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IMPACT OF GLOBALIZATION TO LAW: NEW CHALLENGES AND NEW OPPORTUNITIES

GLOBALIZACIJOS ĮTAKA TEISEI: NAUJI IŠŠŪKIAI IR NAUJOS GALIMYBĖS

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The publication presents the materials of the conference "Impact of Globalization to Law: New Challenges and New Opportunities", which was held on the 22nd of May, 2009, at the Vytautas Magnus University, Kaunas. The materials touch upon the actual issues of the impact of globalization to law at the general theoretical, interdisciplinary (covering sciences of law and politics), and specialized (focused to the branches of law, especially these of the civil, commercial, criminal, and environmental law) levels.

Depending on what was presented by the participants of the conference, the materials contain either the presentations or the summaries (theses) of the presentations. The materials are presented in English. If author has prepared the research article on the basis of the presentation in the periodical reviewed scholarly journal with the electronical access possibility, the reference to this article or journal is provided at the end of the corresponding text. If the research article is still in the process of the preparation, this fact is mentioned at the end of the corresponding text.

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LEIDINIO ANOTACIJA

Leidinyje pateikta konferencijos „Globalizacijos įtaka teisei: nauji iššūkiai ir naujos galimybės“, vykusios 2009 m. gegužės mėn. 22 d. Kaune, Vytauto Didžiojo universitete, medžiaga. Joje gvildenamos globalizacijos įtakos teisei aktualios problemos bendruoju teoriniu, tarpsritiniu teisės ir politikos mokslų bei specializuotu atskirų teisės šakų (ypač civilinės, komercinės, baudžiamosios ir aplinkosaugos teisės) lygmenimis.

Pagal konferencijos dalyvių pateiktą medžiagą leidinį sudaro pranešimai arba pranešimų santraukos (tezės). Tekstas pateiktas anglų kalba. Jeigu pranešimo pagrindu autorius parengė mokslinį straipsnį periodiniam recenzuojamam mokslo žurnalui su elektronine prieiga, šio straipsnio ar žurnalo nuoroda pateikta straipsnio pabaigoje. Jeigu mokslinis straipsnis dar rengiamas, tai pažymima straipsnio pabaigoje.

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TEACHING TECHNIQUES OF LAW AT VMU: IMPACT OF GLOBALIZATION

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GLOBALIZACIJOS ĮTAKA TEISĖS DĖSTYMO METODAMS VDU

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THE PRESENTATION

The teacher affects eternity; he can never tell where his influence stops.
Henry Adams, The education of Henry Adams (1907)

The idea to present a paper about teaching methods in legal profession arose after taking part in the conference of International Association of Law Schools of the world that took place in Montreal last May. The conference focused on the questions of globalization in law studies as well as the newest trends in comparative legal teaching methods. 100 participants took part in the conference and delivered presentations on the newest teaching methods applied in their countries[1].

While preparing the presentation for Montreal conference, I realized that there is no scientific debate in Lithuania about teaching methods applied in universities or other higher schools that educate lawyers at all.

First, I would like to discuss the problems and challenges that influence the search of more advanced methods in legal education.

1) It is obvious that we witness drastic global transformation processes. These processes influence the contents of law studies and teaching methodology to great extent. Topics such as world economic crisis, free movement of services, among them legal services and education, foreign investment, the destruction of authoritarian regimes, the birth of new nations/ states, the more significant role of non governmental organizations are the reality of the world we live in today.

[1] You can learn more about the conference and delivered papers, among them VMU Law Institute presentation about comparative study experience, here at the World's Higher Law School Association website http://www.ialsnet.org/.

High technologies, internet, information webs link us with the remotest parts of the world at a click of a mouse. As a result the society became much more open, accessible and receptive both to positive and negative impacts of globalization. Can we, as teachers, claim to be preparing our students for these challenges?

2) It is noticeable that there are changes not only in the surrounding world; our students have changed a lot too. The young people entering legal studies at the moment are called "Millennial Generation", these are the people born in 1977–1998, those born prior to that are called "Generation X"[2].

The most topical and essential problems pertaining to the effectiveness of teaching arise due to the changes in students' ability to receive and understand the information. "Generation X" was studying from the books. Today's young people perceive a book as one of many studying resources. They get big bulk of information from other sources of information such as TV, internet, and worldwide web. That is the reason their perception abilities have dramatically changed. Research shows that even if information is perceived, memorized and understood without analysis, systematization and evaluation it will be erased from the memory relatively soon. First, the information has to be presented in a systematic way and later evaluated critically. A propos, Lithuanian Ministry of Education and Science recommends adapting internationally acknowledged sources such as, for example, Blum's taxonomy[3], while preparing teaching curricula. Blum's taxonomy classifies "knowing" as one of the lowest of the six levels of knowledge acquisition steps. Consequently, acquiring passive knowledge should not be the university's prerogative and main objective. Higher level of acquisition, according to Blum's taxonomy, is understanding, followed by application, analysis, synthesis and evaluation.

3) To my mind, the search of more advanced teaching methods is particularly important today due to the fact that student expectations and the expectations in the labor market have dramatically changed.

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[2] More about generations Diane Thielford & Devon Scheef, Generation X and the Millennials: What you need to know about mentoring the new generations, Law practice today (ABS Law practice management, Aug. 2004), at: http://www.abanet.org/lpm/lpt/articles/mgt08044.html.

