reduction, damage mitigation, disaster-responsive enforcement measures, assistance, supervisory technics, compensation of the affected parties and monitoring. Due to the fact that each disaster demands separate follow-up measures, such classification as this study outlines above under the aegis of the *ex ante* regulation cannot be drawn.

However, the model-like post-Chernobyl regulations includes the adoption of the 1986 Convention on Early Notification of a Nuclear Accident and the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (models of post facto regulations, however the main aim was to mitigate the damages). These regulation steps confirmed the reality and feasibility of the prompt and efficient follow-up measures (in the midst or before the end of the Cold War era) within the field of international law and state-to-state relations. The lack of notification was a crucial point in the handling of the Chernobyl disaster<sup>11</sup> by the Soviet authorities – by keeping the event secret for several days, the emission of dangerous materials via air to the atmosphere of a number of European countries went unchecked.

The 1986 Early Notification Convention set up a specific notification system (post facto) on incidents having transboundary nature and radiological character or significance. According to Article 2, the state of origin shall notify, directly or through the International Atomic Energy Agency those States which are or may be physically affected about the nuclear accident, its nature, the time of its occurrence and its exact location where appropriate. Accordingly, the *post facto* main features of the notification requirement are clearly and aptly seen.

The other post-Chernobyl treaty, the 1986 Assistance Convention established a system, therein the states shall cooperate between themselves and with the International Atomic Energy Agency in accordance with the provisions of the Assistance Convention to facilitate prompt assistance in the event of a nuclear accident or radiological emergency to minimize its consequences and to protect life, property and the environment from the effects of radioactive releases (Article 1).

<sup>11</sup> The exact account of impact consist of the immediate death of more than thirty people “and, as a result of the high radiation levels within a twenty-mile radius, 135 000 people had to be evacuated for an indefinite period. Clouds contaminated by radiation moved from Chernobyl to Sweden where increased radiation was first noticed by measuring equipment in Western Europe. Easterly winds transported radiation to Central Europe, causing damage to vegetables and fruit as far away as Austria and Switzerland.” See, M. Hinteregger, ‘Environmental Liability and Ecological Damage in European Law’ (Cambridge: Cambridge University Press 2008) 45

Notwithstanding, Chernobyl disaster (after nuclear incident in Three Mile Island in 1979 and just prior to 1987 Goiânia catastrophe) has unprecedented societal effects regarding the legislation-regulation (see the conventions above), approval for and support (whether it is governmental or public) of nuclear energy, movements against the nuclear power plants, and the disaster threw new light upon the nuclear issue worldwide. The real connection between environmental disasters and societal impacts (paradigm-shifts) is principally proven by nuclear incidents (Chernobyl and mainly, Fukushima from the previous past).

Thus, the regulation methods at the international level within the field of *post facto* regimes are the following:

- i. early notification on the effects (if it has transboundary impacts; however, nowadays, almost each environmental disaster has transboundary effect);
- ii. assistance after the disaster (state-to-state aspect);
- iii. disaster responsive prompt provisions (military-based, law enforcement and/or legislative)<sup>12</sup>;
- iv. monitoring;
- v. indemnification methods (polluter-pays-principle, third party liability, etc.);
- vi. reconstruction  
or – and the study lays down that this one is the best option –
- vii. a *mixed method of regulation*, encompassing the previous i)-vi) regulative objectives.

#### IV. CONCLUSION

The societal effects of environmental disasters are the subject of numerous research fields: sociology, jurisprudence-legal and political studies, ecology, economy, management studies and history, as well. This study reflected some specific aspects of the legal studies, thoroughly taking over the position of post-disaster-oriented regulation methods entailing either *ex ante* or *post facto* measures and regulation objectives. Managing a disaster (whether it has rather legislative or law enforcement or other elements) is always a crucial problem to be solved of law enforcement and policymaker bodies before the eyes of the public and the international community.<sup>13</sup>

The typical methods are emphasized within the study by means of categorization of archetypal *ex ante methods* [i) preventive, ii) precautionary measures, iii) disaster-risk-reduction and iv) command-and-control regulation]; while the *post facto methods* are classified into five groups [i) early notification, ii) assistance, iii) disaster responsive prompt enforcement technic, iv) monitoring, v) indemnification and vi) reconstruction], which six methods create the seventh, the vii) best mixed one considered to be the best option, the best-case-scenario of post-disaster regulations.

12 About a certain societal consequence of the Hurricane Katrina through the lenses of law enforcement and military aspects (looting and violence), see, L. G. Sun, 'Disaster Mythology and the Law' [2010] 96 Cornell Law Review 1131-1208

13 Therefore, as Raustiala stated, „the participation of NGOs enhances the ability, in both technocratic and political terms, of states to regulate through the treaty process. As states in concert have expanded and coordinated their regulatory powers in recent decades they have incorporated NGOs; the terms of NGO participation reflect the resources and skills of NGOs as well as the political and technocratic incentives of states.” See, K. Raustiala, 'States, NGOs, and International Environmental Institutions' [1997] 41 International Studies Quarterly 736

In sum, the lawmaker bodies (in this respect, the states) shall pay deep attention to the societal concerns of the wide public regarding the environmentally dangerous activities, plants; thus, the hazards of environmental disasters shall be an integrated part of environmental governance.<sup>14</sup> Due to this necessary preparedness, the law- and policymakers need *ex ante* measures (in advance, to avoid the disasters) and *post facto* measures or post facto plans and concepts (how to manage and mitigate the consequences and to appease the public) simultaneously.

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### Legislations

Convention on Early Notification of a Nuclear Accident [1986] Early Notification Convention

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency [1986] Assistance Convention

Convention on Environmental Impact Assessment in a Transboundary Context [1991] Espoo Convention

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters [1998] Aarhus Convention

14 Which has mainly four broad, and often overlapping, dimensions: integration, monitoring/evaluation, participation, and instruments for environmental protection. See in details, J. Scott, 'Law and Environmental Governance in the EU' [2002] 51 International and Comparative Law Quarterly, No.4, 996- 1005

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## AN ECONOMIC ANALYSIS OF COPYRIGHT LAW - THE DURATION OF COPYRIGHT

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**Abstract.** William M. Landes and Richard A. Posner in “An economic analysis of copyright” wrote that “intellectual property is a natural field for economic analysis of law and copyright is an important form of intellectual property”. As such, copyright constitutes a legally enforceable redistribution of wealth. Copyright provides owners of the copyrighted material with the opportunity to earn returns.

The idea of limiting copyright term of protection is mostly based on economic arguments. First, the author must have monopoly on his work to gain some satisfactory profits and to provide with an incentive to create material. Second, the society has to profit from entering author’s work finally into the public domain. Therefore copyright policy needs to balance this incentive for the development of new content with the desire to provide potential users with access to the material.

The economic analysis of law is the application of economic theory to the analysis of law. The economic rationale for copyright is based largely on the premise that copyright works have characteristics akin to those of public goods. This means that their prospective users can consume the goods without paying for them with the result that the incentives to develop new creative content are difficult to maintain. Economic analysis is a tool to establish whether copyright achieves clearly defined, measurable objectives without excessive unintended consequences.

The main purpose of the paper is to present the economic rationale for copyright duration and to present what is the optimal copyright term of protection. There is a need for empirical research because theory does not provide solid guidelines for copyright policy and digitalisation is challenging old certainties. The paper also provides an economic analysis of the Polish and European Copyright Law and the economic factors which influence the duration of copyright protection in the EU.

**Keywords:** copyright, duration, economic analysis, law and economics

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### INTRODUCTION

William M. Landes and Richard A. Posner in “An economic analysis of copyright” wrote that “intellectual property is a natural field for economic analysis of law and copyright is an important form of intellectual property”<sup>1</sup>. What is the justification for such statement?

Copyright protection is mostly about the right of the author (copyright owner) to prevent others from making copies. The characteristic of intellectual property in general is its ‘public good’

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1 William M. Landes and Richard A. Posner in “An economic analysis of copyright law”, *The Journal of Legal Studies*, Vol. 18, No. 2. (Jun., 1989), pp. 325-363; The University of Chicago Press.

aspect. This also refers to copyright protection. The costs of creating a work subject to copyright protection are usually high, while the cost of reproducing the work are often low. Copyright protection has to be economically efficient, that's why it has to find the right balance between the profits from creating works and losses from limiting access and the costs of administering copyright protection<sup>2</sup>.

The idea of limiting copyright term of protection is mostly based on economic arguments. First, the author must have monopoly on his work to gain some satisfactory profits and to provide with an incentive to create material. Second, the society has to profit from entering author's work finally into the public domain. Therefore copyright policy needs to balance this incentive for the development of new content with the desire to provide potential users with access to the material.

#### THE ECONOMIC ANALYSIS OF COPYRIGHT LAW

The economic rationale for copyright is based largely on the premise that copyright works have characteristics akin to those of public goods. This means that their prospective users can consume the goods without paying for them with the result that the incentives to develop new creative content are difficult to maintain<sup>3</sup>. Economic analysis is a tool to establish whether copyright achieves clearly defined, measurable objectives without excessive unintended consequences.

The dominant view of the economics of copyright is that copyright (and other forms of intellectual property) are necessary for creating incentives to produce intellectual material, but that this benefit must be balanced against the costs entailed in establishing the protection, especially the costs, of restricted access<sup>4</sup>.

Copyright protection defends the market from so called 'free-riders' who seek to benefit from intellectual works of authorship, but at the same time they are not willing to bear the costs of their creating and distributing. Copyright seeks to overcome this problem of free-riding through the statutory proprietary grant of market power<sup>5</sup>. This grant of author's monopoly creates incentives for intellectual activity and production by allowing a price to be charged for the work. Thus it is profitable to invest time and efforts to create a copyrighted work, because it is possible to expect that these costs will be recouped in the future if there is sufficient demand for it.

#### COPYRIGHT DURATION ACCORDING TO LAW AND ECONOMICS

While copyright is a legal concept, enacted by most governments, giving the creator of an original work exclusive rights to it, usually for a limited time, the optimal term of copyright protection should also be based on economic arguments. There must be a guaranteed monopoly to gain the author some satisfactory profits and to provide with an incentive to create additional material,

<sup>2</sup> Ibid.

<sup>3</sup> Report by PricewaterhouseCoopers LLP for the Copyright Licensing Agency Ltd, "An economic analysis of copyright, secondary copyright and collective licensing", March 2011, pp. 4.

<sup>4</sup> Economic Perspectives on Copyright Law, Centre for Copyright Studies, Research Paper prepared for the Centre for Copyright Studies Ltd by The Allen Consulting Group, Published in January 2003 by the Centre for Copyright Studies Ltd, ACN 058 847 948, The Allen Consulting Group 2003, pp. 29-30.

<sup>5</sup> Ibid.

but also there must be a limitation of the term that provides the society with free access to the created material<sup>6</sup>. In fact, the balance between the profits from creating works and losses from limiting access and the costs of administering copyright protection must be identified as a rational for limiting the copyright duration.

By limiting the duration of copyright we also reduce the ‘tracing costs’, which are binding on users during the term of protection. We can distinguish two types of ‘tracing problems’- need of tracking the heirs (copyright holders) and also the problem of identifying the authors of the work, while in Europe there is no system of registration of copyrighted works<sup>7</sup>. It is obvious that all these costs grows with the amount of time, hence it is an argument for limiting the term of copyright protection. The optimal term of copyright protection is when the incentive to create new work given to the author by the copyright monopoly becomes insignificant for author, who expect royalties for a specified period of time in the future. Only a small group of artists can reap profits from their work after a longer time than a few years in the future. We cannot forget that copyright law applies to all authors, not only the ones who gain significant profits from their artistic activity lifelong. That is why income prospects for more than a hundred years in the future have little effect on present decisions of the authors<sup>8</sup>. Copyright protection, in its essence, is not guaranteed to authors forever. The copyright protection should last for a period of time necessary to enable author to recoup the costs of creating the work.

It is worth mentioning that the longer the author’s monopoly last, the fewer the number of works are in the public domain. At the same time the income as well as the costs of creating works for an author are raising, as well the tracing costs and the costs for the society “waiting” for the work to come into the public domain. It is also important that lower costs of copying intellectual works of authorship bacame related to the longer duration of copyright protection. The main purpose of copyright is always to find the balance between these interests and create an optimal term of a copyright protection.

#### COPYRIGHT DURATION IN EU AND POLISH COPYRIGHT LAW

The current length of a copyright protection in the European Union as well as in Poland, is the author’s lifetime plus seventy years. It is extremely hard to explain how this very long term of protection can affect an incentive to create new work. It is rather demotivating for authors who can expect to recoup from works created in their youth lifelong. In fact, we should support young authors in order to encourage them to create new work. Then, not only an author, but the whole society could benefit from the newly created works. However, the income of such a “busy” author would provide him a decent life for its duration.

6 See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 475-76 (2003). For other evaluations of copyright duration in terms of public good economics, see Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 164-66, 170-77 (2002); Avishalom Tor & Dotan Oliar, *Incentives To Create Under a “Lifetime-Plus-Years” Copyright Duration: Lessons from a Behavioral Economic Analysis for Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 437, 446-49 (2002).

7 In the US there is Copyright Office- a registry of retained copies of all copyrighted works.

8 See William M. Landes and Richard A. Posner in “An economic analysis of copyright law”, pp.361-362.

In recent decades we are experiencing permanent extension of copyright protection as well as expanding its scope (for example by including derivative works). However, in the history of copyright the term of protection used to be number of years renewable for another number of years, since The Berne Convention<sup>9</sup> the term of protection depends on the author's longevity. It seems like the duration of copyright become economically irrelevant. We do not anymore reward the author for his creative work in exchange for the transfer after time into the public domain. At present, we are trying to provide him and his heirs with a lifetime financial support.

## CONCLUSION

"Time is of the essence" - these words begin the text of the Washington Declaration on Intellectual Property and the Public Interest, which is the result of the congress, which took place at the end of August 2011 in the United States (just before the EU has extended duration of related rights protection). The Declaration draws the same attention to the dangerous expansion of the powers of the rightholders also in terms of time. While the European Union has decided to extend the duration of certain related rights, the Declaration seeks to point out that intellectual property law affects the whole of society, not just the group of authorized entities. The signatories of the Declaration postulate moratorium on extending the term of protection of copyright, related rights, as well as rights under the patents. Permanent extension of the term of protection, which we are currently experiencing, leads, as a consequence, to restrain the development of society and technological progress. The passage of time allows the future generations to use the work of their predecessors freely, as well as it is an extremely important factor in motivating authors and related rightholders to further creative activity.

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## UNIFICATION OF CIVIL AND ECONOMIC REGULATIONS ON AN EXAMPLE OF POLISH REGULATION REGARDING ENFORCEMENT ORDER FOR UNCONTESTED CLAIMS. AN EXAMPLE OF TECHNOCRATIC LEGISLATION OR ONE OF PRACTICAL MEANS OF ENFORCING INDIVIDUAL'S RIGHTS?

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**Abstract.** The main purpose of the article is an attempt to analyze means and practical ways of deepening the free movement of person, services and capital taking for example the implementation of regulations regarding European Enforcement Order for uncontested claims in Poland and effects of that implementation on Polish market, economy and society as a collective as well as individually from individual entrepreneur's (Small and Medium – Sized Enterprises) point of view.

First of all the ever changing realities of a free market demands quick and effective reaction in the field of legislation to ensure sufficient functioning of common market. But the substantive rules established by the treaties would become meaningless without proper instruments of implementation of those norms given to Member States judiciary. Whether it comes to an international corporation or just a small, regional entrepreneur a vital aspect for a genuine integration within European Union is to have effective ways of enforcing such sentences.

Almost ten years after the Regulation of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims and its implementation to each of Member States it seems to be an adequate moment for a summation of its functioning and rethink its weak sides.

The author will also try to evaluate the impact of this regulation on closing ties between Member States economies and a social aspect of the matter and try to give an answer to a question – is it even possible to create and implement such technocratic regulation ignoring economic and social aspects of the field which is about to be regulated and if the answer to that question would appear negative – how much of economic and social content should have to be included to ensure its reasonable functioning?

Conclusion of the article would be an attempt to find an optimal solution for anticipated problems in current economic situation.

**Keywords:** European Union, Poland, free market, executional proceedings.

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### INTRODUCTION

There is no breakthrough in finding that the economy of the European Union, as well as the economy of its individual Member States are based overwhelmingly on GDP and added value generated by small and medium-sized enterprises (SMEs). In quantitative terms, they constitute the overwhelming majority of entrepreneurs (99%), and generate the added value that greatly exceeds 50% of whole added value in the EU economy<sup>1</sup>. These observations can refer directly to

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1 [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Small\\_and\\_medium-sized\\_enterprises](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Small_and_medium-sized_enterprises)

Poland<sup>2</sup>. Having regard to continuous increase in the number of small and medium-sized enterprises and their impact on gross domestic product, as well as the still ongoing process of widening the circle of the Member States of the European Union matters of the viability of the SMEs seem to be a priority for the proper functioning of the internal market and the deepening of the process of economic integration. In this paper, the author focuses exclusively on the powers available to the creditor regarding with the institution of the European Enforcement Order (EEO) and what the practical implications of it for small and medium-sized businesses.

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Provisions of the Polish Code of Civil Procedure<sup>3</sup> regarding the institution of European Enforcement Order was introduced in close correlation with the Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims<sup>4</sup>, therefore the starting point should be an analysis of the latter act.

In accordance with the provisions contained in article 2 Regulation No. 805/2004 applies to civil and commercial matters, whatever the nature of the court or tribunal except:

- a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
- b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- c) social security;
- d) arbitration.

Crucial for the implementation of the discussed regulations has become capacious but at the same time as precise as possible definition of two issues - the concepts of due and payable claims and an uncontested claim as well as forming procedures for service of the judgment debtor (defendant) in a way that is compatible with a variety of procedures that occur in the different Member States of European Union. Based on the of the Regulation the claim is considered uncontested if:

- a) the debtor has expressly agreed to it by admission or by means of a settlement (in the procedure before a court or extrajudicial settlement approved by a court); or
- b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings;  
or
- c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or
- d) the debtor has expressly agreed to it in an authentic instrument.

2 The Report on small and medium-sized enterprises in Poland; <http://www.parp.gov.pl/files/74/81/469/12554.pdf>

3 Act of 17th of November 1964 - Code of Civil Procedure [Dz.U.1964.43.296]

4 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims OJ L 143/15

Regulation is applicable in the territory of all the Member States of the European Union, with the exception of Denmark. Regulation applies to judgments rendered following its entry effect, to court settlements approved or concluded before a court after the entry into force of the Regulation, as well as official documents, which have been drawn up or registered after the entry into force of the Regulation, after 21st January 2005<sup>5</sup>.

Polish law rulings that meet the requirement of indisputability of claims are such decisions as judgment of recognition (if the defendant admittedly involved in the procedure, but did not polemicalize with the claims of the plaintiff) as well as judgments rendered in absentia (where there is no activity of the defendant, who was notified properly about the lawsuit), settlements concluded before a court in the course of proceedings (article 223 of Polish Code of Civil Procedure) as well as settlements concluded in the conciliation proceedings conducted prior to the initiation of proceedings (article 184 of Polish Code of Civil Procedure) and agreements contained in result of the mediation and then approved by the court<sup>6</sup>.

Additionally, important from the point of view of the discussed concepts of matter is its legal definition of claim which is defined as a claim for payment of a specific sum of money that has fallen due or to which the due date is specified in the judgment, court settlement or authentic instrument (or administrative document).

Paramount importance if the claim is determined to be uncontested has judicial procedure of the service of pleadings, in particular lawsuit, or a different equivalent initiating the substantive proceedings. The Regulation introduces in this matter so called minimum standards to procedures for uncontested claims. In practice, these are procedural framework which are relating to servicing of pleadings to the parties, to guarantee defendants (debtors) the right to defend. Apart from the traditional forms of personal delivery, or substitute way of delivery to the householder of the debtor or to address of business activity performed by the debtor electronic form of service with automatic confirmation of delivery is approved, provided that the debtor consents to direct correspondence to him in such form. The minimum standards are also regarding to the elements that a letter initiating proceedings should include. According to the Regulation 805/2004 an indication of the sum of money and the creditor is not sufficient enough<sup>7</sup>. In the event of a money claim is connected with a claim of interests the creditor is obliged to specify for what period interest is sought unless statutory interest is automatically added to the principal amount under the law of the certain Member State. In relation to each of claims it is also necessary to indicate the grounds for its request (concise statement of the legal and factual basis).

Minimum procedural requirements are also information that a letter initiating proceedings should include concerning the procedural requirements to take polemics with the creditor and contesting by the debtor the claim and an indication of the consequences of an absence of objection of the creditor demands. This information takes the form of instruction, in the Polish legal

5 J. Maliszewska – Nienartowicz, 'Stosowanie prawa Unii Europejskiej przez Sądy', (Warsaw 2010) 450 – 452

6 J. Gołaczyński, 'Współpraca sądowa w sprawach cywilnych i handlowych w Unii Europejskiej', (Warsaw 2007), 271 - 272

7 A. Jakubecki [in:] J. Bodio, T. Demendecki, O. Marcewicz, P. Telenga, M.P. Wójcik, 'Kodeks postępowania cywilnego, Komentarz', (Warsaw 2013)

system in the form of an extract from a legal provision with explanatory notes. What should be emphasized is that, according to Article 19 of Regulation 805/2004 the possibility of contesting the claim is based on the assumption of the existence of fully substantive control of the ruling. This is particularly important in the context of the objective that the institution of a European Enforcement Order (EEO) has to meet. The efficiency and speed of the procedure for issuing a certificate of EEO is conditioned and determined by limiting its control and strengthening the confidence in the legal systems of the Member States, especially when it comes to procedures before their courts. The idea of the institution EEO is an efficient and fast execution creditor rights, with a minimum of legal protection of the debtor expected in a democratic state of law.

What is important, however, is that even in the lack of compliance of minimum standards described above by the Member State regulations, there is still the possibility of so-called. rectification (rectification of non-compliance with the minimum procedures). Thus, the creditor will receive certified as a European Enforcement Executive when the statement was served on the debtor in the manner described in the Article 13 or 14 of Regulation 805/2004 (regular or substitute service), the resulting letter was included detailed instruction on the possibility of contesting the claim and the consequences of the lack of its adoption, and the debtor objected to the claim. Requirements outlined above are extremely important given the effects a judgment provided with a certificate of European Enforcement Orders Title has. Such a ruling shall be enforceable in any Member State of the European Union without having to repeat the substantive examination of the case. In order not to duplicate the need for an inquiry, the court of the Member State in which the creditor seeks a certificate of EEO focuses only on the regularity of the previous proceedings with regard to fulfilling requirements of the Regulation 805/2004 and the specific procedural requirements of the Member State.

As in other Member States, under the Polish law the certificate of EEO is issued only after the application of the creditor. In case of refusal to issue a certificate copy of such provision shall not be delivered to the debtor. Debtor also did not receive a copy of the creditor's complaint against the decision of refusal for him. Such a solution significantly improves the proceedings. The activity of the debtor in the proceedings may take place only at the moment of receiving the copy of the order of the EEO certificate and can take the form of an application for it to be revoked. The deadline for such remedy is a month from the service of copy of the order to the debtor. This term is relatively short, which should be viewed positively because of the certainty of legal transactions. Normally in such a period of time creditor has already initiated execution proceeding on the basis of such certificate, and the bailiff is able to take the first activities of execution. At the same time this term is a sufficiently long period of time for debtor to appeal against this decision. In this context, that legislation should be assessed positively.

To summarize the analysis of legislation introduced by Regulation 805/2004 in relation to Regulation (EC) Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and trade a significant progress should be indicated. Regulation 805/2004 clarifies the regulation of its legal predecessor. Revision and evolution of regulation, manifested by the abolition of the requirement to perform the procedure for obtaining the exequatur constitutes an important step in achieving more efficient means of realizing their

civil claims by economic operators, especially SMEs who often don't have sufficient resources for professional legal advice in that matter. While retaining the right to benefit from the exequatur procedure (e.g. required in matters related to the employment relationship), the procedure of initiation of enforcement in the State of the creditor has been made significantly more flexible. The debtor retains the minimum of rights to defend his position in a lawsuit, preserved in cases of gross violations of procedure, in particular in not informing him of the claim, while he receives the information about creditor granting the EEO in only after the moment of positive settlement in this matter for creditor. This is to prevent not entirely ethical protraction of proceedings by the debtor in a situation where there are strong grounds to issue a certificate of EEO. When the debtor learns about the issuance of a certificate of EEO the creditor is already able to simultaneously initiate enforcement proceedings. This issue is of great importance for the success of the enforcement proceedings since the premature notification to the debtor could actually greatly hinder and slow down the procedure and even nullify the purpose of the whole proceedings.

In summary the direction that tends legal regulation designed to facilitate creditors to initiate enforcement proceedings in the Member State of their registered office should be assessed positively. Regulation No 805/2004 abolished the obligation to obtain an exequatur, however, the creditor still has in this regard freedom of choice. He can benefit from former rules, as well as apply for certification on the European Enforcement Order. At the date of its introduction the institution of the EEO should be evaluated very positively<sup>8</sup>. It is a significant step forward, both in terms of closer judicial cooperation of the Member States of the European Union, but also a measure of the real execution of claims arising from the mobility in the area of freedom of movement freedom of persons and services. It is also an expression of the harmonization of the legal protection of the parties of economic relations, by which exemptions from the procedure for obtaining the exequatur may be made (in certain categories of cases). From the economic point of view this regulation significantly improves the economic turnover, primarily fulfilling a protective function for the participants in free market. This kind of procedure that are fast and devoid of unnecessary formalities are aimed reduce payment bottlenecks and can ensure swift and as efficient as possible enforcement of the judgment. Thus creditors receive real measures to protect their interests and the execution of their receivables, both from entities established in the European Union and beyond EU borders. These are the factors of prime importance for the proper functioning of the internal market of the European Union. Without this type of regulation the freedom of movement of capital, people and services could become only the declarations devoid of practical measures for their implementation.

## CONCLUSION

Due to the time passed since the Regulation 805/2004 took effect it is possible to revise and discuss of its possible improvements. In the author's view a few issues could be postulated. Firstly, the regulation could require expanding its scope for matters with the element of international

<sup>8</sup> Polish Government Position prepared in conjunction with Art. 6 paragraph. 1 point 2 of the Act of 11 March 2004 on Cooperation Council of Ministers with the Parliament and the Senate in matters related to the membership of the Republic of Polish in the European Union

arbitrage. It also could be possible to facilitate the enforceability of such a component, while respecting the *acquis*, custom and practice of applying the New York Convention from the year 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. This could take the form analogous to retaining provisions of the exequatur, i.e. the creditor would retain the freedom to choose the procedure. Secondly, electronic form of service of pleadings to the parties of the proceedings should be popularized appropriately. It is, however, the demand for harmonization of the whole civil procedure. It is, however, a postulate for harmonization of the whole civil procedure inside the EU. For efficiency and transparency of such measures it would be necessary to revise these provisions ranked in codes or other equivalent legal acts regulating the proceedings before the courts of civil and economic litigations in the Member States. The main point here is the implementation of the idea of the so-called. electronic Courts and electronic proceedings as a real vision of settling matters before the courts, at least in the simplest terms of their facts.

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## RECONCILING DIFFERENT REALMS: EXAMPLES OF ECONOMIC ANALYSIS OF CORPORATE LAW

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**Abstract.** Economic analysis of law is currently a dominant paradigm in corporate law doctrine. However, when researching in the field of law and economics, a scholar immediately faces the issue of different meanings of the same concept used by law and economics. This raises a question, can these different meanings be reconciled or translated from one field to another without losing its initial meaning? Thus, the article discusses theoretical insights related to incompatibility between law and other sciences as well as illustrates discrepancies in different realms by corporate law and economics examples. The article also discusses several implications of such discrepancies between economic and legal realms.

**Keywords:** interdisciplinary, corporate law and economics, incompatible realms

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### I. INTRODUCTION

In the scholarship of company law it became traditional to combine comparative method and economic analysis of law.<sup>1</sup> Some US scholars even imply that economics of corporate law is a synonym to corporate law jurisprudence.<sup>2</sup> The economic reasoning in corporate law has also become dominant in Europe. Thus, in the area of corporate law scholarship the question, should legal research primarily be doctrinal or interdisciplinary, at least with regard to one interdisciplinary field - law and economics - for now seems to be answered.

However, when researching in the field of law and economics, a scholar immediately faces the issue of different meanings of the same concept used by law and economics. This raises a question, can these different meanings be reconciled or translated from one field to another without losing their initial meaning?

Some scholars claim that the new constructs taken from (*inter alia*) economics and imported to law become new hybrid creatures, having different meaning from the initial one.<sup>3</sup> Such constructs lose their brand “made in science” after they enter the system of law.<sup>4</sup> Thus, the law and other sciences are incompatible and autonomous discourses.

In the light of these theoretical insights the article discusses few examples of corporate law and economics, which illustrate incompatibility between different realms of law and economics. The article also discusses several implications of the discrepancies between economic and legal realms.

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1 See S. Grundmann, ‘European company law: organization, finance and capital markets’ (Cambridge: Intersentia, 2012) 41

2 See B. McDonell, C. Hill ‘Introduction: The evolution of the economic analysis of corporate law’ In *Research Handbook on the Economics of Corporate Law*. Ed. C. Hill, B. McDonnell (UK: Edward Elgar 2012) 1

3 G. Teubner, ‘How the Law Thinks: Towards Constructivist Epistemology of Law’ [1989] 23 *Law and Society* 745, 747

4 *Ibid* 749

Although the ideas regarding incompatible discourses are not new, the issues discussed are important and relevant for the development of Lithuanian law science. Lithuanian corporate law scholarship as well as its economic argumentation is still at its initial development stage.<sup>5</sup> Thus, deepening the theoretical understanding of interdisciplinary problems could, perhaps, fasten the process of interdisciplinary scholarship evolution towards more coherent field of knowledge.

## II. CAN DIFFERENT REALMS OF LAW AND ECONOMICS BE FULLY RECONCILED?

There are different ways of formulating the relationships between law and other sciences.<sup>6</sup> One of the approaches could be called “incompatible discourses approach”.<sup>7</sup> This approach first of all can be related<sup>8</sup> to works of sociologist N. Luhmann and his leading exponent<sup>9</sup> legal scholar G. Teubner<sup>10</sup>. G. Teubner’s theory of law sees the law as autonomous self-reproducing system of communications. Law’s relation to other sciences is an interference with other autonomous communication systems, which reproduce themselves according to their own specific communicative codes.<sup>11</sup> The communicative code of law is the distinction between legal and illegal.<sup>12</sup> This is the distinguishing feature of legal communication system, which delimits the law from other subsystems in society (e.g. economics).

Thus, according to G. Teubner there is a plurality of different realities and multiple truths of legal, political and others fields<sup>13</sup>. Law is not a reflection of some economic, social, political or other realities, but is separate reality of its own<sup>14</sup>. There is no instruction of the law by the outside world, there is only construction of the outside world by law.<sup>15</sup>

The co - existence of such realities predetermines that integrating knowledge of other fields into the law does not solve the problem of conflicting legal and other scientific realities. This is because the new constructs by entering system of law from other sciences are distorted or are given a specific legal

5 See E. Lauraitytė, P. Miliauskas, ‘Sustainable Companies under the Lithuanian Company Law’ [2013]. University of Oslo Faculty of Law Research Paper No. 2013-10 at <http://ssrn.com/abstract=2248591> 7; also see G. Lastauskiene commenting on the initial stage of economic reasoning in Lithuanian legal scholarship (G. Lastauskiene, ‘Ekonominiai argumentai teisėje: jų vieta ir ribos’ [2013] 89 *Teisė* 20-22)

6 See D. Nelken discussing several possible approaches (D. Nelken, ‘Can law learn from social science?’ [2001] 35 *Isr. L. Rev.*).

7 D. Nelken, ‘Can law learn from social science?’ [2001] 35 *Isr. L. Rev.* 13

8 G. Teubner also bases his insights on works of Michel Foucault and critical theory of Jürgen Habermas (critical theory) (*Ibid* No. 3, 732). Also this approach can be associated with the works of other authors (see R. Van Krieken, discussing insights of P. Bourdieu (R. Van Krieken, ‘Law’s Autonomy in Action: Anthropology and History in Court’ [2006] 15 *Social & Legal Studies* 578); also see P. Goodrich ‘Anti-Teubner: autopoiesis, paradox and the theory of law’ [1999] 13 *Social Epistemology* [202])

9 D. Nelken, ‘Getting at Law’s Boundaries’ [2006] 15 *Social & Legal Studies* 599

10 Please note that this article cannot capture and reflect the whole complexity of N. Luhmann and G. Teubner autopoietic system theories and is mainly limited to some of the main G. Teubner’s ideas specific to law as social phenomenon.

11 *Ibid* No 7, 12

12 P. Goodrich ‘Anti-Teubner: autopoiesis, paradox and the theory of law’ [1999] 13 *Social Epistemology* 204

13 *Ibid* No 3, 732

14 It also means that when one test law against, for example, economic reality - it just comparing different realities, but not finding the real truth.

15 *Ibid* No 3, 740

meaning anew.<sup>16</sup> When concepts of one field are being translated to another they necessarily undergo certain changes from their initial meaning. This also means that law and economics operate according to the different logics and direct communication between them is impossible.<sup>17</sup> Thus, these different realities can never be fully united or reconciled.<sup>18</sup>

### III. EXAMPLES FROM ECONOMIC ANALYSIS OF CORPORATE LAW

The conflicts between the systems can be well illustrated by various examples from the interdisciplinary field of corporate law and economics.

#### 3.1. What scholarship shall qualify as corporate law and economics?

Even though interdisciplinary nature of economic analysis of corporate law seems to be self-evident, few comments are needed to explain the field. Law and economics or economic analysis of law<sup>19</sup> can be defined as application of economic methods in the analysis of law.<sup>20</sup> In corporate law scholarship, the meaning of this definition can differ depending on whether the scholarship comes from the lawyers or economists. For example, the scholarship of economic analysis of corporate law includes formal mathematical modelling, econometric data analysis, however, also a softer, more informal, non - mathematical, form.<sup>21</sup> The later type is more common for scholarship created by lawyers. Such scholarship will often be underpinned by certain textual (not mathematical) explanation of economic argument and its application to system of law.<sup>22</sup> Thus, it may be asked should such scholarship qualify as interdisciplinary at all? After all it is the same old hermeneutic method (the focus of which is text interpretation and arguments about a choice among diverging interpretations<sup>23</sup>), which is traditional and typical to legal scholarship<sup>24</sup>.

There are various interpretations of what an interdisciplinary research is, including what are the degrees of it or advancement levels.<sup>25</sup> Some authors indicate that at the minimum it can be

16 The same is true in case of legal transplants (or, according to G. Teubner, “legal irritants”), i.e. transplanting a foreign legal rule into national law from other jurisdictions (G. Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies’ [1998] 61*The Modern Law Review* 12)

17 A. Johnston, ‘International Corporate Law and Financial Market Regulation. EC Regulation of Corporate Governance’ (Cambridge: Cambridge University Press 2009) 23

18 *Ibid* No 3, 749

19 The terms “economic analysis of law” and “law and economics” will be used as synonyms.

20 F. Parisi, ‘The language of Law and Economics. A Dictionary’ (Cambridge: Cambridge University Press 2013)165

21 B. McDonnell, C. Hill ‘Introduction: The evolution of the economic analysis of corporate law’ In *Research Handbook on the Economics of Corporate Law*. Ed. C. Hill, B. McDonnell (UK: Edward Elgar 2012) 1

22 This is especially the case for the economic reasoning in Lithuanian company law scholarship (see L. Mikalonienė, ‘Asmeninio komercinio bendradarbiavimo pagrindinės teisinės formos. Daktaro disertacija.’(Vilnius: Vilniaus universitetas, 2011); J. Rimas, ‘Privataus kapitalo sandoriai: bendrovių teisės aspektai. Daktaro disertacija.’ (Vilnius: Vilniaus Universitetas, 2010); R. Čiočys, ‘Bendrovių valdymo reglamentavimo Lietuvoje problemos. Daktaro disertacija’ (Vilnius: Vilniaus Universitetas, 2013)).

23 M. Van Hoecke, ‘Legal Doctrine: Which Method(s) for What Kind of Discipline?’ in *Methodologies of legal research. Which kind of method for what kind of discipline?* Ed. M. Van Hoecke (Oxford, Portland, Oregon: Hart Publishing 2011) 4, 11

24 *Ibid* 4, 17

25 For example, M. Siems discusses basic and advanced interdisciplinary research (see M. Siems, ‘The Taxonomy Of Interdisciplinary Legal Research: Finding The Way Out Of The Desert’ [2009] 7 *Journal of Commonwealth Law and Legal Education*).

understood as interconnection (integration or synthesis) between different academic disciplines<sup>26</sup> or use of other disciplines external to law to provide insight on its broader economic, social and other implications<sup>27</sup>. Following this view, even a researcher, who only applies the insights of economic arguments to explain legal phenomenon (and *vice versa*) (and does not necessarily use econometrics, statistics or other methods used by the economists), already qualifies as interdisciplinary and is exposed to the discussed interdisciplinary challenges. The examples used in the paper will be of the latter type - the explanations of the economists of legal phenomenon - a corporation- and certain related concepts.

### 3.2. Same concepts, different meanings

Purely from the positive law perspective a corporation could be defined as a legal person with certain common legal features observable across various jurisdictions. These features typically are a separate legal personality, limited liability, delegated management, transferable shares and investment ownership.<sup>28</sup>

In economics (as well as in economic analysis of law) one of the dominant theories of the corporation is contractual, which sees the corporation as a nexus of contracts.<sup>29</sup> According to this theory corporation is nothing more than a multitude of complex relationships, *i.e.* contracts, between the legal fiction (the firm) and the owners of labour, material and capital inputs and the consumers of output.<sup>30</sup> In this sense the “behaviour” of the firm is like the behaviour of a market, that is, the outcome of a complex equilibrium process.<sup>31</sup> Beside that the contract between shareholders and managers (and perhaps with other stakeholders)<sup>32</sup> can be described as economic agency contract.

Lawyers in the field of economic analysis of corporate law try to adapt the contractual concept corporation to legal reality by calling company law norms an implicit contract, which the parties would have concluded should the transactional cost were equal zero.<sup>33</sup> However, calling the company law norms an implicit contract, does not make them contract in any legal sense. Also even though certain legal rules governing corporation could have been adopted by contract (*e.g.* delegated management), other legal features could not be achieved purely by contract (as it is understood in the legal sense). For example, limited liability of the shareholder towards the tort victims (non - contractual creditors) is in its essence non - contractual.<sup>34</sup> The same is applicable

26 D. W. Vick, 'Interdisciplinary and the discipline of law' [2004] 31 *Journal of Law and Society* 163

27 B. Cheffins, 'Using Theory to Study Law: A Company Law Perspective' [1999] 58 *Cambridge Law Journal* 198

28 R. Kraakman, et. al., 'The Anatomy of Corporate Law. A comparative and Functional Approach. 2<sup>nd</sup> Edition' (Oxford: Oxford University Press 2009) 5

29 *E.g.* A. Alchian, H. Demsetz, 'Production, Information Costs, and Economic Organization' [1972] 62 *The American Economic Review*; M. Jensen, W. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' [1976] 3 *Journal of Financial Economics*.

30 M. Jensen, W. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' [1976] 3 *Journal of Financial Economics* 9

31 *Ibid*

32 R. Kraakman, et. al., 'The Anatomy of Corporate Law. A comparative and Functional Approach. 2<sup>nd</sup> Edition' (Oxford: Oxford University Press 2009) 90

33 H. Easterbrook, F. D. Fischel, 'The Economic Structure of Corporate Law' (US: Harvard University Press, 1991) 10-35

34 Also it cannot be completely explained on economic efficiency ground (*e.g.* see R. Posner, 'Economic analysis of law. 8th ed.' (New York: Aspen Publishers 2011) 537-539

to legal feature of separate legal personality of the corporation, which is granted specifically by law and has effects on third parties. However, for economist<sup>35</sup> (and sometimes for lawyers)<sup>36</sup> the legal concept of legal personality is just a fiction, the substance of which is translated to economic terms.<sup>37</sup>

Thus, economic explanation of the corporation for the lawyer seems to be one of many metaphors<sup>38</sup>, which cannot be integrated into the legal discourse using legal meanings.

Moreover, the contract itself has a rather different meaning in economics compared with the meaning used in the legal discourse. For example, the economic meaning of the contract also encompasses the reputational and legally non enforceable terms.<sup>39</sup> However, binding force of contract is one of the essential features of the contract in the legal sense.<sup>40</sup>

The definitions of agency relations in economics also differ from the agency relations defined in law. According to economists the agency relations are broadly defined and can mean the situation when wealth of one person depends on the actions of another person.<sup>41</sup> In this economic sense the directors of the company could be understood as agents of shareholders. Nevertheless, when it comes to company law regulation usually the management bodies have the fiduciary duties towards the company as whole.<sup>42</sup> Moreover, they are not considered the agents of the shareholders in legal sense, which defines an agent as having authority to alter the principal's legal position'.<sup>43</sup> Thus, when economists refer to management as agents of the shareholders, this does not mean that they have a legal duty to represent the interests of the shareholders and such statement can only have normative implication that the law policy, along with the other mechanisms of corporate governance, should aim to ensure managerial accountability to shareholders.<sup>44</sup>

35 see M. Jensen, W. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' [1976] 3 *Journal of Financial Economics*.