[3] LR order of the minister of Science and Education 2009 January 5 No. ISAK-16 suggestions of work group at http://www.smm.lt/msr/docs/Rekomend_09_02_09.doc.

One of the declared aims of the higher education reform is study program choice-related funding which will promote the competition among universities.

In the face of the fact that a lot of information can be found in the textbooks and other sources, any teacher anywhere in the world might raise a question: "What is my role in the classroom?"

I am deeply convinced that if a lawyer has not had the opportunity to compare and juxtapose the legal system of his country with the legal system of the other countries thoroughly, not superficially, he is not able to understand his own legal system. Prior to dealing with Lithuanian teaching methods in legal profession, first of all I would like to present the results[4] of a comparative research which compared the peculiarities of the US and German legal education, as well as Goteborg and Edinburgh university professor's Dr. Rainer Grote research about teaching methods in legal profession in Germany[5].

Teaching traditions in Lithuanian legal schools have been directly inherited from German schools of law where the ideal lawyer is defined as thorough, exact and dogmatic professional with a huge inclination to relive scientific controversies as well as attracted by legal constructs, but with little concern for ethical, practical questions or application of socially "purified" law and the consequences following.

Looking back into history, Germany started preparing lawyers in the 14th century. In Lithuania, however, Vilnius academy began preparing lawyers in 1567. Legal studies lasting five years were established and followed by the legal practice which focused on preparing legal government officers. One of the features of German and/or Continental legal education system is state's influence to the study program and form. In Germany there is a state exam for all university graduate lawyers. This explains why the quality of education is similar and complies with the standard.

The typical rating of universities like in the USA is neither typical nor significant in Germany. It is worth noticing that the USA law schools prepare students to become advocates whereas German schools

[4] Juergen R. Ostertag, Legal education in Germany and the United States – a structural comparison, Vanderbilt Journal of transnational law, 1993.

[5] Rainer Grote, Comparative law and teaching law through the case method in the civil law tradition – a germanų perspective, University of Detroit Mercy Law Review, Vol. 82:163, 2005.

prepare court and state officials. Different objectives trigger different teaching methods. If a student is taught to evaluate a factual situation form the point of view of a judge: generalize the facts, apply the law, use a variety of legal explanatory methods, discuss a possible outcome of the judgment, discern the loopholes of the law and apply legal and analogous possibilities, it means the teaching methods are oriented towards the cultivation of student's adjudicative abilities. It is typical for Lithuania, Germany and other continental countries. On the other hand, in the US and other common law countries students are taught to find factually similar cases, also to determine legal issue, the rule that can be applied to it, find arguments, among them social, political and economical as this can change the rule. In such a case students' argumentative skills are trained, in other words "advocacy skills". Thus the method that dominates the US schools is Socratic also called the case method.

Traditionally law studies in German universities are being organized similarly to Lithuanian: monologue-dictation based lectures filled with rather abstract material, passive students who usually do not get ready for classes, seminars being conducted by doctoral students or beginner teachers, where the class discusses lecture material and tries to solve hypothetical situations. Thus, although we have to admit that the method of case analysis is partly applied during the above mentioned seminars: students are analyzing hypothetical situations, aim to determine law act that is applicable for the situation, try to find the loopholes in the law, generalize the facts, apply a doctrine; but unlike in Socrates method they evaluate the facts neutrally like a judge. In Socrates method, on the other hand, a student is encouraged to defend his position this way honing creative and critical thinking skills. Teaching methods in Germany are debated and criticized a great deal[6]. The biggest shortcoming of the legal education in Germany is the student's lack of preparation for the lectures and as a consequence absence of valuable discussions with a professor who teaches the subject. Another problem is lecturing huge groups of students - the feature that does not allow for multiple and meaningful discussions between a professor and a student. That is the reason why the main priority of professors teaching at universities is their scientific

[6] Riner Grote, Comparative law and teaching law through the case method in the civil law tradition – a German perspective, University of Detroit Mercy Law Review, Vol. 82:163, 2005, p. 175.

work or research. Only the research justifies teacher's value and demand in an academic society.

According to Benjamin V. Madison, professor at the University of Regent, if higher law school paid more attention to the findings in educology, the teaching quality would improve significantly. In the book called "Best practices for legal education" (2007), (it can be accessed through the internet[7]), authors reproach teachers who do not attempt to adapt to the changing student needs, growing world and who do not search for more advanced teaching methodologies.

Let us go back to the search of the more advanced teaching methods at VMU and their actual application in the teaching process there. After the analysis of more than 60 presentations from the already mentioned Montréal conference, I noticed that the influence of globalization in the methods applied at VMU law faculty manifest themselves mostly through the domination of Socrates method. On the other hand, the most effective way to update and improve teaching methodology effectively in the global market as we find ourselves today is to employ comparative analysis of various legal systems. It is obvious that the most effective way to learn about other legal systems is studies abroad. The opportunities for students to study abroad are increasing. At the moment one of the major programmes in this context is the Erasmus student exchange programme. The law faculty at VMU is a member of the Campus Europae association network of universities. The Campus Europae project makes it possible for the most gifted and ambitious students to have an opportunity study for one or two years at another Campus Europae association university located, for example, in Germany, Luxemburg, Italy, Turkey, Poland, Finland and other countries and maintain a chosen study programme. The VMU law faculty students can benefit a lot from the project. During the studies abroad they are able not only to get acquainted with the legal system of another country but also learn a foreign language. The studied subjects are fully approved at the home university. It is obvious that the essential goal in such exchange programmes is mutual diplomas and full accreditation of studies by foreign universities. VMU law faculty has advanced in two directions in this sphere, namely, it leads a certificate

[7] Roy STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007), at http://cleaweb.org/documents/bestpractices/best-practices-full.pdf.

program with the prestigious Michigan state university (USA) since 2001; and this year joined the Campus Europae association network where participating universities prioritize united diplomas. On the other hand, it is obvious that it is not possible to send all of the students to study abroad because of the high study costs. It is interesting to note, though, that our partner Campus Europae university of Luxemburg introduced an obligatory requirement to study abroad for all students. As an alternative, our university invites a large group of visiting professors from foreign countries. Visiting lecturers teach only advanced students who need extensive focus on a subject. Lectures are delivered in English applying a comparative and Socratic methods. In order to provide better conditions for visiting professors, our faculty organizes intensive courses during the five finishing study semesters (two summer semesters among them). The subject is delivered through two week period instructing students every day and focusing only on a single subject.

Without a doubt a big part of advanced teaching methods such as group work, visual aids, distance learning and the like were left untouched due to the time shortage. The aim of this presentation, though, was to provoke and invite everyone to discuss this topic here in Lithuania and I hope I succeeded. Thank you for your attention. I would like to kindly invite my colleagues, teachers and students who take part in this conference to discuss this topic and share their experience.

PROCESSES OF INTEGRATION AND DOUBLE CITIZENSHIP

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INTEGRACIJOS PROCESAI IR DVIGUBA PILIETYBĖ

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THE SUMMARY (THESES)

1. When relations of citizenship are regulated, it is very important to assess new actual situations, new needs of society and the state and to react to them adequately. The ever increasing integration of states, big emigration of citizens of the Republic of Lithuania, virtually unrestricted opportunities to get jobs in almost all states of the European Union, the increasing number of mixed marriages and of the children born in such families, as well as other circumstances create preconditions for the increase in dual citizenship. At present approximately 65 percent of European Union states allow their citizens to be citizens of other states at the same time; about 30 percent of such states tolerate dual citizenship (they have a rather liberal viewpoint of dual citizenship), and only 15–20 percent of the states virtually prohibit dual citizenship.

2. It is important that the Law on Citizenship define as to what persons are citizens of the Republic of Lithuania, in what situations a citizen of the Republic of Lithuania may be also a citizen of another state, since citizenship is not only a formal legal category, it is always inseparably related with the issues of sovereignty, national identity, political order, and the rights and freedoms of persons. Only citizens of the Republic of Lithuania, i.e. the state community—the civil Nation—have the right to create the State of Lithuania, i.e. only citizens have the right to decide what sort of the State of Lithuania there should be, to establish the constitutional order of the State of Lithuania, the structure of the institutions implementing state authority, the basics of legal relations between the person and the state, to establish the system of national economy etc. While implementing the rights and freedoms of citizens, citizens participate in implementing the sovereignty of the Nation.

3. While regulating the citizenship relations from the very restoration of the State of Lithuania in 1918, the view was upheld that, as a rule, a citizen of Lithuania may not also be a citizen of another state at the same time, and that dual citizenship was allowed only in individual cases established in the law. The absolute prohibition of dual citizenship was provided for only in the 1922 Constitution, wherein it was established that "no one is allowed to be a citizen of Lithuania and of another state at the same time" (Article 9). In 1990, upon restoration of the independent State of Lithuania, also the view was upheld that dual citizenship was allowed only in individual cases provided for in the law—the Provisional Basic Law (the Provisional Constitution) established that "as a rule, a citizen of Lithuania may not be concurrently a citizen of another state" (Paragraph 2 of Article 13). The Constitution which is valid at present (Article 12) also entrenches the principle of prohibition of dual citizenship, however, it is not absolute—with the exception of individual cases provided for by law, no one may be a citizen of both the Republic of Lithuania and another state at the same time. In its ruling of 13 November 2006, the Constitutional Court held that, under Article 12 of the Constitution, dual citizenship may not be a wide-spread phenomenon.

4. The development of legislative regulation of citizenship after the entry of the 1992 Constitution into effect shows that the legislator gradually widened the circle of the persons who were allowed to be citizens of the Republic of Lithuania and of another state at the same time. In 2006, when a legal dispute arose regarding the compliance of some provisions of the Law on Citizenship with the Constitution, the Law on Citizenship used to contain the legal regulation whereby the absolute majority of citizens of the Republic of Lithuania, regardless of where they lived—in Lithuania or another foreign state—were allowed to be citizens of another state at the same time as well. By its ruling of 13 November 2006, the Constitutional Court recognised such legal regulation as being in conflict with the Constitution. As long as Article 12 of the Constitution entrenches the principle that with the exception of individual cases provided for by law, no one may be a citizen of both the Republic of Lithuania and another state at the same time, the legislator is not allowed to establish any such legal regulation whereby the number of such cases is so big that the cases of dual citizenship are a wide-spread,

but not rare phenomenon. No matter how the concept of the provisions of Article 12 of the Constitution presented in the Constitutional Court ruling of 13 November 2006 is assessed—it is possible to agree or disagree with it—however, it is the official construction of the Constitution and official concept thereof, and no one, save the Constitutional Court itself, can change it.