36 E.g. H. Fischel and D. Easterbrook claims that this is an invention only for convenience (H. Easterbrook, F. D. Fischel, 'The Economic Structure of Corporate Law' (US: Harvard University Press, 1991) 12)

37 Ibid No 17, 24

38 This view is also taken by some corporate law scholars, urging to seek for new theories of the corporation (e.g. P. Nobel, 'Stakeholders and the legal theory of the corporation' In '*International Corporate Law and Financial Market Regulation. Perspectives in Company Law and Financial Regulation*' Ed. M. Tison, et.al. (Cambridge: Cambridge University Press, 2009) 175)

39 J. Gordon, 'The Mandatory Structure of Corporate Law' [1989] 89 *Columbia Law Review* 1549-1550

40 Ibid No 17, 23

41 B. Cheffins, 'Company law: theory, structure, and operation' (Oxford: Oxford University Press, 1997) 45; H. Easterbrook, F. D. Fischel, 'The Economic Structure of Corporate Law' (US: Harvard University Press, 1991) 91; R. Kraakman, et. al., 'The Anatomy of Corporate Law. A comparative and Functional Approach. 2<sup>nd</sup> Edition' (Oxford: Oxford University Press 2009) 35

42 See P. Davies, S. Worthington, 'Principles of Modern Company Law. 9<sup>th</sup> ed.' (London: Sweet and Maxwell 2012) 506, 507

43 See P. Davies, 'Introduction to Companies Law. 2<sup>nd</sup> Edition' (Oxford: Oxford University Press, 2010) 111; B. McDonnell, C. Hill, 'Fiduciary duties: the emerging jurisprudence' In *Research Handbook on the Economics of Corporate Law*. Ed. C. Hill, B. McDonnell (UK: Edward Elgar 2012) 135; V. Mizaras, In V. Mikelėnas, G. Bartkus, V. Mizaras, Š. Keserauskas, 'Respublikos civilinio kodekso komentaras. Antroji knyga. Asmenys. 1-as leidimas' (Vilnius: Justitia, 2002) 261. Also Art. 2.133 part 1 of the Civil Code of the Republic of Lithuania (Valstybės žinios, 2000, Nr. 74-2262; 2000)

44 Ibid No 17, 26

The contractual theory of the corporation is only one example. However, other economic explanations of corporate law also faces the same challenge - they cannot be fully integrated into the system of law.<sup>45</sup>

#### IV. WHAT ARE THE IMPLICATIONS OF DIFFERENT REALITIES OF LAW AND ECONOMICS?

If the different fields of law and economics (or other disciplines) cannot be integrated why should scholars bother to engage into interdisciplinary research at all and why not to stick to doctrinal research? After all such research requires a lot of efforts of a legal researcher: to learn the new field of economics (*e.g.* subject matter, system, methods, sources, the main theories in the fields) and to understand the precise meaning of the new concepts. Even more efforts are needed if one wants to use certain mathematical methods, which are often unknown to the lawyers. If different realms are incompatible such research could seem at least irrational.<sup>46</sup>

When answering this question first of all it should be mentioned that there is a difference between learning from other social sciences and creating interdisciplinary super-science, which would integrate everything there is to know about law<sup>47</sup>. Such integration would raise problems of epistemology, methodology and research skills.<sup>48</sup> A very close partnership of law and other fields according to some authors would not be desired because there could be no space for imagining a different type of social order.<sup>49</sup> Thus, considering these insights, perhaps, one should not even seek an integration of law and economics or other fields.

What matters, though, is putting law into the context and explaining the various connections/disconnections and compatibility/non compatibility of law and other disciplines. It cannot be disagreed that law is first of all is a social phenomenon and therefore the legal ideas should be interpreted in such way, which, *inter alia*, can help to assess the significance of particularities in a wider societal perspective.<sup>50</sup> The economic interpretation of law is one of many possibilities, but it can be seen as specialized co-worker with broader social inquiry.<sup>51</sup>

45 For example, corporate law scholars J. Armour and M. Whincop developing property rights theory (based on the works economists O. Hart, O. Williamson and others of the corporation also has to admit that the rules they discuss are not all found within the domain of 'property law' as defined in legal discourse (J. Armour, M. Whincop, 'The Proprietary Foundations of Corporate Law' [2007] 27 Oxford J Legal Studies 435).

46 Similar idea is raised by some Lithuanian scholars (*e.g.* G. Lastauskiene indicates that one of the reasons why law and economics will not become significant tool in the courts is that the lawyers will consider redundant to engage in additional studies of microeconomics, when traditional reasoning is sufficient enough (G. Lastauskiene, 'Ekonominiai argumentai teisėje: jų vieta ir ribos' [2013] 89 Teisė 34).

47 See comments of M. Van Hoecke on such integration and its risks (M. Van Hoecke, 'Preface' in '*Methodologies of legal research. Which kind of method for what kind of discipline*' Ed. M. Van Hoecke (Oxford, Portland, Oregon: Hart Publishing 2011) ix).

48 Ibid. But see Bart du Laing on theoretical and methodological integration (B. Du Laing, 'Promises and Pitfalls of Interdisciplinary Legal Research: The Case of Evolutionary Analysis of Law' in '*Methodologies of legal research. Which kind of method for what kind of discipline*' Ed. M. Van Hoecke (Oxford, Portland, Oregon: Hart Publishing 2011) 252-254)

49 D. Nelken, 'Getting at Law's Boundaries' [2006] 15 Social & Legal Studies 603

50 R. Cotterrell's calls for broader transdisciplinary interpretation (R. Cotterrell, 'Why must legal ideas be interpreted sociologically?' [1998] 25 Journal of law and society 183, 190)

51 Ibid 185

Also exploring other fields can give a lot of ideas for legal innovations. According to G. Teubner the permanent reconstruction of legal world by other sciences can give a lot of ideas for new legal interpretations.<sup>52</sup>

Moreover, constructivist approach towards law, does not claim that different realms are completely isolated. The law does in some way also 'respond' to external influences.<sup>53</sup> However, one of the risks is that incorporation of one reality to another creates additional reality which is neither purely scientific, nor legal.<sup>54</sup> For the legal researcher these insights might remind that the coexistence of different realms requires careful and patient examination and explanation of the concepts of different fields in order to avoid creating "hybrid creatures with unknown social consequences"<sup>55</sup>.

## V. CONCLUDING REMARKS

It seems that at least from constructivist perspective legal discourse is resistant to integration of knowledge from other fields, including economics. This can be illustrated by various examples from the economic analysis of corporate law. Nevertheless the incompatibility of different fields is more a matter of degree than an absolute phenomenon. Interdisciplinary research can contribute to legal innovations and explain compatibility/non-compatibility of law with other realms.

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52 Ibid No 3, 750. G. Teubner himself explores the ideas of various disciplines on the issues of corporate social responsibility and law (G. Teubner, 'Corporate Fiduciary Duties and Their Beneficiaries' In '*Corporate governance and directors' liabilities: legal, economic and sociological analyses on corporate social responsibility*' Ed. by K. Hopt, G. Teubner (Berlin: de Gruyter, 1985) 156.

53 See D. Nelken commenting on G. Teubner's views (D. Nelken, 'Getting at Law's Boundaries' [2006] 15 *Social & Legal Studies* 599).

54 Ibid No 3, 745, 747-750

55 Ibid

12. M. Van Hoecke, 'Preface' in *'Methodologies of legal research. Which kind of method for what kind of discipline'* Ed. M. Van Hoecke (Oxford, Portland, Oregon: Hart Publishing 2011)
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## HOLISTIC PERSPECTIVE ON LEGAL RESEARCH

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**Abstract.** This conference paper shall cover examination not only of the three major trends of legal methodology (doctrinal 'black-letter' research, socio-legal research and axiological-ethical research), but also the possibility of their synthesis will be discussed in the perspective of holism. Holism in the context of this paper shall be viewed as the idea that systems and their properties should be viewed as wholes, not as collections of parts. Consequently, studies of one dimension of legal phenomena (formal law, real law or ideal law) without the examination of other two will not grant us the whole picture of legal reality. Author of this paper proposes that the holistic perspective has the ability to provide starting point for the methodological synthesis of the doctrinal, socio-legal and axiological-ethical research of law.

**Keywords:** methodology of legal research, holism, doctrinal research of law, socio-legal research, axiological-ethical research of law, methodological synthesis

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### INTRODUCTION

As A. Peczenik stated at the end of XX century: 'Jurisprudence (legal theory) is a strange discipline, at the intersection of traditional legal research, some sociology and almost all branches of philosophy, such as ontology, epistemology, moral philosophy, philosophy of science, logic and philosophy of language. A law theorist must know all of these. Since nobody can have a robust knowledge of this dimension, doing research in jurisprudence is almost a mission impossible. The scholar must pick up fragments of different disciplines and put them together to serve new purposes. This is a high risk project, and there is not much to win'<sup>1</sup>. After looking more deeply into these thoughts, four main statements can be derived: (1) interdisciplinarity is undoubtedly encoded in the intrinsic nature of jurisprudence; (2) thorough research in the field of jurisprudence demands deep knowledge of all law-related disciplines; (3) scientific potential of individual scholar is limited, therefore interdisciplinary thorough research is 'a high risk project' and "almost a mission impossible"; (4) even if such project would succeed, there would be 'not much to win'. The author of this paper agrees with the first statement, partly accepts the second, has counter-argument for the third and flatly rejects the last one. Firstly, interdisciplinarity of legal science is inevitable, because the very legal reality is multifaceted. Secondly, also robust knowledge of all law-related fields is much important, it is not necessary (and would certainly be impossible) for a scholar to have knowledge of similar depth in all of such fields, rather she/he should have at least

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1 A. Peczenik, 'Second Thoughts on Coherence and Juristic Knowledge, On Coherence Theory of Law' In 'Proceedings of a symposium in Lund 1997' (Lund: Juristförlaget 1998) 51

basic understanding of all the main law-related fields and strive to perceive the whole picture of legal reality and its research. Thirdly, yes, thorough interdisciplinary research is not possible as long, as it is conducted by one scholar only. That is why all holistic research projects demands for the multiplex team work, in which specialists from all the necessary disciplinary fields are involved. Lastly, in the context of holistic research such words as ‘there is not much to win’ sounds extremely pessimistic at least: on the contrary, without the holistic perspective there is so much to lose.

Many serious thinkers numerous noted the complexity of legal phenomena and many at first sight seemingly strange and even paradoxical statements on law were made as the legal discourse unfolded. Such statements, according to H. L. A. Hart, were ‘not only said but urged with eloquence and passion, as if they were revelations of truths about law, long obscured by gross misrepresentations of its essential nature’<sup>2</sup>. There is no common standpoint on what should be referred as object of legal science: ‘for some legal science should scrutinise only positive law, narrowing to *de lege lata* issues, while others seek to include *de lege ferenda* issues’<sup>3</sup>. Deeper understanding of the multiplicity of law reveals inevitable diversity of theoretical legal paradigms and corresponding variety of methodological approaches to legal research. The multifaceted nature of legal phenomena is at least ternary. Taking into account the diversity of legal paradigms, one can refer to law as formal law, real law or ideal law<sup>4</sup>, also as particular combination of them. The methodological approaches to legal research diverge accordingly: doctrinal research is the cornerstone of the examination of formal law; socio-legal research is essential for the inquiry on real law and axiological-ethical research is intended to explore ideal law.

Proceeding to the holistic perspective on legal research, brief stop on the holism itself should be made. Holism is broadly defined as ‘theory that parts of a whole are in intimate interconnection, such that they cannot exist independently of the whole, or cannot be understood without reference to the whole, which is thus regarded as greater than the sum of its parts’<sup>5</sup>. In the context of this paper holism shall be viewed as the idea that systems and their properties should be viewed as wholes, not as collections of parts. Consequently, studies of one dimension of legal phenomena (formal law, real law or ideal law) without the examination of other two will not grant us the whole picture of legal reality. Such holistic approach in one or another form is detectable in legal theory of J. Hall<sup>6</sup>, H. J. Berman<sup>7</sup>, W. Menski<sup>8</sup> and other scholars.

In order to perceive the holistic perspective on legal research, it may be reasonable to look carefully at each of the methodological approaches it consists of.

2 H. L. A. Hart, ‘The Concept of Law’ 2nd edition (New York: Oxford University Press 1994) 1

3 A. Vaišvila, ‘Teisinis personalizmas: teorija ir metodas’ (Vilnius: Justitia 2010) 139

4 The main source of formal law (law in books) is state; real law (law in action) derives from society; ideal (natural) law origins from morality, ethics and/or religion.

5 Oxford Dictionaries Online [2014-03-01] (Oxford University Press) <<http://www.oxforddictionaries.com/definition/english/holism?q=holism>>

6 J. Hall, ‘Comparative Law and Social Theory’ (Baton Rouge: Louisiana State University Press 1963)

7 H. J. Berman, ‘Towards an Integrative Jurisprudence: Politics, Morality, History’ [1988] Vol. 76 No. 4 California Law Review 779-801

8 W. Menski, ‘Comparative Law in a Global Context’ (New York: Cambridge University Press 2006)

## DOCTRINAL RESEARCH OF FORMAL LAW

As an academic discipline law is well known for its unique vocabulary, exclusive institutional practices and specialised method of legal interpretation<sup>9</sup>. The core identity of legal science for the last century, as D. W. Vick notes, has been ‘a doctrinal approach involving the use of particularly interpretative tools and critical techniques in order to systematize and evaluate legal rules’<sup>10</sup>. In the context of doctrinal research law is defined as an autonomous system of rules together with general legal principles which give coherence to these rules. Such type of research remains internal to legal doctrine and focuses primarily on cases and statutes (also, to a lesser extent, on academic commentaries on these sources). Doctrinal ‘black-letter’ research focuses on law in books; such issues as enforcement of legal rules, the politics of law reform, etc. are excluded or remain as marginal topics<sup>11</sup>. The theoretical core of doctrinal research consists of legal positivism<sup>12</sup> (J. Bentham, J. Austin, H. L. A. Hart, H. Kelsen, J. Raz, etc.) and legal formalism<sup>13</sup> (A. Scalia, F. Schauer, etc.).

In the past decades doctrinal research of formal law received harshest criticism from many legal scholars. According to Vick, ‘doctrinalism has been accused of being rigid, dogmatic, formalistic, and close-minded’<sup>14</sup> and, as W. Twining put it, the central charge of law as academic discipline is that it ‘has been dominated by a monolithic orthodoxy which was narrow, conservative, illiberal, unrealistic and boring’<sup>15</sup>. Needless to say that many scholars who had adopted doctrinal approach to legal research are helpless in front of non-doctrinal questions. Another serious critical aspect of such approach concerns formulation of suggestions to legislators. Many scholars after conducting doctrinal *de lege lata* examination are shifting straight to *de lege ferenda* without any substantial reasoning and thorough research in the field of socio-legal and/or axiological-ethical analysis. In doctrinal research we often encounter the classical problem of ‘is’ and ‘ought to be’. As D. Hume stated it in his famous treatise, ‘of a sudden ... instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with *an ought*, or an *ought not*’<sup>16</sup>.

9 Such methods as linguistic, systemic, historical, teleological, precedent-related, comparative and many others can be distinguished (D. Mikelėnienė; V. Mikelėnas, ‘Teismo procesas: teisės aiškinojimo ir taikymo aspektai’ (Vilnius: Justitia 1999) 167-237).

10 D. W. Vick, ‘Interdisciplinarity and the Discipline of Law’ [2004] 31 Journal of Law and Society 165

11 M. Salter; J. Mason, ‘Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research’ (Dorchester: Pearson Education Ltd. 2007) 118

12 See, e.g., J. L. Coleman; B. Leiter, ‘Legal Positivism’ In D. Patterson (ed.) ‘A Companion to Philosophy of Law and Legal Theory’ 2nd edition (Oxford: Wiley-Blackwell 2010) 228-248

13 See, e.g., E. J. Weinrib, ‘Legal Formalism’ In D. Patterson (ed.) ‘A Companion to Philosophy of Law and Legal Theory’ 2nd edition (Oxford: Wiley-Blackwell 2010) 327-338

14 D. W. Vick, ‘Interdisciplinarity and the Discipline of Law’ [2004] 31 Journal of Law and Society 181

15 W. Twining, ‘Blackstone’s Tower: The English Law School: Discipline of Law (Hamlyn Lecture Series)’ (London: Sweet & Maxwell 1994) 141 (as cited in M. Salter; J. Mason, ‘Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research’ (Dorchester: Pearson Education Ltd. 2007) 112)

16 Continuing thoughts on this matter, Hume wrote: ‘This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, ‘tis necessary that it shou’d be observ’d and explain’d; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it’ (D. Hume, ‘A Treatise of Human Nature’ (1739) [2014-03-01] (The Online Library of Liberty) <[http://files.libertyfund.org/files/342/Hume\\_0213\\_EBK\\_v7.0.pdf](http://files.libertyfund.org/files/342/Hume_0213_EBK_v7.0.pdf)> 386).

## SOCIO-LEGAL RESEARCH OF REAL LAW

Whereas doctrinal approach deals with formal law (law in books), socio-legal research concentrates on real law (law in action). Socio-legal approach adopts qualitative and quantitative methods from various social sciences and view law as social phenomena. The character of its methodological scope is difficult to define. Socio-legal studies cover a range of disciplinary contexts within the social sciences and law, and relate the legal to the sociological, political and economic dimensions of human activity. The essence of socio-legal research might be described as an appreciation of interdisciplinary relationships and an application of such a perspective to problems. Some researchers are likely to be interested in evaluating normative approaches within one or more economic processes and social, cultural or scientific phenomena affect the development and application of law. Other may be interested in civil justice or the legal professions with a focus on civil justice processes and their relation to procedure and views of the state, funding, consumer views or tribunal services, etc.<sup>17</sup>

The theoretical foundation of socio-legal research is particularly broad covering sociological jurisprudence<sup>18</sup> (R. Pound, E. Durkheim, M. Weber, L. Duguit, E. Levy, E. Ehrlich, etc.), legal realism<sup>19</sup> (O. W. Holmes (Jr.), K. Llewellyn, J. Frank, A. Hägerström, K. Olivecrona, A. Ross, etc.), historical school of jurisprudence<sup>20</sup> (F. K. von Savigny, K. Marx, H. Spencer, H. J. Berman, etc.), law and economics<sup>21</sup> (R. Coase, G. Calabresi, H. Manne, R. Posner, etc.), radical jurisprudence<sup>22</sup> (R. M. Unger, D. Kenedy, M. Kelman, J. Derrida, M. Fineman, M. Matsuda, D. Cornell, C. MacKinnon, etc.) and many more. As R. Cotterrell accurately described it, socio-legal research is distinguished for its 'rich, almost anarchic heterogeneity' and 'consistent openness to many different aims, outlooks, and disciplinary backgrounds'<sup>23</sup>.

Academic positions of socio-legal research are improving dramatically year after year, as it was reflected by Cotterrell, 'All the centuries of purely doctrinal writing on law has produced less valuable knowledge about what law is, as social phenomena, and what it does than the relatively few decades of work in sophisticated modern empirical socio-legal studies.'<sup>24</sup> Nevertheless it is crucial to note some drawbacks of this approach. J. Palomar correctly pointed some critical aspects which should not be missed: 'Empirical socio-legal research is challenging. It is difficult to obtain data and equally difficult to interpret the data obtained. ... It also can be difficult to control variables and results can have more than one possible cause. Other limitations on and issues regarding empirical socio-legal research exist ... For example, even if results are clear and unassailable, will courts

17 M. Salter; J. Mason, 'Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research' (Dorchester: Pearson Education Ltd. 2007) 139

18 See, e.g., R. Cotterrell, 'Sociological Perspectives on Law' 2 vols. (Aldershot: Ashgate/Dartmouth 2001)

19 See, e.g., S. Ratnapala, 'Jurisprudence' (Cambridge: Cambridge University Press 2009) 93-116

20 See, e.g., R. E. Rodes (Jr.), 'On the Historical School of Jurisprudence' [2004] 49 American Journal of Jurisprudence 165-184

21 See, e.g., J. Hanson; K. Hanson; and M. Hart, 'Law and Economics' In D. Patterson (ed.) 'A Companion to Philosophy of Law and Legal Theory' 2nd edition (Oxford: Wiley-Blackwell 2010) 299-326

22 See, e.g., S. Ratnapala, 'Jurisprudence' (Cambridge: Cambridge University Press 2009) 212-241

23 R. Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' [2002] 29 Journal of Law and Society 632

24 R. Cotterrell, 'Law's Community' (Oxford: Oxford University Press 1995) 296

and legislators abandon long-standing legal maxims? Will factual research prevail if instinct and emotion are contrary?<sup>25</sup>

#### AXIOLOGICAL-ETHICAL RESEARCH OF IDEAL LAW

The presence of ideal law can be detected most clearly in hard cases on such controversial issues as legalisation of euthanasia, prohibition of abortion, legalisation of same-sex marriages or partnerships and many others. In such cases in one legal system two different jurists working with the identical formal law and in circumstances of the same real law can generate absolutely contrary results! How is it possible? Answer to this lies in dimension of ideal law. Each of us has her/his own unique perception of ideal law, of what is just and what is unjust. Two separate individuals have sometimes slightly different and sometimes totally opposite systems of values, which effect on law should not be derogated.

The methodological approach to the research of ideal law can be named as axiological-ethical. Its theoretical base is undoubtedly natural law theory<sup>26</sup>. The philosophical school of natural law is heterogeneous – two main branches can be distinguished: traditional natural law theory (Aristotle, Cicero, Augustine, T. Aquinas, etc.) and modern natural law theory (J. Finnis, L. Fuller, M. S. Moore, M. Murphy, R. Dworkin, etc.). The inner variety of this theory can be presented by pointing possible sources of natural law, which, from theory to theory, varies from eternal cosmic order and eternal law of God to natural requirements of life, self-evident values and practical reason<sup>27</sup>. Nevertheless, despite all theoretical differences, the core of natural law theory is the statement, that positive (formal) law is subordinated to natural (ideal) law.

Axiological-ethical research is utterly challenging. What methods should be used to analyse eternal cosmic order or eternal law of God? Other categories, such as natural requirements of life, self-evident values and practical reason are challenging to comprehend as well. Such kind of research is much more philosophical than strictly scientific.

#### (IM)POSSIBILITY OF METHODOLOGICAL SYNTHESIS IN LEGAL RESEARCH

Keeping in mind all the three dimensions of legal phenomena (formal law, real law and ideal law) and corresponding methodological doctrinal, socio-legal and axiological-ethical approaches, we can finally try to unfold the holistic analysis of methodological synthesis in legal research. In order to complete such task, a hypothesis can be formulated and verified: elimination of any one of these three methodological approaches from the domain of jurisprudence will preclude the possibility of thorough research of legal reality.

Can the doctrinal research of formal law be eliminated from legal science? Considering the interpretive nature of legal phenomena and significance of positive law, the answer on this question

25 J. Palomar, 'The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says "Cease Fire!"' [1999] Vol. 31 No. 2 Connecticut Law Review 526 (as cited in M. Salter; J. Mason, 'Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research' (Dorchester: Pearson Education Ltd. 2007) 164)

26 See, e.g., B. Bix, 'Natural Law Theory' In D. Patterson (ed.) 'A Companion to Philosophy of Law and Legal Theory' 2nd edition (Oxford: Wiley-Blackwell 2010) 211-227

27 S. Ratnapala, 'Jurisprudence' (Cambridge: Cambridge University Press 2009) 124

is negative despite all harshest criticism doctrinal approach is receiving. However such criticism should be accepted very seriously: scholars should clearly understand what doctrinal research can and what can not do. Moreover, this methodological standpoint should not artificially undermine other two approaches to legal research, but rather seek integrate them and be integrated in them. Only then the challenges of contemporary legal science could be met.

What about socio-legal research? The examination of real law is impossible without this approach, which opens the door for law in social sciences and for social sciences in law. Despite all the drawbacks mentioned above, 'empirical research must be pursued and its methodologies further developed and refined. For it is only empirical research that can yield facts to reveal whether the assumptions upon which we base our laws may be specious.'<sup>28</sup>

Proceeding to axiological-ethical research of ideal law, at least three methodological attitudes on this approach can be distinguished: (1) 'true' meaning of law can be revealed with doctrinal legal methods only; application of other methods is outside of the scope of legal science; (2) jurisprudence is not possible as a *science* without empirical socio-legal methods; (3) scientific practice is more (in case of doctrinal research) or less (in case of socio-legal research) subjective; each jurist has unique perception of ideal law, which in one way or another inevitably influence her/his legal research and because of that axiological-ethical aspects should be necessarily taken into account. Keeping in mind these positions, legal scientists have at least two options: (1) deliberately ignore the problem of ideal law and continue to hold doctrinal view an legal science – legal scholar 'objectively' discover 'true' meaning of law by applying specialised scientific interpretive methods; (2) leastwise start to consider the place of axiological-ethical research in the methodology of legal science. Nevertheless the second path is particularly challenging, without the research of ideal law holistic perspective will not be obtained. Achievements made in social philosophy and interdisciplinary team work of specialists form all the related disciplinary fields may have the right potential for such profound task.

## CONCLUSION

First tentative steps towards methodological synthesis in legal research are already made. The research has shown that holistic perspective on jurisprudence should include at least three methodological approaches: the doctrinal research of formal law, the socio-legal research of real law and the axiological-ethical research of ideal law. Any of these three is not self-sufficient and without any one of them the thorough research of legal reality is not possible.

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## THE PRESENCE OF POLITICAL ASPECTS IN THE LEGAL RESEARCH ON INTERNATIONAL PRIVATE LAW

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**Abstract.** The purpose of this conference paper is, first of all, to share experience and maintain an academic discussion with other legal researchers – how to carry out and deal with the interdisciplinary elements in legal research, secondly, what methods use in order to analyse these elements, but at the same time not converting legal research into political one, and thirdly, to provide practical guidelines and examples derived from the legal research (PhD thesis). Accordingly, legal background for this conference paper are those issues that derives from commercial contracts concluded by the state and private party, and arbitration as a dispute resolution mechanism chosen by these parties. Based on methodological, empirical and practical aspects, in summary of this conference paper recommendations and insights will be provided.

**Keywords:** legal research, state contracts, arbitration

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### INTRODUCTION

Generally, arbitration is a method of a dispute resolution for international merchants. At the present time states can freely conclude international commercial contracts with an arbitration clause and opposite party can be secure that the state will not use its legal instruments, for example - state immunity, against it. Businesses chose arbitration (over litigation in the national court) because of its confidentiality, flexibility, privacy and in order to reach an acceptable resolution with the least disruption to their business. States concludes commercial contract with only one purpose – for the common good of the society. This means that, first of all, in order to examine “how” these contracts are concluded, methods of legal research should be applied, and secondly, to examine “why” states concludes international commercial agreements with an arbitration clause, two political concepts – “common good” and “state interests” should be analysed. Moreover, it is necessary to disclose the content of the concepts and discover link between these concepts. Accordingly, above mentioned fundamentally different aims should be the reason why dispute resolution where one of the parties is the state should be treated differently. But whether these factors are in favour of the state? Whether it is already generally accepted that arbitration is the most suitable dispute resolution mechanism for the cases, where one of the parties is the state, or is there any exceptions? And what is the justification for such exceptions? How to move forward in legal research in case if political aspects prevail?

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## LEGAL BACKGROUND

At the present time states concludes international commercial contracts and moreover, it is internationally recognized that the states can also freely conclude international arbitration agreements. This means that in case of dispute arising under international arbitration agreement, case will be heard in arbitration<sup>1</sup>. First and foremost, arbitration is known as a method of dispute resolution for international traders. Merchants choose arbitration due to the fact that this dispute resolution method will bring several advantages over court based litigation (for example, speed of resolution, flexibility, confidentiality, neutrality, enforcement). In the author's opinion, neutrality and enforcement could be nominated as predominant. "International arbitration is nationally neutral in the sense that there does not need to be a link between any party's place of incorporation or residence and the place of the arbitration. The parties can choose any place of arbitration, any applicable law, and any language for their arbitration. All of these elements can be neutral with respect to the parties."<sup>2</sup> And with respect to enforcement, it is particularly important in dealings with the state due to the fact that state can use its immunity from enforcement to avoid arbitral award.

Regarding state immunity it should be noted that before restrictive state immunity doctrine developed, leading was absolute state immunity doctrine, according to which "States enjoyed immunity before foreign courts with regard to any subject matter; that is to say, in the past, a State could not without its consent be made a defendant before a foreign court"<sup>3</sup>. Historically, "absolute immunity was granted in an age when the distinction between sovereign and non-sovereign activities was least manifest, given that State functions were at that time confined to the traditional spheres, of, say, legislation, administration, national defence, and the conduct of State-to-State political relations and that, as a result, it was possible and natural to regard 'State' activities as synonymous to with 'sovereign' activities. The growing participation of States in international economical activities fundamentally transformed the functions of State and that transformation resulted in a vastly different conception of the State."<sup>4</sup> According to the restrictive state immunity doctrine, immunity applies only for *acta iure imperii*, but for commercial contracts (*acta iure gestionis*) state cannot claim its immunity. This means that even if one of the parties is the state, both parties will be treated equally and in case if the state concludes commercial contract – *acta iure gestionis*, state will not be able to claim immunity. To distinguish whether contract has commercial nature, various legal methods must be applied.

When the state engages in commercial transaction with a private party and concludes arbitration agreement, waiver of immunity from jurisdiction can be proved without difficulty, but

1 For example, according to the International Chamber of Commerce International Court of Arbitration (hereinafter – ICC Arbitration) statistics for the past three years, in approx.10 % of cases at least one of the parties was a State or parastatal entity, 'ICC Statistics', available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>. It should be noted that ICC Arbitration is the most global arbitration institution, although there are several other international commercial arbitrations where disputes may be heard.

2 'Introduction to ICC Arbitration', available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/>.

3 X. Yang, 'State Immunity in International Law' (Cambridge University Press: 2012), p. 7.

4 Ibid, p.8.

regarding immunity from execution situation can be more complicated. There are some cases where courts states that “the obligation entered into by the State by signing the arbitration agreement [...] implies a waiver of the State’s immunity from execution”<sup>5</sup>, but mainly waiver of this immunity must be proved.

“Generally, it is accepted that the undertaking to arbitrate by a foreign State constitutes waiver of immunity from jurisdiction and probably also waiver of immunity from execution.”<sup>6</sup> In order to ensure waiver from both immunities, “[...] a party incorporating an arbitration agreement into a contract with a state party should include not just a reference to the relevant rules of arbitration, but additionally, specific requirements to the effect that immunity [i.e. from execution (author’s note)] is waived.”<sup>7</sup>

State immunity as a legal instrument on the one hand protects the state, but on the other hand, it creates a significant risk to the merchant. In dealings with the state private party cannot be secure whether in case of a dispute, it will be possible to bring a case to a court, and even if so, whether the judgement will be enforceable. This brief example shows that contractual relationships with the state are significantly different from general dealings with a commercial party.

#### DIFFERENT PURPOSES

States take decisions and acts differently from the private party. Even if these both parties should be considered as entirely equal, there are few aspects which should be taken into account. One must observe that “[...] these arbitrations often involve [...] a plethora of national and international interests – economic, political and even cultural”<sup>8</sup>. Even if some scholars argue that “the state’s participation in these commercial contracts is of a fundamentally economic nature”<sup>9</sup>, it is important to analyse the aspects that may arise from such different interests, because they may provide important insights for your legal research.

Political considerations may affect the content of the contract, strategy and even “may dictate that a state be represented by a lawyer who works for the state, or at a minimum, one who is admitted to practice in the state”<sup>10</sup>. Thus, such an analysis helps to better understand the party’s actions. “A state’s position in an arbitration on a politically sensitive issue is usually driven by the government’s political agenda. [...] States answer to different kinds of constituencies [...] electorate as a whole, members of the political party in power and supporters who helped government leaders attain power, or are helping them stay in power”.<sup>11</sup> Then the question is – whether the

5 Case Creighton v. Qatar July 6, 2000, cited in E. Gaillard, ‘State Entities in International Arbitration’ (IAI Series on International Arbitration No.4, Juris Publishing: 2008), p.179.

6 D. Chamlongrasdr, ‘Foreign State Immunity and Arbitration’ (Cameron May:2007), p.79.

7 N.Pengelly, ‘Waiver of Sovereign Immunity from Execution: Arbitration is Not Enough’, *Journal of International Arbitration* 26 (6), (Kluwer Law International: 2009), p.871.

8 B.Leon, J.Terry, ‘Special Considerations When a State Is a Party to International Arbitration’, *American Arbitration Association’s Dispute Resolution Journal*, [ February-April 2006], p.2.

9 I.Guevara-Bernal, ‘The Validity of State Contracts Arbitration: A ‘Law and Economics’ Perspective’, *Revista de Derecho Económico*, Pontificia Universidad Javeriana (Bogotá, No.2, December:2004), p.19.

10 B.Leon, J.Terry, ‘Special Considerations When a State Is a Party to International Arbitration’, *American Arbitration Association’s Dispute Resolution Journal*, [ February-April 2006], p.7.

11 *Ibid*, p.4.

best way to protect the public (state) interests is to resolve international commercial disputes in the arbitration?

“The approach to State contracts in international commercial arbitration is characterized by its oscillation between two contrasting tendencies, one economic; the other political.[...] The imperatives of the global economy have given rise to expressions intended to ensure that State parties take part in arbitration and uphold the commitment they have made when consenting to an international commercial arbitration agreement.”<sup>12</sup> As for the state, public interest is the main motive to conclude commercial agreement at all. This means that even if a state concludes international commercial agreements, it has been done without a view to make a profit; it is for the common good. Hence, most of the advantages, which we can identify in arbitration process (were both parties are merchants), will not be accessible in arbitration process, where one of the parties is a state. For example, confidentiality as the benefit of arbitration over court - “[...] the very presence of a State as a party to the arbitration raises a public interest because the nationals and residents of that State have an interest in how the government acts during the arbitration and in the outcome of the arbitration. Moreover, the existence of this public interest has obvious implications for the conduct of the arbitration: according to principles of human rights law and good governance, government activities should be subject to basic requirements of transparency and public participation.”<sup>13</sup>

Thus one may argue that the use of international commercial arbitration mainly brings benefits to the private companies and not the state. On the other hand, in cases when a private company enters into international commercial agreement without an arbitration clause, and state is opposite party, state can use other legal or political instruments in order to control the whole process, or, for example, avoid the execution of the contract. Therefore, for the legal researchers it is important to identify these political risks, analyze them and provide recommendations for practitioners.

#### COMMON GOOD AND STATE INTERESTS

Before Latvia withdrew its reservation to the European convention on International Commercial arbitration<sup>14</sup>, one of the draft law stipulated that “local government authorities before concluding the arbitration agreement shall transmit a draft to the Ministry of Environmental protection and regional development to obtain opinion from the State Chancellery that the arbitration agreement is in conformity with the state interest.”<sup>15</sup> Accordingly, State Chancellery would assess whether the arbitration clause included in the international commercial contract (in case if intended that contract would be signed between local authority and private party), is consistent with the

12 E. S. Romero, ‘ICC Arbitration and State Contracts in ICC’, International Court of Arbitration (Bulletin Vol.13 No.1: 2002), pp.59-60.

13 ‘Revising the UNCITRAL Arbitration Rules to Address State Arbitration’, International Institute for Sustainable Development, available at [http://www.iisd.org/pdf/2007/investment\\_revising\\_uncitral\\_arbitration.pdf](http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf).

14 ‘1961 European Convention on International Commercial Arbitration’, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-2&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en).

15 Draft law available in Latvian, ‘grozījums likumā “Par Eiropas konvenciju par Starptautisko komercšķirējtiesu”’, <http://titania.saeima.lv/LIVS11/saeimalivs11.nsf/0/ED4CEB6E5CF3B1A5C22579A00044FB8C?OpenDocument>.

public interests. The questions in this case are – what is the state interest (common good), how to determine it and after all, is it possible only from the content of the arbitration agreement identify whether the state interests will be protected?

‘Interest of the democratic state is to provide and develop a policy that is directed towards the common good. In order to establish whether the national interest is directed to the common good, it is first necessary to find out what is the common good of society. The main problem is that it is not possible to clearly define what constitutes the common good. First, the higher values are relative, and, second, different groups of individuals they define and perceive differently. The main risk is that the notion of “common good” can be filled with content that represents only the interests of the main political groups.<sup>16</sup> Even if “the public interest is not simply the sum of the individual interests, but also the advance of a healthy and functional community, one where the search of the private interests is balanced with the search of the community’s interests”<sup>17</sup>, it is necessary to analyse if only from the content of the arbitration clause is possible to determine whether state interests with this arbitration clause will be protected. Accordingly, it is necessary to analyse the concept of the terms - state interests and common good and the arbitration clause functions.

“It is equally clear that when a legislator speaks of a bill he proposes as “in the public interest” he is not speaking about people’s “interests” and not directly about “what people are interested in,” although both may be relevant.[...] Many who deny that there is a “public interest” assume that it must be either an interest or concern that all members of the public have, or something in which all persons are actually interested.”<sup>18</sup> “In many cases the legislator may find it very difficult or impossible to tell whether a piece of legislation is for the “common good”<sup>19</sup>. Similarly, in this situation, the arbitration clause (a mechanism for dispute resolution) affects only some part of the whole final result. Therefore, it is problematical to ascertain whether and how arbitration clause together with other factors will affect the state interests.

One can discover the scope of these terms from the philosophical legal point of view, but the conclusions do not answer the questions raised in connection with the arbitration clause. Thus, it can reveal what these terms means, but for the legal researcher it does not give an answers. In addition, it would be very difficult to prove any of the statements due to following reasons: state interests primarily affects the substance of the contract, its purpose, terms and conditions contained in the contract and parties’ tactics. Arbitration proceedings and the result can be considered as part of the overall impact on state interests, the arbitration clause itself do not have any legal impact, because the arbitration clause is only a legal instrument.

16 C. W. Cassinelli, ‘Some Reflections on the Concept of the Public Interest’, *Ethics*, Vol.69, No.1. (The University of Chicago Press: 1958), pp.48-61.

17 S. Hernan Ocampo, ‘The Common Good, the Common Interest and the Decision Making Process’, *International Management Review*, Vol.6, No.1 [2010] ,p.7, cit. Thompsen, 1994.

18 B.J. Diggs, ‘The Common Good as Reason for Political Action’. *Ethics*, Vol.83, No.4. (The University of Chicago Press: 1973), pp.285-286.

19 *Ibid*, p.290.

## CONCLUSION

Legal research in the field of international private law, especially in cases where state concludes international commercial contract with the private party and includes arbitration clause in this agreement, are faced with the political aspects and it can be argued that the political dimension of presence is actually inevitable. This conference paper shows practical examples on how political aspects can guide or redirect the legal researcher to find an answer one was searching for.

The analysis confirms that political aspects can significantly affect the agreement, dispute resolution, and enforcement. Therefore, political aspects in the legal research should be analysed and cannot be ignored, since they can significantly affect final results and actually expand the range of those aspects in which legal research cannot give an answer.

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## COULD SUPPLY CHAIN MANAGEMENT IMPROVE LEGAL PROCEEDINGS?

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**Abstract.** The justice authorities in several countries are faced with the challenge to deal with an increasing amount of legal cases with diminishing resources. It is not sufficient that a final judgment is well written and given by an independent tribunal, but the legal proceedings preceding the judgment must fulfil a wide range of criteria, including cost-efficiency and promptness. In this paper, the author aims to look into the production of justice, and relate it to an approach that is yet relatively unfamiliar with and in the legal context. The approach in question is Supply Chain Management, and the specific purpose of this paper is to discuss some of its aspects in the context of legal proceedings. First, the concepts ‘process’ and ‘supply chains’ are explained. After that, the legal proceedings are related to a holistic approach, integration and co-operation, flow, and customer focus. The paper will end with some concluding remarks on the implications for legal researchers.

**Keywords:** legal proceedings, processes, supply chain, supply chain management

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### INTRODUCTION

Delays and reverse case flow in legal proceedings are problems that many legal systems are struggling with. These issues have been made evident by the activity of the European Court of Human Rights (hereafter ‘ECHR’): violations of the right to a fair trial (set out in article 6 of the European Convention on Human Rights and Fundamental Freedoms (hereafter ‘the Convention’)) constitute about 44 % of all violation judgements.<sup>1</sup> Lengthy proceedings alone make up approximately 26 % of all violation judgments.<sup>2</sup>

The length is however only one of the elements that have to be considered when the quality of legal proceedings is evaluated. Both national legislation and international conventions contain a wide range of criteria that judicial bodies and other public authorities must pay attention to when handling legal cases and passing judgments. It can be challenging to fulfil all criteria in each case, and the task is rendered even more difficult by budget constraints and diminishing resources. It is a difficult equation to solve, and legislators, managers and researchers turn to foreign legal systems or other fields of knowledge than law to find solutions to the problem.

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1 European Court of Human Rights, ‘Overview 1959–2012 (Strasbourg: European Court of Human Rights, Public Relations 2013) 5

2 European Court of Human Rights, ‘Statistics 1959–2010: Statistics on judgments by State [accessed on 2014-02-11] 3 at [http://echr.coe.int/Documents/Stats\\_violation\\_1959\\_2010\\_ENG.pdf](http://echr.coe.int/Documents/Stats_violation_1959_2010_ENG.pdf)

One field of knowledge that has not yet given much attention to legal proceedings, but has the potential to provide solutions to some of the problems, is Supply Chain Management (SCM). Researchers in this particular field have for more than twenty years dealt with the issue of how to manage production of goods and services in such a way that customer and stakeholder requirements are met but valuable resources used sustainably. Since the core interests within SCM have some common features with the challenges that justice authorities are faced with, the purpose of this paper is to discuss some aspects of Supply Chain Management in the context of legal proceedings. For this purpose, a few of the most-cited journal articles about SCM were selected. The works of Petra Pekkanen (Ph.D.)<sup>3</sup> and Ana Lúcia Henriques Martins (Ph.D.)<sup>4</sup> will be used extensively in the discussion, since these researchers have studied the legal sector from perspectives related to Supply Chain Management. The author will in addition use the Finnish legal system as basis for parts of the discussion.

## LEGAL PROCESSES AND SUPPLY CHAINS

‘Supply Chain Management’ is a concept that has many different meanings, and a number of authors have tried to give it an all-embracing definition. One definition often referred to is the one established by the Global Supply Chain Forum, i.e. that SCM ‘is the integration of key business processes from end users through original suppliers that provides products, services, and information that add value for customers and other stakeholders.’<sup>5</sup>

Supply chain management as a managerial practice and a field of research can be said to have emerged from the observation that individual companies no longer compete as autonomous entities, but instead make up nodes in supply chains that compete with other supply chains.<sup>6</sup> Globalisation has led to a need to seek more effective ways to coordinate the flow of materials into and out of the company, and a defect-free product that is delivered to the customer in a faster and more reliable way has become simply a requirement to be in the market.<sup>7</sup> The coordination of supply chains, although external to the individual company, is what particularly interests researchers and managers in SCM. Before going further into some of the aspects of SCM, the two concepts ‘process’ and ‘supply’ will be presented in more detail.

Cooper, Lambert and Pagh defined ‘process’ as a ‘specific ordering of work activities across time and place, with a beginning, an end, clearly identified inputs and outputs, a structure for action.’<sup>8</sup> Different functions within an organisation, or several organisations, are engaged in the

3 Lappeenranta University of Technology, School of Industrial Engineering and Management. Profile available on <http://research.lut.fi/converis-lut/publicweb/person/9622?show=PUBLICATION&pubyear=&type=All&endDate=&pubyear=&lang=1>

4 University Institute of Lisbon, Business School. Profile available on [http://ibs.iscte.pt/en/index.php?pt=faculty\\_management\\_department&op=SITE\\_OP\\_FORM&id=67#tabs-1](http://ibs.iscte.pt/en/index.php?pt=faculty_management_department&op=SITE_OP_FORM&id=67#tabs-1).

5 Referred to by D. M. Lambert and M. C. Cooper, ‘Issues in Supply Chain Management’ [2000] 1 *Industrial Marketing Management* 66

6 D. M. Lambert and M. C. Cooper, ‘Issues in Supply Chain Management’ [2000] 1 *Industrial Marketing Management* 65

7 J. T. Mentzer et al, ‘Defining Supply Chain Management’ [2001] 2 *Journal of Business Logistics* 2

8 M. C. Cooper, D. M. Lambert and J. D. Pagh, ‘Supply Chain Management: More than a New Name for Logistics’ [1997] 1 *The Journal of Logistics Management* 5

sequence of activities that transforms inputs into outputs, which are hoped to be of greater value to the organisation than the original inputs.<sup>9</sup> The outputs can be physical goods or intangible services, or a combination of goods and services.

Legal proceedings are typical processes (from a SCM perspective) since they are sequences of events, regulated by law, that progress through particular subsections with a decision (judgment) as their final aim.<sup>10</sup> The proceedings can also be further divided into sub-processes, which all have their own specific output and input. In the overall process, the input could be defined as the claims filed by a party in a dispute, or the appeal against an administrative decision. These events spark the activities that follow within the justice organisations. In the criminal procedure however, the trial phase in its broad meaning extends to the investigation and the prosecution activities.<sup>11</sup> It is reasonable to include the investigation and prosecution in the overall process, since this would best reflect the practice of ECHR: the right to a fair trial is guaranteed from the moment when ‘the official notification [is] given to an individual by the competent authority of an allegation that he is suspected of having committed a criminal offence’, alternatively from the moment ‘the situation of the [suspect] has been substantially affected because of that same suspicion’.<sup>12</sup> From the viewpoint of the organisations dealing with criminal offences, the input in the process could be defined as the reporting of an offence, or the observation by investigating authorities that an offence has been committed. The output of a legal process is the judgement.

If a process is made up of the activities performed to transform input into output, then the ‘supply chain’ is made up of the organisations performing the transformation activities. The processes cut across the supply chain, thus business processes become supply chain processes.<sup>13</sup> Mentzer et al. described the supply chain as ‘a set of three or more entities (organisations or individuals) directly involved in the upstream and downstream flows of products, services, finances, and/or information from a source to a customer.’<sup>14</sup> It is worth to notice that supply chains exist whether they are managed or not.<sup>15</sup> The supply chain for an offer (a product or service) is often illustrated as a line of entities, but the reality is a bit more complex; each entity is usually part of several supply chains, and there might also be what Lambert and Cooper call supporting members, i.e. ‘companies that simply provide resources, knowledge, utilities, or assets for the primary members of the supply chain.’<sup>16</sup>

The supply chain of legal proceedings should be quite simple to draw up, since the structure is regulated by law and the possible supply chain members limited to a few public or private entities.

9 Adapted from J. T. Mentzer et al, ‘Defining Supply Chain Management’ [2001] 2 *Journal of Business Logistics* 15; and F. R. Jacobs and R. B. Chase, ‘Operations and Supply Chain Management’ 13<sup>th</sup> ed. (New York (NY): McGraw-Hill/Irwin 2011) 144

10 (author’s translation) D. Frände et al. ‘Prosessioikeus’ 4<sup>th</sup> ed. (Helsinki: Sanoma Pro Oy 2012) 49

11 D. Frände et al. ‘Prosessioikeus’ 4<sup>th</sup> ed. (Helsinki: Sanoma Pro Oy 2012) 64

12 N. Mole and C. Harby, ‘The right to a fair trial – A guide to the implementation of Article 6 of the European Convention on Human Rights’ 2<sup>nd</sup> ed. (Strasbourg: Council of Europe 2006) 19-20

13 M. C. Cooper, D. M. Lambert and J. D. Pagh, ‘Supply Chain Management: More than a New Name for Logistics’ [1997] 1 *The Journal of Logistics Management* 5

14 J. T. Mentzer et al, ‘Defining Supply Chain Management’ [2001] 2 *Journal of Business Logistics* 3-4

15 J. T. Mentzer et al, ‘Defining Supply Chain Management’ [2001] 2 *Journal of Business Logistics* 4

16 D. M. Lambert and M. C. Cooper, ‘Issues in Supply Chain Management’ [2000] 1 *Industrial Marketing Management* 70

The actual organisations involved in the supply chain may vary depending on the matter in question, but could for example be investigating bodies such as the police or customs authorities, supporting services such as law firms or legal-aid offices, and the actual judicial bodies such as courts of different levels. What will be discussed further is some of the elements that are often connected to the management of supply chains.

### A holistic view

SCM researchers have pointed out that organisations need to move away from a functional silo thinking,<sup>17</sup> (i.e. activities are divided between functional areas and performed in isolation) and instead adopt a holistic view on itself and the environment. Since competition nowadays is taking place on the supply chain level, the success of a specific supply chain depends on the performance of the supply chain as a whole and the individual entities within it. Lambert and Cooper stated that the 'objective of SCM is to create the most value, not simply for the company but for the whole supply chain network including the end customer.'<sup>18</sup>

ECHR's practice to consider the process in total when evaluating the fairness of proceedings implies that a prompt handling of a case in one single phase of the process is insignificant if the process in total has taken too long. Similarly, improvement efforts in only one part of the process might not have as much impact as if improvement is made with the whole process in mind.

### Integration and co-operation

The management of the supply chain involves multiple firms and activities and the coordination of activities across functions and firms in the supply chain.<sup>19</sup> One weak link in the supply chain, for example in a situation where one supplier delivers components of low quality or fails to deliver on time, could harm the whole supply chain. To avoid such harm, entities develop close and long-term relationships with their customers and suppliers. Integration and co-operation is needed to create value that benefits all entities involved in the supply chain. The links between two or more entities often involve some kind of sharing – of resources, information, risks and rewards, processes, etc. Disintegrated supply chains that are neither streamlined nor managed, can result in frictions and thus a waste of valuable resources.<sup>20</sup>

In legal proceedings, the structure of the supply chain is presumably stable for a long period of time since supply chain members are forced by law to have 'transactions' (of information and physical documents) with certain organisations further up and down the chain. There are no alternative suppliers to turn to if, for instance, a judge is unhappy with the work of the national prosecution office. The integration of processes and co-operation between supply chain members

17 D. M. Lambert and M. C. Cooper, 'Issues in Supply Chain Management' [2000] 1 *Industrial Marketing Management* 66-67

18 D. M. Lambert and M. C. Cooper, 'Issues in Supply Chain Management' [2000] 1 *Industrial Marketing Management* 81-82.

19 J. T. Mentzer et al, 'Defining Supply Chain Management' [2001] 2 *Journal of Business Logistics* 17

20 D. M. Lambert and M. C. Cooper, 'Issues in Supply Chain Management' [2000] 1 *Industrial Marketing Management* 81

might however be difficult due to the culture in justice organisations: Pekkanen and Niemi noted that there is a strong emphasis on the autonomy and self-management of court employees, and the most important quality criterion of rulings is objectivity.<sup>21</sup> Together with fixed roles and duties of different participants, this emphasis on objectivity creates silo thinking and restricts possibilities to co-operate in the production process.<sup>22</sup>

## Flow

Flow refers to the movement of products, services, finances, and/or information within and between organisations. The word in itself indicates that the movement is continuous, without stagnation. Flow in the supply chain can go in both directions, both up and down the chain, and it is the element that connects the many customer-supplier relationships, since the material, services, finances and information regarding a particular offer is shared (or should be shared) by all entities involved in the production of that offer.

The judgements given by ECHR illustrate that the production of justice in some countries suffer from the lack of flow. Martins and de Carvalho examined value creation in Portuguese courts and identified backlogs and bottlenecks that were caused by court personnel and constraints in physical facilities.<sup>23</sup> They also found that complex and time consuming cases were delayed at the judge's table, and they proposed inappropriate performance criteria for the evaluation of judges' work as a possible explanation.<sup>24</sup>

## Customer focus

To enable flow, the supply chain (and movements within it) must be synchronised with the requirements of customers;<sup>25</sup> otherwise the supply chain will get loaded with products that are unwanted. SCM can be said to drive supply chain members to have a customer orientation and to focus on creating value for the customer.<sup>26</sup> Enhanced customer value and satisfaction is proposed to lead to enhanced competitive advantage for the supply chain as a whole, as well as each member firm.<sup>27</sup>

In legal proceedings, many individuals and entities (among others litigants, state officials, witnesses, the media, tax payers, attorneys, police agencies, victims of criminal cases, and the general public)<sup>28</sup> might be involved and/or have interests in the matter. The customer requirements

21 P. Pekkanen and P. Niemi, 'Process performance improvement in justice organizations – Pitfalls of performance measurement', [2013] 2 International Journal of Production Economics 606

22 P. Pekkanen and P. Niemi, 'Process performance improvement in justice organizations – Pitfalls of performance measurement', [2013] 2 International Journal of Production Economics 606

23 A. L. Martins and J. C. de Carvalho, 'Creating Value in a Services Supply Chain', Proceeding of the 10<sup>th</sup> International Symposium on Logistics 3–5 July 2005, Lisbon 710

24 A. L. Martins and J. C. de Carvalho, 'Creating Value in a Services Supply Chain', Proceeding of the 10<sup>th</sup> International Symposium on Logistics 3–5 July 2005, Lisbon 710

25 Stevens [1989] in J. T. Mentzer et al, 'Defining Supply Chain Management' [2001] 2 Journal of Business Logistics 6

26 J. T. Mentzer et al, 'Defining Supply Chain Management' [2001] 2 Journal of Business Logistics 7

27 J. T. Mentzer et al, 'Defining Supply Chain Management' [2001] 2 Journal of Business Logistics 15

28 P. Pekkanen and P. Niemi, 'Process performance improvement in justice organizations – Pitfalls of performance measurement', [2013] 2 International Journal of Production Economics 606

and value could therefore be quite difficult to define and different perspectives need to be considered and the customers redefined for the different processes and aspects of court operations.<sup>29</sup> Martins and de Carvalho recognised that the court in every case will fail to supply value to at least one of the parties of the case, but that the final solution will anyway fulfil the essence of value for society, since the ‘justice’ provided transforms into a social equilibrium that enables life in society.<sup>30</sup>

## CONCLUDING REMARKS

In this paper, the author aimed to look further into the production of justice, and relate it to a Supply Chain Management. Some of the concepts and aspects included in SCM was presented and discussed in relation to legal proceedings. In the following, the implications for legal research will be discussed.

Supply Chain Management might lack a generally accepted definition and many authors have contributed with more or less different versions to explain its elements, objectives and application. When it comes down to the bottom-line though, SCM is just another way of perceiving the world and a tool for organising human activity. The paper has, however, not presented any particular models or steps for how to manage supply chains, integrate with other entities, create a smooth flow, or define the customer requirements.

The structure of the legal supply chain and the progress of legal cases within the chain are regulated by the law, and outside the control of the members of the supply chain. Delays and reverse flows in legal proceedings, together with the more general task to balance many different quality criteria, are real world challenges that need to be solved by legislators, managers and researchers. If legal researchers take on the SCM ‘glasses’ when studying for example how regulations affect judges’ motivation to deal with difficult cases, or analysing what the procedural law should be in the future, they might get new insights and see the problems in a new light.

For researcher in Supply Chain Management on the other hand, the legal proceedings could be seen as another production environment where SCM can be implemented in order to gain new insights that could expand the field of knowledge and develop new managerial tools. Due to the specific characteristics of public organisations and the legal profession, the SCM researcher would probably benefit from growing an understanding of legal rules, the law-making process and application of justice in real cases. Legal research might therefore be very helpful for researchers who want to understand the characteristics of this yet unexplored environment.

29 P. Pekkanen and P. Niemi, ‘Process performance improvement in justice organizations – Pitfalls of performance measurement’, [2013] 2 International Journal of Production Economics 606

30 A.L. Martins and J.C. de Carvalho, ‘Creating Value in a Services Supply Chain’, Proceeding of the 10<sup>th</sup> International Symposium on Logistics 3–5 July 2005, Lisbon 709

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## BOUNDED RATIONALITY AND THE LAW: HOW AFFECTED IS CONSTITUTIONAL LAW BY HEURISTICS AND BIASES?

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**Abstract.** Legal scholarship is stuck in what economist and Nobe prize laureate Ronald Coase called „stamp collecting“. It consists mainly in analyzing positive law and its placement in the legal hierarchy. The perspective from Behavioural Law and Economics is different: instead of being purely descriptive, this method offers among others the opportunity to adjust rules and their effects to the condition of the human being and his sometimes „irrational“ reactions. In particular the analysis from Behavioural Law and Economics may provide a neutral and technical way to evaluate the effects of legal projects and could therefore be a helpful additional tool in judicial policy.

**Keywords:** behavioural law and economics, heuristics, biases, constitutional law

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### I. INTRODUCTION

On the 18<sup>th</sup> of May 2013 the controversial french Law on same sex marriages was published in the Official Journal.<sup>1</sup> This law provides the possibility for human beings of same sex to conclude marriage, implying the right to adopt a child, to chose a family name and to celebrate the act in front of a french mayor. France is now the 9<sup>th</sup> country in Europe and the 14<sup>th</sup> country in the world to legalize same sex marriage. The law on same sex marriages was a core project of the socialist government, which came into power with a large majority in 2012. On the 26<sup>th</sup> of May, again, a huge demonstration took place in Paris, reuniting over 150 000 protesters.<sup>2</sup> However, the socialist government was totally surprised by the great number of protesters and the division this law created.

From the point of judicial policy it can be crucial for governments in the future to foresee the effect of laws in the population in order to adjust reaction. Keeping already known discussions on religion, common values or morals aside - may there exist more technical and neutral tools to evaluate the effects of laws in society? May in particular the analysis from Behavioural Law and Economics be helpful?

Let me start with some introducing remarks about the nature of the questions raised here. What does economic and behavioural mean in our context?

Legal scholarship has traditionally a quite narrow field of action. It consists mainly in bringing new legal phenomena in the right order with the existing ones. Laws, legal decisions, projects of law have to be adjusted to the existing system by an analysis of the existing and the new and

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1 LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.

2 [http://www.nytimes.com/2013/05/27/world/europe/thousands-march-in-france-against-gay-marriage.html?\\_r=0](http://www.nytimes.com/2013/05/27/world/europe/thousands-march-in-france-against-gay-marriage.html?_r=0) (last consultation on 12<sup>th</sup> March 2014).

avoiding contradictions. This is what Nobel Laureat Ronald Coase once called „Stamp collecting“.<sup>3</sup> Lawyers are stamp collectors. They don't create knowledge, they administrate it. I would rather call it landscape gardening. Lawyers are designers. Not very creative ones, but still designers of legal reality.

This changed in Coase's opinion, when The Law & Economics Movement started its activity about 50 years ago. Law and Economics is the way of analyzing the law by the application of criteria from economic theory based on models used by economic theory.<sup>4</sup> One of the underlying models of neo-classical economic theory is that of the rational actor or the homo oeconomicus. This model reduces the human being and its behaviour to mainly three guiding principles: "[A]ll human behavior can be viewed as involving participants who [1] maximize their utility [2] from a stable set of preferences and [3] accumulate an optimal amount of information and other inputs in a variety of markets."<sup>5</sup> This way of thinking has been applied not only to Economic Law, Antitrust law but also to Constitutional Law. In the latter field James M. Buchanan e.g. has developed a theory of public choice in analogy to assumptions made by economic theory.<sup>6</sup> He asks, if there may exist a logical economic explanation for the raise of democratic political institutions and, finally also for Constitutions – on the basis of the assumption that human beings are individualistic.

The Behavioural Law and Economics Movement challenges the economic approach by trying to humanize the homo oeconomicus and turning him into a more realistic actor, the homo sapiens again (Thaler). This movement applies results from psychology to legal phenomena by stating that the model of the rational actor is incomplete and that „real people“ differ from it and succumb to „bounds“ that question in their eyes the central ideas of utility maximization, stable preferences, rational expectations, and optimal processing of information. „People can be said to display bounded rationality, bounded willpower, and bounded self-interest.“<sup>7</sup>

This assumptions are based on the works of the american psychologue Herbert A. Simon, who destroyed the image of human being as a maximizer of utility. In his view, people apply a technique he calls „satisficing“ (a combination of sufficient and satisfying), when being confronted with circumstances in which an optimal situation cannot be determined. Satisficing means that they decide themselves for a satisfying option instead of keeping to look for an unsure optimal outcome.<sup>8</sup> The other big field are the works by Daniel Kahneman and Amos Tversky (of course others are implied too) on heuristics and biases.<sup>9</sup> They challenge the rational actor model by proving that people, even when acting rational, are still prone to biases, which means irrational behaviour and to so called rules of thumb, the heuristics. Well known biases are e.g. The Halo-Effect, which means that people judge others on the first impression (clothes, way of talking etc.) even concern-

3 „Much, and perhaps most, legal scholarship has been stamp collecting. Law and economics, however, is likely to change all that and, in fact, has begun to do so.“, Coase, Law and Economics at Chicago, in: 36 Journal of Law and Economics, 1993, p. 254.

4 Posner, Economic Analysis of Law (1998), p. 3, 4.

5 Becker, The economic approach to human behaviour, p. 14.

6 Buchanan, The Calculus of Consent, p. 37.

7 Jolls, Sunstein, Thaler, Stanford Law Review Vol 50, p. 1476.

8 Simon, Psychological Review 63 (2) , p. 129 (136).

9 See for an overview: Kahneman, Slovic, Tversky (ed.), Judgment under uncertainty: Heuristics and biases.

ing subjects (competence e.g.) without having additional information. The Availability heuristic is the phenomenon that people tend to overweigh recent information when judging a situation because they overestimate the fact that the information that can be recalled must be more important for the solution. Finally, the Endowment Effect describes the phenomenon that people who own things tend to overestimate its value in relation to the real market price due to the personal affection they have for the good, for example houseowner or owners of old cars.

## II. THE IMPACT OF THE ECONOMIC APPROACH ON CONSTITUTIONAL LAW

The Law and Economics Movement has had its effects in German and French scholarship<sup>10</sup>, but rather little in Constitutional Law even though certain scholars confirm, that the interest is rising.<sup>11</sup> Even though the opposition of German Constitutional Law to Law and Economics has been the most fervent, also the Behavioural Law and Economics Movement, criticizing the pure economic approach, hasn't had the merited impact.<sup>12</sup>

This may surprise because at a first glance the parallelism between economic theory and the Constitutional Law seems quite obvious. Even though the logic of the two fields is quite different, there are still some common points.

When I started research in the field of behavioural law and economics I always found intriguing several „coincidences“: First, that the rise of the Constitutional State falls in the same epoch as the rise of neo-classical economic theory. The declaration of Independence coincides with the publication of Adam Smith's book „The Wealth of Nations“, 1776.

The second coincidence is the application of models. What the rational actor is for economic theory is the psychological assumption in Constitutional Law about the willingness of a people to constitute itself as nation or an entity. From Aristotle and Cicero to Hobbes, Kant, Rousseau, Hegel and Durkheim the question has been if people unite themselves because of a natural need of society or because of fear from others. Both are psychological conditions.

Third, Constitutional Law parts from a certain model of human being: American Constitutional Law knows the pursuit of Happiness, the German Basic Law is based on the human being keen on developing its capacities and personality, all part of his dignity of man. Fourth coincidence: classic economic theory as Constitutional Law is itself inspired not by an evolutionary approach, responding to changes, adaptation etc. but by status quo preserving. They both tend to avoid disturbance, economic theory by the idea of equilibrium (Pareto-Optimum, Kaldor-Hicks), Constitutional Law by fostering legal peace (Rechtsfrieden) and outbalancing conflicts between different interests. The German Constitutional Court (BVerfG) has made the evaluation of the proportionality of state interference of any kind a leading constitutional principle. In the words of a Behavioural Economist: both are status quo biased, they imply a natural preference for the existing. And as we look on both of them from the point of view of Luhmann's System theory, we may acknowledge: they did quite well, concerning the goal of self-preservation. Both, capitalism and the Nation State

10 For Germany this is due to publications as Horst Eidenmüllers „Effizienz als Rechtsprinzip“.

11 Lüdemann/Magen, preprint 2008/41, p. 4.

12 Fiebig/Lüdemann, Juristenzeitung Nr. 2 1997, p. 85.

are (despite a large number of critics) still the reference as to legal and economic organization of society.

Historically, all these coincidences may not surprise. As James M. Buchanan states, „both the theory of democracy and the theory of the market economy are products of the Enlightenment, and, for the eighteenth-century philosophers, these two orders of human activity were not to be discussed separately. The democratic State was conceived as that set of constraints appropriate to a society which managed its economic affairs largely through a competitive economic order, in which the economic interests of individuals were acknowledged to be paramount in driving men to action.“<sup>13</sup>

Despite these „coincidences“, the logic of economic theory and Constitutional Theory differs most evidently in one of the main fields of Constitutional Law: as far as human or basic rights are concerned. While the latter might be seen also as „ressources“ or „goods“ – economically spoken – they are, however, not „rare goods“. In fact, they are, - like the air or the sun – given to anyone who is concerned by them. The German Basic Law makes a difference between basic rights given to Germans (and by the application of European Law also to citizens of the European Union), such as the right in Art. 12 GBL, the right to choose and to exercise a profession, and rights given to every human being – such as the dignity of man in Art. 1 GBL or the right to have access to jurisdiction (Art. 19 IV GBL). The main difference lies therefore in the form of distribution. Constitutional Law distributes as a sort of „legal monopoly“ ressources (or rights) in endless dimensions, while economic theory deals with the allocation of ressources or goods, which are endless or even rare. The example of same sex marriages evoked above illustrates it: the basic right concerning protection of family and marriage (as it is guaranteed for example in Art. 6 GBL) is „distributed“ to a new group, couples of same sex, to profit from the same recognition as couples of different sex. The allocation of the ressource „recognition“ or „equal treatment“ of same sex couples doesn't exist because of any sophisticated process of economic theory. It exists because of non-economic reasons a societal progress in a certain debate. Freedoms, simply said, are given by state without the risk of running out in the near future.

The relationship between the human being designed by Behavioural Law economists is much nearer to Constitutional Law than the homo oeconomicus model. The Citizen is indeed very different from the good consumer. He does things irrational from an economic point of view. He fights in wars risking his life. He demonstrates on the street for liberty and freedom, which, as we have seen in Ukraine some weeks ago is on a short-term-scale a life-threatening investment and on the longterm-scale a at least unsecure investment in democracy. So why take the risk? Democracy can only be thought, when people are seen as irrational actors as well, as irrationally means virtuous from a democratic point of view, living solidarity, altruism and risk-taking.

### III. THE BEHAVIOURAL EXPLANATION FOR PROTESTS AGAINST SAME SEX MARRIAGES

Economic theory therefore seems little to offer for the explanation of same sex marriages from a Constitutional Law point of view and it can't explain the protests taking place during and after the vote of the same sex marriages law in France as well. Protest against a law seems to be

<sup>13</sup> Buchanan, op. cit, p. 24.

a quite obvious and self-explaining phenomenon in democracy. From an economic point of view, this behaviour is however only explainable, when personal resources and their diminution are at stake. This isn't the case here. Why are people demonstrating against same sex marriages, as they have no direct profit from it? They are loosing by demonstrating: they could sit in Cafés, go in museums, participate or allocate in cultural, leisure etc events. Same sex couples do have an interest in demonstrating in favor of adoption of this law, as they gain legal resources, such as the right for adoption, or – later – access to medical assisted procreation.

Therefore the application of tools from Behavioural Law and economics could be more suitable for our case. Again, leaving aside arguments from religion, morals and family values the distress caused to the protesters by the enlargement of legal recognition to same sex couples can be seen in a purely behavioural way.

The main explication for the protesters behaviour could be that of „Loss aversion“, the phenomenon that „losses weigh more heavily than gains“<sup>14</sup>. This could also be the case by comparison. When others get the same, ours is not as valuable anymore. We all know the example: We are happy when we get paid 20% more on our salaries, but get depressed when we discover that our colleagues, neighbours etc. actually got 40% more. But from a behavioural point of view applied to legal matters, a loss can be something completely virtual or idealistic as well. Married couples of different sex do profit from certain legal benefits, such as tax cuts and the right to adoption. They don't lose anything when the others profit from the same status. However there could be a feeling of virtual loss as well. By applying the same standards to couples of same sex, this could mean for couples of different sex, that their way of life, being longtime the only one which benefited from a special legal status, is now devalORIZED.

#### IV. RÉSUMÉ

Of course, this is only one explanation. The other is about values in a more general way, assuming that it is part of the nature of man to have values, to share them and to demonstrate their commitment. Even if it doesn't make any sense from the economical point of view. Anyway, this example shows, that conflicts can be seen from the psychological biases view. Maybe conflicts could have been prevented. It should interest governments, legislators etc. which effect a law proposal could have, as to adjust their policy, their reaction etc. And this is just, what I intended to demonstrate. As the swiss scholar Klaus Mathis states: an evaluation of each legislation from an economic or behavioural economic point of view should be a sort of „minimal standard“.<sup>15</sup>

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<sup>14</sup> Jolls, Sunstein, Thaler, op. cit., p. 1484.

<sup>15</sup> Mathis, *Effizienz statt Gerechtigkeit?*, p. 214.

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## RESEARCH BIOBANKS' IN LITHUANIA: A QUESTION OF ITS HISTORICAL, SOCIAL, ETHICAL & LEGAL PERCEPTION

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**Abstract.** The purpose of this paper is by analysing the major social, historical and legal factors, which influence applicable models of research biobanks (i.e., a collection of human bio-sample and linked information, used for future research purposes) in various countries, find the best solution for legal framework in Lithuania. Recent researches have shown that contemporary medicine is moving from “reactive approaches” centred on disease therapy to personalized, predictive, preventive and participatory medicine (i.e., *P4 Medicine* or *asymptomatic predictive medicine*<sup>1</sup>), which focuses on the maintenance of health. In this transitional period research biobanks have the real potential to become important source for helping to drive this change in healthcare delivery in the country. Undoubtedly, implementation of the biobanks would not only raise the level of research and personalized medicine in Lithuania, but might also have positive impacts for the economy by attracting big pharmaceutical companies to the country, create work places, etc. However, based on various surveys of all EU countries the awareness of biobanks by society is relatively low<sup>2</sup>. Therefore, in order to build a better understanding and social perception, many social, ethical and legal problems must be analysed and solved. The main focus in this paper will be made on the comparative study of the definition of a biobank, which would allow us to crystallize major legal problems – a starting point for a proper legal framework. Furthermore, it will allow us to decide if this relatively new institute cannot be regulated under existing legal norms in Lithuania and if traditional theories, socially acceptable and used in medicine’s practise, such as informed consent, cannot be “borrowed” also for research biobanks.

**Keywords:** biobank, consent, personalized medicine, genetics, DNA.

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### INTRODUCTION

The historical retrospective shows that society tends to reject any attempts to regulate a new sphere, which it does not understand or understand improperly. It takes a lot of efforts to convince that legal norms are really needed, because during the past ages the laws only reflect to the already existing practise, i.e. it always started as morally acceptable rules, which after a long use were transformed to what we call the laws. Whereas, nowadays the world spins too fast in order to wait for the habits and practise to form before creation of the laws. For this reason, the laws are created based on the needs of the society even before the majority of them understand

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1 National Consultative Ethics Committee for Health and Life Sciences. 'Ethical issues raised by collections of biological material and associated information data: "biobanks", "biolibraries"'. Opinion No.77, p. 9.

2 European Commission, 'Biobanks for Europe: A Challenge for Governance' (Luxembourg: Publications Office of the European Union 2012) 25.

about it and evaluate all risks and benefits, if certain rules would work in practise, instead of being “dead-norms”, i.e. the norms, polluting the law<sup>3</sup>, etc. So it is the moral, if not purely legal, task of the legislators, lawyers and other professionals to prove that positive rules are needed in order to allow the progress as well as to ensure the protection of the society itself. Understanding of any social, ethical or legal problems requires a proper understanding of the phenomenon itself, in this case – understanding of the biobanks.

#### A DEFINITION OF BIOBANK AS A BASIC GROUND FOR LEGAL STUDY

It would be practically impossible to find a perfect definition of a research biobank in any national or international legal document. The definitions and its understanding vary from country to country, from one legal document to another, in such a way creating the obstacles for a common legal framework at least on the EU level. In addition to that it make harder to cooperate for researchers, who are willing to get the knowledge about various diseases, its treatment, risks, progress and etc.

Despite this diversity the definitions used around the world theoretically could be grouped into four categories:

*First, a direct definition of the biobank in legislation.* E. g., in Norway the definition ‘biobank’ includes human biological material, such as human tissues, cells, body parts, blood, etc., without any connection to the medical data<sup>4</sup>);

*Second, an indirect definition of the biobank in legislation.* E. g., Estonian gene bank is defined as a database established and maintained by the chief processor consisting of tissue samples, descriptions of DNA, descriptions of state of health, genealogies, genetic data and data enabling the identification of gene donors<sup>5</sup>; or Latvian database of the genes’ donors<sup>6</sup>;

*Third, a definition related to the object.* In this case, the biomaterial and related data are regulated by different laws. Instead of biobanks, definitions “biomaterial collection” or “biolibraries”<sup>7</sup> are used;

*Fourth, a definition related to the possibility to identify the person.* E. g., in Sweden the biobank can be called even one biosample<sup>8</sup>, which is stored for a long term and allow identifying the person.

Despite variations of these definitions, two major tendencies in regulation could be identified:

*First tendency* is a separation of the human biological material as a collection from the databases, which consists of certain information about human biomaterial (e.g., name, last name, gender, medical records). In this case, the biobank equals to biosamples, but not to the personal or medical information of any kind;

3 Recently there was a tendency to create specific regulation for each case of our life and for each legal relationship, even though it could have been regulated by similar general norms using the analogy of the laws.

4 The Norwegian Biobank Act (2003) at [http://ec.europa.eu/research/biosociety/pdf/norwegian\\_act\\_biobanks.pdf](http://ec.europa.eu/research/biosociety/pdf/norwegian_act_biobanks.pdf).

5 Estonian Human Genes Research Act (2000) Article 2 paragraph 10 at <http://biochem118.stanford.edu/Papers/Genome%20Papers/Estonian%20Genome%20Res%20Act.pdf>.

6 Latvian Human Genome Research Act, Article 1, Points (8)-(9) at <http://www.dvi.gov.lv/en/legal-acts/human-genome-research-law>.

7 National Consultative Ethics Committee for Health and Life Sciences, ‘Ethical issues raised by collections of biological material and associated information data: “biobanks”, “biolibraries”’. Opinion No.77, p. 9.

8 Definition used as a shorter version of “biological sample” or “human biological material”.

*Second tendency*, which can be indicated as predominant in the genomics, to combine the biological material and the medical information related to it<sup>9</sup>. This tendency is followed by European Commission's recommendation<sup>10</sup> under which the following criteria of biobank can be identified: (i) *a quantity criterion* – a biobank is made of biological samples taken from whole or major part of the population; (ii) *a purpose criterion* – a biomaterial is taken or collected with the aim to conclude future researches, but not to treat the person; (iii) *a relational criterion* – possibility to link biosamples with genealogical or medical data and even life habits (e.g., sport activities, smoking or non-smoking, use of alcohol, etc.) and constantly renew; (iv) *an organizational criterion* – biosamples are collected and stored in a certain order based on the shape, age of the person, diseases, etc. It is obvious that according to EC, only existence of entire criteria allow us to define biomaterials and related data as a biobank.

The above mentioned tendencies are influenced by different law traditions as well as constant change of the science, which has a direct impact for a certain understanding of the biobank. The development of new science and law theories such as the view that: (i) genetics is about the family<sup>11</sup>, which shares among the family members common genes, rather than the individual with unique DNA; (ii) there is a need to protect even separated from the body biosamples based on the similar legal grounds and principles, as we protect the human itself, influences the definition of the biobank, broadens its activities and simultaneously the problems. **So the definition of the biobank is not an unchangeable constant, which can be set in the laws once and forgotten. Contrary, according to the author, there is a need of the definition of the biobank in Lithuanian legislation, which would be both clear and wide enough to reflect the future changes in society and science (i.e., the objects the research involves).**

However, setting only the definition in legislation would not be sufficient. At the moment the lack of regulation in Lithuania does not allow us to gather the newest information about diseases or to create new modern treatment, in other words, does not fulfil one of the Constitutional aims – “*the right to public health as constitutionally important goal, a public interest*”<sup>12</sup>. In addition to that such situation allows creating the medical and science practise, in which human rights, such as right to autonomy, right to private life and confidentiality of health related data, are not properly taken into account.

As it will be shown through the below analyses, the specific essence of research biobanks involving historical, ethical, moral and legal questions might not allow the legislators to avoid special regulation and use already existing laws as the law analogy.

9 A. M. Capron, N. Biller-Andorno, A. Mauron, B. Elger, A. Boggio. 'Human genetic databases: towards a global ethical framework' (World Health Organisation 2006).

10 Council of Europe. Recommendation (Rec 2006/4) of the Committee of Ministers to Member States on Research on Biological Material of Human Origin. (Strasbourg 2006) at [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/bioethics/texts\\_and\\_documents/Rec\\_2006\\_4.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/bioethics/texts_and_documents/Rec_2006_4.pdf).

11 G.T. Laurie, 'Challenging Medical-Legal Norms: The Role of Autonomy, Confidentiality and Familial Group Rights in Genetic Information' [2001] 22 Journal of Legal Medicine 9.

12 Case No. 3/02-7/02-29/03 [2004], decision of the Constitutional Court of the Republic of Lithuania re the Law on Alcohol Control and the Rules on licensing for manufacturing of alcohol products of the Republic of Lithuania.

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## A SPECIFIC CONSENT vs. A TRADITIONAL INFORMED CONSENT

A consent is often seen as a fundamental principal, a legal and ethical ground for modern medicine and biomedical research, explicitly indicated in international legal instruments such as Nuremberg code<sup>13</sup>, Declaration of Helsinki<sup>14</sup> as well as national laws – the Law on Ethics of biomedical research of the Republic of Lithuania<sup>15</sup> (hereinafter – LEBR), regulating biomedical researches.

The law requires that any invasive medical procedures<sup>16</sup>, starting from taking the blood samples and ending with a surgery, shall not be started without a free wilful approval of the person, who shall make his decision based on the complete information about the purpose of the research<sup>17</sup>, procedures, which will be made during the diagnostic or treatment stage<sup>18, 19</sup>, possible health risks<sup>20</sup> and benefits<sup>21, 22</sup> for the participant. Looking from the historical perspective it is obvious that such a rule was created after fraudulent medical researches with humans during the II world war. So in general it can be said that its legal genesis is based on the wish to protect of the human rights rather than to control the medical practise itself. The need of it can be legally and morally justified by the fact that any medical practise can cause to some extent harm for one's health or life.

However, the question arises if similar risks exist in case of research biobanks, which mostly use already collected biomaterial for research purposes, i.e., the purpose to get the basic knowledge instead of the treatment of the individual? The author holds the position that it is not possible to use traditional informed consent for research biobanks in Lithuania for the following reasons:

(i) *An unknown purpose of a research* – the aim of a research biobank is to collect samples and data for the future research, which due to technological and other objective purposes are

- 13 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law, 'Nuremberg Code' (Nuremberg: US Government Printing Office 1946) 181 at <http://history.nih.gov/research/downloads/nuremberg.pdf>.
- 14 World Medical Association. Declaration of Helsinki (with all further amendments) concerning the ethical principles for medical research involving human subjects [1964] at [http://www.who.int/bulletin/archives/79\(4\)373.pdf](http://www.who.int/bulletin/archives/79(4)373.pdf).
- 15 Law on Ethics of biomedical research of the Republic of Lithuania [2000] State News VIII-1679.
- 16 An invasive medical procedure might be defined as the one that penetrates or breaks the skin or enters a body cavity. Traditional examples of invasive procedures include those that involve perforation, an incision, a catheterization, or other entry into the body. More information can be found at [http://en.wikipedia.org/wiki/Invasiveness\\_of\\_surgical\\_procedures](http://en.wikipedia.org/wiki/Invasiveness_of_surgical_procedures).
- 17 A. Mauron, 'Introduction: biobanks, genomics, and research – a nightmare for public policy makers?' In 'Ethical Issues in Governing Biobanks: Global Perspectives', (Hampshire: Ashgate Publishing Limited 2008) 1-9.
- 18 Council for International Organizations of Medical Sciences (CIOMS), World Health Organization (WHO). 'International Ethical Guidelines for Epidemiological Studies' (Geneva: CIOMS Publishing 2009).
- 19 Organization for Economic Co-operation and Development (OECD). Draft Guidelines for Human Biobanks and Genetic Research Databases: Text for Comment (Paris: Organisation for Economic Co-operation and Development 2008).
- 20 Council of Europe (COE) Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine [1997] Oviedo: Council of Europe.
- 21 World Medical Association. Declaration of Helsinki (with all further amendments in 1975, 1983, 1989, 1996, 2000, 2002, 2004 and 2008) concerning the ethical principles for medical research involving human subjects [1964] at [http://www.who.int/bulletin/archives/79\(4\)373.pdf](http://www.who.int/bulletin/archives/79(4)373.pdf).
- 22 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law: Nuremberg Code, Nuremberg, October, 1946: US Government Printing Office 1946, No. 10, p. 181.

unknown at the time of collecting. Therefore, the requirement of Art. 8(1) of LEBR to indicate such purpose is impossible in the practise;

- (ii) *An unknown period of storage* – Article 4 of the Law on Legal Protection of Personal Data<sup>23</sup> (hereinafter – Data protection law) indicates that “*personal data shall not be stored longer than it is necessary for data processing purposes*”. In general, the aim of the biobank should be to store the samples and data as long as possible<sup>24</sup> and required. This period will depend on the type of the consent a participant gives to the biobank. For example, if the consent is broad (i.e., allowing to conduct any future researches without limitations), the period of storage will be indefinite or until such consent is revoked, whereas, in case of multi-layered consent (i.e., when certain research types are allowed or prohibited) or specific (i.e., given for a certain research), the period will be shorter – until the finish of certain studies;
- (iii) *Unknown other purposes of usage of the samples and data*. Biobank’s collected material could be used for other public purposes, such as identification of the criminals or victims after disasters. Various legal norms set forth in the Criminal Procedure Code<sup>25</sup> (e.g., Article 155 (1) of the CPC<sup>26</sup>) allow the prosecutor and other officers to get data and other material (e.g., bio-samples) from any institutions, including biobanks<sup>27</sup>, when investigating the case. The laws allow to do such actions confidentially, this can be also grounded from the social point of view, however, it means that the participant of the biobank would even not know that his data was reviewed, until any allegations about the crime is imposed on him or her.

These are just a few brief examples showing that it is impossible to provide all required information for the person. For this reason an alternative consent model should be introduced in order to create the balance between biobank’s interest to conduct the research<sup>28</sup> and participants’ wish to have their rights and interests protected. In order to fulfil the balancing task of the rights and provide valuable conclusions, other social sciences such as for example history and sociology, analysing historical experience, mentality, public perception of the research projects and need to safeguard the data, should be taken into account.

The author of this paper believes that major part of the countries in which the biobanks are operated under different consent models, such as *a public agreement with “opt-out” right, presumed*

23 Law on Legal Protection of Personal Data of the Republic of Lithuania [1996], State News No. I-1374.

24 J. Kaye, ‘Broad Consent – the Only Option for Population Genetic Databases?’ In ‘Blood and Data – Ethical, Legal and Social Aspects of Human Genetic Databases’, G. Arnason, S. Nordal, V. Arnason (Iceland University Press 2004) 352.

25 Criminal Procedure Code of the Republic of Lithuania [2002] Law No. IX-785 (last amended on December 23, 2010 by Law No XI-1264).

26 Article 155 (1) of the Criminal Procedure Code allows the prosecutor to get any documents and make the copies of them in any institution or legal entity if these actions are required in order to solve the criminal case.

27 In this case biobank is seen as the institution, i.e., legal person. However, according to the author, when creating a legal framework, it shall be concentrated on the biobank as a certain infrastructure made of categorized human biological samples and linked medical information rather than indicating it as a certain legal entity, as there is the case with the definition of the „bank“.

28 According to some scholars biobank’s functions shall be limited to collection and storage of the biological material and data, without further researches, which are being made by the third parties. However, in order to reveal the legal and ethical problematic it is hold in this paper that the biobank’s functions or both – management of the samples and research studies.