5. The concept of the provisions of Article 12 of the Constitution presented in the Constitutional Court ruling of 13 November 2006 also means that most of those citizens of the Republic of Lithuania, who departed to other states to settle there, provided they acquire citizenship of some other state, they will not be able to retain citizenship of the Republic of Lithuania. The construction of the provisions of Article 12 of the Constitution caused big dissatisfaction among Lithuanian emigrants, especially among those citizens of the Republic of Lithuania, who recently emigrated from Lithuania.

6. Article 12 of the Constitution can be amended only by referendum. When one looks for ways how, by not calling a referendum on amending Article 12 of the Constitution, to amend the Constitution so that cases of dual citizenship would not be rare ones, there are proposals that, e.g., Article 32 of the Constitution be supplemented with the provision "A person who acquired citizenship of the Republic of Lithuania by birth may not lose it against his will", or to supplement Article 18 or 32 of the Constitution with the provision "Not a single citizen of Lithuanian descent, nor his children can lose, against their will, citizenship of the Republic of Lithuania acquired by birth, even with acquisition of citizenship of another state". Such proposals are unacceptable and are in conflict with the Constitution. The fact that the Constitution itself establishes that the provisions of Article 12 can be amended only by referendum means that the Constitution considers these provisions as very important and fundamental ones in the life of society and the state, that a special protection of these provisions is entrenched in the Constitution itself, and that they cannot be amended by the Seimas. The fact that the provisions of Article 12 can be amended only by referendum means that the Seimas, while enjoying powers to amend other provisions of the Constitution, cannot amend those other provisions of the Constitution in the manner whereby one would establish a legal regulation competing with the legal regulation

established in the provisions of Article 12 of the Constitution, while the latter provisions may be amended only by means of a referendum. If the Seimas adopted such amendments and established a legal regulation competing with that entrenched in the provisions of Article 12 of the Constitution, whose amendment is possible by referendum only, there would appear a legal situation where, even if the provisions of Article 12 of the Constitution, which may be amended only by means of a referendum, are not formally amended, these provisions would be "neutralised" by the law on the amendment of the Constitution adopted by the Seimas. Thus, the legal regulation entrenched in the provisions of Article 12 of the Constitution, which may be amended only by means of a referendum, would be distorted and denied.

7. The main discussion issue regarding the new draft Law on Citizenship is this: how many situations is one allowed to legislatively establish, where a citizen of the Republic of Lithuania is permitted to have citizenship of another state at the same time. In other words, how broad could be the limits established by the law permitting dual citizenship. The draft Law on Citizenship chose the date of 11 March 1990 as the dividing line. The drafters chose this date only because they were bound by the concept of Article 12 of the Constitution presented by the Constitutional Court rulings, whereby dual citizenship may not be a wide-spread phenomenon (in other words, the legislator is not allowed to provide for so many "individual cases" where a citizen can have citizenship of another state at the same time and where dual citizenship would become a wide-spread phenomenon). It is to be assumed that the said dividing line was chosen because no other more convincing and more objective criterion was found how, while expanding possibilities to be a citizen of the Republic of Lithuania and another state at the same time, not to violate the requirement established in Article 12 of the Constitution. According to the press, more than a million individuals of Lithuanian descent live abroad at present and about 400 thousand citizens of the Republic of Lithuania left Lithuania after the restoration of the independence. If the draft Law on Citizenship provided that not only the persons who left or were exiled from Lithuania until 1990, but also the persons who left Lithuania after the restoration of independence, are allowed to have dual citizenship, it would mean that the law would again establish the legal regulation whereby dual citizenship becomes

(might become) a widespread phenomenon; it would also mean that the law would again establish the legal regulation which was recognised unconstitutional by the Constitutional Court ruling of 13 November 2006. It is noteworthy that, under the Constitution, the legislator may not overcome a ruling of the Constitutional Court by repeatedly adopting the law or separate provisions thereof which were recognised unconstitutional by Constitutional Court rulings.

8. If the legislator was really committed to follow the provision that dual citizenship may be a widespread phenomenon, and this would be so if, alongside the cases specified in the draft Law on Citizenship, one would provide that also the persons who left Lithuania after 11 March 1990 are allowed to have dual citizenship, it would be necessary to correspondingly amend the provisions of Article 12 of the Constitution. This can be done by referendum only. No matter how the legislative regulation of the relations of citizenship of the Republic of Lithuania will be amended in the future, one must pay heed to the provisions of the Constitution, including those which entrench equality of rights of all persons and non-discrimination on ethnical grounds.

9. The regulation of citizenship relations in European Union states shows that they have an increasingly liberal view towards dual citizenship and are abandoning the formerly strict prohibition of dual citizenship (e.g. Sweden 2001 Law on Citizenship). Most of European Union states can react to the new factual situation caused by the state integration due to the fact that their constitutions do not regulate dual citizenship relations—the legislator is allowed to regulate these relations.

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THE IMPACT OF THE PROCESSES OF GLOBALIZATION TO THE SYSTEM OF ENVIRONMENTAL LAW

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GLOBALIZACIJOS PROCESŲ ĮTAKA APLINKOSAUGOS TEISĖS SISTEMAI

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THE PRESENTATION

Introduction

The relevance of the paper is determined by the role environmental law plays in the process of reduction of negative influence of globalisation on the environment, and, at the same time, by its aim to ensure the implementation of aims and goals of sustainable development in our society. However, the impacts of globalisation on environmental law and inevitable changes under new conditions have not been substantially studied in scientific literature. The main idea of the paper was to find answers to questions on globalisation. Which processes can be called global, which of them determine changes in environmental law and bring forth new problems, and whether Lithuanian environmental law, as we know it today, is efficient enough to put limits or neutralize the harmful influence of globalisation processes on the environment and society. Finally, what are the prospects for development of environmental law under new conditions?