*consent*<sup>29</sup>, *authorization of the supervisor*<sup>30</sup>, *broad*<sup>31</sup> or *open*<sup>32</sup> consent or *multi-layered*, have the same legal and ethical aim – to protect human rights and comply with internationally acceptable bioethical standards. Although according to some scholars only a specific consent, i.e., given for a specific research, can grant the autonomy of the person, however, the author holds that autonomous person should be allowed to take the risk and pass some decision rights for the supervisors (i.e., in case of authorization model) or even not to care about further use of its samples and data after it was donated.

There is no miracle model, which would fit to all cases and solve all fears the society might have. However, it is extremely important to take into account these fears indicated in various surveys and try to minimise the social and legal risks to the lowest possible level. It is obvious that the consent model, which allows any researches in the future too broadly, threatens to infringe the right of autonomy and might cause data protection and similar legal and ethical problems, whereas another extremity – a specific consent – might unreasonably restrict the researchers, which would cause harm both for the biobanks and the society, who is interested in the development of the healthcare system. For this reason, **the combination of a few consent models<sup>33</sup> together with the granted right to revoke the consent at any time would be recommended for Lithuania. The right to consent and revoke should be seen as the same dual right, specific for biobanks.**

#### A NEED FOR ADDITIONAL LEGAL SAFEGUARDS FOR PARTICIPANTS

The consent, although really needed, cannot be seen as the only legal base for a proper protection of the person. Various foreign surveys have shown that the society has not understood the information, provided before consenting<sup>34, 35</sup>, or forgot for what reason and to what extent the consent was given. For this reason, it should be concentrated not on the formal requirements of the consent but rather on its comprehensibility in form<sup>36</sup> and content.

According to the author, participants of the biobank shall be granted with additional legal safeguards throughout the whole storage and research process<sup>37</sup>, i.e., possibility to require further

29 C. Lenk, N. Hoppe, K. Beier, 'Human Tissue Research – A European Perspective on the Ethical and Legal Challenges' (Oxford: Oxford University Press 2011) 18.

30 The model under which the decision and control of the use of biosamples and data is transferred from the person to the supervisory body (e.g., biomedical research ethics committee).

31 The model under which a person allows the biobank to conduct any research project. However, differently from the open (blanket) consent, it is still being controlled by the supervisory body.

32 Also known as blanket consent, allows the biobank to conduct any research project without any limitations. The person is not re-contacted after the initial consent is given.

33 In order to decide, which model or parts of it should be used, various social studies should be conducted analysing the trust level of the society on biobanks, perception of certain degree of the risks, etc.

34 L. B. Dunn, B.W. Palmer, M. Keehan, 'Understanding of Placebo Controls Among Older People With Schizophrenia' [2006] 32(1) Schizophrenia Bulletin 137-146.

35 M. Stead, D. Eadie, D. Gordon, K. Angus, 'Hello, hello – it's English I speak!: a qualitative exploration of patients' understanding of the science of clinical trials' [2005] 31 Journal of Medical Ethics 664-669.

36 Explanation of the 4th guideline of Council for International Organizations of Medical Sciences (CIOMS), World Health Organization (WHO), 'International Ethical Guidelines for Epidemiological Studies' (Geneva: CIOMS Publishing 2009).

37 In this case, the consent is seen a process rather than a one-time action.

information and be ensured that all researchers follow biomedical research ethic rules, which despite “soft law” look in Lithuanian law appear to be imperative with all its legal consequences, such as fines, revocation of the research and etc.

In order to reach its aims the research biobank shall collect a vast amount of human materials, linked with personal and data from various researches, which will be analysed in the future research projects. Development of genetics, informatics (“data mining”), nanotechnologies and micro-electronics raises data protection and possible genetic discrimination problems. It is acknowledged by the case law that each person shall be anonymous in controlling his personal life, including the spread of information about him or her, which appears to be quite hard to do in population biobanks.

The problem is even bigger when analysing Data protection law, which does not regulate the biological material<sup>38</sup>. According to Article 2(1), the personal data is any information relating to a person who can be identified directly or indirectly by reference to certain data<sup>39</sup>. The question is, whether we can equal biomaterial to data or hold that the person can be indirectly identified from such biosamples?

This is once again where social sciences, such as genetics, come into help explaining that biomaterial operates as an USB or a hard drive from which the genetic data could be extracted<sup>40</sup>. So biomaterial is not data itself. However, in order to fill this legislature gap, there is a tendency to broaden the data protection and apply it also for biomaterials. Recently such broader position was upheld by the European Court of Human Rights in *Marper v. UK*<sup>41</sup> case. Therefore, it might be expected in the future to have data protection of biosamples on EU level either through the general data protection laws or specific, biobanks’ related, laws.

Keeping that in mind it is required to grant the proper protect of the confidentiality of the information either in its direct form as paper or electronic document or in a form of a biological material of any kind by: (i) codifying<sup>42</sup> or anonymising<sup>43</sup> the data; (ii) creating proper supervisory system, which would cover not only biomedical researches, but also the primary process – collection and storage of the samples in the research biobank; (iii) indicating which information, in what form and to whom can be provided. What is actually needed and how it should be regulated can be explained only after questioning the patients, medical and legal professionals and analysing the social, historical and even economical<sup>44</sup> fears of the society might have.

38 Article 29 Data Protection Working Party Opinion No. 4 on the concept of personal data [2007] 01248/07/EN WP 136 at [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf).

39 For example, a personal identification number or one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

40 The example of water can even better explain the situation, because, even though the water in your glass will have DNA, it cannot be called personal data itself. Water can reveal the person’s identity only when 2 cumulative conditions exist: (i) the information (DNA) is extracted from water; (ii) when the example of the person’s DNA is already held by the researches, who can match it.

41 *S. and Marper V. The United Kingdom*, applications no. 30562/04 and 30566/04 [2008] ECHR 1581.

42 *Codification* should be understood as changing of the personal information to a certain code (e.g., a sequence of various letters), which does not allow the researchers to identify the persona without having the code.

43 *Anonymisation* is the removal of information that could lead to an individual being identified, either on the basis of the removed information or this combined with other information held by the biobank.

44 Some surveys have revealed that the patients are not against commercial use of their body parts itself. However, they are not happy with the fact that some private companies might gain profit from it, which might force them to act illegally against the participants of the biobank.

## CONCLUSION

The lack of harmonized EU or international obligatory legislation together with all above raised problems reveal that a research biobank is a specific institute, which requires specific regulation in Lithuania. It can be both – in a form of a new Biobank law or as a part of the Law on Ethics of biomedical research, which, according to the author, is the most suitable, as it already sets major principles of research projects, ethical-legal ground for evaluation of such projects, responsibility of researchers and other important questions, therefore including biobanks in this law would help to create an integral regulation in research sphere.

It is obvious that biobank topic triggers not only legal, but primary ethical and moral questions, therefore without denying the need of clear laws, it is essential to create specific law principles and standards, applicable for such research biobanks. These principles, such as already known priority of individual vs. the interests of the society and science, autonomy, justice, openness to the public, transparency shall be combined together in each case, creating a more principle (ethics) based rather than legal norms based regulation. R. Alexy's introduced theory of the balancing of laws<sup>45</sup> should be also applied here in order to avoid both – gaps of law as well as too restrictive norms, which despite its legal side do not reflect to the needs of society.

In order to fulfil these tasks systematic interdisciplinary study of possible legal and social risks is needed before any concrete solutions are transferred into the legal norms. Research biobanks can be useful only if they collect and store enough biomaterial and information, which would be impossible without a trust of a society. This perception of the biobanks cannot be built only on formal legal norms, i.e., which are not creating a proper mechanism in order to protect the human rights and does not solve social problems in everyday life<sup>46</sup>.

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- 46 This clearly shows that nowadays the law is being influenced by other social-ethical factors, therefore in order to have a complex legal research it also cannot be separated from other social sciences. Only interdisciplinary analyses would create a strong legal basis for such a complex institute as a research biobank.

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## IS LEGAL FORESIGHT CRUCIAL FOR SOCIAL STRATEGIC PLANNING?

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**Abstract.** Legal research is unquestionably a kind of social science. Issues typical for legal research interweave with issues crucial for social sciences. Those links are clearly seen when new phenomena are taken into consideration. The matters in which we lack the moral, ethical or even linguistic intuitions. In such cases legal scholars, legal practitioners and legislators have to take into account social and economic consequences because they are the only available criterion.

In our paper we will argue, that foresight (seen as subdiscipline of future studies) can be applied to legal research as well as it is to economic and social studies. Foresight is developing discipline which helps to organize institutions' and enterprise's strategies according to social and technological changes. It is the study aimed at predicting the near future changes and adapting enterprise's development accordingly.

The discipline is well established academically – the best evidence is highly influential journal “Technological Forecasting and Social Change” published since 1969. Also interest expressed by European Union is growing. There are many ongoing studies which aims is to predict how the continent will grow and how it will look like in near future (e.g. in 5 or 10 years). The main scope of abovementioned studies is technological and social forecasting.

We claim, that methodology provided by foresight can be also applied in legal discipline. After we present background of legal forecast we will argue why we need to recognize this interdisciplinary study as interesting and important. We will present three argument to corroborate our claim. The first one will be economic one: forecasting future law will give an opportunity to create more efficient regulations for emerging technologies. The second one will be sociological (or axiological): due to lack of moral intuitions legislators have to base regulation on long-term social and economic consequences. The third one will be practical: in the world of rapid technological growth the time which may be devoted for creation of regulation shrinks. Therefore some issues have to be decided before they become practical legal problem.

Those three arguments will support the claim, that legal foresight is not only academic discipline but also the practical one. It will also back the thesis, that strategic planning in needed not only in enterprises but also in bigger entities such as states and multinational organization.

**Keywords:** foresight, future studies, law-making, effective legislation

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## INTRODUCTION

Legal research is unquestionably a kind of social science. Issues typical for legal research interweave with issues crucial for social sciences. Those links are clearly seen when new phenomena are taken into consideration. The matters in which we lack the moral, ethical or even linguistic intuitions. In such cases legal scholars, legal practitioners and legislators have to take into account social and economic consequences because they are the only available criterion.

In response to the emergence of the mentioned new problems one may realize the appearance of the posthuman topics in the legal discourse<sup>1</sup>. Posthumanism can be understood here as a conceptual frame, which departs from the anthropocentric point of view. It also tries to notice for example the cybernetic<sup>2</sup> understood similarities between particular systems transforming the knowledge regardless of whether organisms are human, animal or advanced electronic entities.

In view of the unusual dynamics of the technological transformation, these problems occur with an increasing frequency which causes that the legislators are not always able to keep up with the proper regulations. If they begin to prepare them the moment when the problem appears, a lot of time has to pass before the situation will be expressed in any legal framework. This period of legislative inertia can cause many adverse consequences or lead to a practice so widespread that its later regulation can be extremely difficult. The perfect example of the delayed regulation may be the issue of so-called high-frequency trading. This model of shares trade on stock exchanges spread so much at the beginning of the second decade of the twenty-first century that according to information of the Bank of England and Tabb Group it was responsible in 2010 for more than half transactions on the New York Stock Exchange. It had also led to spectacular (although short-lived) crashes<sup>3</sup> which results, fortunately, was not long-lasting. However, legislators began to treat this matter seriously only in recent years when the projects of acts restricting the HFT started to arise in the US or Germany<sup>4</sup>. However the basic problem that appears in connection with regulations is related to the fact that there is an attempt to strongly limit (or even prohibit) something which had already become an important part of the trading practices in developed countries.

The introduction shows that in the modern world the legislator, who sees a problem after its appearance, already at the beginning loses the possibility of real influence on a policy of the state. This situation is particularly noticeable in the world of technology. The answer to mentioned problem may be the adaptation of a research trend that becomes more prevalent among the tycoons in the technology world. This refers to so-called the “foresight”.

The term ‘foresight’ “refers to approaches to informing decision-making, by improving inputs concerning the longer-term future and by drawing on wider social networks than has been the

1 A. Sulikowski, ‘Posthumanizm a prawoznawstwo’ (Opole: Wydawnictwo Uniwersytetu Opolskiego 2013)

2 N. Wiener, ‘Cybernetics: Or Control and Communication in the Animal and the Machine’ (Cambridge: MIT Press 1948)

3 M. Phillips, ‘Nasdaq: Here’s Our Timeline of the Flash Crash’ [2010] The Wall Street Journal at <http://blogs.wsj.com/marketbeat/2010/05/11/nasdaq-heres-our-timeline-of-the-flash-crash/> [access: 10.03.2014]

4 Entwurf eines Gesetzes zur Vermeidung von Gefahren und Missbräuchen im Hochfrequenzhandel <http://dip21.bundestag.de/dip21/btd/17/116/1711631.pdf> [access: 2.03.2013]

case in much ‘futures studies’ or long-range planning”<sup>5</sup>. The term has been used increasingly in the specific way since the late 1980s<sup>6</sup>.

The discipline is well established academically – the best evidence is highly influential journal “Technological Forecasting and Social Change” published since 1969. Also interest expressed by European Union is growing. There are many ongoing studies which aims is to predict how the continent will grow and how it will look like in near future (e.g. in 5 or 10 years). The main scope of abovementioned studies is technological and social forecasting.

#### WHY FORESIGHT IN LEGAL DOMAIN IS CRUCIAL?

We claim, that methodology provided by foresight can be also applied in legal discipline. In the introduction we presented background of future studies and foresight. Now we will argue why we need to recognize this interdisciplinary study as interesting and important from legal point of view. We will present three arguments to corroborate our claim. The first one will be economic one: forecasting future law will give an opportunity to create more efficient regulations for emerging technologies. The second one will be sociological (or axiological): due to lack of moral intuitions legislators have to base regulation on long-term social and economic consequences. The third one will be practical: in the world of rapid technological growth the time which may be devoted for creation of regulation shrinks.

The arguments that will be presented are strongly related and interweave with each other. Theoretically they could be presented as a single multifaceted argument but it seems that because of the clarity of the reasoning it will be better to divide it into three indicated varieties.

#### Economic argument

In fact, economic argumentation is the most important base for development of the whole discipline of future studies. During the strategic planning of development of enterprises it is necessary to prepare them not only for the existing factors that may influence positively or negatively on their effectiveness. In connection with the obvious fact that the return of investment is not immediate it is necessary to anticipate trends that yet to appear. This necessity is not so clearly visible in the fields that are not prone to sudden changes in technology. These are, for example, traditional areas of industry connected with the extraction and processing of natural resources. However, in fields where the number of new opportunities grows exponentially due to exponentially increasing technological capability<sup>7</sup> predicting of the unpredictable is essential.

Mentioned development is not irrelevant also for the legislative activity. In connection with a significant increase of complexity of reality modern legislators create more and more paternalistic established regulations to protect citizens against possible abuses. Modern law, besides focusing

5 European Foundation for the Improvement of Living and Working Conditions, ‘Handbook of Knowledge Society Foresight’ (2003) 20 at <http://www.eurofound.europa.eu/pubdocs/2003/50/en/1/ef0350en.pdf> [access: 5.03.2014]

6 Ibid. 21

7 G.E. Moore, ‘Cramming More Components onto Integrated Circuits’ *Electronics Magazine* 4 at <http://www.cs.utexas.edu/~fussell/courses/cs352h/papers/moore.pdf> [access: 1.03.2014]

on classic issues, has to deal with technological problems which change the reality at an incredible pace. It seems, therefore, that the use of the methodology proposed by the foresight in law is becoming more reasonable. Even the shortest legislative process may last several months. For this reason the period of lack of regulations can lead to irreversible changes that may not be positive. This applies particularly to the field of new technologies. Therefore, law connected with the technological aspects of reality can not only respond to emerging changes. For the maintenance its effectiveness it must be ahead of these changes. The legislator can not just ask how to solve the existing problem; his new task is answer the question: how to solve a problem that may appear?

As in every case, here is also a second way that legislators might choose to maintain the effectiveness of the law. It is the departure from the well-known since antiquity principle *lex retro non agit*. However, the introduction of retroactive law hits even harder the existing order and it seems that it could lead to worse results than the regulation in reaction to occurring problems.

### Sociological argument

The essence of the methodology proposed by the foresight is basing actions on the expected consequences. However, these are not limited only to the economic aspects. During the strategy creation for the development of enterprises also the aspects that can be classified as the anthropological-sociological are taken into account. There is no doubt that from the point of view of the effectiveness, any actions that are taken by the biggest players in the technology market, have ultimately an economic dimension. However, describing their only by economic language may cause that the drawn image will not be sufficiently detailed.

The previous development of technology has caused the rise of many sociological or ethical problems. However, all of them have had one common quality: they refer to some common conceptual framework. The final answer, whether from a social point of view the technology is advantageous, could be different, but the area of the discussion has been relatively clear. The current technologies are not so easy to classify. The perfect example is the dynamic development of the so-called intelligent systems. Although, of course, they does not have a "real" intelligence, in the last few years they reached the level that few year ago has been unimaginable for the most of the population. This caused that the classic concepts which has been used to describe the popular technologies now do not correspond with the reality. The indicated discourse concerning intelligent software is a perfect example of that<sup>8</sup>. Most people used to think of the software as strictly algorithmic beings that do exactly what user commands. However, the reality is much more complicated and the most advanced programs not only learn from their mistakes but also operate without any supervision of the users.

This incoherence of conceptual framework becomes a problem also for lawyers. It turns out that the previous regulations, even after the complex interpretative procedures, are insufficient to the problems existing in practice. While earlier the economic argument was related to specific solutions, in this case foresight methodology applied to the development of the law would allow the construction of proper conceptual frameworks which will allow the legislative discussions.

8 S. Chopra, L. White, 'A Legal Theory for autonomous artificial agents' (Michigan: University of Michigan Press 2011)

Predicting not only economic consequences of regulations but considering them from the socio-anthropological point of view would allow for even more effective results.

### Practical argument

The practical argument supporting the concept of introduction of foresight methodology to law is similar to the economic argument. The modern state is undoubtedly interested in creating effective regulations and the time for lawmaking work is getting shorter. However, this does not apply only to creation of law. Today most of states are oriented statistic<sup>9</sup>, at least in some way. Besides creating law and organize the lives of their citizens, the states pursue policies which the aim is not only the administration but also the realization of the macro-economic objectives. In this aspect, the state acts very similarly to any kind of profit oriented corporations. Therefore, proper analysis of the future would be only using of known methodology by another public entity. Thanks to this, the state during determining its macroeconomic objectives could purpose a long-term coherent policy, taking into account existing and forecasted law.

### CONCLUSION

Those three arguments support the claim, that legal foresight is not only academic discipline but also the practical one. It also backs the thesis, that strategic planning is needed not only in enterprises but also in bigger entities such as states and multinational organization.

In the world of the exponential growth, the future exists in the present world to a much greater extent than before. Time to prepare for the upcoming changes is reduced, what is particularly important for the entities characterized by immanent and resulting from the size inertia of actions. These subjects, in this case legislators, can not act *ad hoc*. As has been pointed out, they also can not only react, because then their actions may be completely misguided and ineffective. Therefore it seems that the importance of methodologically exact *future studies* may increase not only for private entities acting in the world of technology, but also for public entities that are responsible for creating law and setting political aims at the macro scale.

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## THE INTERRELATION OF SOCIAL ASPECTS OF THE OLD TESTAMENT AND LAW

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**Abstract.** The paper is a contribution for the discussion regarding the interrelation between the notions - “welfare state”, the Old Testament and law. The concept of the paper is based on “the theory of Christian values”. Religious thought and theological approach can influence the legal issues in Roman-Germanic law countries.

This is a particular time. It is the century of fast means of information and its use, growing technology development and missing understanding of “right” ethics, as the basic values become modified and sometimes specially caricatured. The interpretation of basic values of the society must be overlooked. *Prima facie* obvious phenomena which previously were not doubted must be settled in the legal framework. The aim of the paper is to observe in mutual interaction the rules of the Law of Moses (three books of Torah – Exodus, Leviticus and Deuteronomy) and modern welfare state concept. In order to deal with the subject-matter, the texts of the Law of Moses are analysed and grouped, the notions of “welfare state” and “responsibility” and their content are analysed.

**Keywords:** welfare state, welfare state principle, social responsibility, Old Testament

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### INTRODUCTION

The fact that the civilization of Europe (culture, spiritual identity and consequently – rights) largely are shaped and influenced by Christian ideas and values, already since the end of the XVIII century is generally accepted viewpoint.<sup>1</sup> The Christian values involve the understanding that the created world is real and good. They include also human ontological equality, original sin consciousness (it means that all people in their identity are equally good and equally bad, and ideal societal form is not possible), as well as, the demarcation of spiritual and temporal spheres.<sup>2</sup> At the beginning of the XI century, the rights served as a mechanism in order to resolve the conflict for the pretensions to fundamentally theocratic regiment and the establishment of procedures for court proceedings between the Pope Gregory VII and the Emperor Henry IV.<sup>3</sup> As it has been recognized - the democratic type state has been created, by implementing freedom ideals of a religious person.<sup>4</sup>

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1 J. Rudevskis, ‘Satversmes preambulas projekts, mode, progress un kristīgās vērtības’ [2013] 43 (794) *Jurista Vārds*; E. Levits, ‘Izvērstas Satversmes preambulas iespējamā teksta piedāvājums un komentārs’ [2013] 39 (790) *Jurista Vārds*; N. Horns, ‘Ievads tiesību zinātnē un tiesību filozofijā’ [2000] 3 *Likums un Tiesības* 76

2 J. Rudevskis, ‘Satversmes preambulas projekts, mode, progress un kristīgās vērtības’ [2013] 43 (794) *Jurista Vārds*

3 J. Broks, ‘Tiesības filozofija’ (Rīga: Biznesa augstskola ‘Turība’ 2008) 49; A. Ryan, ‘On Politics’ (London: Penguin Books, 2013) 217-218

4 J. Broks, ‘Tiesības filozofija’ (Rīga: Biznesa augstskola ‘Turība’ 2008) 54

A welfare state principle is the third main principle of the modern democratic state of the European Union.<sup>5</sup> The linking of the welfare state concept and the Old Testament distinctly means a certain allowance to transcendentalism. At the same time, the rights as an independent cultural phenomenon contain in their genealogy a lot of religious aspects and the understanding of rights is not possible, without realizing their connection with religion.<sup>6</sup> In other words, the religion could be characterised as cultural background that unites the individuals in society and state and is necessary for stability of society and state.<sup>7</sup> The question is about to what extent the Law of Moses (three books of Torah – Exodus, Leviticus and Deuteronomy) is interrelated with modern society in perspective of social responsibility. The Constitutional Court of the Republic of Latvia has recognized that Latvia is a socially responsible state (synonym of the welfare state). Although, some law scholars are more critical on this issue, by indicating that it is only illusory fiction, not reality<sup>8</sup> and that the welfare state is the direct antithesis of socially responsible and solidarity-based society<sup>9</sup>.

#### NOTION OF WELFARE STATE AND ITS CONTENT

At the end of XIX century aligning Karl Marx developed economic justification of socialism and Immanuel Kant's ethics, in the frame of Neo-Kantianism appeared a new trend – ethical socialism. It brought to the fore the idea of solidarity.<sup>10</sup> The ideological justification of the welfare state is linked with such notions as human dignity (which is the highest value of human rights and from which all other human rights are derived), justice, equality and solidarity.<sup>11</sup> In this way, the interaction with the paradigm of duty moral<sup>12</sup> and egalitarianism<sup>13</sup> resultant from the Law of Moses appears. Such moral obligation insets basic rules without which an organized society is not possible<sup>14</sup> and it includes:

- helpfulness – ox, sheep, ass straying away, clothes and all other lost things have to be given back to a brother (Deut. 22:1-4), also enemy's ox or ass has to be brought back to him (Ex. 23:4) and if the animal lies under its burden, it shall be released (Ex. 23:5);
- mercy – „If there be among you a poor man of one of thy brethren within any of thy gates in thy land which the LORD thy God giveth thee, thou shalt not harden thine heart, nor shut thine hand from thy poor brother: But thou shalt open thine hand wide unto him, and shalt surely lend him sufficient for his need, in that which he wanteth.”<sup>15</sup> (Deut. 15:7-8);

5 Konstitucionālo tiesību komisija, 'Viedoklis „Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu’ (Rīga: 2012)

6 J. Broks, 'Tiesības filosofija' (Rīga: Biznesa augstskola 'Turība', 2008) 39

7 N. Horns, 'Ievads tiesību zinātnē un tiesību filozofijā' [2000] 2 Likums un Tiesības 42

8 G. Litvins, 'Sociāli atbildīga valsts un sabiedrība' [2012] 43 (742) Jurista Vārds

9 J. Rudevskis, 'Par Veco Derību, sociāli atbildīgu valsti, demogrāfiju un žēlsirdību' [2013] 25 (776) Jurista Vārds

10 J. Broks, 'Tiesības filosofija' (Rīga: Biznesa augstskola 'Turība', 2008) 122-124

11 A. Kovaļevska, 'Sociāli atbildīgas valsts princips' [2008] 32 (537) Jurista Vārds

12 J. Broks, 'Tiesības filosofija' (Rīga: Biznesa augstskola 'Turība', 2008) 100

13 J.J. Graafland, 'Social and Economic Aspects in Old Testaments' in: H. Klok, T. van Schaik, S. Smulders (eds.), Economologues. Liber amicorum voor Theo van de Klundert (Tilburg: University of Tilburg 2001) 151

14 J. Broks, 'Tiesības filosofija' (Rīga: Biznesa augstskola 'Turība', 2008) 100

15 Bible texts are quoted as in King James Version of the Old Testament (1611), King James Bible 'Authorized Version', Cambridge Edition. At <http://www.kingjamesbibleonline.org/>

- loving your neighbour, understanding with the notion “neighbour” not only the persons – relatives, but every member of society (foreigner, servant) and, thus, respect and dignity of other persons – „*But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself.*” (Lev. 19:34), also (Ex. 20:12, 20:16–17), (Lev. 19:18), (Deut. 5:16, 20-21).

Although the welfare state principle is not *expressis verbis* mentioned in Satversme (the Constitution of the Republic of Latvia), the Constitutional Court in its judgments has revealed that it is functioning in Latvia. The Constitutional Court derives this principle from the whole text of the Constitution (particularly from the art. 1 and Chapter 8 of Satversme).<sup>16</sup> „*Constitutional legislature of Latvia laid down a series of social rights. Thus, the legislature has determined that Latvia is a socially responsible state.*”<sup>17</sup> The Constitutional Court of the Republic of Lithuania, interpreting the art. 52 of the Constitution which envisages the state duty to guarantee the rights of pension and social help in certain cases, several times has concluded that Lithuania is a socially oriented state.<sup>18</sup> Although there are practically used different terms “socially responsible state” (Latvia), “socially oriented state” (Lithuania), “social state” (Germany, France), “welfare state” (the term usually used in English),<sup>19</sup> comprehension of the notion is relatively uniform and equally subject to dynamic changes in all countries.

The welfare state principle includes two aspects. Firstly, the state has the positive duty to create effective functioning system of social security. Secondly, the state has to care for the protection of more vulnerable groups (rights of children, rights of persons with special needs, work rights, consumer rights, rent rights and competition rights).<sup>20</sup> The care for different kinds of more vulnerable persons and measures to reduce inequities can be found already in the Law of Moses:

- care for poor, foreigner, orphan, widow and sharing benefits with them - „*At the end of three years thou shalt bring forth all the tithe of thine increase the same year, and shalt lay it up within thy gates: And the Levite, (because he hath no part nor inheritance with thee,) and the stranger, and the fatherless, and the widow, which are within thy gates, shall come, and shall eat and be satisfied; that the LORD thy God may bless thee in all the work of thine hand which thou doest.*” (Deut. 14:28-29), also (Ex. 22:21), (Lev. 19:9-10), (Deut. 26:12-13, 27:19, 24:19–21).
- understanding about hired servant’s (nowadays respectively – employee) hardness of life and respect of paying the hire (wage) - „*At his day thou shalt give him his hire, neither shall the sun go down upon it; for he is poor, and setteth his heart upon it: lest he cry against thee unto the LORD, and it be sin unto thee.*” (Deut. 24:15), also (Lev. 19:13);
- special attitude towards deaf and blind people (nowadays – persons with special needs) - „*Thou shalt not curse the deaf, nor put a stumblingblock before the blind, but shalt fear thy God.*” (Lev. 19:14).

16 G. Kūtris, ‘Tiesiskās pašāvēības un sociāli atbildīgas valsts principi’ [2009] 33 (576) Jurista Vārds; A. Kovaļevska, ‘Sociāli atbildīgas valsts princips’ [2008] 32 (537) Jurista Vārds

17 Case 2006-07-01 [2006] 18 Constitutional Court of the Republic of Latvia / Latvijas Republikas Satversmes tiesa

18 A. Kovaļevska, ‘Sociāli atbildīgas valsts princips’ [2008] 32 (537) Jurista Vārds

19 A. Kovaļevska, ‘Sociāli atbildīgas valsts princips’ [2008] 32 (537) Jurista Vārds

20 A. Kovaļevska, ‘Sociāli atbildīgas valsts princips’ [2008] 32 (537) Jurista Vārds

As well as nowadays the system of social security exists, also in the Law of Moses there can be identified several mechanisms by which the poor were protected, eliminating gaps between rich and poor<sup>21</sup>:

- prohibition to take an interest on money lending - „*Thou shalt not give him thy money upon usury, nor lend him thy victuals for increase.*” (Lev. 25:37), „*If thou lend money to any of my people that is poor by thee, thou shalt not be to him as an usurer, neither shalt thou lay upon him usury.*” (Ex. 22:25), also (Deut. 23:20). The prohibition of usury is not present any more in Christian values-based countries, but it is existing in the Islamic law<sup>22</sup>;
- Sabbath laws that in addition to their social motive also had an ecological motive – preventing land exhaustion<sup>23</sup>:
  - the 7<sup>th</sup> day in which everybody has to rest (yourself, son, daughter, servant, ass, other animals, stranger) (Ex. 23:12), (Deut. 5:13–14),
  - the 7<sup>th</sup> year, when the poor have to be given food (Ex. 23:10–11), the slaves – the servants must be dismissed (Ex. 21:2), (Deut. 15:12–14) un release made, e.g., to dismiss the loans (Deut. 15:1–11),
  - Jubilee year (calculating seven years seven times, the Blessing of the fiftieth year), when everybody can get back his property, which, perhaps, he has been forced to abandon due to poverty, and the servants are released in freedom (Lev. 25). At the same time, this section details the redemption of property and servants, depending on the shrinking number of years until the Jubilee year.

Abovementioned are the main social aspects which can be found in the Law of Moses and form the basis of social responsibility. The understanding of social responsibility in the modern democratic country is multi-layered. The author of this conference paper advocates for the viewpoint that this principle essentially affects all areas of life. Its framework covers not only material welfare (the satisfaction of material needs), but also nation’s mental (human empowerment), social (respected and active position of a person in the society) and cultural (the creation and the consumption of cultural supply)<sup>24</sup> welfare, including the right to live in benevolent environment. The social responsibility permeates all human rights established by the Constitution. The implementation of human rights provides the possibility for a person to live a respectful life and to self-identify with the state.

As until now the welfare state principle is seen as mainly connected with the questions of the system of social security and other social issues (disposal of property, regulated rent in denationalized buildings). The revelation of other multi-layered aspects of the welfare state still is a work for the future.

21 J.J. Graafland, ‘Social and Economic Aspects in Old Testaments’ in: H. Klok, T. van Schaik, S. Smulders (eds.), *Economologues. Liber amicorum voor Theo van de Klundert* (Tilburg: University of Tilburg 2001) 150-151

22 J. Rudevskis, ‘Vispārējs ieskats musulmaņu tiesībās’ (2011) 3 (650) *Jurista Vārds*

23 J.J. Graafland, ‘Social and Economic Aspects in Old Testaments’ in: H. Klok, T. van Schaik, S. Smulders (eds.), *Economologues. Liber amicorum voor Theo van de Klundert* (Tilburg: University of Tilburg 2001) 151

24 E. Levits, ‘Izvērstas Satversmes preambulas iespējamā teksta piedāvājums un komentārs’ [2013] 39 (790) *Jurista Vārds*

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 CATEGORY OF RESPONSIBILITY

In the 7<sup>th</sup> extract of the preamble project of Satversme it is indicated that everyone's responsibility is to take care of themselves, their families and the common good of society, to behave responsibly towards their fellow human beings, society, country, environment, nature and future generations.<sup>25</sup> Other scholars argue that such reference has no place in the Constitution, and that mother and father must teach such things; if someone has not been taught them, it is meaningless to write them in the Constitution because it will not change anything.<sup>26</sup> Without calling into question, first and foremost the responsibility is the category of the value scale of human inner world. Still, according to such interpretation it would be possible to come to the conclusion that many legal norms which are written into the Constitution and in other legal acts would lose their sense due to their *prima facie* self-evidence. It must be taken into account also the meaning which one of the most modern and, probably, for society the abstruse principle – the principle of sustainable development with a high abstraction degree allocates to the dimension of welfare state. The legislature has to create such legal framework that is focused on sustainable development.<sup>27</sup> In the framework of this principle essential meaning of "future generations" that initially emerged as the notion of environmental law and now is widely recognized at international level,<sup>28</sup> commences to influence other branches of law. In this context, the comparison might be done with social security tax as the tax of future generations. Thus, the author of this conference paper believes that the formulating of responsibility in the preamble of the Constitution would not be considered as redundancy.

The reasons behind the creation of the constitutions are closely linked with the transition from natural law understanding to legal positivism - World Wars, authoritarian and totalitarian regimes demonstrated the negative influence of legal positivism and natural law regenerated.<sup>29</sup> The last decades again reinforce the position of positivism and self-evident things that have not previously been called into question, are defined in different types of law.<sup>30</sup> These processes are connected with the modifications of comprehension of values in societal consciousness. They depend on nation's self-dignity and self-identification, too.

From the 7<sup>th</sup> extract of the preamble project of Satversme results in the notion „social responsibility”. „*Thou shalt not avenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbour as thyself.*” (Lev. 19:18) Once an individual can love the state that is the form of organization of the whole society, only then he loves himself and his neighbour. Then he can take responsibility for himself and his neighbour and love the land (meaning – the territory of the state) and nature. The land, nature and environment as a whole cannot be separated from the state.

25 E. Levits, 'Izvērsta Satversmes preambulas iespējamā teksta piedāvājums un komentārs' [2013] 39 (790) Jurista Vārds

26 J. Rudevskis, 'Satversmes preambulas projekts, mode, progress un kristīgās vērtības' [2013] 43 (794) Jurista Vārds

27 Case 2010-21-01 [2010] 21.3 Constitutional Court of the Republic of Latvia / Latvijas Republikas Satversmes tiesa

28 J. Rudevskis, 'Satversmes preambulas projekts, mode, progress un kristīgās vērtības' [2013] 43 (794) Jurista Vārds

29 S. Osipova, 'Valsts valoda kā konstitucionāla vērtība' [2011] 42 (689) Jurista Vārds; J. Broks, 'Tiesības filosofija' (Rīga: Biznesa augstskola 'Turība', 2008) 90

30 S. Osipova, 'Valsts valoda kā konstitucionāla vērtība' [2011] 42 (689) Jurista Vārds

Although „social responsibility” and „political accountability” are different notions, however, like politicians have the last, every member of society should be aware of and feel the “social responsibility”. E.g., university graduates should feel the social responsibility for the state resources invested in their education. Strangely, most of them consider “to be a normal thing” to travel abroad for searching “a better life” after graduation. A simplified example of social responsibility is driving on the road. The driver assumes the responsibility at the same time both for himself and others. His task is to act in accordance with the road rules and the situation on the road and not to endanger other road users, relying on exactly the same pattern of conduct on their part. Ideologically, this means that, firstly, an individual’s behaviour should be determined by sense of social responsibility, rather by eventual consequences of civil and / or criminal liability. Secondly, when the individual is acting in a socially responsible manner, he is entitled to expect the rest of society will be socially responsible.

In one moment, it might happen that certain notions and phenomena which are fundamental components and values of the democratic state of rule of law in societal comprehension are not self-understandable or modified. They miss their fundament embodied by the Old Testament in the form of love (it comprises also “self-love” and state love in the democratic country which is based on Christian values). Then the transformation of these notions and phenomena into written law can serve as the mean, in order to educate the society and its individuals and to reinvigorate the core values. On one hand, it is true that the family is the most important unit of the “micro-society” of each country, and the provision of every child with all necessary means for his wholesome development is of national importance because later it is hard to correct dramatic consequences of traumatized childhood. On the other hand, at the same time the educating of the whole society is inevitably necessary, when legal awareness is diminished, and priority of self-interests governs the society.

Based on modern common recognition of life-long education process, i.e., the process is not confined to graduation from school or high school, public education is also the state task. Although the values that are fundamental in the democratic state of rule of law result from internal being of every person (classically, it develops in close interaction with Judeo-Christian worldview), this is the century when the form and its interconnection with other notions become increasingly multi-formed. The duty of the state is to explain the society the main directions of its development, by using relevant terms of modern legal culture, e.g., “social responsibility”, “responsibility towards future generations”, “sustainable development”.

## CONCLUSION

As until now the welfare state principle is seen as mainly connected to the questions of the system of social security and other social issues, the revelation of other multi-layered aspects of the welfare state principle still is a work for the future.

Social responsibility is one of the essential parts of wholesome respectful human life. The implementation of the truly democratic and welfare (based on Christian values) state of rule of law is possible only when the individuals feel social responsibility towards themselves, other individuals, future generations and state (including its land, nature and environment).

Nowadays, rapidly changing era creates necessity to allocate a new form to *prima facie* obvious things and to interconnect them with other notions. The duty of the state is to provide the society the elucidation of these phenomena, thus educating the individuals.

The fact that natural values exist independently from their written form does not mean that formulation of social responsibility in legal acts might be considered as verbiage, especially when there has been a long and progressive decay of legal awareness and lack of social responsibility in the society.

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## HOW SOCIOLOGICAL ANALYSIS CAN INFLUENCE CONSTITUTIONS. A FEW REMARKS

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**Abstract.** The paper investigates the usefulness of sociology as a social science auxiliary used in constitutional research. According to the author, the potential of sociology in this field is limited. On the one hand, sociological methods can help to evaluate the level of political culture of a given country. This may end, for instance, in positive changes in constitutional provisions regulating the division of powers. In a state of high political culture, a larger space for political habits may be left. In case of lower standards in that area, it is more reasonable to pass possibly most precise regulations on competences of respective power holders, and to establish clear boundary lines between them. On the other hand, sociological analysis can influence constitutional research also in a negative way. Apart from the legal or organizational function, constitutions play several further roles, among others the integrative one. If the citizens are to identify with the statehood, whose foundation is established by the constitution, the basic law should not contain norms useful to fuel serious controversies in the public opinion. Including axiologically one-sided norms into constitutions should be assessed as disadvantageous, even if it took place as a result of sociological analysis based on public opinion surveys.

**Keywords:** constitution, sociology, system of government, integrative function of constitution

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### INTRODUCTION

The main role of the constitution in a democratic state is to establish the legal framework for its functioning. The constitution contains provisions pertaining to the state's authorities and a catalogue of human and civic freedoms and rights. It being a legal act does not mean, however, that only lawyers should be involved in the process of preparation or amendment thereof. Its role in the society is much too important. Therefore, the aim of this paper is to consider the role of sociology as a social science auxiliary used in constitutional research. In a few remarks (from the point of view of a young scholar in the field of constitutional law) I want to show both the favourable and unfavourable possible impact of sociology on constitutional research. On the one hand, sociology can help to prepare legal regulations more coherently organizing state apparatus. On the other hand, making use of sociological ascertainties can create several dangers that will result in a weaker fulfillment of the integrative function of the constitution. In order to illustrate both of the

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above I will use examples taken from the Constitution of the Republic of Poland of 2<sup>nd</sup> April 1997 (named below also as: “the 1997 Constitution” or “the Constitution”)<sup>1</sup>.

## SOCIOLOGY AND THE SHAPE OF THE SYSTEM OF GOVERNMENT

The shape of the relations between the parliament, the head of the state and the government constitutes the matter of the constitutional system of government whose models vary greatly in contemporary democracies. The benchmarks are: presidential, parliamentary, semi-presidential and directorial system<sup>2</sup>. An assembly responsible for the process of preparation of a new constitution of a given state has to decide how to shape the system of government and usually the final solution differs in details (sometimes significantly) from those benchmarks<sup>3</sup>. In the end, the constitutional model of the division of powers can be more or less effective. How can sociology help to construct an effective version of this model?

Among sociological disciplines there is a branch called sociology of politics that “explains the phenomena of the fight for power and the execution of power which both constitute the essence of politics”<sup>4</sup>. Following questions are discussed by the discipline of sociology of politics: 1) sociology of political movements and political parties; 2) sociology of state and its particular institutions (e.g. representative bodies, army, public administration); 3) sociology of political behaviour; 4) sociology of international political relations<sup>5</sup>. Another discipline of sociology – sociology of public life – deals generally with the issues of social activity in the public sphere, *inter alia* of the political activity<sup>6</sup>. The field of interest of both sociology of politics and sociology of public life encompasses also such issues as national character or political culture<sup>7</sup>.

When thinking about the future shape of the division of powers, reflection regarding observations made by sociologists may be very productive, as it can help to predict the consequences of the implementation of a given model. It seems justified to say that in a state of high political culture, a larger space for political habits may be left. In case of lower standards in that area, it is more reasonable to pass possibly most precise regulations on competences of respective power holders, and to establish clear boundary lines between them. Thus, sociological analysis of political actors’ behaviour can lead to an improvement of the foundations of the political system.

A detailed analysis of the current Polish system of government is not a subject of this paper<sup>8</sup>. My only aim is to investigate whether sociological analysis could be a useful factor in the possible

1 Published in: *Dziennik Ustaw Rzeczypospolitej Polskiej* No. 78, item 483, as amended.

2 See more B. Banaszak, ‘Prawo konstytucyjne’ (Warszawa: Wydawnictwo C.H. Beck 1999) 439-442.

3 B. Banaszak, ‘Prawo...’ 437.

4 J.J. Wiatr, ‘Socjologia polityki’ (Warszawa: Wydawnictwo Naukowe Scholar 1999) 11.

5 *Ibid.* 19-20.

6 See E. Wnuk-Lipiński, ‘Socjologia życia publicznego’ (Warszawa: Wydawnictwo Naukowe Scholar 2008) 11.

7 See J.J. Wiatr, ‘Socjologia...’ 173-196; E. Wnuk-Lipiński, ‘Socjologia...’ 160-177.

8 This matter was comprehensively considered in Polish legal literature, see e.g. R. Mojak, ‘Parlament a rząd w ustroju Trzeciej Rzeczypospolitej Polskiej’ (Lublin: Wydawnictwo UMCS 2007), M. Grzybowski (ed.), ‘System rządów Rzeczypospolitej Polskiej. Założenia konstytucyjne a praktyka ustrojowa’ (Warszawa: Wydawnictwo Sejmowe 2006); a few texts in: P. Sarnecki, A. Szymt, Z. Witkowski (eds), ‘The Principles of Basic Institutions of the System of Government in Poland’ (Warszawa: Wydawnictwo Sejmowe 1999).

process of constitution's enactment or amendment. In order to answer this question I have to start with some general remarks on the Polish version of the system of government established by the 1997 Constitution.

Generally speaking, Poland is an example of rationalized parliamentarism in which the constitutional position of the Council of Ministers and the President of the Council of Ministers is strengthened at the expense of the constitutional position of the President of the Republic. However, the functions of the Polish President are not exclusively representative<sup>9</sup>. Although it is the Council of Ministers that conducts the internal affairs and foreign policy of the Republic of Poland (art. 146 para. 1) and many regulations of the Constitution provide the government (and not the President!) with instruments to fulfill this task, the President – parallel to the government – is considered a part of the executive power (art. 10 para. 2). This, together with the maintenance of universal and direct elections of the head of the state<sup>10</sup>, makes the Polish system of government inconsistent<sup>11</sup> and creates a space for potential clashes of the two state authorities in whom the executive power is vested.

There are some spheres in which the already mentioned risk of conflict is especially high. The first one is foreign policy. For constitutionalists it is obvious that it is the Council of Ministers that conducts this policy (see again art. 146 para. 1). However, for politicians elected as consecutive presidents it was not so obvious, since according to art. 133 para. 3: "The President of the Republic shall cooperate with the Prime Minister and the appropriate minister in respect of foreign policy". Although the sense of this provision is to deter the President and the government from rivalry in the field of foreign affairs<sup>12</sup>, in political practice it was used by President Lech Kaczyński as a tool for demands to take part, together with the prime minister, in the summit of the European Council in 2008. This dispute over authority found its ending in the judgment of the Constitutional Tribunal<sup>13</sup> but the question emerges whether the inclusion of the above mentioned art. 133 para. 3 into the Constitution was a reasonable solution.

Another sphere of conflict is legislation. In parliamentary democracies the government conducts their policy above all using legislative initiative which later turns into statutes. The current situation in Poland is similar<sup>14</sup>. However, the President has the right of legislative veto which is very difficult

9 More about the rationalisation of the Polish parliamentary system see e.g. M. Kruk, 'System rządów w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 roku', in: W. Skrzydło, R. Mojak (eds), 'Ustrój polityczny Rzeczypospolitej Polskiej w nowej Konstytucji z dnia 2 kwietnia 1997 roku' (Lublin: Wydawnictwo UMCS 1998) 29, 35-43; J. Szymanek, 'Elementy racjonalizacji w konstrukcji parlamentarnego systemu rządów: analiza rozwiązań zawartych w Konstytucji RP', in: T. Mołdawa, J. Szymanek, M. Mistygacz (eds), 'Parlamentarny system rządów. Teoria i praktyka' (Warszawa: Dom Wydawniczy ELIPSA 2012) 146-159.

10 Such a character of the elections was took for granted already at the beginning of constitutional preparatory works, see M. Kruk, 'System...' 29-30.

11 See many critical remarks on this issue e.g. in: T. Borkowski, 'System rządów w nowej Konstytucji' [1997] 11-12 Państwo i Prawo 71-85.

12 See e.g. Z. Witkowski, 'Dyrektywa >współdziałania władz< jako element organizujący życie wspólnoty państwowej w świetle Konstytucji RP z 2 kwietnia 1997 r.', in: J. Wawrzyniak, M. Laskowska (eds), 'Instytucje prawa konstytucyjnego w dobie integracji europejskiej. Księga jubileuszowa dedykowana Prof. Marii Kruk-Jarosz' (Warszawa: Wydawnictwo Sejmowe 2009) 141, 143.

13 See order of the Constitutional Tribunal, Kpt 2/08 [May 20<sup>th</sup>, 2009] OTK ZU 2009/5A/78.

14 Also the Polish constitutional practice confirms this statement, see e.g. S. Bożyk, 'Tryb ustawodawczy w Sejmie RP i w parlamentach państw Unii Europejskiej' (Warszawa: Wydawnictwo Sejmowe 2013) 15-17.

to reject for the Sejm (according to art. 122 para. 5 of the Constitution, a majority of 3/5 of voting members of the Sejm is needed). Despite the fact that the President does not conduct the policy of the state, he has an instrument that can block the government and the parliamentary majority (if not as large as 3/5) supporting it, in fulfilling their tasks<sup>15</sup>. Although the general directive of cooperation between the public powers is mentioned already in the Introduction to the 1997 Constitution, in fact a relatively harmonious cooperation between divided powers took place mostly during the time of the same political origin of the President and the Council of Ministers, rather than in periods of “cohabitation” of political opponents. The legislative veto is a good example – presidents Aleksander Kwaśniewski and Lech Kaczyński used this instrument much more often during the “cohabitation” with prime ministers coming from another political milieu than in the period when the governments were composed of politicians of their own faction<sup>16</sup>.

The key problem is that the authors of the Constitution did not take sufficiently into account the problem of the level of political culture and the habits of political actors in contemporary Poland. They implemented the directive of cooperation of public powers (both into the Introduction and into art. 133 para. 3 of the Constitution), hoping that it would be enough to limit particular political interests of the power holders in the name of the common good. Notwithstanding perturbations which took place during the Polish “cohabitation” periods, some scholars continue to defend this directive and still believe in its usefulness for constitutional practice<sup>17</sup>. On the other hand, there are also some critical views, emphasizing that such a directive is “another expression of an attempt of juridification of relations that in their nature do not subject easily to legal regulations, as they are a reflection of influence of political and personal factors”<sup>18</sup>. I fully agree with the conclusion of another author who noticed: “Assuring cooperation where political rivalry comes into play, should be perpetrated through the creation of mechanisms making the cooperation profitable for political actors. If confrontation is politically more advantageous, tension between the vision of the 1997 Constitution’s authors and the constitutional practice rises and eventually it leads to the decrease of the role of the Constitution in the democratic society and to the further erosion of political culture”<sup>19</sup>. I am afraid that the meaning of the educational function of the constitution that was appreciated in literature<sup>20</sup> has not been reflected in political practice. It would be much more reasonable to revise the constitutional system of government in the direction of

15 This is why some scholars strongly criticize the current shape of the presidential veto, see e.g. R. Balicki, ‘Relacje między organami władzy wykonawczej – na drodze do systemu kanclerskiego?’, in: B. Banaszak, M. Jabłoński (eds), ‘Konieczne i pożądane zmiany Konstytucji RP z 2 kwietnia 1997 roku’ (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego 2010) 345-346.

16 See P. Zakrzewski, ‘Kompetencje prezydenta o charakterze hamującym w procesie ustawodawczym (na przykładzie polskich rozwiązań ustrojowych)’, in: T. Mołdawa, J. Szymanek (eds), ‘Instytucja prezydenta. Zagadnienia teorii i praktyki na tle doświadczeń polskich oraz wybranych państw obcych’ (Warszawa: Dom Wydawniczy ELIPSA 2010) 104-105.

17 See especially Z. Witkowski, ‘Dyrektywa...’ 139-145; P. Sarnecki, ‘>...ustanawiamy (...) prawa podstawowe dla państwa oparte na (...) współdziałaniu władz, dialogu społecznym...<’, in: ‘Preambuła Konstytucji Rzeczypospolitej Polskiej’ (Warszawa: Biuro Trybunału Konstytucyjnego 2009) 35-38.

18 J. Ciapała, ‘Prezydent w systemie ustrojowym Polski (1989-1997)’ (Warszawa: Wydawnictwo Sejmowe 1999) 220. As this author concludes, such a directive should not be included in the text of the constitution.

19 W. Brzozowski, ‘Współdziałanie władz publicznych’ [2010] 2 Państwo i Prawo 15.

20 See P. Sarnecki, ‘>...ustanawiamy...<’, 36-37.

its further evolution into a clear chancellor model<sup>21</sup> than to hope that the directive of cooperation will contribute to solving our constitutional problems<sup>22</sup>. The sociological analysis and observations of the level of political culture could be a useful instrument leading to a realistic assessment of the possible behaviour of political actors. Finally, they can also lead to a better (since clearer) shape of the division of powers established by the Constitution.

## SOCIOLOGY AND THE INTEGRATIVE FUNCTION OF THE CONSTITUTION

Apart from the legal or organizational role constitutions have also further functions, e.g. the integrative one. In that context constitutions are treated as an instrument serving citizens' identification with the statehood<sup>23</sup>. In order to fulfill this function constitutions should, *inter alia*, "create mechanisms helping to solve social conflicts"<sup>24</sup>. Considerations on the integrative function of the constitution bring up the issue of constitutional axiology, as axiology is always involved in social conflicts. As noticed by Janina Zakrzewska: "It seems to be almost universally accepted that there are no constitutions, even the most juridical ones, neutral towards values"<sup>25</sup>. A constitution is even a normative act of a special axiological colouring<sup>26</sup>. However, the question of the usefulness of sociology in the discussed field is a question of what we understand as axiology which should be reflected in the text of the constitution.

As regards absolutely fundamental values common for almost all citizens (excluding only some extreme milieus at the margin of the society), sociological methods (such as public opinion surveys) can be taken into account in the process of constitutional preparatory works.

The current Polish Constitution is an example of a constitution of a liberal democratic state. Such a state expresses some general ("formal") values like the principles of: human dignity, rule of law, sovereignty of the nation and numerous personal and political freedoms and rights (e.g. the freedom of speech, of privacy, of elections). Sociological methods can help finding potential further values expected by the society to be included in the text of the constitution which are not so obvious as the above-mentioned ones. For instance, sociological analysis can show that the right to public information is desired by the citizens<sup>27</sup>. Including such a right into the constitution, which is also an expression of liberal democracy, does not violate anybody's personal axiological beliefs. Following on from this, it does not limit the integrative function of the constitution either. Liberal democracy – due to its universal and inclusive (not exclusive) character – constitutes a

21 Many scholars follow this view, see e.g. B. Opaliński, 'Funkcjonowanie władzy wykonawczej z perspektywy 15 lat obowiązywania Konstytucji Rzeczypospolitej Polskiej z 1997 r.', in: S. Biernat (ed.), 'Konstytucja Rzeczypospolitej Polskiej w pierwszych dekadach XXI wieku wobec wyzwań politycznych, gospodarczych, technologicznych i społecznych' (Warszawa: Biuro Trybunału Konstytucyjnego 2013) 228.

22 Many remarks against the directive of the cooperation of powers (especially in the context of foreign policy and the powers of the President of Poland in the legislative procedure) I made in: M. Pach, 'Dyrektywa współdziałania władz w Konstytucji RP z 1997 roku jako przykład ustrojowego *wishful thinking*', in: S. Biernat (ed.), 'Konstytucja...' 205-216.

23 B. Banaszak, 'Prawo...' 75.

24 *Ibid.* 76.

25 J. Zakrzewska, 'Spór o konstytucję' (Warszawa: Wydawnictwo Sejmowe 1993) 150.

26 P. Winczorek, 'Konstytucja i wartości', in: J. Trzciniński (ed.), 'Charakter i struktura norm konstytucji' (Warszawa: Wydawnictwo Sejmowe 1997) 37.

27 It has been present in the 1997 Constitution since its beginning (see article 61). I use it only as a general example.

fundamental political and social framework of freedom which is wanted and positively evaluated by almost all. Within this framework each citizen can act as he or she pleases, and sociology may be used in order to investigate some detailed questions of the favourable shape of liberal-democratic legal institutions.

On the other hand, the axiology of the constitution can be perceived also as an expression of very specific “material” values, of a less indisputable character, shared in the time of enactment of a constitution by majority groups of the society – but not by a whole society as such. If so, sociologists could help to ascertain, using public opinion surveys again, what kind of values are preferred at the moment by the majority of the society, e.g. conservative, liberal or social democratic. This potential influence of sociology on the text of the constitution seems to be very unfavourable, as provisions included into the constitution under such conditions may become an additional factor provoking or deepening social conflicts. This, in turn, is inconsistent with the integrative function of the constitution.

It has become a kind of a truism that political pluralism is a necessary and positive feature of liberal democracy. The principle of political pluralism is one of the constitutional expressions of the latter and must be considered a relatively indisputable ingredient of the constitutional axiology (“formal” values). By contrast, “pluralism in action” should not take its toll on a larger scale on the text of the constitution. It is the role of parliaments and ordinary statutes to adjudicate different questions of social or economic policy. Each democratic parliament has the legitimacy to expand the line of policy supported by the majority of voters as reflected by elections result. The next parliament can consist of different political factions and, in consequence, follow different policy. There is nothing reprehensible even in fierce disputes in parliaments or in clashes of different axiological visions since ordinary statutes do not have to express an integrative function on such a scale as the constitution does; this is the difference between them and the basic law of a state.

Article 18 of the 1997 Polish Constitution is a good example of a constitutional provision with a strongly axiological content which can result in unfavourable consequences from the point of view of the integrative role of the constitution. The provision reads as follows: “Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland”. This definition of marriage – as a union of a man and a woman – was included into the text of the Constitution under the pressure of the Catholic Church in Poland<sup>28</sup>. The aim of its adherents was to unblock the possible process of legal institutionalization of homosexual domestic partnerships – not only in the face of liberalization of family law in Western Europe<sup>29</sup>, but also in response to similar demands being formulated during the preparatory works on the text of the Polish Constitution<sup>30</sup>. My personal opinion is that the intention of the originators of article 18 was not properly transformed into the text of the provision and its formulation does not prohibit “pro-homosexual” legislation. According to article 18 there only exists an obligation for the state’s authorities to spread out legal protection and care on heterosexual marriages, family, motherhood and

28 See e.g. B. Banaszkiewicz, ‘Problem konstytucyjnej oceny instytucjonalizacji związków homoseksualnych’ [2004] 2 Kwartalnik Prawa Prywatnego 383.

29 *Ibid.* 382.

30 W. Skrzydło, ‘Konstytucja Rzeczypospolitej Polskiej’ (Warszawa: Wolters Kluwer 2007) 25.

parenthood – the state cannot abandon it, but this obligation does not exclude the admissibility of the legislative’s acceptance of legal institutionalization of other forms of human relationships<sup>31</sup>. However, the predominant opinion among scholars leads to the conclusion that this institutionalization would not be conform to the Constitution<sup>32</sup>. The same line of reasoning was followed in practice as such opinion was repeated in 2013 by Jarosław Gowin – the conservative Minister of Justice of that time – during the first reading of the three statutory initiatives tendered by different parties represented in the Sejm<sup>33</sup>. All three drafts aimed at the legal institutionalization of domestic partnerships (both homo- and heterosexual), without calling such partnerships “marriages” and without providing them with the right of children’s adoption. After a heated discussion that fully reflected major differences in social attitudes to the issue of domestic partnerships all three drafts were rejected already in the first reading.

Doubtlessly such a definition of marriage truly reflects the beliefs of the majority of Poles in 1997 as well as in 2014. A survey by the Centre for Public Opinion Research (CBOS) between 31st of January and 6<sup>th</sup> of February 2013 showed that 60% of respondents do not approve the possibility to create a formalized relationship by two persons of the same sex<sup>34</sup>. Should such a survey be an argument for the maintenance of article 18 of the Constitution (which is interpreted as described above)? In accordance with the integrative role of the constitution – definitely not. This function is fulfilled when the constitution contains fundamentally indisputable norms shared by almost all citizens. Meanwhile, article 18 is an example of a provision useful to fuel social conflicts, as it creates a preference for some groups at the expense of others. It does not matter that those groups are in majority, as the society is always divided into rather conservative and rather liberal groups, and the constitution should contribute to the identification of both conservatives and liberals with the statehood. Therefore, sociological analysis indicating a current advantage of one of those groups in the society should not influence the constitutional research and, in consequence, the text of a constitution.

## CONCLUSION

None of the constitutions in the world is an ideal legal act that fully and eternally guarantees perfect functioning of a given state. Too much depends on the holders of constitutional powers, on their personal attributes. Nevertheless, we can evaluate constitutions as better or worse for the specific state, considering such features as the clearness of the system of government or the level of fulfillment of different constitutional functions, as it was discussed in this paper. Sociology can be an appropriable branch of knowledge used to suggest *de lege ferenda* arguments. However, it should be applied cautiously in the constitutional research because not all of its scientific tools or methods are able to bring positive effects in the process of creating and amending the basic law.

31 See also a comprehensive study on the admissibility of such legislation: E. Łętowska, J. Woleński, ‘Instytucjonalizacja związków partnerskich a Konstytucja RP z 1997 r.’ [2013] 6 Państwo i Prawo 15–40.

32 See B. Banaszkiwicz, ‘Problem...’ 380–386; W. Skrzydło, ‘Konstytucja...’ 25; L. Garlicki, remarks to article 18, in: L. Garlicki (ed.), ‘Konstytucja Rzeczypospolitej Polskiej. Komentarz’, vol. 3 (Warszawa: Wydawnictwo Sejmowe 2003) 3.

33 He invoked also the opinion sent to the Sejm by the Supreme Court in which the same position was brought.

34 See picture 4 in: ‘Stosunek do praw gejów i lesbijek oraz związków partnerskich’ – communication on a public opinion survey at [http://www.cbos.pl/SPISKOM.POL/2013/K\\_024\\_13.PDF](http://www.cbos.pl/SPISKOM.POL/2013/K_024_13.PDF) (Warszawa: CBOS 2013) 6.

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#### Case

27. Order of the Constitutional Tribunal, Kpt 2/08 [May 20<sup>th</sup>, 2009] OTK ZU 2009/5A/78

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## BEHAVIOURAL ECONOMICS AND CONTRACT LAW

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**Abstract.** Individuals make economic decisions on a daily basis that do not look rational and that sometimes turn out to be mistakes. This behaviour has a cost for each individual and for society as a whole. Behavioural law and economics identifies which mental shortcuts used by individuals in decision making are behind those mistakes. Once cognitive biases affecting people are determined, behavioural law and economics propose to use the information gathered to design a set of rules that reduces individual and collective losses. This set of rules would steer people to rational choices that set them better-off and produce social welfare, but this would be done without banning or blocking choices; each individual would be free to choose an action which goes against the socially good for behavioural economists. Therefore, behavioural law and economics might be a new approach to be taken when dealing with contract law situations where intervention is considered necessary. This paper tries to explain the main features of behavioural law and economics while questioning the validity of its assumption that people are not rational. In addition, this paper addresses the problem of intervention in some grounds of contract law and takes a stand on whether it is desirable a strong intervention, a lighter one based on behavioural law and economics, or a neoclassical approach in favour of free market and freedom of contract with restrictions on them being an exception.

**Keywords:** behavioural law and economics, rationality, cognitive biases, contract law

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### I. INTRODUCTION. WHAT IS BEHAVIOURAL LAW AND ECONOMICS?

Behavioural Law and Economics (hereinafter, BLE) can be defined as a social science that analyses cognitive processes and frameworks, information-processing mental shortcuts and other factors that influence individuals' decision making in their economic life, in order to design regulation so people are steered towards rational behaviour while respecting freedom of choice of each individual<sup>1</sup>. The starting point is an economic scenario and people's behaviour in it. Every day, people must make economic decisions and choose what they think is the best for their needs, desires and goals, and in order to do so, a decision making process is required.

BLE analyses what elements are actually influencing people towards one specific choice among several ones. Neoclassical Economics assumes people's behaviour is rational, and if it is found one decision made without following this presumption, the rational-choice economist will search a

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1 See R. BUBB and R. H. PILDES, 'How Behavioral Economics Trims Its Sails and Why' [2014, forthcoming] 127 HLR - NYU Law and Economics Research Paper No. 13-29, at 2.

theoretical explanation for it and will check if there is after all a point of rationality in it<sup>2</sup>. In BLE, individual rationality is abandoned. Behavioural economists try to identify irrational human behaviour and cognitive biases causing it<sup>3</sup>.

BLE takes approaches from many different sciences, and the most important one is psychology. That is because BLE's ultimate goal is to set a paternalist intervention in law and the two main aspects behavioural economists argue to explain the necessity of paternalism are psychological phenomena: bounded rationality and self-control problems<sup>4</sup>. At the same time, studies may get into the scope of sociology when cultural, historical or racial factors are taken into consideration. Non-social sciences also influence BLE studies, such as neuroscience or biology<sup>5</sup>.

Behavioural economists think it is necessary to preserve freedom of choice. Hence, their intention is not banning choices, but guiding people to actions that set the individual better-off and that foster social welfare. Thus, BLE aims at 'libertarian paternalism', also referred to as 'soft paternalism' or 'weak paternalism', which has been defined as 'an approach that preserves freedom of choice but that authorizes both private and public institutions to steer people in directions that will promote their welfare'<sup>6</sup>. However, the idea of a 'libertarian paternalism' itself is open to discussion, since other scholars think it is a contradictory concept<sup>7</sup>.

Financial services, marketing, community managing, social work or business administration are just a few of many grounds where understanding people decision making processes can be useful for economic purposes. It might be useful for businesses and consumers as well, since being aware of their cognitive processes may help them to choose better. In law, this can be useful for legislators in order to set rules that steer people to social desirable behaviour.

## II. COGNITIVE BIASES AND BEHAVIOUR

Nobody can deny that people do not always make the right choice, nor that people are emotional and make decisions based on feelings<sup>8</sup>. The key idea is that when people must make decisions in complex situations, they do so by using 'simple mental shortcuts' in their cognitive processes

- 2 See J. D. WRIGHT, D. H. GINSBURG, 'Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty' [2012] 106 Nw. U. L. Rev. 1040.
- 3 See R. A. EPSTEIN, 'BEHAVIORAL ECONOMICS: HUMAN ERRORS AND MARKET CORRECTIONS' [2006] 73 U. Chi. L. Rev. 111 ('the literature on cognitive biases is filled with accounts of the pitfalls of ordinary reasoning: anchoring, availability, representativeness, hindsight, optimism, hyperbolic discounting, and the like'). See also C.R. SUNSTEIN, R. H. THALER, 'Libertarian Paternalism Is Not An Oxymoron' [2003] 70 U. Chi. L. Rev. 1163.
- 4 See E.L. GLAESER, 'Paternalism and Psychology' [2006] 73 U. Chi. L. Rev. 133-156. See also D. KAHNEMAN, 'Maps of Bounded Rationality: Psychology for Behavioral Economics' [2003] 93 AER 1449-1475.
- 5 On neuroscience and BLE, see C. F. CAMERER, 'Wanting, Liking, and Learning: Neuroscience and Paternalism' [2006] 73 U. Chi. L. Rev. 87-110; B. KNUTSON *et al.*, 'Neural predictors of purchases' [2007] 53 Neuron 147-156. For a biological approach, see T. BURNHAM, 'Toward a neo-Darwinian synthesis of neoclassical and behavioral economics' [2013] 90 J. Econ. Behav. Organ. 113-127; Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 Revue de Philosophie Économique 29-37.
- 6 See C.R. SUNSTEIN, R. H. THALER, 'Libertarian Paternalism Is Not An Oxymoron' [2003] 70 U. Chi. L. Rev. 1160, 1170; R. H. THALER, C. R. SUNSTEIN, 'Libertarian Paternalism' [2003] 93 AER 179.
- 7 See G. MITCHELL, 'Libertarian Paternalism Is an Oxymoron' [2005] 99 Nw. U. L. Rev. 1245-1277.
- 8 See R. A. EPSTEIN, 'BEHAVIORAL ECONOMICS: HUMAN ERRORS AND MARKET CORRECTIONS' [2006] 73 U. Chi. L. Rev. 111.

which are referred to as ‘heuristics’<sup>9</sup>. This way, individuals deal on a daily basis with many complex situations without making much effort or spending too much time. But at the same time it is out of the question that heuristics lead people to make mistakes<sup>10</sup>. The point is which concrete factors people are affected by, if those factors play a substantial role or just a small one, and if they imply that people are irrational by nature. There are lots of elements that influence people’s behaviour, but now we will refer to just a few of them. In first place, for example, five problems have been identified as factors that may contribute to excessive borrowing: cumulative cost neglect, procrastination and inertia, unrealistic optimism, self-control problems and miswanting<sup>11</sup>.

Sometimes, individuals come to different conclusions in spite of having received the same information, depending on the way the information is presented; this is a ‘contextualization error’ known as ‘framing effect’<sup>12</sup>. Another heuristic people suffer is anchoring and adjustment<sup>13</sup>. Anchoring is observed when the information people start with affects their perception of the situation as a whole, while adjustment comes from the fact that, when provided a numerical data as anchor, people rely too much on it and are unable of adjusting their response up or down from it<sup>14</sup>.

The ‘overchoice effect’ must be mentioned as well. Logic says the more options we can choose among, the more well-being we will have. However, this turns out to be wrong as it gets to a point when too many options are available, people do not take into account all of them, and risks of choice deferral and post-decision regret increase<sup>15</sup>.

Another shortcut is availability. Addressing the frequency or probability of an event, availability makes the person estimate it by relying on the ideas or examples that come quickly to mind<sup>16</sup>. Availability is sometimes confused with representativeness. When individuals have to determine the probability of an event, they do so using representativeness if they compare the characteristics of the event to the main characteristics of the process the event results from<sup>17</sup>.

One of the most important biases is called the ‘sunk cost effect’, which has been described

9 See J. J. RACHLINSKI, ‘Selling heuristics’ [2012] 64 Ala. L. Rev. 390.

10 *Ibidem*, 391.

11 See C. R. SUNSTEIN, ‘Boundedly Rational Borrowing’ [2006] 73 U. Chi. L. Rev. 251-253.

12 See J. D. WRIGHT, D. H. GINSBURG, ‘Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty’ [2012] 106 Nw. U. L. Rev. 1041-1042 (‘an individual faced with an identical set of choices in different contexts makes different choices, thereby implying an underlying inconsistency in his preferences’). See also J. J. RACHLINSKI, ‘Cognitive Errors, Individual Differences, and Paternalism’ [2006] 73 U. Chi. L. Rev. 210-216; M. J. SANDEL, ‘Justice: What’s the Right Thing to Do?’ (New York: Farrar, Straus and Giroux 2009) 21-24.

13 See A. TVERSKY, D. KAHNEMAN, ‘Judgment under Uncertainty: Heuristics and Biases’ [1974] 185 Science, New Series 1128-1130.

14 See J. P. SIMMONS, R. A. LEBOEUF, L. D. NELSON, ‘The Effect of Accuracy Motivation on Anchoring and Adjustment: Do People Adjust From Provided Anchors?’ [2010] 99 JPSP 917-918.

15 See B. SCHWARTZ, A. WARD, ‘Doing Better but Feeling Worse: The Paradox of Choice’, in P. A. LINLEY, S. JOSEPH (eds.) ‘Positive Psychology in Practice’ (Hoboken: John Wiley & Sons, Inc. 2004) 86-104.

16 See A. TVERSKY, D. KAHNEMAN, ‘Availability: A Heuristic for Judging Frequency and Probability’ [1973] 5 Cognitive Psychol. 208. See also C. JOLLS, C. R. SUNSTEIN, R. H. THALER, ‘A Behavioral Approach to Law and Economics’ [1998] 50 Stan. L. Rev. 1477 (‘[R]ules of thumb such as the availability heuristic - in which the frequency of some event is estimated by judging how easy it is to recall other instances of this type’).

17 See A. TVERSKY, D. KAHNEMAN, ‘Availability: A Heuristic for Judging Frequency and Probability’ [1973] 5 Cognitive Psychol. 208; A. TVERSKY, D. KAHNEMAN, ‘Judgment under Uncertainty: Heuristics and Biases’ [1974] 185 Science, New Series 1124-1127.

as a 'tendency to continue an endeavour once an investment in money, effort, or time has been made'<sup>18</sup>. Another heuristic to refer to is a process known as 'mental accounting'. Since people have limited funds to satisfy their needs and desires, they assign an amount of money to obtain something and account the transactions they get into to evaluate their outcomes. One of the features of mental accounting is dividing the total budget into several categories or accounts which are not exchangeable, so each category serves some specific purposes and the funds in each one are not going to be used for purposes different than those initially established. This is a violation of the principle of fungibility of the money<sup>19</sup>.

Related to mental accounting and the sunk cost effect is decoupling, a cognitive bias by which the more you separate the act of payment from the act of consumption the lower the cost you will perceive. When people assign funds to purposes, they link the utility they get and the cost of it; if they fail to get the utility in one given domain, the cost becomes a loss and the individual feels badly. By decoupling, the mentioned link gets weakened, reducing the perception of the potential loss<sup>20</sup>.

### III. ARE HUMAN BEINGS *TRULY* IRRATIONAL?

Behavioural economists admit that all biases do not affect all the people, all the time, and to the same extent, but most of them point out that within a given group, individuals' biases are more or less the same so conclusions for that group can be reached<sup>21</sup>. But since each individual has different experiences, education, training, skills, emotions, values and preferences, BLE sceptical scholars state BLE cannot be a better predictor because it assumes people's cognitive processes and vulnerabilities are the same.

In very complex situations, it is impossible to execute all the operations required to calculate the consequences, benefits, costs and externalities of each decision<sup>22</sup>. People have limited computational skills, so they display 'bounded rationality', people do some things although they know they are acting against their long-term interests ('bounded willpower'), and some human actions do not seem to reflect the utility function, but a 'bounded self-interest'<sup>23</sup>. These three aspects may indicate human beings are actually irrational. But at the same time, many of the cognitive biases could be actually rational tools; if people are emotional, it would be rational to act according to their emotions, because feeling good with one's choices is also getting utility<sup>24</sup>.

In the same way, in order to be able to make lots of decisions without making great efforts and spending too much time evaluating the situation, using anchors and relying on availability and

18 See H. R. ARKES, C. BLUMER, 'The Psychology of Sunk Cost' [1985] 35 *Organ. Behav. Hum. Dec. Processes* 124.

19 See R. H. THALER, 'Mental Accounting Matters' [1999] 12 *J. Behav. Decis. Making* 183-206.

20 See D. SOMAN, J. T. GOURVILLE, 'Transaction Decoupling: How Price Bundling Affects the Decision to Consume' [2001] 38 *J. Mark. Res.* 30-44.

21 See J. J. RACHLINSKI, 'Cognitive Errors, Individual Differences, and Paternalism' [2006] 73 *U. Chi. L. Rev.* 208-210.

22 See H. A. SIMON, 'A Behavioral Model of Rational Choice' [1955] 69 *Q. J. Econ.* 103-104.

23 See C. JOLLS, C. R. SUNSTEIN, R. H. THALER, 'A Behavioral Approach to Law and Economics' [1998] 50 *Stan. L. Rev.* 1476-1479. See also R. A. POSNER, 'Rational Choice, Behavioral Economics, and the Law' [1998] 50 *Stan. L. Rev.* 1553-1558.

24 See R. A. POSNER, 'Rational Choice, Behavioral Economics, and the Law' [1998] 50 *Stan. L. Rev.* 1554. See also Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 *Revue de Philosophie Économique* 25 ('The maximization of utility function is erroneously identified with the maximization of monetary profit').

representatives while assuming potential mistakes could be rational. Behavioural economists have accepted this, but they have stated that then individuals would divert from the standard rational choice model<sup>25</sup>. This model implies that individual preferences are complete, transitive and continuous<sup>26</sup>. Therefore, it is necessary to define 'rationality' to check out if the stickiness on what behavioural economists refer to as the standard model is justified, or if behaviour does not become irrational in spite of the diversion from it. In my opinion, a simple but quite accurate definition of rationality was given by POSNER: 'choosing the best means to the chooser's ends'<sup>27</sup>.

Hence, attention must be paid to concepts as 'optimization', 'satisfaction' and 'maximization'<sup>28</sup>. It has been said that people do not actually try to 'optimize' their utility, as the standard rational choice model suggest, but just try to get an acceptable level of utility (satisfice), or the best option among a limited amount of possibilities (maximize). Maximization and optimization are sometimes very close of being the same thing, since trying to optimize an action could increase the decision costs too much without getting an equal benefit in return. A rational individual seeks efficiency, and that implies to take into consideration marginal utility<sup>29</sup>.

Some scholars have pointed out that behavioural economics is useful to predict mistakes even in situations where it may be rational to use shortcuts, because tools taken by individuals to manage complex problems are themselves predictable<sup>30</sup>. In general, scholars who are sceptical of behavioural economics do not deny that in certain situations behavioural economics *might* be a better predictor of human behaviour than neoclassical economics<sup>31</sup>. But in some important economic grounds, such as standard form contracts -including credit card contracts- or supermarket shelf space allocation, BLE as a better predictor has been called into question<sup>32</sup>.

- 25 See C. JOLLS, C. R. SUNSTEIN, R. H. THALER, 'A Behavioral Approach to Law and Economics' [1998] 50 Stan. L. Rev. 1477 and 1478 ('[S]omeone using such a rule of thumb may be behaving rationally in the sense of economizing on thinking time, but such a person will nonetheless make forecasts that are different from those that emerge from the standard rational-choice model').
- 26 See Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 Revue de Philosophie Économique 11 ('Complete are the preferences, for example A and B, that the individual may either (i) prefer A to B, or (ii) prefer B to A, or (iii) is indifferent between them. Transitive are the preferences, say A, B and C, where, if the individual prefers A to B and B to C, then she prefers A to C. [...] Continuous preferences mean that for any bundle of two goods there is at least another bundle of the same goods in different proportions offering the same utility for the individual'). See also R. A. POSNER, 'Rational Choice, Behavioral Economics, and the Law' [1998] 50 Stan. L. Rev. 1551 and 1552.
- 27 See R. A. POSNER, 'Rational Choice, Behavioral Economics, and the Law' [1998] 50 Stan. L. Rev. 1551. See also Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 Revue de Philosophie Économique 8-13.
- 28 See B. SCHWARTZ, A. WARD, 'Doing Better but Feeling Worse: The Paradox of Choice', in P. A. LINLEY, S. JOSEPH (eds.) 'Positive Psychology in Practice' (Hoboken: John Wiley & Sons, Inc. 2004) 91-93.
- 29 See Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 Revue de Philosophie Économique 12.
- 30 See C. JOLLS, C. R. SUNSTEIN, R. H. THALER, 'A Behavioral Approach to Law and Economics' [1998] 50 Stan. L. Rev. 1477.
- 31 See J. D. WRIGHT, 'Behavioral Law and Economics, Paternalism, and Consumer Contracts: an Empirical Perspective' [2007] 2 NYU J. L. & Liberty 471-472.
- 32 *Ibidem*, 509-510. See also Y. FOKA-KAVALIERAKI, A. N. HATZIS, 'Rational After All: Toward an Improved Theory of Rationality in Economics' [2011] 12 Revue de Philosophie Économique 20; R. A. POSNER, 'Rational Choice, Behavioral Economics, and the Law' [1998] 50 Stan. L. Rev. 1559.

#### IV. LEGAL INTERVENTION AND CONTRACT LAW

As it has been already said, BLE's ultimate goal is to set a legal framework that, without erasing individuals' freedom to choose whatever they want, steers them towards behaviour considered good for social welfare and for individuals themselves. Steering people towards a specific behaviour while respecting free choice is anything but new in law; every default rule that can be opted out does that. Out of the scope of contract law, the burden of excluding the application of default rules is easy to observe in certain matters, as it has been noticed about organ donations; a public policy setting a change in a default choice from an opt-in to an opt-out seems to increase donation rates<sup>33</sup>.

In contract law, parties to a contract are sometimes steered to maintain default rules, and not only because of the traditional argument that drafting a contract clause implies some costs that they may not want to assume, which can be true, but maybe most importantly because the mere proposal to derogate or modify a default rule could make the other party suspicious and trust is important in agreements<sup>34</sup>. The strength of non-mandatory default rules is not so great in contracts with standard terms because the cost of drafting a document to be applied to all contracts of the same type is small and clients do not want to spend much bargaining terms which are often applicable to uncommon situations<sup>35</sup>. The utility of getting the offered good or service is great, while the risks are small because if contract terms were truly harmful for consumers that information would spread easily through the market and that would be bad for the business; that is the ultimate reason why standard contract terms do not *seem* to reflect efficient terms and BLE predicts their quality will decrease the more competition there is<sup>36</sup>.

When lawmakers pass mandatory rules in private law matters, they are seeking to impose a regulation that sets fair results. In certain grounds such as consumer law or labour law, freedom of contract is highly restricted in order to make all the contracts be fair<sup>37</sup>. Sometimes, protective rules in contract law deal with factors leading to unacceptable unbalanced situations that the law tries to correct, but more often their effect is to avoid some concrete results and provide a remedy to set some specific contract terms aside. BLE pretends results as well, but the approach taken is to fight the process leading to undesirable outcomes, not the outcomes themselves. Under a BLE legal framework, once the intervention is set, the imbalance that might result from the agreement would be in principle valid, binding and legally enforceable. Thus, libertarian paternalism is closer to freedom of

33 See D. LI, Z. HAWLEY, K. SCHNIER, 'Increasing Organ Donation via Changes in the Default Choice or Allocation Rule' [2013] 32 J. Health Econ. 1117-1129.

34 See O. BEN-SHAHAR, J. A. E. POTTOW, 'On the Stickiness of Default Rules' [2006] 33 Fla. St. U. L. Rev. 652-653.

35 See R. KOROBKIN, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' [2003] 70 U. Chi. L. Rev. 1227-1234.

36 See L. A. BEBCHUK / R. A. POSNER, 'One-sided contracts in competitive consumer markets' [2006] 104 Mich. L. Rev. 829-831; R. KOROBKIN, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' [2003] 70 U. Chi. L. Rev. 1243-1244; J. D. WRIGHT, 'Behavioral Law and Economics, Paternalism, and Consumer Contracts: an Empirical Perspective' [2007] 2 NYU J. L. & Liberty 496.

37 In the European Union, restrictions on party autonomy in contract law are quickly identified with consumer protection, but it should be regarded more as protection of the weaker party in an asymmetric contract, whether the weaker party is a consumer or not. See V. ROPPO, 'From Consumer Contracts to Asymmetric Contracts: a Tend in European Contract Law?' [2009] 5 ERCL 304-349.

choice than imposing mandatory rules that no one can opt out from, because although BLE aims to make people decide the *right thing*, ultimately individuals have the option to act *irrationally*.

If people make mistakes because of heuristics, a genuine free market seems to be the best scenario for all kinds of hustlers. Behavioural economists have been able to change decisions by manipulating some conditions, so other people would be able to do it in the marketplace, taking advantage of the weakest ones<sup>38</sup>. But BLE says individuals would make bad choices even without anybody else trying to fool them. With this in mind, desirability of intervention seems out of the question; law should protect individuals from others and also from themselves<sup>39</sup>.

Libertarian paternalism might be a new general approach to address legal reforms about matters individuals are free to choose about, but most importantly it might be a more efficient tool than mandatory rules to constrain freedom of contract in those grounds where it is considered that one of the parties to the contract must be provided special protection because of an asymmetry.

In my opinion, libertarian paternalism is better option than a mandatory legal framework because it allows individuals to adapt themselves to the specific marketplace they operate in, making easier maximization of utility. However, BLE also presents some problems. Now, individuals go to the marketplace and think they are acting freely, but BLE tells us that individuals' will is steered by human cognitive biases. With a BLE legal framework, people would go to the marketplace thinking they are free but they would be being steered as well, towards what legislators have considered to be better for social welfare and for individuals themselves. Why should people trust in legislators that, as human beings, are biased, use shortcuts, and therefore can be deceived by their assistants and counsellors or lobbies?

Another problem of BLE is that it would bring moral hazard. Now, people are aware of the fact that marketing experts, businesses and other private individuals may try to make profits out of their mistakes. In this context, individuals can be wary and ask market operators to compete to earn their trust. But if individuals give legislators enough power to steer them, nobody would think about deception, arising moral hazard<sup>40</sup>. And if legislators can steer people towards a given economic behaviour, those interested in taking advantage of biases will find ways to do it as well, and moral hazard would make deceiving people easier. Then, new intervention would be needed and we would get on a slippery slope; one day, libertarian paternalism would not be libertarian anymore<sup>41</sup>. BLE scholars defend free market and think freedom of contract should be a key princi-

38 This is what some scholars have argued about standard contract terms, which are considered sometimes a weapon of businesses to take advantage of consumers. On the contrary, and in my opinion more accurately, other scholars have pointed out that each consumer is different and that a business cannot distinguish which biases a client is affected by, so a good business strategy may be 'to ignore these biases altogether'. See R. A. EPSTEIN, 'BEHAVIORAL ECONOMICS: HUMAN ERRORS AND MARKET CORRECTIONS' [2006] 73 U. Chi. L. Rev. 121.

39 See J. J. RACHLINSKI, 'The Uncertain Psychological Case for Paternalism' [2003] 97 Nw. U. L. Rev. 1165-1166.

40 See R. KOROBKIN, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' [2003] 70 U. Chi. L. Rev. 1248 ('But buyer bounded rationality can result in the market providing sellers with a profit incentive to draft inefficiently low-quality form terms. Legislatures have no such incentive, and they can thus focus their full attention on drafting efficient terms'). See also J. D. WRIGHT, 'Behavioral Law and Economics, Paternalism, and Consumer Contracts: an Empirical Perspective' [2007] 2 NYU J. L. & Liberty 473.