In his work, the author pursues the following objectives: 1) to describe changes and new issues on environmental law when influenced by globalisation processes; 2) to carry out a comparative analysis of international, European and national systems of rules of law that regulate integrated environment protection and shield from the damaging economic and anthropogenic impact; and 3) to summarise the goals and prospects of environmental law development under the globalisation by introducing respective conclusions.

1. Changes and goals of environmental law as determined by globalisation.

This chapter presents a short review of scientific literature, as well as the author's opinion on the problem of globalisation conception, alongside with changes and goals of environmental law as determined by those globalisation processes. Having made analysis of scientific information, the author draws a conclusion that *globalisation is an inevitable and objective historical process of society evolution, where the driving force is the development of science, technologies, and information systems, also, the increasing movement of goods, capital, and workforce from country to country, and finally, the development of international co-operation among countries in various fields of human activity.*

The author expresses a positive attitude towards globalisation processes, which determine further development of society and progress; nevertheless, he underlines the fact that at the same time they cause unrequited consequences on environment and society. The author agrees with the idea, that an increasing number of the world population has a direct impact on globalisation processes, since consumption and social needs grow, and to meet those needs, the society uses natural resources, which are limited. The increasing exploitation of natural resources in industry, energy, and other fields of economic activity is the reason of environment pollution, and the nature fails to purify itself from the pollution effects. Contaminants pervade the environment and produce harm to animate and inanimate nature; they deteriorate the quality of society life and health, induce climate changes, and, consequently, quite often entail natural disasters, such as floods, hurricanes, etc. Statistical data about the growing number of the world population, the rate of environment pollution, and its impact on environment and society are presented in the paper.

On the other hand, the author thinks, that not all processes occurring worldwide are global, but only those which cause harmful effects on international level concerning the earth climate and environment, when natural resources are destroyed and degenerate; the quality of society life and health deteriorates, and the limitation of exploitation of resources and neutralisation of industrial effects requires international co-operation among the countries of the world.

According to the author, globalisation impact on environmental law under new conditions demonstrates itself in significantly expanded regulation, that encourages the improvement and implementation of the following aims and goals: 1) to restrict or neutralize harmful effects of these processes on environment and society; 2) to expand international co-operation between countries and societies in the field of environment protection; 3) to make reforms and develop national system of environmental law, considering international commitments of Lithuania and the strategy of sustainable development of society.

2. Problems of integrated environmental legal regulation.

The idea of integrated environment has been formulated in the environmental policy and legal acts of the EU, and it promotes transition from separate isolated environmental objects and resources (e.g. land, water, air, etc.) to the establishment of integrated environmental system and global protection. By developing this idea, the author expresses opinion that *integrated environment means integration of protection measures applied to the earth climate, some specific environment objects, and resources (i.e. land, land depths, water, air, biological diversity, etc.) against the damaging economic or anthropogenic activity into a united system of environmental protection*. Under the influence of globalisation processes, the increasing environment pollution, as well as other harmful anthropogenic effects, provokes undesirable changes in the earth climate and the whole environment, and this is the reason of demand in legal regulation to be able to protect the planet environment on international level.

In this chapter, the author uses a comparative method to analyse international agreements, and the legal standards of the EU and Lithuania, which regulate relationships within an integrated environment system. With a view of the system complexity and volume, however, the author limits his research up to investigation of legal regulation issues on global climate and environment pollution restriction.

Having compared legal regulation acts with those of the UN *General Convention on Climate Change, Kyoto Protocol*, the corresponding EU and Lithuanian acts on integrated environmental relationship, the author draws a conclusion, that in Lithuania, legal regulation of such relationship

is fragmentary, inadequate and of inexpedient legal form. These especially important environment and society protection relationships, regarding implementation of society and individual right to safe environment, are regulated by departmental legal acts of the Minister of Environment, not laws. This considerably reduces effectiveness of environmental law in regulation of these relations, because departmental legal acts possess minor legal power; with a view to incorporation and development of not complete standards of international agreements and the EU legal acts, the implementation mechanism remains obscure. An integrated and united environmental system of legal regulation has not yet been adopted in Lithuania.

3. Development prospects of environmental law under globalisation.

The author summarises the situation and current problems of integrated environmental legal regulation in Lithuania and comes to a conclusion, that future national environmental law development suggests the following aims and goals in the context of globalisation: 1) universal implementation of Lithuanian international commitments and international agreements, as well as integration of the EU legal standards, regulating environmental relationship; 2) modification of aims and goals of sustainable development strategy in environmental law for Lithuanian society; 3) creation and development of united national environmental law system.

With the view of implementation of these particular aims and goals, the author suggests that laws on climate protection and integrated environment protection were enacted, where prevention and control measures would be considered, together with respective international agreements and the EU legal acts on climate protection and integrated environmental issues. The author proposes the idea of creation of a unique system of environmental law, and for this purpose, he states it is crucial to make a reform in the basic law on environment, to expand limits of its legal capacity and content, regarding strategy and international commitments of sustainable development of Lithuanian society, and to find links with other laws on protection regulation applied to individual objects and resources.

In the final paragraph, the author formulated respective conclusions to summarize the important issues discussed in the paper and the ways of possible solutions to the problems.

Basic concepts: *globalisation processes, integrated environmental protection, environmental law.*

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WORLD ENVIRONMENTAL CONSTITUTION

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THE PRESENTATION

The globalization process is steadily gaining momentum in the modern world. Its development is particularly active in those spheres of public life which at the same time affect the interests of both individuals, so-called "citizens of the planet", and states as well. One of the branches of law, directly experiencing the impact of globalization, is the environmental law. In particular, the need to resolve economic and environmental conflicts, as well as the lack of properly structured and codified rules of international law have given rise to an idea of formulation and adoption of the World Environmental Constitution (WEC).

It is well known that the first international legal instrument focused on the environmental matters was the Agreement on the Protection of Fur Seals signed in 1879. It is logical that, as new environmental challenges and the need to meet them emerged, an array of international and national environmental laws has grown ever since. In his interview noted Ukrainian scientist, expert of Council of Europe by environmental law, a member of the International Permanent Court of Arbitration (The Hague), member of the National Academy of Sciences of Ukraine, Director V. M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, Doctor in law, Professor Yu.S. Shemshuchenko noted that "according to the United Nations Environment Program (UNEP), nowadays international environmental treaties cover more than 250 issues" [1]. Besides, one should also take into account a multitude

of international environmental agreements entered into between individual states and groups thereof, as well as between international organizations. Despite such a huge mass of international environmental laws, including international legal acts of a general nature, in particular, Stockholm Declaration on Environment (1972) [2], Rio Declaration on Environment and Development (1992) [3], World Charter for Nature (1982) [4] and others, it should be recognized that the as far as their content is concerned they have certain legal shortcomings, i.e., these documents are not legally binding since they have an advisory nature; besides, many of them have a declarative character lacking universalism. Consequently, these flaws increase the risk of gaps in environmental legislation, moot cases and, therefore, affect the quality of law enforcement in this sphere. Thus, the need has occurred to systematize all previous agreements in the field of environmental protection and sustainable development, as well as to define institutions to enforce their provisions.

Yu.S. Shemshuchenko pointed out that "for the first time this consideration was officially stated by Ukrainian delegation (F. Burchak, M. Kostitsky, S. Kravchenko, Yu. Tunitsa, Yu. Shemshuchenko) at the International Conference on Federalism held at Hofstra University, New York (1992)" [5]. The conference adopted a resolution On Establishment of New Institutional Structures for International Environmental Cooperation and took a decision to develop and adopt the World Environmental Constitution under the aegis of the UN.

Later, **the Ukrainian political circles** actively promoted this idea:

1) Address by the President of Ukraine *Leonid Kuchma* at the **19th Special Session of UN General Assembly** in June 1997: "Even today we should begin development of a global international legal instrument to safeguard the environmental security of all countries in the world. Such an instrument which would define acceptable standards of environmental conduct for all States for the sake of survival and prosperity of civilization" [6].

2) Hearing on global climate change problems at the **UN Headquarters** in July 2007. Chairman of the National Environmental Investment Agency of Ukraine *V. Nakhlupin* urged to developing the WEC, as well as to creating an integral system of global environmental safety [7].

3) **The 62nd Session of the UN General Assembly** held in September 2007. Minister of Foreign Affairs of Ukraine *A. Yatsenyuk* supported the idea of adopting this Constitution [8].

4) Plenary meeting of **the 63rd Session of UN General Assembly** held in New York on September 24, 2008. The Ukrainian President *Viktor Yuschenko* states that "Ukraine puts forward an initiative to develop a framework binding agreement - World Environmental Constitution and to establish a system of a single structure for ecological protection with relevant authority and mechanisms of work in the UN" [9].

At the moment, the conceptual framework of the WEC is being developed at the V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine [10]. In particular, the following aspects contained in the Constitution can be pointed out:

1) Basic principles of international cooperation in the field of environmental relations. However, detailed description of various aspects of environmental relations should be avoided while maintaining the framework nature of this document.

Content and structure of the WEC must be constructed in such a manner that this unprecedented international instrument would not compromise the sovereignty of any country, but enjoin each of them to use their natural resources and environment so as to ensure the welfare of both present and future generations… The WEC should become a tool for "greening" the economy and education, stimulate the formation of a new – environment-friendly economics [11].

2) The human right to safe environment: "Nothing is said about this right in the Universal Declaration of Human Rights (1948), nor in the European Convention on Human Rights and Fundamental Freedoms (1950) nor in the International Covenant on Civil, Political, Economic, Social and Cultural Rights (1966). By implication, this right is referred to in the Stockholm Declaration on Environment and the Rio Declaration on Environment and Development" [12]. Although the international community has made some efforts to promote the human right to a safe environment, national legislation in many countries outruns the international law in legal support of this right. In particular, it should be noted that this right is guaranteed by the constitutions of many post-Soviet states. With a view to developing this right, the other environmental human rights should be included in the WEC, namely:

- rights of general and special use of natural resources;

- public access to environmental information and public acquisition of environmental data;

- rights of public participation in environmental decision-making and participation in conduct of ecological examination at domestic and international levels, etc.

3) Basic principles of a national environmental policy:

- Rational and careful exploitation of natural resources;

- Non-pollution and comprehensive assessment of environmental conditions;

- Provision of environmental safety and sustainable development;

- Mandatory environmental impact assessment of construction projects;

- Preservation of biological diversity;

- Prohibition of military or otherwise hostile use of the environmental impact means;

- Cooperation of States in environmental issues;

- Free exchange of environmental information;

- Prevention of environmental damage and peaceful settlement of environmental and legal disputes;

- State responsibility in international law for environmental damage and violation of human rights to safe environment, etc.