41 See J. D. WRIGHT, D. H. GINSBURG, 'Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty' [2012] 106 Nw. U. L. Rev. 1075-1080.

ple to be respected, but given the power to steer wills to legislators, who knows when, where and how to draw the line?

And there is another point. Some BLE scholars argue sellers adapt their strategies to consumer misperceptions<sup>42</sup>. If they do, they do so without knowing exactly which heuristics their customers use and the extent of their effects; sellers face many different interests and preferences. So, if behaviour becomes more uniform thanks to BLE's intervention, people who want to take advantage of consumer misperceptions would have to find just one way to deceive them all.

## V. CONCLUSION

In my opinion, the starting point should be the assumption of rationality and the general rule to respect freedom of choice without interventions, bans or any other attempts to steer people to specific behaviour. Of course in some grounds intervention is required and some actions must be forbidden and punished, but to establish intervention as a general rule does not seem desirable to me<sup>43</sup>. I think human beings must take responsibility for their actions, and that implies the person making a right choice is the only one entitled to the profits out of it and the person making a bad choice must be the one who assumes the cost of his mistake. Self-interest is a powerful tool to reduce, at least, irrational behaviour. Individuals learn from their mistakes and seek to avoid them in the future because they suffer the cost of their errors<sup>44</sup>. Even in grounds as excessive borrowing and credit-card contracts, which have been considered situations where irrational behaviour is the rule, it can be said markets work well<sup>45</sup>.

Every person is different and therefore flexibility is highly valued. Marketplaces differ, and within one specific type of contract many differences can be found because there are lots of different business strategies<sup>46</sup>. Facing a coercive system such as that of mandatory rules, flexibility is erased in order to get *what someone considers* fair. BLE is coercive as well, since paternalism has been defined as 'the interference of a state or an individual with another person, *against his will*, and justified by a claim that the person interfered with will be better off or protected from harm' (emphasis added)<sup>47</sup>. Legislators must see intervention as something accidental and extraordinary, and maybe now it is a good time to recall HERBERT SPENCER's famous quote: 'a man's liberties are

42 See O. BAR-GILL, 'The Behavioral Economics of Consumer Contracts' [2008] 92 Minn. L. Rev. 765-780.

43 See R. A. EPSTEIN, 'The Neoclassical Economics of Consumer Contracts' [2008] 92 Minn. L. Rev. 804-805 ('There are, however, two-sets of well recognized circumstances in which the neoclassical theory accepts the proposition that some government intervention *may* make sense: private monopoly and imperfect information').

44 See R. A. EPSTEIN, 'The Neoclassical Economics of Consumer Contracts' [2008] 92 Minn. L. Rev. 811. The counter-argument is to question the efficacy of learning; on the one hand, its positive effects may come just after some costly mistakes and at the same time the different uses of a product, on the other, if products are functionally non-standardised the information and learning that one consumer gets is less useful for other consumers. See O. BAR-GILL, 'The Behavioral Economics of Consumer Contracts' [2008] 92 Minn. L. Rev. 754-758.

45 See R. A. EPSTEIN, 'BEHAVIORAL ECONOMICS: HUMAN ERRORS AND MARKET CORRECTIONS' [2006] 73 U. Chi. L. Rev. 127, 131. See also J. D. WRIGHT, 'Behavioral Law and Economics, Paternalism, and Consumer Contracts: an Empirical Perspective' [2007] 2 NYU J. L. & Liberty 485-488.

46 See R. KOROBKIN, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' [2003] 70 U. Chi. L. Rev. 1249.

47 See C. F. CAMERER, 'Wanting, Liking, and Learning: Neuroscience and Paternalism' [2006] 73 U. Chi. L. Rev. 101-102.

none the less aggressed upon because those who coerce him do so in the belief that he will be benefited'<sup>48</sup>.

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<sup>48</sup> See H. SPENCER, 'Principles of Ethics', Vol. II (New York: D. Appleton and Company 1896) 224 at [http://www.hubertlerch.com/pdf/principles\\_of\\_ethics2\\_spencer.pdf](http://www.hubertlerch.com/pdf/principles_of_ethics2_spencer.pdf).

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## CHILD'S RIGHT TO EDUCATION: LESSONS FROM A RESEARCH IN THE KIRTIMAI SETTLEMENT

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**Abstract.** The Law on Education in Lithuania embodies a principle of equal opportunities in education – it emphasizes that educational system is fair, ensures equality for individuals irrespective of gender, race, nationality, language, origin, social position, religion, beliefs or convictions and guarantees each individual access to education (LR Seimas 1991). Yet, the results of a sociological research, conducted with Roma residents of Kirtimai settlement (Vilnius), opens questions on implementation of the statutory principle of equal opportunities in the system of education of Lithuania. The 2011 census results showed an increase in Roma education levels in Lithuania – compared to 2001, more people have attained basic education level, the number of illiterate people has decreased by 15 per cent (from 26 to 10 per cent). This increase in educational attainment among Lithuanian Roma has not been even in the whole country. The youngest generation (10–19 years olds) of Roma, living in the Kirtimai settlement, continue to have very low educational attainment levels. In the conference paper, main results of a dissertation research, conducted with Roma children attending a primary school in Vilnius, are presented, paying special attention to the role of the state in implementing the child's right to education.

**Keywords:** equal opportunities in education, Roma, local government.

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### INTRODUCTION

UN Convention on the Rights of the Child, adopted in 1989 and ratified in Lithuania in 1992, was one of the most important documents that not only changed the legal status of a child, but also had a major impact on positioning of a child in society, vis-à-vis other social actors, such as parents, teachers, policy makers and others. The change in a legal status of a child has triggered a paradigm shift in sociology of children – a child was seen no longer to be seen as an object, but rather a subject of research.<sup>1</sup>

This change in legal status and understanding of a child brought many new conceptual and methodological challenges both to legal and sociological research. The child was to be seen as an independent subject, having rights and interests that are defined separately from the family and having ability to take part in implementing and protecting his/her own rights.<sup>2</sup> Furthermore, in implementing rights of the child, the best interests of the child must be assured. Yet, debates on what are the contents of the best interests of the child and how they should be defined in a case of conflict of interests between the child and the family, the family and the state, continues.

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1 P. Christensen and A. James 'Research with children. Perspectives and Practices' (New York: Routledge 2000).

2 B. Kairienė 'Vaiko teisinis statusas: įgyvendinimo problemos' [2012] 4(4) Socialinių mokslų studijos 1443–1445.

Joel Feinberg, discussing the case of *Wisconsin v. Yoder*<sup>3</sup> in which a conflict of interests between parents' fundamental right to freedom of religion and the state's interest in educating its children was considered, raises a question of the child's right to open future. Feinberg divides the rights of children into three categories – rights that are common to adults and children (i.e. right to life, right to own property, etc.), rights that derive from the child's dependency upon others for the basic instrumental goods of life and "rights-in-trust" that can be summed up as a single "right to an open future".<sup>4</sup> The peculiarity of the "rights-in-trust" is their projection into the future, that is, instead of focusing on the current interest of the child, these rights are intended to protect future interests of an adult-to-be. A right to an open future refers to "rights that are to be saved for a child until he is an adult, but which can be violated in advance, before the child is even in a position to exercise them".<sup>5</sup>

The duty of adults to safeguard the best interests of the child, that also encompasses the future interests of the adult-to-be, can bring many difficult problems in practical implementation. In order to enrich legal debates on questions like – what is the contents of the best interests of the child, how conflicts of interests between separate persons (the family and the child, parents and the child) should be adjudicated and what assistance to parents in implementing their rights and obligations should be provided<sup>6</sup> – new insights from sociological research on children could be considered.

In this paper, results of a sociological research on early withdrawal of Roma children from school is analysed, discussing several issues that are common both to legal and sociological inquiries, such as – limits in ability of the child to protect his/her own rights, identification of possible breach of legitimate interests of the child and an intersection of principles of equal opportunities and justice in education in implementation of child's right to education. Author's dissertation research was conducted in a segregated Roma community in Kirtimai settlement (Vilnius) in 2009–2013. The empirical research combined several different data collection methods: a quantitative survey of the residents of Kirtimai (N=378), participant observation conducted in the period of two academic years (2009–2011, a total of 20 Roma children, attending 1<sup>st</sup> and 2<sup>nd</sup> grades participated) and qualitative structured interviews with field actors (Roma parents, teachers, school administration, social workers, child protection agency, police, policy makers, NGO workers and others) (N=27). For comprehensive analysis of research data see Petrušauskaitė (2014; 2012).<sup>7</sup>

3 *Wisconsin v. Yoder* 406 U.S. 205 (1972).

4 J. Feinberg 'The Child's Right to an Open Future' in 'Freedom and Fulfillment: Philosophical Essays' (Princeton, Princeton University Press 1992) 78–97.

5 *Ibid*, 76–77.

6 B. Kairienė 'Vaiko teisinis statusas: įgyvendinimo problemos' [2012] 4(4) Socialinių mokslų studijos 1443–1445.

7 V. Petrušauskaitė 'Ankstyvas romų vaikų pasitraukimas iš švietimo sistemos Vilniaus mieste: švietimo lauko analizė' (dissertation thesis, Vilniaus universitetas 2014).

V. Petrušauskaitė 'Romų vaikai švietimo sistemoje: Vilniaus ir Ukmergės savivaldybių atvejai' (Vilnius: Lygių galimybių kontrolieriaus tarnyba 2012).

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 EDUCATION AND REPRODUCTION OF SOCIAL INEQUALITY

Reasons for early withdrawal from education or lower education attainment among different social groups is one of the most important research questions in sociology of education, closely related to issues of social justice in education. Sociologists of education argue that in attempts to understand reasons why early withdrawal from education can be observed not only among individuals, but in entire social groups, one needs to go beyond analysing social or cultural specificity of these groups and analyse the role of the education system in reproduction of social inequalities.<sup>8</sup>

Research in sociology of education has consistently demonstrated the existence of educational inequalities among different social groups and the existing correlation of the educational inequalities with wider social inequalities (in particular, socio-economic status of parents, ethnic divisions, etc.). In order to understand the process of how the educational inequalities are transmitted from one generation to another, sociologists have turned their attention not only to the relationship between children and parents, but also to the system of education and its role in reproduction of social inequalities. Several powerful explanatory models of social inequalities of through schooling have been developed<sup>9</sup>, all of which emphasized the importance to analyse the form and content of schooling and helped to dispel the image of cultural impartiality of general education.

The fact that socio-economic background of a child remains the strongest predicament of his/her educational achievement, which in turn is one of the key factors of individual economic status and capacity for social mobility, is perceived as an instance of social injustice that has been addressed in important philosophical debates.<sup>10</sup> In Lithuania, the assessment of education system in terms of delivering social justice or equal opportunities has rarely been addressed in policy, legal or social research.<sup>11</sup> Valantiejus (2009), reviewing judicial practices in application of the principle of justice in education, notes that the number of court cases concerning issues of education was rather small (40 cases in the period of 2001–2009) and only few of them addressed issues of social justice (mainly those that concerned conflicts over reorganisation reform of school network).<sup>12</sup>

8 See:

P. Willis 'Learning to labour: how working class kids get working class jobs' (Cambridge: University Press 1977);

G. Evans 'Educational failure and working class white children in Britain' (London: Palgrave Macmillan 2006).

S. Fordham and J.U. Ogbu 'Black students' school success: Coping with the burden of acting white' [1986] 18 *Urban Review*, 176–206.

J. MacLeod 'Ain't no makin' it. Aspirations and attainment in low income neighborhood' (Boulder: Westview Press 2009).

9 Among others:

P. Bourdieu and J.C Passeron 'Reproduction in education and society' (London: Sage Publications 1990).

B. Bernstein 'Class, code and control. Volume 1: Theoretical studies towards a sociology of language' (London: Routledge and Kegan Paul 1971).

S. Bowles and H. Gintis 'Schooling in capitalist America' (London: Routledge 1976).

10 For review on debates on justice in education as *justice of harmony*, *justice as equity* and *justice as equality* see E. Smith 'Key Issues in Education and Social Justice' (London: Sage Publications 2012).

11 I. Mikutavičienė 'Education and social inequality interaction phenomenon: Lithuanian Context' (dissertation thesis Vytautas Magnus University 2009).

12 G. Valantiejus 'Teisingumo švietime principo samprata ir taikymas Lietuvos Respublikos administracinių teismų praktikoje' [2009] 9(20) *Socialinis ugdymas* 60–72.

Although statistical data on differences of educational attainment of children by ethnicity, mother tongue, and social status is not available in Lithuania, differences in educational attainment of various ethnic groups can be observed when analysing census data. In the next part of the paper, special attention will be given to educational indicators of the Lithuanian Roma group and their changes in the last ten years.

#### CHANGES IN EDUCATION INDICATORS OF THE LITHUANIAN ROMA IN 2001 AND 2011

The 2011 census results show that the smallest part of residents without basic education are in Ukrainian, Jewish and Russian ethnic groups (about 10%), the largest – within the Roma ethnic group (52%). In Lithuanian and Polish ethnic groups about 17% people do not have basic education.<sup>13</sup> Since 2001, in both Lithuanian and Polish groups, the fraction of residents without basic education has decreased by 10 percentage points, whereas in Roma group this part decreased only by 4 percentage points.

Despite the fact that the growth of educational attainment, observed in the Lithuanian society in the last 10 years, was considerably slower in the Roma group, the analysis of the census data of 2001 and 2011 has shown significant positive changes in education indicators of the Lithuanian Roma. The share of illiterate persons or persons without primary education has decreased remarkably in the Lithuanian Roma group over the last decade (from 26 to 10 per cent) and the relative share of Roma with basic education has increased (from 15 to 29 per cent).

Notwithstanding the positive trends, the education indicators of Lithuanian Roma are still significantly below national average. When the indicators of education of the whole Lithuanian population have been improving, especially in attainment of university education, the education of Lithuanian Roma has improved only on the lowest levels – the attainment of primary and basic education.

In the last 10 years, positive changes in education of the youngest age group (10–19 years of age) of the Roma could be observed. Compared to the results of the same age group in 2001 census, there was a notable decrease in illiteracy rates (from 47 to 11 per cent) and an increase in the relative share of young Roma with basic education (from 10 to 26 per cent). Important differences, however, remain in the acquisition of secondary and tertiary education.

Emphasis should be placed on significant disparities in educational levels within the group of Lithuanian Roma. The data of the population survey in the Kirtimai settlement reveal the distinctive character of the Kirtimai settlement in the general context of Lithuanian Roma – people residing there had a significantly lower education level than the average in Lithuanian Roma group; high illiteracy was characteristic for persons of all age groups. The indicators of education of children and youth (10 to 19 years old) residing in the Kirtimai settlement were considerably lower than the indicators of this age group in the Lithuanian Roma group – there was a larger proportion of illiterate children or children without primary education in this settlement (49 per cent); only several young persons (10 to 19 years old) had completed basic education (2 per cent). Although the comparison between the 2011 survey data and the data of the survey conducted by Institute of

13 Statistikos departamentas 'Lietuvos gyventojai pagal išsilavinimą ir kalbą mokėjimą' (Vilnius: Statistikos departamentas 2013).

Labour and Social Research in 2001 showed some positive changes in the education indicators of the Kirtimai settlement population (in particular, in the group of young women), the illiteracy ratio remains quite high in the settlement and the positive change that took place were significantly less significant than in the group of Lithuanian Roma.

#### CHILD'S RIGHT TO OPEN FUTURE: WHO IS DEFENDING IT?

The dominant discourse of failure of Roma children to succeed in school has repeatedly stressed individual-cultural reasons (lack of work ethics, lack of engagement with curriculum, prioritisation of other activities, etc.)<sup>14</sup>, yet a closer look at the education field shows a more complicated picture of dropping-out from school as early as primary level. In the dissertation research, early withdrawal of Roma children from school was analysed in one locality, comprehensively analysing relationships between all agents involved in implementation of child's right to education for Roma children. The developed model of empirical study was based on theoretical models of Bourdieu and Passeron (1990) and Martin (2011)<sup>15</sup>, thoroughly combining research on social reproduction in education with a methodological field-theory approach in social sciences.

The study was based on a child-centred approach – analysing reasons why children drop-out from school, academic careers of a total of 20 Roma first-graders were followed in the course of one–two years. Special attention was paid to issues that hinder full participation of children in education, analysing possibilities of children and other actors in the field to solve the emerging problems. The research has established that unwillingness of children to go to school and the signs of avoidance behaviour (being late to return to the classroom after breaks, refusal to work in the classroom) would come up after children have started attending school, in particular, after they encountered various difficulties they were unable to overcome on their own. The main challenges faced by the Kirtimai settlement children at the start of their education in general education schools were related to the acquisition of learning supplies and understanding of educational arrangements, getting ready for school and ensuring a safe trip to school, their need for additional education in order to overcome learning difficulties and the support necessary to deal with various emotional problems (anger, sadness, frustration) and conflict situations.

The willingness of children to go to school to a large extent depended on the ability of other field actors to solve the encountered difficulties. The main responsibility for ensuring the child's right to education rests with his/her parents or care-givers, yet in the Kirtimai settlement many parents were unable to provide their children with needed support in the process of schooling due to their own illiteracy, poverty and other social risks factors. Almost a third of all children living in Kirtimai, lived in households where all of the adults were illiterate, half of the children – in households, where the highest education level of an adult was primary education.<sup>16</sup> Furthermore,

14 V. Petrušauskaitė 'Dropping out of school – an issue of disaffection, non-participation or social exclusion? Analysing school policies towards Roma schoolchildren in Lithuania' [2010] 2010/1-2 Etniškumo studijos 105–120.

15 P. Bourdieu and J.C Passeron 'Reproduction in education and society' (London: Sage Publications 1990). J. L. Martin 'The explanation of social action' (Oxford: Oxford University Press 2011).

16 For exact statistical data see: V. Petrušauskaitė 'Ankstyvas romų vaikų pasitraukimas iš švietimo sistemos Vilniaus mieste: švietimo lauko analizė' (dissertation thesis, Vilniaus universitetas 2014)

possibilities of parents to provide children with the needed support were often undermined by difficult financial situation of families (unstable income, debts, insecure housing, lack of basic necessities at home). Responsibility of the state to oversee the implementation of the rights of the child and to provide families with needed social assistance was divided among several field actors: teachers, school administration, social workers, child protection specialists, police and the education department at the city municipality. During the research, attempt was made to understand why in the case of evident failures of Roma children at school, no substantial efforts were made on the part of the state to improve the current situation of non-education of the Roma children.

The research data has shown that the possibilities of Roma children to participate in education were not equal to the possibilities of other children; however, these substantial inequalities were disregarded in the field of education. The field actors holding power positions in the researched field did not assume responsibility for seeking positive changes. Responsibility for school failure of Roma children was shifted on the actors with least power – on the children themselves – emphasising their “unwillingness to learn” and understating the weight of difficulties they encounter in education. Ethnic distinction of Roma children from the ethnic majority group was often actualised to substantiate the claim that allocation of additional resources would not help to solve the problem and that needs of other children deemed to deserve priority. Most of the actors in the field exhibited dispositions of helplessness (disability) in terms of their ability to ensure the rights of Roma children to education. Although it was often admitted that Roma children had limited opportunities to participate in education and were susceptible to early drop-out risk, the common attitude of helplessness discouraged allocation of additional resources to solving of this problem. Furthermore, efforts of individual actors in the field were downgraded as insufficient or meaningless even when positive developments were noticeable.

Although the system of education remains one of the most important social mobility channels for members of the groups in social exclusion, the research data validated criticism of the role of the education system in the process of social integration of Lithuanian Roma. The marginalisation of the needs of Roma children in education and the absence of the public policy that integrate social and education policy measures explains how the Lithuanian education system contributes to reproduction of social exclusion of Roma in Lithuanian society.

## CONCLUSIONS

The adoption of the Convention on the Rights of the Child and the subsequent change in the legal status of a child has had a significant impact on positioning of a child in social research. Contrary to previous approaches to the child as an object – that is as a person acted upon by others and that is fully dependent from others, – children in sociology became to be seen as “social actors with their own experiences and understandings, [that] act, take part in, change and become changed by the social and cultural world they live in”.<sup>17</sup> This new approach allows reframing some

<sup>17</sup> P. Christensen and A. Prout ‘Working with ethical symmetry in social research with children’ [2002] 9(4) *Childhood* 477–497.

of the biggest debates in sociology of education – namely, on the role of education system in reproduction of social inequalities.

The conceptual status of the child as an independent and autonomous social actor that is no longer to be seen only as a part of social structures that surround him/her (i.e. family, school, ethnic group, etc.) allows a new revision of the balance of rights and obligations between different subjects (children, parents and the state) in implementation of child's right to education. Analysis of injustice in education that has thus far been mainly considered in respect to large social groups (i.e. working-class, migrants, ethnic minorities etc.) can now be reframed and analysed from the perspective of a child of these specific groups. In sociological research, this change in perspective allows identifying new important factors for early withdrawal from school that have not been discussed in applied education research. The new empirical evidence collected by sociologists can help to raise new important questions to be considered in legal research, such as – how does a current system of legal responsibilities affect implementation of child's right to education and how the best interests of the child could be secured in cases when parents are in need of assistance in implementing their rights and obligations.

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## THE INFLUENCE OF THE LEGAL EXPERT AUTHORITY ON LEGAL REASONING – AN EXPERIMENT

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**Abstract.** The topic of the paper is evaluation of the data gathered during empirical experiment conducted by the author on a group of trainee attorneys and legal councilors. The goal of the experiment was to discover to what extent does doctrine and court rulings have influence on interpretation of legal texts by lawyers. One of the main questions that the experiment can solve is: Is it true that most lawyers (especially inexperienced ones) submit to the line of the interpretation of the legal texts that is already established by influential legal experts and higher instance courts. During the experiment three groups of trainee attorneys and legal councilors were given a short passage from legal text that could be interpreted only in two ways (A and B). First of the assessed groups was given court ruling that supported interpretation B, second group could use court ruling that supported interpretation A besides the legal text that they had to interpret. Third was control group and was given no additional data, so they had to use only their legal reasoning skills to render the legal text. The paper will depict the experiment and the results based on comparison of choices of legal interpretation of the three different groups. The level of derivation of choices in interpretation of the legal text in groups one and two from the control group can be seen as the scope of the influence that legal expert authorities have on the interpretation of legal texts. The experiment is an example of using social sciences methodology in legal research and its scientific goal is especially important in era of common use of the electronic legal expert systems that store vast database of secondary sources that are often used before lawyer makes his own interpretation using array of legal reasoning rules, thus affecting his opinion.

**Keywords:** authority, legal interpretation, Constitutional Tribunal

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### INTRODUCTION

The topic of the paper is preliminary evaluation of the data gathered during empirical experiment conducted on a group of trainee attorneys and description of the experiment itself. The goal of the experiment was to discover to what extent does legal expert authority such as Constitutional Tribunal<sup>1</sup> has influence on interpretation of legal texts by young lawyers. In Polish legal science there is strong debate concerning influence of Highest Court, Highest Administrative Court and Constitutional Tribunal rulings on legal practice, some scholars even describe the practice of rigidly following opinion of judicature as *de facto* precedents<sup>2</sup>. For me the most important thing was the social psychology aspect of following an expert opinion concerning the interpretation of legal texts. The impact that authority of an expert can have on our own reasoning was debated at least from the

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1 Constitutional Tribunal – 'Trybunał Konstytucyjny' is the name of Polish Constitutional Court

2 L. Morawski, 'Zasady wykładni Prawa', (Toruń: TNOiK – Towarzystwo Naukowe Organizacji i Kierowania. Dom Organizatora 2007) 19-20, 130-210

time of Aristotle from many different angles and with different approaches<sup>3</sup>. The thing that should be stressed before describing the experiment is that all lawyers should be experts in law, people pay for their legal expertise and expect legal knowledge. In the experiment we have therefore example of experts being influenced by opinion of other presumably more distinguished experts. Which is not so uncommon, other examples could be medical experts, scientist, artists, philosophers etc. that use opinion of other experts as their benchmark, comparison or inspiration. Undeniably the important factor here is that respondents were trainee, attorneys or legal councilors and level of the influence that might be exerted on far more experienced lawyers needs further studies.

#### DESCRIPTION OF THE EXPERIMENT

Respondents were chosen from second and third year trainees/applicants (*aplikanci*) undergoing legal training called application (*aplikacja*) under the surveillance of Polish legal corporations. They all were lawyers after five years of legal studies and with at least minimum compulsory practice, but still with limited ability to stand before higher courts. Application is the most common way of earning the right to take the bar exam in Poland. Respondents were both trainee attorneys and trainee legal councilors.<sup>4</sup> Survey was internet based and tests were sent via second and third year trainee mailing lists and open only for trainees to the bar Facebook groups.

Survey consisted of three sets, (numbered 1,2,3) all with only one and the same question concerning constitutionality of several articles relating to the strict requirements that person had to fulfil to terminate the compulsory car insurance contract<sup>5</sup>. Those articles were chosen because they were out of date so most trainees didn't interpret them beforehand and were controversial, so it was not easily decided if they were constitutional or not. Question concerning constitutionality had another advantage that all lawyers should have the capacity to interpret the Constitution but at the same time, generality of the Constitution means that two different answers were possible. For an overview of the generality of articles of Constitution that maybe were violated, they are as follows:

##### **Article 2**

The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.

##### **Article 32**

1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.<sup>6</sup>

3 For example: A.R. Pratkanis, E. Aronson, 'Age of Propaganda. The everyday Use and Abuse of Persuasion' (New York: W. H. Freeman 2001), Douglas Walton, 'Appeal to Expert Opinion: Arguments from Authority' (University Park : Pennsylvania State University 1997)

4 Differences between these two professions are irrelevant for the results of the experiment.

5 Polish Parliament Act (Ustawa) 22.05.2003 : art. 28 ust. 1 w związku z art. 18 ust. 1 w związku z art. 4 pkt 1 ustawy z dnia 22 maja 2003 r. o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych (Dz. U. Nr 124, poz. 1152, but only with changes to 30.12. 2009)

6 <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> 10.02.2014

There were only two answers possible for the question: either the articles were constitutional (**option A**) or were not (**option B**). As far as the content of the question was always the same, it was the additional information which respondents received that was different. Besides the question and abstracts from Constitution and the Act, one of the groups (1) received a fragment of Constitutional Tribunal Provision clearly indicating that Constitutional Tribunal reasoned that articles were violating the Constitution (**option B**). Parts of the fragment indicating *expressis verbis* that reasoning were even highlighted: “Non-compliance of the contested norm to Art. 2 of the Constitution is...”, “Imposition of duties on citizens whose impact may depend on factors beyond their control infringes the (...) guarantees arising from the principle of the rule of law”, “...justifying that the Constitution was violated”. Second Group received fragment of the same Constitutional Tribunal Provision but this time parts of the provision were chosen to point constitutionality of the articles (**option A**) but not that directly as option B was indicated in Group 1. Some parts were highlighted, for example: “Therefore, (...) the condition of the effectiveness of termination of the insurance contract liability, which is to handle to the recipient (insurance company) registered letter, not the result of art. Paragraph 18. 1 in connection with Art. Paragraph 28. 1 Insurance Act, but with art. 61 § 1 of the Civil Code”, “It is unacceptable to also consider the objection of unconstitutionality substantially...”. Third Group was the control group and did not receive any additional text exceeding the question and fragments of legal texts to interpret.

To ensure that there was no one and only right answer, the Constitutional Tribunal historically didn't answer the question and closed the case because of formal reasons at the same time considering arguments and opinions of all parties involved in constitutional question procedure. Legal opinions of the Speaker of the Parliament, Attorney General and District Court that initiated the question procedure, were all well presented in Constitutional Tribunal Provision from 29.02. 2012 (Signature P 3/10). Fragments of the Provision that were provided to the respondents were carefully chosen to make impression that the opinions are actually of the Constitutional Tribunal itself, so that only one legal expert authority would be the source of legal interpretation. Using opinions of different types of legal experts such as Attorney General, Speaker of the Parliament, famous legal scholars etc. could show different levels of influence over legal reasoning of the respondents, depending not only on quality of the legal opinion but on the 'level' of authority they have. That would require a lot more respondents than in an experiment measuring only the level of any influence. It should be stressed that respondents were not given any facts to consider and were ordered to answer the question after **independent and abstract interpretation** of the fragments of legal texts that were provided.

Differences in the distribution of A and B options between two groups, (1,2) and the control group (3) allows to examine the influence of authority of the Constitutional Tribunal on the interpretation of the law among the studied group that is representative for young lawyers in Warsaw.

The results are:

95 applicants finished the survey (from more than 400 that have seen the question but didn't answer it). Most of the answers are from Group 1 albeit the surveys were sent roughly to the same number of young lawyers, so possibly Group 1 of the respondents was far more active, more respondents knew me personally or it was better advertised by the Bar than other groups<sup>7</sup>.

<sup>7</sup> To send surveys via mailing list official District Attorney Council (*Okręgowa Rada Adwokacka*) channel was used.

Overall answers	Option A – Constitutional	Option B – Unconstitutional
Group 1 – 60	A20 ~33.3%	B40 ~ 66.6%
Group 2 – 20	A11 55%	B9 45%
Group 3 – 15	A8 ~ 53.3%	B7 ~ 46.6%

## CONCLUSION

The level of derivation of choices in interpretation of the legal text in groups one and two from the control group can be seen as the scope of the influence that the Constitutional Tribunal opinion has on the interpretation of legal texts by trainee attorneys and legal counsels. Results show that choice of the answer in the control group was almost equal. In Group 2 in which fragment of the Constitutional Tribunal Provision suggested option A there was slight change of results in favour of option A, but in Group 1 in which the fragment of the Constitutional Tribunal Provision directly favoured option B the shift in answers preference was immense. Twice as many respondents as those who chose option A ‘independently’ interpreted that the articles were unconstitutional thus giving answer B. The reasons why respondents were so heavily influenced in their legal interpretation by reading fragments of the Constitutional Tribunal Provision may be various. The authority of Constitutional Tribunal, soundness of the arguments used in the fragments, laziness and conformism or even lack of confidence attributed to beginners, among others, can all be sources of that heavy influence. Nonetheless the experiment can be a point of departure for further research. That would be desirable especially as the results might seem alarming, showing that at least some of the young lawyers are easily influenced and don’t think independently. The experiment is an example of using social sciences methodology in legal research and its scientific goal is especially important in era of common use of the electronic legal expert systems that store vast database of secondary sources that are often used before lawyer makes his own interpretation using array of legal reasoning rules, thus affecting his own reasoning.

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## 'EUROPEANISATION': FROM POLITICAL IDEA TO THE LEGAL CONCEPT

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**Abstract.** The paper contributes for a conference topic of integrating social sciences into legal research by considering an aspect in which legal science may address political one and make use of some of its ground-work. The question at issue is the concept of Europeanisation, a term used in various social studies, but developed and consolidated by political science. It is argued that legal research, also concerned with this concept, may borrow the definition and main reasoning from political disciplines and apply them for own purposes. Moreover, providing law colleagues with a definition is not the only way political research may be relevant. It also contains important conclusions as to the reasons and methods of political activities of EU and its Member states. As far as legislative process in the Union is subject to political considerations, a study of this empirical material, gathered by political science, presents another significant objective.

**Keywords:** Europeanisation, European integration, harmonisation of laws, political adaptation, domestic effect of Europeanisation

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### INTRODUCTION

Currently the author is engaged in a doctoral research on Europeanisation of procedural law. The theme was proposed by scientific supervisor and was based on author's previous experience in the field of comparative law and law of civil procedure. However, the theme of Europeanisation seemed to be quite a captious one. It is almost obvious what people mean when they speak of it, however it is utterly difficult to define it. It represents a tendency that takes place throughout culture, economics, politics and law. In simple words Europeanisation happens when something becomes more European-like than before. However, this explanation only leads to new questions: how and why does the process happen? Is it controlled by the states or does it take place autonomously? What is its direction and what can it finally result in?

Again, we do not need to forget that our research concerns law and even more than that – a particular branch of law – that of civil procedure. It is strongly believed that Europeanisation here takes the form of harmonisation of procedural laws of EU member states and is presented by studies on EU Regulations, such as Regulation 44/2001 that brings together states' approach towards jurisdiction in the field of commercial disputes and simplifies recognition of judgments within the Union.

Nevertheless, this research attempts to catch the very concept of Europeanisation instead of consequences it brought with itself. Without any doubt this study will help to measure the effectiveness of current EU procedural legislation and stipulate on how the things may be improved. In

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order to achieve that aim a decision was made to devote a whole chapter of the thesis to defining Europeanisation, both in its common meaning and its meaning for the legal sphere. Here where the author had to address the political disciplines. It appears that the topic was developing mainly by the scholars in that field of social sciences and they were responsible for a number of discoveries that have value beyond the mere political studies. It was then decided that an excursus into political field in a law dissertation would not seem inappropriate; on the contrary it would give answers to the questions that lie in the very heart of it.

#### APPROACHES TO THE CONCEPT OF EUROPEANISATION

Europeanisation has recently become a popular topic of scientific research. The term appears in social, economic, cultural, political and legal studies<sup>1</sup>. Numerous definitions of it were proposed, as well as its interrelation with other concepts was explored. However, the works are not strongly interrelated – each of them belongs to its own field of study and is devoted to proving particular issues instead of making common conclusions<sup>2</sup>. The authors did not come to any consent as to term's actual meaning, though they noted that its use in several social sciences in different interpretations results in the loss of meaning<sup>3</sup>. Beside that it was obvious that researchers needed to provide a definition of the concept in order to delimit it from other phenomena, to show that it had its own meaning, otherwise the necessity of its introduction would be questioned. One view all researchers share is that Europeanisation is to be regarded as a process and not an outcome<sup>4</sup>.

The first references to the concept date back to 1990, while only at the end of the decade it was acknowledged as a “distinctive research area in EU studies”<sup>5</sup>. Some use the term to define a process “whereby a question becomes a matter for determination by Community law rather than by national law”<sup>6</sup>. In such meaning Europeanisation is seen as a transfer of several problems from state to supranational level where they begin to be solved by supranational institutions. It does not deal with the changes themselves – the questions remain the same – but the authority responsible for handling them changes.

Most often authors choose a narrow view and speak about Europeanisation in terms of domestic response to EU political initiatives. For example, Moumoutzis includes here incorporation of supranational norms, practices and procedures into the domestic level<sup>7</sup>. Carter and Scott describe it as emergence of new models of policy formulation and decision-making at the domestic level, which is a direct result of political activity of EU institutions.<sup>8</sup> In the same vein dwells

- 1 W. Müller, M. Bovens, *et al.*, ‘Legal Europeanization: Comparative Perspectives’ [2010] 88 Public Administration 75
- 2 J. Olsen, ‘The Many Faces of Europeanisation’ [2002] Vol. 40 No. 5 JCMS 921
- 3 K. Featherstone, C. Radaelli, ‘The Politics of Europeanization’ (Oxford: OUP 2003) 3-4
- 4 T. Exadaktylos, C. Radaelli, ‘Research Design in European Studies: The Case of Europeanization’ [2009] Vol. 47 No. 3 JCMS 510
- 5 A. Gawrich, I. Melnykovska, R. Shweickert, ‘Neighbourhood Europeanization through ENP: the Case of Ukraine’ [2010] 48 JCMS 1209-10
- 6 T. Hartley, ‘Unnecessary Europeanisation under the Brussels Jurisdiction and Judgments Convention: the case of the dissatisfied sub-purchaser’ [1993] ELR 506
- 7 K. Moumoutzis, ‘Still Fashionable Yet Useless? Addressing Problems with Research on the Europeanization of Foreign Policy’ [2011] Vol. 49 No. 3 JCMS 607
- 8 C. Carter, A. Scott, ‘Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union’ [1998] 4 EJIL 437

Ladrech<sup>9</sup> and Goetz<sup>10</sup>, who see Europeanisation as a change of national public policies due to EU's demands. As a domestic change this process is described by Flockhart, however, he broadens the territorial and historical scope of the process, pointing out that EU has also a significant impact on non-members and that in fact Europe influenced other nations in this or that way throughout entire history<sup>11</sup>. He names the current state of the process "EU-isation" and regards it as an integral part of Europeanisation<sup>12</sup>.

Territorial aspect is indeed relevant and thus it is important how far can we go speaking of Europeanisation. Most scholars agree that the process is not tied to the EU Member States and may describe changes in other regions<sup>13</sup>. Gawrich *et al.* include here accession and neighbourhood Europeanisation, the latter refers to outsiders who have no immediate accession perspectives<sup>14</sup>.

Europeanisation is understood in a narrow sense<sup>15</sup>, as EU-linked, due to the fact that it presents a 'core' of unification activity and is active in all spheres of life, thus becoming a leading force of Europeanisation. It has no equal rivals as no other organization or union declares such broad and brave goals as it does: formation of area of freedom, security and justice and the effective functioning of the common market, based on unified legal principles<sup>16</sup>.

Another view of Europeanisation argues that our study of domestic impact of EU activities cannot be considered integrate without a regard to the reverse process of how the Member States (and in broad terms – outside nations) influence the Union. Thus Aspinwall writes that the influence is actually 'reciprocal'<sup>17</sup> and domestic policies of Member States can also become an object of study in order to determine how they participate in EU institutional and policy building. For Angelopoulou Europeanisation represents a concept, the essence of which is a two-way process of exchange of policies between the EU and domestic level<sup>18</sup>. Börzel refers to the terms 'top-down' and 'bottom-up' approaches, describing the two directions. She also notes that the latter actually dominated in former European studies, as there was a lot of literature on institution-building and states' role in it<sup>19</sup>. For that reason it is obvious that nowadays it is more important to pay attention to the former, 'top-down' aspect. Thus we need to remember that Europeanisation has two sides, but give priority to the latter, 'local impact', as it deserves particular attention and explanation.

- 9 R. Ladrech, 'Europeanisation of Domestic Politics and Institutions: the Case of France' [1994] Vol. 31 No. 1 JCMS 69
- 10 K. Goetz, 'National Governance and European Integration: Intergovernmental Relations in Germany' [1995] Vol. 33 No. 1 JCMS 92
- 11 T. Flockhart, 'Europeanisation: The Myths and the Facts' [2006] Public Policy Research 86, 91
- 12 T. Flockhart, 'Europeanization or EU-ization? The Transfer of European Norms across Time and Space' [2010] Vol. 48 No. 4 JCMS 790-1
- 13 U. Liebert, 'Causal Complexities: Explaining Europeanisation' [2002] CEuS Working Paper No. 2002/1 7 at [http://edoc.vifapol.de/opus/volltexte/2012/3776/pdf/2002\\_1\\_Liebert.pdf](http://edoc.vifapol.de/opus/volltexte/2012/3776/pdf/2002_1_Liebert.pdf)
- 14 A. Gawrich, *et al.*, *supra* note 5, 1210
- 15 W. Müller, M. Bovens *et al.*, *supra* note 1, 5
- 16 Article 3(2) of the Treaty on the Functioning of the European Union at <http://eur-lex.europa.eu/en/treaties/new-2-47.htm>
- 17 M. Aspinwall, 'NAFTA-ization: Regionalization and Domestic Political Adjustment in the North American Economic Area' [2009] Vol. 47 No. 1 JCMS 3
- 18 M. Angelopoulou, 'Approaching the Europeanisation process from a cosmopolitan perspective' at <http://www.idec.gr/iier/new/>
- 19 T. Börzel, T. Risse, 'When Europe Hits Home: Europeanization and Domestic Change' [2000] Vol. 4 No. 15 EioP 1 at <http://eioip.or.at/eioip/texte/2000-015a.htm>; C. Knill, D. Lehmkuhl, 'The national impact of European Union regulatory policy: Three Europeanization mechanisms' [2002] 41 EJPR 255

In conclusion of the discussion on the term's substance it will be useful to cite another 'broad' Flockhart's definition of Europeanisation: "different forms of diffusion processes of European ideas and practices across time and space"<sup>20</sup>. The advantage of this view is the use of the term "diffusion" that implies the spread of ideas irrespectively of the direction: whether bottom-up or top-down. This depicts better what is happening in European political process. Norms do not come from one place, but they are rather involved in a circulation, thus appearing at first on one level they would then be adopted and accepted on another. Norms and forms may come from outside, but they are generally discussed on different European levels, reshaped and formalized. A close position is that of C. Radaelli, who regards Europeanisation as an ongoing process that consists of "construction, diffusion and institutionalisation of formal and informal rules, procedures, policy paradigms, styles, appropriate behaviour and shared beliefs and norms"<sup>21</sup>. This is a step forward, as apart from a norm movement between various levels it shows also how the norm is born, and how it ultimately strikes root in the national law. Radaelli also provides a list of what actually is participating in this circulation: 'rules, paradigms...'

If we try to apply the concept of Europeanisation to law we may conclude that it also encompasses a process of change due to political activity of Member States and EU institutions. Hess, for example, regards Europeanisation as a process through which national legal provisions and whole areas of law that have previously been original are becoming replaced by Community standards and norms, or conditioned on them<sup>22</sup>. This 'top-down' vision needs to be supplemented by a 'bottom-up' approach that will study how the domestic actors influence legislative process on supranational level. Europeanisation discourse shall build itself around the processes of legal norms discussion and adoption as well their implementation and application. Like political scholars, we focus mainly on the aspect of Member States adaptation, as the whole process of Europeanisation begins at the domestic level (initiatives for legal reforms) and ends there (implementation of eventual legal rules).

#### EMPIRICAL MATERIAL RELEVANT TO LEGAL RESEARCH

After defining the process of Europeanisation we focus on how the political sciences may be relevant in describing the way the process operates. These sciences' achievement consists not only in developing the concept of Europeanisation, but in exploring the very process both from inside and outside, in discovering its mechanism and its logics. Though the process is of a political nature, we can still rely on the data of political sciences as the activities of institutions and interest groups have always a political background, whether we speak of cultural, social policy or a policy in legislative sphere. Moreover, all of these areas are closely interrelated and it is simply impossible to take them separately.

The amount of the article and its purposes do not give a possibility to reveal all the relevant thoughts expressed by political scientists, thus we will focus on their main conclusions.