4) Forms and methods of environmental cooperation among States in view of its diversity:

- Harmonization of environmental management plans and projects (in particular, with regard to natural resources/objects that expand to the territory of several states);

- Harmonization of actions related to prevention of environmental pollution, elimination of natural and man-made disasters, provision of environmental conditions safe for human life and health;

- Environmental appraisal and environmental impact assessment of commercial construction projects;

- Implementation of environmental monitoring and control;

- Exchange of environmental information;

- Implementation of public educational and research programs on environmental safety, etc.

5) Institutional mechanism of the WEC implementation. Due to the low efficiency of UNEP, which was more than once mentioned at various international forums and on the UN floor, it becomes necessary to change the format of this international organization, or to replace it with an alternative body of relevant jurisdiction: "In particular, during the 19th Special Session of the UN General Assembly mentioned above Brazil, Germany, Singapore and South Africa came up with a joint statement which called for a radical re-formation and strengthening of the United Nations Environment Program, as well as for establishment of a new UN body on environment. In our view, an *Environmental Security Council* (italics - A.Ch.) could become such a body to be set up on the model of the UN Economic and Social Council dealing with economic and social spheres. This council could be created by way of reforming the UNEP. It would be appropriate to give the Environmental Security Council a status of the special international organization and lodge it with wide-ranging powers to ensure environmental safety, coordinate international environmental cooperation, as well as to monitor the implementation of the World Environmental Constitution" [13].

As regards *the judicial protection* of violated environmental rights on the international level, currently the United Nations International Court, International Court of Arbitration and the European Court of Human Rights deal with the matters pertaining to this sphere. However, the fact is certain that all these courts have general jurisdiction and, therefore, it is difficult sometimes to ensure their timely settlement of litigation in this sphere. Even the existence of specialized branch courts, e.g., the International Tribunal for the Law of the Sea, International Maritime and River Arbitration Court, cannot withdraw from agenda the issue of establishing a system of qualified international courts specializing in environmental matters. In particular, at the inaugural International Foundation Conference held in Mexico City in 1994 *an attempt was made to establish an International Court of Environmental Arbitration and Conciliation* [14]. It consisted of environmentalists from 22 countries. For certain reasons, this attempt failed. Presently, legal practitioners and scholars actively discuss the establishment of *an International Environmental Court under the aegis of the UN*. In addition, in order to ensure the implementation of the WEC provisions it is proposed to set up under the auspices of *the UN the*

International Service for Environmental Monitoring and the International Environmental Bank.

When considering this subject, we should also mention the problems that may arise in the process of harmonization and implementation of the WEC. One of the issues that may influence the adoption and implementation of the Constitution, is rooted in different levels of socio-economic and political development of individual nations, including the development of their institutional environment. Another problem stems from the fact that it affects the interests of major subjects of world politics. As an example, it suffices to recall the case of the U.S. refusal to ratify the Kyoto Protocol to the UN Framework Convention on Climate Change (1997) [15].

Based on the foregoing, one can conclude that the WEC concept has a good practical basis and its provisions may well be implemented. Some scientists consider the codification as a redundant and unnecessary work, a waste of developers' and other process participants' time and state and international organizations' money. But it is not. Codification helps to evaluate and classify the legal regulations taken and effective at the moment, and thus facilitate the operation of all law enforcement agents: from individual citizens to corporations and public authorities, to international organizations.

Another issue that arose in the process of developing the WEC concept was the title of the document: "One of the basic objections of numerous opponents to the WEC idea was that the Constitution traditionally referred to an individual state (as the basic law), while in the case in question it goes about the entire world" [16]. In our opinion, at this moment the title of this international codifying instrument is not important, whether it is WEC, or UN Code or Convention on the Environmental Safety [17]. What is important is the very idea to codify and systematize the international environmental law, thus giving it a binding effect. While considering this matter, one should bear in mind the scientific idea to develop and adopt at the international level the Global Noospheric (spiritual and ecological) Constitution of Mankind: "The Constitution developers view this document as an extension of the main provisions of the Earth Charter relating to environmental awareness and information management culture. The Constitution defines the new and updates the existing international human rights and

freedoms in so far as they relate to his spiritual and biological aspects" [18]. This concept, in our opinion, has a general nature and, in matter, represents a philosophical idea rather than an actual legal instrument of international significance.

The WEC has a great potential to turn into an effective instrument of globalization in the environmental field. It should be noted that we are witnessing and taking part in an interesting process of implementing scientific concepts into real life. Thus, suffice it to mention a more than 10-year history of development and adoption of the UN Convention on the Law of the Sea 1982 [19], which has effectively ensured the participation of all mankind in solving problems of the World Ocean development as one of the global challenges of our time. Subsequently, by A. P. Movchan's remark, this Convention also known as the Law of the Sea Treaty, "became a historically significant stage in codification and progressive development of international maritime law, serving as a positive example of successful political and legal solution of the contemporary problems that have an urgent and planetary nature"[20].

The objective of globalization in the environmental sphere is to promote the successful development of environmental economics subject to compliance with the strategic and vital interests of the mankind. Thus, let us hope that the development and adoption of the World Environmental Constitution will have a positive impact on the life quality of individuals and the world community as a whole.