20 T. Flockhart, *supra* note 12, 788

21 C. Radaelli, 'Europeanisation: Solution or problem?' [2004] Vol. 8 No. 16 EIoP 3 at <http://eiop.or.at/eiop/texte/2004-016a.htm>

22 B. Hess, 'The Integrating Effect of European Civil Procedure Law' [2002] 4 EJLR 3

To begin with, political studies help us to address the essence of ‘changes’ that happen at the domestic level. In Börzel’s view, *e.g.*, they happen as long as there exists ‘inconvenience’ between national policies and those of supranational level. She calls this inconvenience ‘misfit’ and determines that “the lower the compatibility between [the levels] the higher [is] the adaptational pressure”<sup>23</sup>. On the contrary, when there is a strong compatibility, there will be no problems with the share of policies. The same remains true for legislative process as well: our study needs first to elaborate what is the legal situation in the Member States, then – what proposals for reforms are there in EU mind and finally – whether they are to be effective in each particular Member State and if not – what can be done.

Political studies also provide us with information on how the reverse (*bottom-up*) influence takes place. Again we shall admit that lawyers studying Europeanisation almost always depict it as a process of approximation of legal rules and treat the process in a *top-down* perspective, asking what are the changes that EU legislation brings to the national legal orders and, probably, how deep the Union should be permitted to intervene. The question of reverse influence is not studied in a thorough way, thus leaving the overall picture incomplete<sup>24</sup>.

An insight on how *bottom-up* influence happens is provided in some of Börzel’s works. She speaks of different motives that occupy the minds of national actors and comes to the conclusion that for them the most important is to ‘upload’ their paradigms onto the supranational level. They may follow several strategies: ‘pace-sitting’, ‘foot-dragging’ and ‘fence-sitting’. The first of them means active pursuing a policy goal at the EU level, the second – active ‘not letting things happen’: blocking or delaying initiatives, and the third one – a passive form of building coalitions with one of the previous groups, depending on actual interest. Börzel also reveals that state’s behaviour is influenced by its desire to maximise a benefit from participation and minimise costs<sup>25</sup>. States may also use regional integration to achieve their own purposes and aims<sup>26</sup>. It is always to be remembered that there are Eurosceptics and Europhiles among the political players at the national level<sup>27</sup>.

Europeanisation studies also show us when and how changes may take place in states outside the EU. A relevant study in this field was conducted by Gawrich *et al.* who looked upon how East Neighbourhood Partnership (ENP) influenced democratic development and economics of Ukraine. In that country’s case EU was concerned primarily with democratic promotion, economic co-operation and co-operation in Justice and Home Affairs<sup>28</sup>. It was shown that degree of compliance

23 T. Börzel, T. Risse, *supra* note 19, 5-6

24 B. Hess, ‘Procedural Harmonisation in a European Context’ *In* ‘Civil Litigation in a Globalising World’ (The Hague: Asser Press 2012) 160

25 T. Börzel, ‘Pace-Setting, Foot-Dragging, and Fence-Sitting. Member State Responses to Europeanization’ [2001] Queen’s Papers on Europeanisation No. 4/2001 2 at <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/EuropeanisationFiles/Fileupload,38434,en.pdf>

26 P. Vercauteren, ‘European Integration and the Crisis of the State’ [2001] Queen’s Papers on Europeanisation. No. 7 at <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/EuropeanisationFiles/Fileupload,38431,en.pdf>

27 R. Bellamy, D. Castiglione, ‘Normative Theory and the European Union: Legitimising the Euro-polity and its Regime’ [2001] Queen’s Papers on Europeanisation No 13/2001 at <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/EuropeanisationFiles/Fileupload,38425,en.pdf>

28 A. Gawrich *et al.*, *supra* note 5, 1215

with EU demands actually depends on local perception, content and clarity of the propositions, incentives and rewards, forms and degrees of linkage and financial support. It is to say that other researches also name the main techniques of the EU to cause changes, the main of which are conditionality and socialisation<sup>29</sup>. Actually these findings may be relevant for understanding the success or failure of some legislative reforms<sup>30</sup>.

An important conclusion of ENP study is also that in the process of non-member Europeanisation both pressure from EU level and own initiative of the states are relevant<sup>31</sup>. Europeanisation may be induced, it may be caused by political initiatives of the Union that wants to build up effective relations with its neighbours and candidate countries. Again it must be presumed that in cases of potential members, the pattern of EU's activity is going to be direct and clear: it will demand the reforms it wants the candidate to undertake. In case of such states as Russia and Belarus that do not seek either membership or even association much will depend on the will of these nations. In case they are interested in political, economic and legal co-operation, they will need to adapt at least in some relevant fields. The initiative here will come mostly from them rather than from EU.

Taking legal sphere, it may result there in legislative reforms initiated by a state in order to comply with European standards. To bring an example from procedural law: both states and citizens are interested in recognition of state's judgments abroad. In EU such system is almost unified through Regulation 44/2001, Regulation 2201/2003 and others. Other nations cannot benefit so easily from the free movement of judgments, but can adapt to European norms in order to make EU Members trust in their procedural systems and treat them not worse than their own. For Example, the Resolution of VI Russian Convention of Judges<sup>32</sup> determined that there existed a strong necessity either to seek membership in Lugano Convention on judgment recognition (it exists as an alternative to Regulation 44/2001 for non-EU states) or to develop on its base a separate international treaty. It may be argued that such a proposition is a result of indirect influence of EU legislative activities in procedural field.

Political literature does not stop here and discusses various forms of interaction between national and supranational levels, factors facilitating and hampering changes, various 'interest groups' that have a possibility to affect the process. These studies are thorough and deep and despite their logics lies beyond legal mind it virtually helps to show how the things are actually done and on that occasion are necessary to be taken into account.

## CONCLUSION

Political sciences were responsible for the elaboration of the definition of Europeanisation. They were trying to set the tone for discussions concerning its scope, limits, possibilities and the necessity of the very term. When we speak about Europeanisation in law, it is important to

29 F. Schimmelfennig, 'Europeanization beyond Europe' [2012] Vol. 7 No. 1 LREG 8 at <http://www.livingreviews.org/lreg-2012-1>

30 A. Gawrich *et al.*, *supra note 5*, 1215

31 *Ibid.* 1216

32 On the state of justice in Russian Federation and the perspectives of its development [2004] Resolution of VI Convention, Moscow, 2 December 2004.

understand that originally the term comes from the field of political sciences and all its analysis and classification got matured there.

The question is what we can bring from the political sphere to the legal one that can facilitate the research on a particular doctrinal problem or just help to enrich the legal science in general?

First of all it is our understanding of Europeanisation as a process: (1) that is ongoing and is unlikely to be stopped or reversed; (2) that is connected with changes that happen with the object of study; (3) that cannot be regarded as unequivocally positive or negative; (4) that is not free from political pressures and is highly influenced by them (may be delayed or forwarded to another direction); (5) that is manifested in law in the form of approximation of legal instruments and their application in practice (by courts, governmental agencies, etc.), convergence of legal systems, adoption of common standards and rules and their partial replacement of existing national rules;

Political sciences have really done a significant job for us by developing the concept of Europeanisation and exploring its main features. However, the cooperation between legal and political disciplines in the field does not end here. We [lawyers] will still have to address political discourse in order to see what is going on there and how to measure the effectiveness of legislative activity planned for the future. Indeed in order to achieve success our sciences need not live in isolation, but in fruitful interaction.

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## THE PROCESS OF FILLING GAPS IN THE LAW AS A SPECIFIC POLITICAL ACTIVITY

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**Abstract.** The paper explores contradicting views on the process of filling gaps in the law. To perform this examination, the author considers in detail this process. The results of the analysis of filling gaps in the law make it possible to determine the correct view.

**Keywords:** gap in the law, lacuna, analogia legis, analogia juris, legal fiction

### INTRODUCTION

There are contradicting views on the process of filling gaps in the law. Some scholars see it as the application of the law.<sup>1</sup> Other specialists argue that this is a creative process, lying outside the scope of the application of the law and involving the consideration of policy.<sup>2</sup> The aim of the paper is to address this contentious issue.

### THE ANALYSIS OF THE PROCESS OF FILLING GAPS IN THE LAW

Usually a gap in the law is defined as the nonexistence of a legal norm on a certain case.<sup>3</sup> However, a lacuna cannot be confirmed by the absence of a legal rule itself. The case which falls under a gap should require legal regulation. To identify this need one has to analyse the contemporary political objectives of a state.

Once the existence of a lacuna has been proven, a ruling or—in the words of H. Kelsen<sup>4</sup>—an individual norm is to be formulated. Its aim is to fill a gap in the law.

It is important to clarify the process of creation of this ruling. According to H. Kelsen, ‘The court creates this individual norm by applying a general norm . . . a norm which the positive legislator failed to create. The court-created individual norm is justifiable only as application of such a not positive, general norm.’<sup>5</sup>

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1 See: K. G. Wurzel, ‘Methods of Judicial Thinking’ In ‘Science of Legal Method. Select Essays of Various Authors’ (NY, 1921) 321; Леушин В. И. Динамичность советского права и восполнение пробелов в законодательстве: дис. ... канд. юрид. наук. Свердловск, 1971. С. 36, 98; Алексеев С. С. Общая теория права. Т. 2. М., 1982. С. 347, 349.

2 See: T. Lundmark, ‘Charting the Divide between Common and Civil Law’ (NY: Oxford University Press 2012) 273; Гамбаров Ю. С. Гражданское право. Общая часть. СПб., 1911. С. 362; Завадский А. В. К учению о толковании и применении гражданских законов. М., 2008. С. 162–163, 237, 282.

3 See: T. Lundmark. Op. cit. 269

4 See: H. Kelsen, ‘Pure Theory of Law’ (Berkeley: University of California Press 1970) 244

5 Ibid. G. F. Shershenevich has also expressed the same idea. См.: Шершеневич Г. Ф. Общая теория права. Т. IV. М., 1910. С. 747–748.

The content of both not positive norm and a ruling which is derived from it cannot be determined by the existing legal rules, as none of them regulates and is applicable to a case which falls under a gap. As a result, policy arguments have to be taken into account to condition this content. These considerations are to be found in the sources where the will and the policy of the sovereign power are expressed, e.g. in various legal and political documents, treatises on political science and jurisprudence, information provided by the mass media.

In this regard, it is appropriate to make a comparison with the legislative function. By contrast to the creation of statutory norms, the process of filling gaps results in rulings for resolving concrete disputes.<sup>6</sup> Despite this difference, both activities are political in their nature.

The analysis carried out so far reveals the critical importance of taking into account political arguments in the activity of filling gaps in the law. However, at least in the civil law countries, these considerations cannot constitute the justification for a judicial ruling.<sup>7</sup> There is a simple reason to explain it. If a court's decision is not based on the existing law, then it would be illegitimate.<sup>8</sup>

As a result, a judge dealing with a lacuna is faced with a difficult task. He has to come to a decision which can be only reached on the basis of political argumentation. On the other hand, this ruling has to be perceived as an outcome of application of certain legal norms, even though—as it was proved— no applicable legal rules can be found in a case of a gap in the law.

The optimal solution for this task may be suggested: the creation of a ruling which fills a gap in the law should be disguised behind the veil of application of existing legal rules. The method employed for this concealment could be referred to as a 'creative legal fiction' and defined as follows: it is an assumption which conceals or attempts to conceal the fact that under the guise of application of a legal rule a certain state body formulates and implements a ruling, which cannot be derived from this legal rule.

The use of this fiction enables a judge to achieve a desired effect. He may turn to political considerations while determining the content of a ruling which fills a lacuna. At the same time, the whole process of filling a gap is portrayed as application of the law, making it possible for a judge to conceal a breach of legitimacy caused by such a ruling. In other words, no application of legal rules in its precise meaning is carried out during the course of this process. They only serve to give an impression, though a false one, that a court's decision is legally justified.

#### ANALOGIA LEGIS AND ANALOGIA JURIS AS CREATIVE LEGAL FICTIONS

Two types of creative legal fictions employed to fill gaps in the law can be distinguished: *analogia legis* and *analogia juris*. They differ according to the legal norm which is used to justify a judgement. When it is justified by a legal principle, i.e. by a norm which generalises the content of several more concrete legal rules, *analogia juris* is applied. When a judicial ruling is supported by a concrete legal norm directly regulating certain social relations, i.e. by a legal norm which is not a legal principle, *analogia legis* is applied.

6 See: H. Kelsen. *Op. cit.* 244; T. Lundmark. *Op. cit.* 270

7 See: T. Lundmark. *Op. cit.* 104

8 See: *ibid.* 418

Obviously, not every legal rule is able to provide support for a judicial ruling in question. Therefore, while selecting the most suitable legal provision to perform this function, one has to take into account the following. *Analogia legis* implies that such a legal norm is to be found whose ratio legis, or underlying purpose, can be classified as a subtype of a type which comprises only two elements. These are ratio legis of this legal rule and ratio legis of a not positive norm, from which a gap-filling ruling is derived.

Some scholars do not explicitly mention that courts should employ policy arguments while applying *analogia legis*. They assert that a judge has to find a legal rule governing a case similar to one which falls under a lacuna. This norm would serve as an example for a judicial ruling, thereby determining its content.<sup>9</sup>

This reasoning seems to be hardly correct. As it was argued by certain representatives of ‘free law’ movement<sup>10</sup> and I. N. Steinberg,<sup>11</sup> the current policy of a state could be quite different from the former one, which had conditioned the content of the existing law. In this case, a gap-filling ruling built on the basis of a particular legal rule would be inconsistent with the contemporary policy of the sovereign power. As a result, ‘«the dead would control the living», and justice would commit its greatest sin by not serving the interests of the developing life, trying to squeeze it into the norms enacted in the past.’<sup>12</sup>

*Analogia juris* implies that a not positive norm and a legal principle used to justify a gap-filling ruling have something in common. This is a broad political objective, which—in various more concrete forms—finds its way into these norms.

In any legal system, which can be perceived as a hierarchical structure of superordinate and subordinate legal norms,<sup>13</sup> a more specific legal principle includes more general, higher ones. Therefore, if a gap-filling ruling could be justified by a group of several legal principles with the different degree of generality, the most concrete of them should be chosen and cited as the legal basis of this ruling. In this way, all other legal principles from the group will also be employed, though not explicitly, in justifying a court’s decision.

The content of a concrete legal rule directly regulating certain social relations includes all legal principles which— by means of the logical operations of induction and abstraction—can be derived from a group of legal provisions comprised of this and other concrete legal norms. Accordingly, when a concrete legal rule directly regulating certain social relations serves to justify a gap-filling ruling, these legal principles also provide legal support for it. In other words, the application of *analogia legis* implies ‘automatic’ application of *analogia juris*.

Another conclusion can be drawn from what have been said. ‘Separate,’ that is not ‘automatic,’ application of *analogia juris* implies that a gap-filling ruling is justified only by legal principles. However, if *analogia legis* is applied to fill the same lacuna, then this court’s decision will be supported not only by these legal principles, but also by a concrete legal rule directly regulating certain social

9 См.: Шершеневич Г. Ф. Указ. соч. С. 748; Хвостов В. М. Общая теория права. Элементарный очерк. М., 1914. С. 113; Люблинский П. И. Техника, толкование и казуистика Уголовного кодекса. Петроград, 1917. С. 137–138.

10 См.: Завадский А. В. Указ. соч. С. 237

11 См.: Штейнберг И. З. Что такое «движение свободного права»? (Закон и судья). М., 1914. С. 12–13.

12 Там же. С. 13.

13 See: H Kelsen, ‘On the Theory of Interpretation’ [1990] 2 *Legal Studies* 127

relations. Hence, in such cases *analogia legis* provides stronger legal support compared to the 'separate' application of *analogia juris*.

It is worth emphasising that municipal laws of various countries include provisions authorising courts to use *analogia legis* and *analogia juris*. Their typical wording reads as follows: when there is no legal norm exactly applicable to the point at issue, legal rules governing analogous cases should be applied (*analogia legis*), and, in their absence, the general principles of law (*analogia juris*).<sup>14</sup>

These legislative provisions contain a fiction, as it is not possible to fill a gap by applying existing legal rules. In this regard, E. Huber, the creator of the 1907 Swiss Civil Code, said, 'Until now, the court's practice employs the fiction that judges always and in all cases apply the law. Due to this fact, they have to resort to various tricks trying to legally justify their decisions.'<sup>15</sup>

Such considerations prompted E. Huber to draw up Article 1 of the 1907 Swiss Civil Code, which declares: 'When no legal provision is applicable, the judge shall decide according to customary law and, in default of a custom, according to rules which he would lay down if he had himself to act as legislator.'<sup>16</sup> As E. Huber observed, 'Now there would be no grounds to suspect a judge of using such tricks, and that would be more appropriate for his position.'<sup>17</sup>

#### FINDINGS OF THE PAPER COMPARED WITH THE PREVIOUS RESEARCH

Some of the ideas proposed by the author of this paper in the previous discussion have been formulated by legal scholars before. For instance, L. Pospisil has described a concept of 'legalism,' which is highly influential in the legal philosophy of Continental European law schools as well as courts of law.<sup>18</sup> Originated in the Continent as a result of a historical sequence of events, among which the reception of Roman law played a significant role,<sup>19</sup> 'legalism is an extreme emphasis upon abstract rules, which are regarded as the objective revelation of the legislator's will, as the exclusive manifestation and source of law. The individual rules themselves are seen as the exclusive and concrete answers (solutions) to particular disputes.'<sup>20</sup> Thus, 'the juristic method of legalism, ideally speaking, relieves the judge of all legal creativity.'<sup>21</sup>

However, 'law is a category of social . . . phenomena and, consequently, it changes with time. Furthermore, because of the complexity of social life the legalists' assumption that coded rules can encompass the totality of social relations and behavior remains a myth. In order legally to accommodate disputes involving relations and claims obviously absent from the inventory of rules, and at the same time to keep alive the myth (and dogma) of the full adequacy of the code of rules, the legalists resorted to further methodological fictions which they called "analogies." Essentially two types of these fictions have been distinguished: *analogia legis* (analogy of a rule),

14 See: B. Cheng, 'General Principles of Law as Applied by International Courts and Tribunals' (NY: Cambridge University Press 2006) 400–408

15 Завадский А. В. Указ. соч. С. 356.

16 B. Cheng. Op. cit. P. 404

17 Завадский А. В. Указ. соч. С. 356.

18 See: L. Pospisil, 'Anthropology of Law: a Comparative Theory' (NY: Harper & Row Publishers 1971) 22

19 See: *ibid.* 21

20 *Ibid.* 22

21 *Ibid.*

which consists of solving a legal problem not mentioned in the codification by deciding the case on the basis of a principle contained in a rule dealing with a “similar” problem, and *analogia iuris* (analogy of law) which helps to solve legal problems not resembling any of those solved in specific rules by applying to them principles which are thought to permeate the legal system as a whole.<sup>22</sup>

L. Pospisil is the only scholar known to the author of this paper who has called *analogia legis* and *analogia iuris* fictions. However, he has not explained in detail how these fictions are used in practice, limiting the discussion on this issue only to the text quoted above.

Next, some scholars confirm that at least in Germany courts intentionally conceal the use of political considerations in the creation of gap-filling rulings to give them the appearance of legitimacy. For example, T. Lundmark argues that ‘German judges tend to be generous with statutory construction and with applying statutes by analogy. Both of these activities might be seen as ways of obscuring the law-making activity of judges behind a veil of legalistic reasoning.’<sup>23</sup> Moreover, while filling a lacuna, they ‘avoid reciting policy . . . arguments.’<sup>24</sup> ‘Failure to do so,’ concludes T. Lundmark, ‘would mean a loss of legitimacy.’<sup>25</sup> These observations are also maintained by C. Kirchner.<sup>26</sup>

Finally, certain scholars have given the definition of a legal fiction which in some respects resembles the description of a creative legal fiction provided by the author of this paper above. For instance, H. S. Maine has employed the expression ‘Legal Fiction’ to signify ‘any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.’<sup>27</sup> In addition, L. L. Fuller has examined ‘historical fiction,’ by which a judge ‘introduces new law in the guise of old.’<sup>28</sup> In doing so, he ‘is very coolly and calculatingly choosing to hide from the public the fact that he is legislating.’<sup>29</sup>

It is evident that according to H. S. Maine and L. L. Fuller a legal fiction is employed to alter the law. However, as it was demonstrated in this paper, the process of filling gaps in the law does not lead to such a result. Furthermore, both these scholars have been mainly investigating the fictions of Roman and English law without providing any analysis with regard to *analogia legis* or *analogia iuris*.

## CONCLUSION

The findings of this paper provide support for the view that the activity of filling gaps in the law is a creative process, lying outside the scope of the application of the law and involving the consideration of policy. Therefore, it can be well argued that at this point political science should be integrated into legal research.

22 Ibid (footnote omitted)

23 T. Lundmark. *Op. cit.* 128

24 Ibid. 104

25 Ibid. 418.

26 See: C. Kirchner, ‘The Difficult Reception of Law and Economics in Germany’ [1991] 11 *International Review of Law and Economics* 284–285

27 H. S. Maine, ‘Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas’ (NY: Charles Scribner 1864) 25

28 L. L. Fuller, ‘Legal Fictions’ (Stanford: Stanford University Press 1967) 56

29 Ibid. 7

However, the contradicting view, though likely to be erroneous, proves valuable in the following respect. If one refers to the process of filling gaps in the law as the application of the law, then the breach of legitimacy caused by a gap-filling ruling will be concealed.

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## BALANCE OF THE INTERESTS IN LAND SPHERE: LEGAL AND ECONOMIC ASPECTS

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**Abstract.** Interest could be understood in economic and legal approaches. Interest as defined by economists is the income earned by the lending of a sum of money. Interest focuses on the human desire to achieve tangible and intangible benefits on the economic point of view. Interest as a classical legal category exists outside of human will and is the real cause of social events behind the immediate motives of social groups that take part in them. Interest can be defined as objectively caused by motives of social actors that consist of awareness of their needs and determine the conditions and the means of their satisfaction with the economic-legal view. Economic understanding of interest in legal classification is noted as private interest. Public good as a main aim of legal regulations is manifested in public interests.

Satisfaction of all interest will be virtually impossible without reaching an appropriate balance. Balance is the case in which opposing rights, interests, or policies are assigned a degree or level of importance is determined by which is considered greater.

The best example of the legal and economic aspects of the private and public interests in land sphere is public-private partnership. Public-private partnership in land sphere gives accession to public good and stability of income for private partner and level of social projects and infrastructure. So, public-private partnership is very significant illustration of the legal and economic methods of research combination necessity.

Majority of legal and economic scholars notice that the main private interest in land sphere is a maximization of the income. Public interest in the land sphere has a big range of display in interests' categories: from the receiving benefits to the satisfaction of social need. Thus it must be remembered that the proper use and protection of land is one of the key objectives of the land law of Ukraine to the balancing of interests.

**Keywords:** private and public interests, balance, land law.

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### INTRODUCTION

Balance of interests is multifaceted and considered at different levels in different areas of science and philosophy. Interest is a difficult category because of its versatility. Interest has its definition in philosophy, sociology, psychology, pedagogy, law, political science, economics and other sciences.

Economic and legal approaches have its practical usage in balance of private and public interests. Land sphere is permanently on the range of public and private fields. Private-public partnership is the relationships when balance of public and private interests is concentrated.

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Interest as defined by economists is the income earned by the lending of a sum of money<sup>1</sup>. Interest focuses on the human desire to achieve tangible and intangible benefits on the **economic point of view**. This aspect is often used in the fields of economics. Interest pays attention to the particular object of thought which is the desired to be achieved. The most suitable definition for the legal definition of economic interest was given by R. Pound<sup>2</sup>. He argued that anyone who has interest is trying to satisfy his desires. These desires are the interest. Understanding of this interest couldn't be denied by instruction that in fact it is not profitable to wish what he wants achieve and what he wants. Each person has its own vision of the interest. Individual is the main actor of any activities from this point of view. All interest should be private and be understood only in economic sphere in the case when person is a main origin of the interest.

Interest is an objective category that exists outside of human will and is the real cause of social events behind the immediate motives of social groups that take part in them **on the positive legal point of view**. The essence of interest is the objective needs that arise in different social groups, individual actors and economic relations that conditioned by the whole society. G. Hlezerman believes that interest is the objective requirements arising from conditions of social existence<sup>3</sup>. Impersonal interest leads to an understanding of what it is separated from a particular carrier becoming self-existing object. Owners of these "generalized" interests are groups of people or social formations like states.

Defined approaches gives understanding that clear economic or legal interest covers only a portion of real practical usage of interest. So, with the economic-legal view of interest it can be defined as *objectively caused by motives of social actors that consist of awareness of their needs and determine the conditions and the means of their satisfaction*<sup>4</sup>.

Structure of the integral interest is:

1. the need to satisfy the needs (requires a presence of need);
2. the ability to satisfy the needs (requires conditions and means of need satisfaction);
3. the awareness of the need and possibilities of its satisfaction.

Economic interest in the legal field is not always clearly related to a person who realizes is interests. Moreover, that interest may occur before birth. Art. 25 (2) of the Civil Code of Ukraine declares that unborn child interests could be protected in cases prescribed by law. Civil Code provides such cases such as inheritance for the unborn child.

Awareness of the interests is one of the important conditions for their implementation, adds nothing to their contents and between the emergence of interest and its realization may take some time. There are a lot of interest classifications. The most applicable classification for combining economic and legal understandings of the interest is dividing on private and public interests. Private interest is impersonation of classical economic approach and public – of legal approach.

1 G.Bannock, R. Baxter, E. Davis, 'Dictionary of Economics. Fourth edition' (Princeton, N.J. : Bloomberg Press, 2003) 342

2 R. Pound, 'An Introduction to the Philosophy of Law' (New Haven: Yale University Press, 1922) 120

3 Г. Глезерман, 'Интерес как социологическая категория' [1966] 10 Вопросы философии 18

4 R. Chopra, 'Academic dictionary of political science' (Delhi: ISHA Books, 2005) 129

The division of interests on private and public seems especially important in terms of R. Ihering<sup>5</sup>. R. Ihering pointed that the nature of interest that is protected by rules is one of the main criteria for the division of the right branch. Category of interest plays an important role in determining the method of regulation. Advantage of public or private interest in legal relations defines whether it is public or private right branch. At the same time J. Bentham noted the economic private interest is basic interest<sup>6</sup>. Implementation of private interests satisfies the needs of one person, the public – all individuals, members of a society.

Not all private (economic) interests should be protected. The Constitutional Court of Ukraine<sup>7</sup> noted that there are interests that are not protected by law because they are contrary to it. Interests should be protected if there are legitimate i.e. those that do not contravene the laws. Illegal interests should not be protected by law because such interests is focused on the infringement of the rights and freedoms of individuals and businesses, limits protected by the Constitution and laws of Ukraine interests of society, the state or “all compatriots”, contradicts the recognized principles of law etc. Legitimate interest reflects the legitimate aspirations to his wish, dream, desire, and therefore – not legal and actual (social) opportunity. Person desires to use certain specific material or immaterial benefits.

Public interest is formed on the basis of balanced consideration of different social groups` interests harmonization without which the state cannot perform the function of an organizer of social life. However full compliance with the public interest is not achievable goal but only a certain ideal because relations state-society always includes some controversy.

When the rule of law dominates in society, the state becomes the mouthpiece of public interest. There is no legal definition of public interests. But there is legal definition of state`s interests as part of public interests. The Constitutional Court of Ukraine defined category of state`s interests<sup>8</sup>. Constitutional court pointed out that the state`s interests differ from other members` of public relations interests. The basis of the state`s interests is the need for the implementation of national (political, economic, social and other) actions, programs aimed at protecting the sovereignty and territorial integrity of the state border of Ukraine, ensuring its national, economic, informational, environmental safety, public land as national wealth, protection of rights, ownership etc.

Interests of the state may coincide entirely, partially or not coincide with the interests of state agencies, state enterprises and organizations. However the state may perceive its interests not only in their work but also in the activities of private enterprises and companies.

At the same time satisfaction of all interest will be virtually impossible without reaching an appropriate balance. Balance is the case in which opposing rights, interests or policies are assigned a degree or level of importance is determined by which is considered greater<sup>9</sup>. Only when the balance of the private and public interests will be implemented as much as possible, these

5 R. Ihering, ‘Law as a means to an end’ (Boston: The Boston Book Company, 1913) 110

6 J. Bentham, ‘A fragment on government’ (Union, N.J. : Lawbook Exchange, 2001) 210

7 *Рішення Конституційного Суду України у справі про охоронюваний законом інтерес* №18-рп/2004 [2004] 239 Урядовий кур’єр

8 *Рішення Конституційного Суду України у справі про представництво прокуратурою України інтересів держави в арбітражному суді* №3-рп/99 [1999] 15 Офіційний вісник України 35

9 ‘Merriam-Webster’s Dictionary of Law’ (Massachusetts, Springfield, 1996) 42

private and public interests could be satisfied to the limit. Balance of public and private interests is recognized as one of the fundamental constitutional principles which should be based on the legal regulation. Ideal interests` balance is when public interest is forming from the system of private motives and is the heart of all government actions.

The need to establish a balance of private and public interests is manifested in various forms and ways. The principle of equal treatment, proportionality principle, the principle of the inadmissibility of excessive and disproportionate restrictions on rights and freedoms, the principle of social justice etc. must be considered in balancing public and private interests. The balance between public and private interests is defined through the rule of law including equality, fairness, proportionality, legal certainty and reasonable expectations.

Lack of coordination between public and private interests can lead to the most pressing social and legal conflicts. The lack of a balance or compromise between public and private interests in the legal practice needs to be resolved at the level of legal regulation of the social relations. The optimal ratio of public and private interests is a prerequisite for the harmonious development of society, individual and the efficiency of the state.

The norms of the Land Code of Ukraine that relates to the so-called mixed areas of law and a method of regulation of which prevails in certain land relationships depends largely on the nature of the relationship. Methods of private and public law in the regulation of land relations are in constant movement and proportion.

Permanent public interest is present in land law. Art. 13 (1) of the Constitution of Ukraine declares that the land is property of the Ukrainian people. The concept of "property of the Ukrainian people" does not mean a total ban to other subjects besides the Ukrainian people to own land. Therefore some scholars suggest a separation of ownership in constitutional and civil form. The constitutional provisions "property of the Ukrainian people" should be understood more in the context of national sovereignty and the right to dispose of the lands within its territory. The Ukrainian land as an abstract category is exclusively owned by the Ukrainian people. On behalf of the Ukrainian people's rights are exercised by bodies of state power and local self-government within the limits set by the Constitution. Civil form of land ownership concerns land within the meaning of the particular lands. But these two branches understandings of land ownership are not completely separated and independent. Constitution of Ukraine on behalf of the Ukrainian people's rights are exercised by bodies of state power and local self-government and government agencies and local governments from the standpoint of the rule of law.

The best example of the legal and economic aspects of the private and public interests in land sphere is public-private partnership. Public-private partnership in land sphere gives accession to public good and stability of income for private partner and level of social projects and infrastructure. So, public-private partnership is very significant illustration of the legal and economic methods of research combination necessity.

Majority of legal and economic scholars notice that the main private interest in land sphere is a maximization of the income. Public interest in the land sphere has a big range of display in interests' categories: from the receiving benefits to the satisfaction of social need. Category of public interest created because it restricts the rights of society to achieve the overall good. Availability of

public interest as such clearly demonstrates not absolutely rights and the need for restrictions of private interests to get an income.

The public interest must be so clear to most people understood the evidence and the importance of such restrictions. It is necessary to demonstrate the level that is required to limit public awareness of fundamental rights and freedoms.

Private partner seeks to meet the public interest and realize his social function which is an optional display of the owner exercising powers under the concept of corporate social responsibility. The public partner in land relations is using public land (state or municipal) property. The use of such property commits to social direction as the owner and his authorized representative and engaged on a contractual basis for business.

However, the implementation of public interest in public-private partnership should be aware that ensuring balance of interests should also be implemented with consideration of economic feasibility.

However, the balance of interests within the public-private partnership can be achieved in the space of determining the real value of land resources including functional and economic, socio-economic and environmental factors ordering relations between owners of land resources in certain areas of the region as well as setting limits on the use of economic land resources<sup>10</sup>.

The key public interest in public-private partnership in the field of use and protection of land resources should address environmental and economic issues of land and resource potential. Public or private sector could not resolve all problems in the context of environmental and economic problems of land recreational use alone. However, the solution of such problems can be achieved only through the use of public private partnerships.

## CONCLUSION

Economic and legal approaches of interest have its best application in private and public interests. Balance of private and public interests plays great role in practical application. Land sphere has permanent conflict of private and public interests. Public-private partnership is an effective mechanism of balance private and public interests compliance in land sphere.

Protection of the land is the most important public interest. General private interest in public-private partnership can be assumed to a profit-making, public – the protection and preservation of land and meeting other social needs. Thus it must be remembered that the proper use and protection of land is one of the key objectives of the land law of Ukraine to the balancing of interests.

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## INTERACTION BETWEEN ENVIRONMENTAL LAW AND NATURAL SCIENCES – A BASIS FOR SOUND ENVIRONMENTAL NORMS

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**Abstract.** Legal research is not a stand-alone process. In order to offer authoritative commentaries and legislative proposals, it has to interact with other areas of research. Environmental law is an example of such an interdisciplinary interaction. Environmental legal norms regulate relations in the area of the environmental protection. They assist environmental policy to achieve its goals and pursue its objectives. Therefore environmental norms have to take into account findings of other sciences, first of all, physical, as well as natural sciences.

Environmental norms interact with natural and physical sciences in several ways. First of all, modifications of environmental norms are triggered by findings of natural and physical sciences on negative environmental impacts of human activities. This is especially relevant in case of new products or technologies being put to the market without prior comprehensive analysis of its environmental impact. In addition, scientific research makes new technologies available, thus allowing legislators to raise environmental standards (e.g., sound levels of new vehicles). On the other hand, goals of environmental policy, implemented through environmental norms, trigger research of new products or technologies allowing better achievement of these environmental goals (e.g., energy efficient construction materials). Finally, environmental standards based on the scientific findings (e.g., ISO standards, EU Best Available Techniques Reference Documents (BREFs)) become sources of environmental law.

In this paper, the basis of interaction between the environmental law and natural and physical sciences is author's analysis of the EU environmental legislation applicable for the unconventional hydrocarbons' activities. In this area, new legislation is currently only in its early phases, with legislators waiting for reliable scientific data on the environmental impact of this activity to be released.

**Keywords:** energy law, environmental law, interdisciplinary research, precautionary principle

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### INTRODUCTION

Legal research cannot be regarded as a stand-alone process, encompassing only analysis of legal rules and other legal sources. In order to offer authoritative commentaries and legislative proposals, legal research has to interact with other areas of research, including interdisciplinary research. Environmental law is an example of such an interaction. Environmental legal norms regulate relations in the area of the environmental protection. They assist environmental policy to achieve its goals – high level of environmental protection, and pursue its objectives: preserve, protect and improve the quality of the environment; protect human health; ensure prudent and

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rational utilisation of natural resources. For this reason, environmental norms have to take into account findings of other sciences, first of all, physical, as well as natural sciences.

The analysis of the interaction between environmental law and natural sciences is a part of author's analysis of the EU environmental legislation applicable for the unconventional hydrocarbons' activities.

#### ROLE OF NATURAL SCIENCES IN LEGAL RESEARCH

Legal norms are usually created as a reflection of society's perception of what is good and what is bad. This perception is influenced by many usually arbitrary factors. Among such factors are: influence of religion, traditions, cultural and historic implications, economic situation, geopolitical factors.

In general, environmental norms reflect our perception of the environment as a common good, and are aimed at pursuing the need to protect a person's right to a clean and healthy environment.

However, the content of environmental norms is shaped not by moral authorities or other above-mentioned factors. It rather is the result of the interaction between the law and natural or physical sciences.

At the EU level, this relationship stems from the primary EU law. In the article 191 of the Treaty on the Functioning of the EU (TFEU)<sup>1</sup> it is stated that the EU environmental policy is aimed at preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources.

#### NATURAL SCIENCES AS A TRIGGER FOR CREATION AND MODIFICATION OF ENVIRONMENTAL NORMS

Environmental norms interact with natural and physical sciences in several different ways. First of all, modifications of environmental norms are triggered by findings of natural and physical sciences on negative environmental impacts of human activities (e.g., impacts of industrial emissions on climate change). This is especially relevant in case of new products or technologies being released to the market without prior comprehensive analysis of their environmental impact. Such findings usually result in environmental norms becoming stricter.

In the EU environmental law, several sectors may be given as an example.

Legislation limiting the use of asbestos was adopted following the findings that asbestos is a carcinogen<sup>2</sup>. A Directive on the protection of workers from the risks related to exposure to asbestos at work was adopted in 1983<sup>3</sup>, and later amended in 1991, 2003, and 2009. These pieces of legislation were adopted taking into account that asbestos is a particularly hazardous agent which can cause serious illness and which is found in various forms in a large number of circumstances at work. In addition, each time the initial Directive was being amended taking into account new

1 OJ C 326, 2012.

2 'Asbestos: elimination of asbestos-related diseases' [interactive]. World Health Organization information. Factsheet 343, 2010. Access online: <http://www.who.int/mediacentre/factsheets/fs343/en/> [2014.03.06].

3 Directive 83/477/ECC [1983] OJ L 263/25.

evidences (that became available because of improving medical diagnostics and researches) on the impact of asbestos on human health<sup>4</sup>. Recently European Parliament adopted a Resolution calling for the total ban of asbestos in the human environment<sup>5</sup>.

Another instance of scientific data influencing the environmental legislation is the restriction of use of phosphates and nitrates in order to improve environment of internal waters as well as seawaters.

One of the problems related to the water resources is the process of eutrophication. Several researches conducted in the middle of the 20<sup>th</sup> century revealed that among main causes of eutrophication are nitrates and phosphates, widely used in industry and agriculture at the time. These results lead to the gradual reduction of use of these elements and their compounds. At the EU level, this reduction is achieved through various pieces of legislation: Directive on Urban Waste Treatment<sup>6</sup>, the Nitrates Directive<sup>7</sup>, Water Framework Directive<sup>8</sup>, Industrial Emissions Directive<sup>9</sup>. However, these measures are of general nature and did not prove to reduce eutrophication satisfactory. For this reason, obligatory measures were taken to reduce concentration of phosphorus compounds used in consumer detergents<sup>10</sup>.

As regards the unconventional hydrocarbons activities, one of the technologies used for the extraction of shale gas is the hydraulic fracturing. Environmental impacts of this technology depend on several factors: geologic situation, correct exploitation of the drilling well, efficient monitoring and control system. The shale gas extraction activity was just recently begun in Europe, thus no proven scientific data exist as to its actual environmental impacts. Therefore the legislation governing this type of activity currently is limited to recommendations and other non-obligatory sources<sup>11</sup>.

## NATURAL SCIENCES AS A CATALYST FOR NEW ENVIRONMENTAL STANDARDS

Another area where natural and physical sciences influence environmental law is the setting of new standards. As the science progresses and new products, processes or technologies become available for mass use, it becomes possible to review existing quantitative environmental standards.

- 4 Directive 91/382/EEC [1991] OJ L 206/16; Directive 2003/18/EC [2003] OJ L 97/48; Directive 2009/148/EC [2009] OJ L 330/28.
- 5 European Parliament resolution of 14 March 2013 on asbestos related occupational health threats and prospects for abolishing all existing asbestos (P7\_TA(2013)0093), not published in OJ.
- 6 Directive 91/271/EEC [1991] OJ L 135/40.
- 7 Directive 91/676/EEC [1991] OJ L 375/1.
- 8 Directive 2000/60/EC [2000] OJ L 327/1.
- 9 Directive 2010/75/EC [2010] OJ L 334/17.
- 10 Regulation (EU) No 259/2012 amending Regulation (EC) No 648/2004 as regards the use of phosphates and other phosphorus compounds in consumer laundry detergents and consumer automatic dishwasher detergents [2012] OJ L 94/16.
- 11 European Commission Recommendation of 22 January 2014 On minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing (2014/70/EU) [2014] OJ L 39/72; 'Golden Rules for a Golden Age of Gas. World Energy Outlook: Special Report on Unconventional Gas' [interactive]. International Energy Agency, 2012. Online access: < [http://www.worldenergyoutlook.org/media/weowebsite/2012/goldenrules/WEO2012\\_GoldenRulesReport.pdf](http://www.worldenergyoutlook.org/media/weowebsite/2012/goldenrules/WEO2012_GoldenRulesReport.pdf)> [2014.03.06].

Basis for this is the above-mentioned Article 191 of the TFEU, stating that in preparing its policy on the environment, the EU takes account of, *inter alia*, available scientific and technical data<sup>12</sup>. At the EU level, newest scientific data and best available technologies are compiled with regard to every major industry in accordance with the Industrial Emissions Directive<sup>13</sup>. Aimed at prevention or reduction of industrial emissions, best available techniques (BAT) reference documents are a result of discussions among Member States, and reflect most innovative and environment-friendly technologies available at the moment. When adopted, BAT Reference documents become environmental standards for all the players of the respective industry.

New products and materials may also trigger evolution of the existing environmental standards. For example, new materials and technologies used for production of vehicle engines as well as tires made it possible to introduce lower sound levels for new vehicles approved for release into the EU market<sup>14</sup>.

On the other hand, political goals of the EU environmental policy, implemented through environmental norms, trigger research of new products or technologies allowing better achievement of these environmental goals. Thus, goals of the EU energy policy until 2020 (so called '20-20-20' goals)<sup>15</sup> foster and facilitate researches in the area of construction, thermal insulation materials, development of energy-efficient electric appliances.

As regards unconventional hydrocarbons activities, no existing BAT Reference documents are applicable for these activities. Therefore, until these Reference documents are adopted, legislators have to apply other related standards in order to achieve high level of the environmental protection. For example, in order to ensure protection of ground water from contamination with used fracking fluid, due to the technical specificities of the hydraulic fracturing process, it is advised<sup>16</sup> to treat the drilling well as a mining waste facility, for which rather strict environmental legislation is applicable: Mining Waste Directive<sup>17</sup> as well as national implementing acts.

Finally, from the point of view of the environmental law, it is worth mentioning that certain environmental standards based on the scientific findings (e.g., ISO standards, EU BAT Reference Documents) become sources of the environmental law itself.

For example, several dozens of environmental standards are applicable for the unconventional hydrocarbons activities – mainly for design and construction of wells, their management and closure<sup>18</sup>. Although not referred to directly in the national legislation, it may be concluded from

12 Supra 1.

13 Supra 9.

14 European Commission proposal for a Regulation of the European Parliament and of the Council on the sound level of motor vehicles, COM(2011)0856, 9.12.2011, currently under the legislative procedure, dossier 2011/0409(COD), not published in the OJ.

15 Presidency Conclusions, Council of the European Union, 8/9 March 2007, 7224/1/07 REV 1.

16 Broomfield M., 'Support to the identification of potential risks for the environment and human health arising from hydrocarbons operations involving hydraulic fracturing in Europe' [interactive]. AEA report for European Commission DG Environment, Ref: ED57281, Issue Number 17c, 2012. Online access: <<http://ec.europa.eu/environment/integration/energy/pdf/fracking%20study.pdf>> [2014.03.06], p. 90.

17 Directive 2006/21/EC [2006] OJ L 102/15.

18 'ISO Standards for use in the oil&gas industry' [interactive]. International Association of Oil & Gas Producers. Online access: <<http://info.ogp.org.uk/standards/downloads/StandardsIssued.pdf>>, [2014.03.06].

various legislative acts that operators have to apply these standards in order to achieve high level of environmental protection during the exploitation activities.

#### PRECAUTIONARY PRINCIPLE

Sometimes the real impact of the product or activity is unknown until the mass production of the product or mass application of the technology has begun. Despite its general benefits for the society or industry, there might be scientifically not proven yet theoretically based speculations as to their adverse environmental impacts. In such a case, a legislator faces a challenge to find a balance between a technological progress and environmental protection. Modern environmental policy allows a legislator to employ the precautionary principle in order to find this balance. Although the precautionary principle is one of the principles of the EU environmental policy<sup>19</sup>, there are still some doubts as to its content and even status as an independent principle (it is called 'precautionary approach' by some authors)<sup>20</sup>. This principle is employed when science cannot give unequivocal answers as to the exact environmental impact of the product or technology under question. Reasons for these uncertainties are many: insufficient scientific knowledge; inconclusiveness of researches; imprecision of measurements of scientific methodology, etc.<sup>21</sup> Application of this principle reflects the attempt to bridge the gap between scientific and political fields. It allows decision makers to make science based decisions on the safety and environmental soundness of the issue at question. Application of the precautionary principle is usually a political and not science or law based action and allows legislators to introduce certain (usually temporary) restrictive measures until the level of science or new scientific data become available to prove safety (or, on the contrary, harmfulness) of the product or technology in question.

Environmental legislation in the area of the extraction of unconventional hydrocarbons is an example of different interpretation of what precautionary measures are. In Europe, various approaches are taken regarding the use of hydraulic fracturing technology for the extraction of hydrocarbons. Thus, Bulgaria, France, and some provinces of Spain have introduced ban on the use of the hydraulic fracturing technology, justifying this ban with the application of precautionary principle. In Germany and in the Netherlands, the activities are only temporarily suspended, until more precise scientific data on the environmental impact of activities becomes available. Finally, following the results of researches as well as recommendations from the International Energy Agency, Lithuania chose to implement rather strict rules on the unconventional hydrocarbons' activities. These rules require constant monitoring of the environmental situation and allow for the rapid reaction to the situations threatening the environment.

19 See Article 191(2) TFEU, *supra* 1.

20 Beyerlin U., Marauhn T., 'International Environmental Law, London' (London: Hart Publishing 2011) 47-57.

21 De Sadeleer N., 'The Precautionary Principle in International Law', in: Kerbrat Y., Maljean-Dubois S. (eds.) 'The Transformation of International Environmental Law' (London: Hart Publishing 2011) 73-89, at 76.

## CONCLUSIONS

Researches in fields of physical and natural sciences as well as results of these researches play a significant role in the creation of legal norms aimed at the protection of the environment and health. Environmental norms not only transpose results of these researches to the legal field but also pave the way for new researches through newly set environmental standards. When no sufficient data exist as to precise environmental impact, legislator may apply the precautionary principle and temporarily restrict certain activities. Environmental legislation in the area of the unconventional hydrocarbons' activities is an example of both the interaction between natural sciences and law and the application of the precautionary principle.

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## THE NECESSITY OF THE ANTHROPOLOGICAL DIMENSION OF LAW AND STATE IN MODERN JURISPRUDENCE

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**Abstract.** In this article, the author encourages the modern scientific community to draw attention to the fact that law being a unique institution of society, appears also a peculiar element of its culture. Thus, it is defended the opinion on the necessity of attraction of highly valuable data and progress of sociocultural anthropology (especially its legal and political directions) in investigation of state-legal problems, appearing objects of jurisprudence and other related social sciences. In turn, such formulation of the problem requires to use a new approach to law and state, the approach of their natural and inseparable connection with culture (in the broadest interpretation of this concept) of particular society. It gives reason to believe, that law and state undoubtedly bear the imprint of concrete culture. This thought is also continued by the following thesis that research (more profound than we have in traditional textbooks on jurisprudence) of the nature of law and state, their mechanisms and specificities as social institutions in fact becomes impossible without the reference to culture (as the system of values, ideas and practices) of society. In addition to the idea of law and state's sociocultural conditionality in the article it is also explored to what useful consequences entails application of the aforesaid anthropological method in jurisprudence, useful both in theoretical and practical aspect. So, it is noted that the anthropological approach, requiring the comprehensive immersion in historical-cultural material, has its advantage, for example, that it is really impossible without using of data and methods of practically all humanitarian sciences (sciences about human, sciences of anthropocentric nature), such as history, sociology, political science, psychology, cultural studies and even philology. Thus, the anthropological approach enriches our understanding of law and state, making it more stereoscopic.

**Keywords:** anthropology, culture, law, postclassical legal understanding, state

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*'Une civilisation se fonde d'abord dans la substance'*

*Antoine de Saint-Exupéry. Lettre à un otage.*

### INTRODUCTION

Since the origin of human civilisation in relation to understanding and consideration of state and law has developed several (sometimes absolutely opposite) directions and methodological schools.

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So, the classic paradigm of law and state understanding formed before the late 20<sup>th</sup> century<sup>1</sup>. Today, however, such paradigm doesn't suit every jurist, and consequently the new visions on the essence of law and state appear. Thus, in modern jurisprudence and political science the postclassical doctrines are formed. One of these doctrines is the anthropological dimension of law and state that comes from their sociocultural conditionality. Thus, this paper is devoted to consideration of such approach.

#### 'BACK TO CULTURE', OR SOME WORDS ABOUT ANTHROPOLOGICAL INVESTIGATIONS

What is anthropological knowledge, and what are its origins? What is the object of such investigations? And what is the influence of sociocultural anthropology at human sciences? These are the questions we shall try briefly to answer in this section.

So, answering these questions, we should understand that the foundation of modern anthropological outlook on humanity was founded in the late 19<sup>th</sup> and the early 20<sup>th</sup> centuries, and this historical period may be regarded by us as the beginning of the new anthropological tradition in philosophy and science.

And if the causes of the origination of anthropology as a scientific discipline come to initial interest in natural history of humanity and its evolution (i. e. anthropogenesis), then philosophical anthropology originated as a new attempt to explain (describe) human society and its realities, proceeding from the human essence. Additionally, such philosophical reappraisal rose as a response to the era's crisis and its tragic challenges that couldn't be explained within the classical Cartesian and positivistic outlooks on the world.

As for the founding fathers of the new philosophical tradition it is worth noting such philosophers as H. Plessner, M. Scheler, A. Gehlen, E. Cassirer, M. Buber, etc. At that, in the different doctrines of philosophical anthropology we can trace the certain evolution of its fundamental concepts. Thus, these doctrines had and have very different orientation: from 'biological' to 'cultural', 'semiotic' and even 'religious'.

In turn, anthropological investigation in science were originally realised as a scientific discipline, 'measuring skulls' and describing the peoples (ethnography). And only later the object of

1 For example, the classical paradigm of law understanding consists of four general traditions: 1) natural law tradition (Hippias of Elis, Cicero, Thomas Aquin, H. Grotius, S. von Purendorf, P. I. Novgorodtsev, R. Stammler, L. L. Fuller, L. Strauss, etc); 2) legal positivism (normativism) tradition (J. Austin, J. Bentham, G. F. Shershenevitch, G. Jellinek, H. Kelsen, H. L. A. Hart, etc); 3) sociological tradition (M. Weber, E. Ehrlich, L. Duguit, G. D. Gurvitch, P. A. Sorokin, R. Pound, K. N. Llewellyn, N. Luhmann, etc); 4) psychological tradition (G. Tard, L. J. Petrazycki, M. A. Reisner, N. S. Timashev, A. Ross, etc). Learn more about these traditions: V. V. Lapaeva, 'The types of law understanding: law theory and practice' (Moscow: Russian academy of justice 2012).

Additionally, there is also the so-called integrative (synthetic) approach, within which scientists try to combine positive moment of the above-mentioned traditions and generate voluminal vision of law. See: A. S. Yashchenko, 'Experience of the synthetic theory of law and state' (Yuryev: Tipographia K. Mattisena1912); I. Flores, 'The Problem About the Nature of Law vis-à-vis Legal Rationality Revisited: Towards an Integrative Jurisprudence' [2012] 12-160 Georgetown Public Law and Legal Theory Research Paper <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2124&context=facpub>.

Ultimately, there are scientists who mark out the additional tradition – the Historical School of law (F. C. von Savigny, G. F. Puchta, K. F. Eichhorn, etc). For example, see: H. J. Berman, 'Faith and Order: The Reconciliation of Law and Religion' (Moscow: Ad Marginem 1999) 340-341.

anthropology was conceptually reappraised thanks to efforts of L. H. Morgan, E. B. Tylor, B. Malinowski, A. R. Radcliffe-Brown, M. Mauss, C. Levi-Strauss and other anthropologists of 20<sup>th</sup> century. It was accompanied by extensive use of sociological methods<sup>2</sup>, that ultimately reflected in the formation of new understanding of anthropology as a complex discipline of social science, as well as in the formation of its classical (amenably the American tradition) system in the form of four main units: 1) biological or physical anthropology; 2) social or cultural<sup>3</sup> anthropology; 3) archeology and 4) anthropological linguistics<sup>4</sup>. Hence, for example, a modern definition of anthropology given by American Anthropological Association: 'Anthropology is the study of humans, past and present. To understand the full sweep and complexity of cultures across all of human history, anthropology draws and builds upon knowledge from the social and biological sciences as well as the humanities and physical sciences'<sup>5</sup>.

However, we should understand that today anthropology is not 'a single since', but a peculiar umbrella term, behind which there is 'an imperfect fusion of quiet different traditions of inquiry: biological, historical, linguistic, sociological'<sup>6</sup>. And additionally, after sociocultural anthropology was heavily influenced by the structuralist and postmodern theories at the end of 20<sup>th</sup> century, whereas archaeology and biological anthropology remained largely positivist, we also can say that the four sub-fields of anthropology have finally lost cohesion.

Thus, in the system of anthropology the special interest to us is its sociocultural module, which today is a modern synthesis of the cultural and social anthropology traditions and within which scientists 'study society and culture, describing and explaining social and cultural similarities and differences'<sup>7</sup> in the problem field of economic and political organization, law and conflict resolution, gender relations, ethnicity, socialization, religion, myth, symbols, language, values and other sociocultural phenomena and institutions<sup>8</sup>.

In relation to sociocultural anthropology, we also should point out a number of important circumstances that have influenced on the formation of its modern discourse and importance within socio-humanitarian knowledge.

So, firstly, we should note that in the second half of 20<sup>th</sup> century anthropologists indeed expanded the object of sociocultural anthropology and include contemporary societies in it<sup>9</sup>. Thus, nowadays sociocultural anthropology studies not only 'traditional societies', but also present societies and cultures. As a result of this reform we have the much more valuable approach, which allows us to investigate social realities as peculiar texts.

2 In particular, the methods of functionalism and structuralism.

3 Anthropologists used to distinguish social and cultural anthropology in accordance with the American (cultural) and European (social) traditions. But today there is a tendency to use the term 'sociocultural'. Thus, next we shall use this term.

4 However, in accordance with the European tradition these 'sub-fields' are frequently seen as absolutely distinct disciplines.

5 American Anthropological Association, 'What is anthropology?' (Official website of American Anthropological Association) <http://www.aaanet.org/about/WhatisAnthropology.cfm>

6 G. W. Stocking, Jr., 'Afterword: A view from the Center' [1982] 1-2 *Ethnos* 172.

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8 Hence, there are so many sub-disciplines of sociocultural anthropology as anthropology of art, political anthropology, legal anthropology, psychological anthropology, anthropology of religion, etc.

9 For example, see: C. J. Geertz, 'The Interpretation of Cultures' (Moscow: ROSSPEN 2004); N. Rapport, J. Overing 'Social and Cultural Anthropology. The key concepts' (London, New York: Routledge 2000).

Secondly, at the same time under the principle of cultural relativism the terms ‘evolution’, ‘progress’, ‘development’ were resolutely rejected by postmodern sociocultural anthropology.

Thirdly, culture and its aspects were put in the forefront of anthropological investigation<sup>10</sup>.

In turn, these factors along with the crisis of positivism and increase number of anthropological interdisciplinary studies provoked the so-called anthropological turn in the social sciences<sup>11</sup>. And as a result – ‘over the last decades ‘anthropologisation’ of all human knowledge with its orientation toward culture has been distinctly traced’<sup>12</sup>.

#### ‘PERUSAL’ OF LAW AND STATE WITHIN THE ANTHROPOLOGICAL PARADIGME

As previously noted, today the anthropological ‘turn’ in the social sciences and humanities is verily their distinctive feature and one of the key directions of their development. And jurisprudence isn’t an exception.

But here, we should note, that within the political-legal discourse ideas of relationship between culture and law are not something absolutely new. In contrast, we can detect description of law and state in the anthropological way as early as the Renaissance. So, we can find the beginnings of such view on state and law institutions in the M. Montaigne’s writings<sup>13</sup>. At the Age of Enlightenment already C.-L. Montesquieu raised the problem of cultural pluralism in the world of customs and policy<sup>14</sup>. Then premonition of anthropological vision on the political and legal problems is found in the I. Kant’s philosophy<sup>15</sup>. While since J. G. Herder we can start counting of the ‘national spirit’ (German: *Volkgeist*) philosophy, where is also found a place for describing of features of nations’ state and law order<sup>16</sup>. Such ideas, but risen to the system, were later continued by G. Hegel<sup>17</sup>. In turn, an original continuation of the Hegel’s tradition, which emphasises a crucial role of national spirit (or mentality), can be also observed in ideas of Slavophiles and Westernizers in Russia in 19<sup>th</sup> century. Meanwhile, in Germany ‘spirit’ ideas are elaborated by the members of the Historical School of law<sup>18</sup>. Ultimately, we should also mention the works of such ‘civilization’ doctrine’s representatives as N. Danilevsky<sup>19</sup>, K. Leontiev<sup>20</sup>, O. Spengler<sup>21</sup>, A. J. Toynbee<sup>22</sup>, etc.

10 See: A. Kuper, ‘The reinvention of primitive society: transformations of a myth’ (Abingdon & New York: Routledge 2005) 223.

11 In sciences, which, by the way, were identified by H. Rickert as ‘cultural sciences’ (German: *Kulturwissenschaften*) as early as the end of 19<sup>th</sup> century. See: H. Rickert, ‘Cultural science and natural science’ (Moscow: Respublica 1998) 45.

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15 I. Kant, ‘Anthropology’ (Saint-Petersburg: Tipografia P. P. Soykina 1910).

16 J. G. Herder, ‘Ideas for the Philosophy of History of Humanity’ (Moscow: Nauka 1977).

17 G. F. W. Hegel, ‘Philosophy of Law’ (M: Mysl 1990).

18 F. C. von Savigny, ‘System of the Modern Roman Law’ Vol. 1 (Moscow: Statut 2011) 15-246; P. I. Novgorodtsev, ‘The Historical School of jurists, its origin and lot’ (Moscow: Universitetskaya tipographia 1896).

19 N. Y. Danilevsky, ‘Russia and Europe’ (Moscow: Institut russkoy civilizacii 2008). By the way, here Danilevsky first produced a definition of the term ‘civilisation’ and introduced the concept of a ‘historical-cultural type’ (so, he distinguished ten types), identifying with ‘original civilisation’ and involving religion, culture, politics and economic structure.

20 K. N. Leontiev, ‘Byzantism and Slavdom’ / Selected works (Moscow: ROSSPEN 2010) 33-153.

21 O. A. G. Spengler, ‘The Decline of the West: Outlines of a Morphology of world history’ Vol. 2 (Minsk: Popurri 2009).

22 A. J. Toynbee, ‘A Study of History’ (Moscow: Ayris-Press 2010).

However, about the purely scientific anthropological approach to understanding of legal-state practices of humanity we can speak only from the late 19<sup>th</sup> – the early 20<sup>th</sup> centuries, when thanks to efforts of G. Mayne<sup>23</sup> and B. Malinowski<sup>24</sup> such related discipline as legal anthropology direct arose. But originally it studied law only in respect of so-called traditional societies<sup>25</sup>, and only later it gradually has expanded the field of its object, including present legal realities<sup>26</sup>. And this fact extensively has led to the current moment, when scientists construct a new type of law and state understanding, within which their (law and state) sociocultural conditionality and anthropocentrism is a departing point. But what are the main principles of such understanding?

So, the departing postulate is an assertion, that *law* (and *state*) is a *product* and, in fact, *one* of the many *manifestations of culture* of particular society at a concrete historical period. This fact inevitably entails the necessity of *taking into account a sociocultural context*, within which both legal and state system of (particular) society appears and functions, as well as a *temporal (historical) factor*. Thus, *sociocultural and historical determination* of law and state is postulated. This circumstance is also pointed out by J. L. Bergel, who consider, that feature of legal phenomenon lies in the fact that it's essentially relative. Its internal idea and its external manifestations vary according to time and space and are conditioned on specific legal systems<sup>27</sup>, which can be regarded by us as legal cultures (in the broadest meaning of this category).

However, law and state not only bears the imprint of unique human culture, but, in fact, also embodies peculiar 'cultural code' of nation, which contains information (text) on crucial for this society values<sup>28</sup>. And by this 'code' law and state is unfolded both in public (collective) and individual (human-actor) consciousness, and then in specific legal rules and acts.

Thus, corresponding human culture<sup>29</sup> (and its different aspects) serves as a *matrix* of such *law* and *state 'materialization'* (objectification). So, in case of law it is *legal culture*, which, in I. L. Chestnov's opinion, is «a mechanism of permanent reproduction <...> of legal reality»<sup>30</sup>. At the same time, legal culture can be viewed in two planes: subjective (legal mind) and objective (legal institutions and relationships, which are built by individuals, who, in turn, are guided by legal mind<sup>31</sup>). At that, the *primary* (subjective) *elements* of the legal culture are 1) *legal thinking* of concrete society, groups, individuals, 2) *language*, and *categories* of such thinking, 3) as well as formed by society *legal values, meanings, expectations* and *traditions*<sup>32</sup>. Whereas 1) legal institutions and 2) the forms of law

23 H. Maine, 'Ancient Law' (Cambridge: Cambridge University Press 2012).

24 B. Malinowski, 'Crime and Custom in Savage Society' (New Brunswick and London: Transaction Publishers 2013).

25 For instance, see: E. A. Hoebel, 'The law of primitive man: A study in comparative legal dynamics' (London: Harvard University Press 1954).

26 Here see, e.g.: N. Rouland, Legal anthropology (Moscow: NORMA 1999); L. Rosen 'Law as culture: an invitation' (New Jersey: Princeton University Press 2006); N. Rapport, J. Overing, Op. cit. 162-172.

27 J. L. Bergel 'General theory of law' (Moscow: NOTA BENE 2000) 33

28 In particular, notions of justice, criminality, state (public) ideology et alias.

29 Including nation, local and group culture.

30 I. L. Chestnov, 'Postclassical theory of law' (Saint-Petersburg: Alef-Press 2013) 508

31 At the same time, these generated institutions and relationships also have an influence on the forming process of new actors' (for example, children, migrants etc.) legal understanding.

32 Here we should understand that these elements are 'conscious'. However, there is the 'collective unconscious' (the C. G. Jung's term) both in legal and state reality. The 'unconscious' becomes apparent in archetypes. In turn, one of the expressions of archetype is myths. In our case we should talk about 'myths of state and law'. So, for example, on

expression, including proper legal norms (rules) and legal relations, are the secondary (objective) elements.

Additionally, we need to understand, that *legal culture*, as *statehood culture*, is only one of *aspects of general society's culture*. And, in fact, all its elements are in inextricable and essential connection with elements of overall culture of certain society: its values, attitudes, ideas, outlook and antinomies<sup>33</sup>. Hence, is disclosed organic connection of law and state with other modules of human culture – religion<sup>34</sup>, morality<sup>35</sup>, language<sup>36</sup>, ideology<sup>37</sup>, science<sup>38</sup>, art<sup>39</sup>, the history of cultural formation<sup>40</sup> and even folktales<sup>41</sup>. And hence, there is the certain possibility of multidimensional study of law and attraction methods of other (not only related with jurisprudence) sciences, investigating humans and their activities.

The next crucial point of the anthropological sight on law and state is *relativism* of these phenomena. Particularly, it means, that there is no universal and a priori criterion, etalon of 'right' of any social practices. In turn, this approach is a fundamental position of all postmodern epistemology and a consequence of revision classical legal understanding, characterised by its doctrinal

myths of positive law see: N. Rouland, Op. cit. 242-249.

33 Thus, for example, the Protestant Reformation of 16<sup>th</sup> – 17<sup>th</sup> centuries in Europe as an opposition to Catholic conservatism of the Middle Ages had undoubtedly influenced on the formation of modern political-legal theory and practices of Western civilisation.

34 On interrelations between religion, law and state see: F. de Coulanges, 'The Ancient City: A Study on the Religion, Laws, and Institutions of Greece and Rome' (Baltimore: Johns Hopkins University Press 1980); H. J. Berman, Op. cit.; K. D. Wald, A. Calhoun-Brown 'Religion and Politics in the United States' (Lanham: Rowman & Littlefield Publishers 2010).

35 Especially it distinctly shows itself in Eastern legal understanding. Thus, a syncretistic tradition of social norm was founded as early as antiquity. See: A. E. Chernokov 'An Introduction to Comparative Law' (Saint-Petersburg: IVESEP, Znanie 2007) 118-168; R. P. Peerenboom 'Law and morality in ancient China: the silk manuscripts of Huang-Lao' (Albany: State University of New York Press 1993).

36 See: M. Freeman, F. Smith, 'Law and Language: An introduction' [2013] 15 Current Legal Issues 1-8 (and following works); I. L. Chestnov, N. V. Razuvaev, L. A. Kharitonov, A. E. Chernokov, 'Social anthropology of law of modern society' (Saint-Petersburg: IVESEP, Znanie 2006) 128-178.

37 Here we can recall the recent Soviet experience, when communist ideology permeated all areas of law, and when the Communist Party of the Soviet Union was declared as 'the leading and guiding force of the Soviet society and the nucleus of its political system' (Article 6 of the Constitution (Fundamental law) of the Union of Soviet Socialist Republics 1977 [07. 10. 1977] available at: <http://www.departments.bucknell.edu/russian/const/77cons01.html>)

38 It is enough to recall how much the influence of criminology is significant with respect to criminal procedure law. But the most significant example is activity of glossators and postglossators in 11<sup>th</sup> – 14<sup>th</sup> centuries, who studying and interpreting Roman law indeed laid the foundation of European countries' law and legal tradition. Of course, we shouldn't forget about the proper influence of jurists (as scientists) on law and state. Thus, sometimes their works are regarded as one of the sources of law, as it is, for example, in Great Britain. Finally, attainments of the management science are actively implemented in the state organising process.

39 Art forms vale orientations, assigns associative attitudes. Especially correlation between art and law show itself through the influence of literature on the forming political and legal doctrines, as well as individuals' acts. So, the ethic investigations of Seneca, thoughts of St. Augustine or Christine de Pizan, utopian projects of T. More, H. de Saint-Simone, C. Fourier, as well as classical Russian literature had great importance in due time. Additional, we shouldn't forget about mass (pop) culture which forms peculiar stereotypes, or which prompts sometimes to deviations of any kind.

40 Thus, we can assert with confidence that, say, the spirit of the Age of Enlightenment in 18<sup>th</sup> century in many respects predetermined the content of the Constitution of the United States (1787) and the French Declaration of the Rights and Man and of the Citizen (1789).

41 See: A. Shytov, 'Thai folktales and law' (Chiang Mai: ACTSCO. Ltd.).

attitude, universalism and oblivion uniqueness of human and culture (within which law and state 'live'). Relativism as the principle of relativity<sup>42</sup> of all actuality leads us to idea of *legal-state pluralism* (in the center of which – equality and self-sufficiency of any political and legal systems), idea of *uniqueness of culture and society*, and ultimately to idea of *contextuality of law and state*<sup>43</sup>.

Another main idea of anthropological law and state understanding is examination of *legal and governmental realities as text*, besides, as text, which, according to I. N. Gryazin, is non-linear<sup>44</sup>. At that, we should understand, firstly, this text (as its 'words', 'category', 'morphology' and 'syntax') is itself unique to each society and also is a product of culture in a specific historical epoch. Secondly, this text is an open system (open to innovations and outside influences). Thirdly, it involves the actor's ability to perceive it<sup>45</sup>. And fourthly, like any text legal-state text is actively 'composed' (constructed) by people.

Hence, appears the following principle, which must be considered within the anthropological 'perusal' of the objects of our attention. It is the *constructible essence of law and state*. So, modern anthropological legal understanding, for example, proceeds from the fact that law is not objectively existing phenomenon, protected by state, on the contrary, it is a peculiar dialogue, which is organised between participants of social interactions and constructed right here, right now. In fact, law is a 'social construct, created and reproduced by practices of concrete individuals'<sup>46</sup>. However, selection and application of practices is not random, but generally determined by a social and cultural context. Hence, in the field of law investigation is offered the methodological challenge to use progress of social constructivism. And, of course, the same approach can be also applied in relation to state. Additionally, here we can also see the essence of the anthropological approach. So, the essence (goal) of this new research program 'is to 'disenchant' (Weber) or 'deconstruct' (Derrida) the social (and legal) world, to see the mechanism of their social construction behind the seeming objectivity of social (and legal) institutes. Therefore, constitution, legislation, public authorities, legal customs are not dogmata <...> They are results of human rulemaking, conditioned on a historical, social and cultural context'<sup>47</sup>.

Ultimately, we can identify the most important principle of anthropological (or cultural) dimension of law and state – its *anthropocentrism*. According to this principle, human is declared as the essential source of all social reality, including state and law. Eo ipso, the 'anthropological 'turn' considers human in all his manifestations, primarily, as sociocultural being, as the center of sociality, and thus, of legal'<sup>48</sup> and state system. It's humans who with their consciousness (formed by dialectic of each actor's individual and social existence) generate law and statehood per creating and reproducing regnant in society notions (images) of law and state, as well as per objectifying these notions within interpersonal and intergroup relations.

42 Concerning a subject of cognition, time and place.

43 For more detail about relativism and contextuality, see: I. L. Chestnov, Op. cit. 66-78; P. Metcalf 'Anthropology: The basics' (Abingdon, New-York: Routledge 2005) 55.

44 I. N. Gryazin, Law is a myth [2011] 5 Pravovedenie 78.

45 The ability is acquired during the socialization process.

46 I. L. Chestnov, Op. cit. 175.

47 I. L. Chestnov, N. V. Rasuvaev, L. A. Kharitonov, A. E. Chernokov, Op. cit. 5-6.

48 I. L. Chestnov, Op. cit. 167.

## WHAT DOES THE ANTHROPOLOGICAL APPROACH GIVE US?

After we have tried to define the conceptual basis of such rather new (for jurisprudence) view on law and state as the anthropological view, we should point out what perspectives it has.

So, we can assert that such approach can yield results, first, in theoretical understanding the essence (ancient Greek: Φύσις) and internal mechanisms of so ambiguous and relative phenomena as state and law. At that, the anthropological approach largely appears as a peculiar synthetic theory that exceeds the limits of classical jurisprudence and absorbs various progresses of both the social sciences and humanities. In fact, the anthropological dimension of law and state is in a way meta-theory, which allows us to study, for example, law not only inside itself<sup>49</sup>, but also through use of data and ideas on human and society from the general-scientific treasury of knowledge. Additionally, at this level, we can use not only scientific knowledge and techniques, but also attainments of the next level, i.e. philosophical level<sup>50</sup>.

Within a study of law and state as generally valid practices, constructed by society under a determinant role of its culture and historical condition, we just need to use methods of history, sociology and political science. Of course, we also need to use advanced psychology data, because, when we investigate law and state, we can't ignore the power aspect, the aspect of mental attitudes and notions (including their coming-to-be, maintenance and objectification), as well as aspects of legitimation, leadership and forming of power elites.

Taking into account the textual character of law and state, we have also to use semiotics and linguistics data. Of course, it is also necessary to attract philosophical methods such as the dialectic, synergies and hermeneutics (including postmodern deconstruction) methods.

In addition, we have to emphasise to the method of comparative analysis, skilful exercise of which is 'art of break to the value dimension of 'other' culture'<sup>51</sup>. Finally, we shouldn't forget about highly valuable epistemological approaches of constructivism.

In turn, such methodological pluralism is necessary for us to successfully 'perusal' of legal-state text and try at least to understand the causes and origins of uniqueness of particular nations' state and law practices.

Thus, such assessment of law and state, when we don't have to limit ourselves by a formal (in the spirit of legal positivism) study of legal rules, but have to carefully examine a political, historical and, of course, cultural context and can to use methods of other social sciences and humanities, very such assessment enables us, for example, to answer such questions as: why in the Preamble of the Germany Constitution 1949 people's responsibility before God is marked out<sup>52</sup>, why does the United States Declaration of Independence 1776, in fact, establish the right to rebellion<sup>53</sup>, why does the Russian President rank a position in government system that doesn't fall into the

49 Not only per jurisprudence's knowledge and methods with their inherent formalism.

50 For example, ideas of philosophical anthropology, social philosophy, philosophy of culture, hermeneutics, etc.

51 I. A. Vasilenko, 'Comparative politics' (Moscow: Yurayt 2013) 93.

52 Preamble of the Basic Law for the Federal Republic of German 1949 [08. 05. 1949] available at: <http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf>

53 The Declaration of Independence 1776 [04. 07.1776] available at: [http://www.archives.gov/exhibits/charters/declaration\\_transcript.html](http://www.archives.gov/exhibits/charters/declaration_transcript.html)

traditional model of parliamentary or presidential republic<sup>54</sup>, why Chinese Hong Kong has practically rights of political autonomy<sup>55</sup>, why the Scottish legal system unlike the English one has a clear differentiation between private and public law, and why in Japan 'giri' (Japanese: 義理) norms are much more efficient than norms of positive (state) law?

Additionally, this approach can yield practical ('tangible') results too. So, under globalisation cultural understanding of the nature of law and state, understanding of their organic connection with values and attitudes, reigning in modern heterogeneous societies, as well as understanding of discourses of political-legal text can serve as a basis to solve such problems as legitimation and effectiveness of positive law; successful reform of national legislation; 'transplantation' of international and foreign legal norms; and even legal settlement of relations between central and regional authorities of the concrete state, including autonomisation questions of particular 'difficult' territorial entities of the state<sup>56</sup>.

## CONCLUSION

Thus, the main value of a study of law and state in the anthropological manner is its meta-system<sup>57</sup> character, which implies undoubted involvement and accumulation of data and methods of most social sciences and humanities. That is not surprising, because in the sociocultural or anthropological point all the social sciences and humanities converge, as they converge in their main object – human (ancient Greek: ἄνθρωπος), who nowadays is not just Homo sapiens, but verily Homo culturalis.

Of course, 'perusal' of law and state (these sets of 'memes'<sup>58</sup>) within a relevant sociocultural and historical contexts of different (sometimes absolutely) societies is difficult and laborious work, but it seems, this work will be very useful in the today's uncertain and contradictory world.

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54 Chapter 4 of the Constitution of the Russian Federation 1993 [12. 12. 1993] available at: <http://www.constitution.ru/en/10003000-01.htm> .

55 Chapter II of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1990 [04. 04. 1990] available at: <http://www.basiclaw.gov.hk/en/basiclawtext/index.html>

56 For example, relations between Catalonia and Spain, Scotland and the UK can't be defined as 'simply'.

57 With respect to law and state theory.

58 'Meme' (the R. Dawkins' tem), per se, is a unit of cultural information. For more details, see: R. Dawkins, 'The selfish gene' (New York: Oxford University Press Inc. 2006) 189-202.

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International Conference of PhD Students and Young Researchers

**INTEGRATING SOCIAL SCIENCES  
INTO LEGAL RESEARCH**

10-11 April 2014

Vilnius University Faculty of Law

**DAY ONE**

**10 April 2014**

(Vilnius University, Universiteto g. 3 & Vilnius University Faculty of Law, Sauletekio av. 9)

**OPENING (Aula Parva – The Small Hall)**

(Vilnius University, Universiteto g. 3)

9.30 – 10.00 *Registration of participants*

10.00 – 10.45

Welcome speech

*Ceremony of official signing the Memorandum to Establish International Network of Doctoral Studies in Law among Lodz University, J.W. Goethe University Frankfurt am Main, Paris Ouest-Nanterre-La Défense University and Vilnius University*

10.45 – 11.00 *Coffee break*

11.00 – 12.00

The Contribution of (Behavioral) Law and Economics to Consumer Law

**prof. dr. Roger Van den Bergh** (guest speaker)

*Discussion*

12.00 – 13.00

*Transfer from Vilnius University, Universiteto g. 3 to Vilnius University Faculty of Law, Sauletekio av. 9*

13.00 – 14.00 *Lunch break*

**PLENARY SESSION I (Room JR 4)**

(Vilnius University Faculty of Law, Sauletekio av. 9)

Moderator: **prof. habil. dr. Malgorzata Krol**

14.00 – 14.15

Holistic Perspective on Legal Research

**Vitalij Levičev**

14.15 – 14.30

Lawyers Canon of the Philosophical Knowledge

**prof. dr. Saulius Arlauskas**

14.30 – 14.45

Law and Science – Relatives or Strangers? The Legal Research of Scientific Field

**Teresa Bedulskaja**

14.45 – 15.00

How Can Legal Discourse Benefit from Philosophy? A Remark on the *Lautsi Case*

**Wojciech Ciszewski**

15.00 – 15.30 *Discussion*

15.30 – 16.00 *Coffee break*

SECTION I (Room JR 4)	SECTION II (Room 302)
<b>Session 1</b>	
Moderator: <b>prof. dr. Maciej Chmielinski</b>	Moderator: <b>prof. habil. dr. Zbigniew Rau</b>
<p>16.00 – 16.15 Towards an Integrated Law and Economics Approach to Economic Regulations: Moving Beyond Fragmented Plurality and Cross-Disciplinarity in Law and Economics <b>Mohamed Sami Aldegwy</b></p>	<p>16.00 – 16.15 Bounded Rationality and the Law: How Affected is Constitutional Law by <i>Heuristics</i> and <i>Biases</i>? <b>Milosz Matuschek</b></p>
<p>16.15 – 16.30 Unification of Civil and Economic Regulations on an Example of Polish Regulation Regarding Enforcement Order for Uncontested Claims. An Example of Technocratic Legislation or One of Practical Means of Enforcing Individual's Rights? <b>Maciej Kuta</b></p>	<p>16.15 – 16.30 The Influence of the Legal Expert Authority on Legal Reasoning – An Experiment <b>Bohdan Pretkiel</b></p>
<p>16.30 – 16.45 The Importance of Economic Analysis of Law to Legislation: An Example of the Legal Regulation Reform in Lithuania Concerning Company Rescue Sigitas Barakauskas</p>	<p>16.30 – 16.45 Juridification in the Realm of the Court – Studies of the Narrative Construction of Legal Reasoning <b>Erik Björling</b></p>
<p>16.45 – 17.00 An Economic Analysis of Copyright Law – The Duration of Copyright <b>Anna Kornecka</b></p>	<p>16.45 – 17.00 Opportunism in Civil Litigation: Diverse Viewpoints on Self-interest in Interim Relief <b>Marija Bliuvaite</b></p>
<p>17.00 – 17.30 <i>Discussion</i></p>	<p>17.00 – 17.30 <i>Discussion</i></p>

<b>DAY TWO</b> <b>11 April 2014</b> (Vilnius University Faculty of Law, Sauletekio av. 9)	
8.30 – 9.00 <i>Registration of participants</i>	
SECTION I (Room JR 4)	SECTION II (Room 302)
<i>Session 2</i>	
Moderator: <b>dr. Lionel Zevounou</b>	Moderator: <b>prof. dr. Timo Tohidipur</b>
9.00 – 9.15 Behavioural Economics: An Undisputable Instrument to Building Better Legal Systems <b>Raquel Franco</b>	9.00 – 9.15 The Process of Filling Gaps in the Law as a Specific Political Activity <b>dr. Evgeny Tikhonravov</b>
9.15 – 9.30 Behavioural Economics and Contract Law <b>Ricardo Pazos</b>	9.15 – 9.30 The Presence of Political Aspects in the Legal Research on International Private Law <b>Nērika Lizinska</b>
9.30 – 9.45 Reconciling Different Realms: Examples of Economic Analysis of Corporate Law <b>Eglė Lauraitytė</b>	9.30 – 9.45 The Concept of Political Responsibility in the Latvian Legal System <b>Artūrs Caics</b>
9.45 – 10.00 The Research Methods in the Field of Law and Economics in the Context of Corporate Governance <b>Žaneta Jakubiec</b>	9.45 – 10.00 ‘Europeanisation’: From Political Idea to the Legal Concept <b>Victor Terekhov</b>
10.00 – 10.30 <i>Discussion</i>	10.00 – 10.30 <i>Discussion</i>
10.30 – 11.00 <i>Coffee break</i>	
<i>Session 3</i>	
Moderator: <b>prof. dr. Roger Van den Bergh</b>	Moderator: <b>dr. Charlotte Girard</b>
11.00 – 11.15 The Nature of Modern Competition Law: Between Law and Economics <b>dr. Konstantin Ivanov</b>	11.00 – 11.15 The Value of Conflictology for the Research in the Field of Civil Procedure and Alternative Dispute Resolution <b>Egor Evtukhovich</b>
11.15 – 11.30 Economic Analysis of Competition Law – From Law in Books to Law in Action <b>Maciej Gac</b>	11.15 – 11.30 Psychological Aspects of Applying Pre-trial Detention <b>Tatjana Gordina</b>
11.30 – 11.45 EU Competition Law and Economic Efficiency: The Interaction between Law and Economics in the Field of Vertical Restraints <b>Ioannis Apostolakis</b>	11.30 – 11.45 Child’s Right to Education: Lessons from a Research in the Kirtimai Settlement <b>dr. Vita Petrušauskaitė</b>

11.45 – 12.00 In Search of the Lost Economist in Every Commercial Lawyer <b>Jadwiga Glanc</b>	11.45 – 12.00 Right of Employees to Information about Employer's Operation <b>Marta Derlacz-Wawrowska</b>
12.00 – 12.30 <i>Discussion</i>	12.00 – 12.30 <i>Discussion</i>
12.30 – 13.30 <i>Lunch break</i>	
<b>Session 4</b>	
Moderator: <b>prof. habil. dr. Sylwia Wojtczak</b>	Moderator: <b>prof. dr. Eric Millard</b>
13.30 – 13.45 Interaction between Environmental Law and Natural Sciences – A Basis for Sound Environmental Norms <b>Jonas Urbanavičius</b>	13.30 – 13.45 The Necessity of the Anthropological Dimension of Law and State in Modern Jurisprudence <b>Alexander Zakrevskii</b>
13.45 – 14.00 The Societal Effects of Environmental Disasters in International Environmental Regulation <b>dr. Gábor Kecskés</b>	13.45 – 14.00 Artistic Value as a Legal Problem: The Case of Contemporary Lithuania <b>Gabrielė Gailiūtė</b>
14.00 – 14.15 Balance of the Interests in Land Sphere: Legal and Economic Aspects <b>Bronislav Totskiy</b>	14.00 – 14.15 The Interrelation of Social Aspects of the Old Testament and Law <b>Leila Neimane</b>
14.15 – 14.30 Behind and Beyond the Italian Forest Legislation of the XIX Century <b>Roberta Biasillo</b>	14.15 – 14.30 Research Biobanks' in Lithuania: A Question of its Historical, Social, Ethical & Legal Perception <b>Edvinas Meškys</b>
14.30 – 15.00 <i>Discussion</i>	14.30 – 15.00 <i>Discussion</i>
15.00 – 15.30 <i>Coffee break</i>	
<b>PLENARY SESSION II (Room JR 4)</b>	
Moderator: <b>Donatas Murauskas</b>	
15.30 – 15.45 Is Legal Foresight Crucial for Social Strategic Planning? <b>Rafał Michalczak, Magdalena Wojdala</b>	
15.45 – 16.00 How Sociological Analysis Can Influence Constitutions. A Few Remarks <b>Maciej Pach</b>	
16.00 – 16.15 Could Supply Chain Management Improve Legal Proceedings? <b>Isabell Mattsson</b>	
16.15 – 16.30 The Junction of Financial Accounting and Tax Law as an Example of Economical and Legal Discourse <b>Martynas Endrijaitis</b>	
16.30 – 17.00 <i>Discussion</i>	
17.00 <i>Conclusion of the conference</i>	



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