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THE SHARPENING OF THE CONFLICT OF THE VALUE-BASED AND INSTRUMENTAL APPROACHES TO LAW UNDER THE CONDITIONS OF GLOBALIZATION

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VERTYBINIO IR INSTRUMENTINIO POŽIŪRIŲ Į TEISĘ KONFLIKTŲ AŠTRĖJIMAS GLOBALIZACIJOS SĄLYGOMIS

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THE SUMMARY (THESES)

Research of the implications of globalization has revealed that globalization and localization are two forces that affect society simultaneously and can, depending on the activities of its members or the absence of thereof, either consolidate or fracture society from within. These processes are the sources of the long-term transformation of the social structure.

The dissociation of the elements of the social structures is checked and constrained by three social institutions: social morality, religion and law. These social institutions have to ensure the coherence, consistency and power of the operation of the social structures as a unity. Under the conditions of globalization the national community takes the responsibility for the consolidation of social integrity by establishing and following legal norms. Social integrity is consolidated by the legal norms which do not undermine the society's trust in common social values. In other words, one of the most important functions of contemporary law is to strengthen the relationship between the cultural values of the national community and the norms of social behaviour. However, this line of thought is curtailed by liberal political philosophy which gives basis to the values of contemporary democracy and legislation.

Liberal political thought gives basis to the instrumental approach to law. The distinction between the classical and modern philosophy suggested by Jürgen Habermas is sufficient to distinguish between the

values-oriented and instrumental approach to law. Modern political thought is inseparable from the mechanical, instrumental approach to society. Law is a political tool. According to Thomas Hobbes, politics is a mechanism that needs no morality. Thus the essential difference between the values-oriented and instrumental approach to law is the denial of the ontical interrelationship between social morality and law. Applying the instrumental approach to law under the circumstances of political consensus and the upholding of social morality does not seem to cause dire consequences of social disorganization.

Only the violence of the Second World War created a necessity to restrict the instrumental approach to society and law. The institutionalizing of human rights performs the function of "the compulsory minimum of social morality", but the new generation who, unlike the earlier generations, has grown up under the operation of human rights does not wish to accept any social obligations that may surpass human rights. As long as the democratic state is powerful, human rights are viewed as a tool of restraining state power. Society takes notice of "the compulsory minimum of social morality" and "misses" social morality in general when the law is not enough to ensure peace among individuals in the course of the interaction between the opportunities available for the state as it loses power and those available for the individuals' freedom. The implementation of human rights without the concern for the norms of social morality makes human rights absolute and destroys social structures. This insight is supported by the social consequences of the deregulation of the market. The implementation of the "Washington consensus" or "neo-liberalism" project under the circumstances of general democracy, decline in moral values and expansion of legal nihilism has enabled us not only to maintain the idea of the welfare state, but also gave rise to unexpected social phenomena such as the three illnesses of contemporary society: individualism, the priority of "the instrumental mind" and their threatening effects on democratic life (Charles Taylor). The social consequences of the expansion of "the instrumental mind" include the Western social consciousness affected by commercialism and the distancing of contemporary democracy from the notion of civic society. In the process of the coalescing of the deregulated market and democracy, society cannot achieve political consensus.

Under globalization the weakening of the state as a civic community is a temporary process of social disorganization in which the community's social structure is transformed. Social disorganization is an inevitable negative phenomenon which accompanies the restructuring process and diminishes with the rise of the function of social control. The impact of the erosion of the social structure will bring into foreground the significance of the creation of common social values and their protection by legal means. This suggests that the instrumental approach to law will be gradually restricted by the rising social significance of the values-oriented approach to the national community. Therefore the clash between the values-oriented and instrumental approaches to law under globalization will continue to exacerbate.

The author is preparing the research article based on the presentation for the journal *Baltic Journal of Law & Politics*.

THE RESULT OF THE IMPACT OF GLOBALIZATION – SUNSET OF THE PUBLIC LAW OF LITHUANIA

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GLOBALIZACIJOS ĮTAKOS REZULTATAS – LIETUVOS VIEŠOSIOS TEISĖS SAULĖLYDIS

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THE SUMMARY (THESES)

The paper focuses on beaten and widely known issues: globalisation's influence on the national law system and national states as such. In the opinion of the author, globalisation is unavoidable (as the laws of nature or geological processes) and affects the national law in many ways, and unfortunately mostly negatively.

An exceptionally heavy influence of globalisation is felt from the perspective of the national public law. It is the result of a greater distinction of public law (as compared to private law) in each country and of a general degradation of public law in the post-soviet area. The purpose of public law is to develop governing legal systems intended for realisation of the public will and to ensure the protection of public interests. In this regard each country is unique, which is not an attribute of the private (civil) law. General withering of the Lithuanian public law was determined by the fact that for a long period public interests were held higher than interests of individuals. During the soviet times private property and other private interests were ignored and actively limited as well. On the other hand, avoidance of active public activity in the interest of society, as well as private property, were considered to be a crime. It would seem such conditions would determine the withering of private law. And they did. However, private law is as universal and as vital as individuals themselves. Therefore, as long as there are at least two individuals they will certainly have certain privity or personal non-property relations. Once the situation changed, private law quickly

regained grounds and even expelled state, or public, law which was in a certain natural stagnation. This was the result of the fact that it always had and has a powerful and fully operational engine – private initiative, fuelled by ideal gas – private property and profit seeking. It cannot be compared to public (constitutional, administrative, penal) law which promises no personal gain, protects interests of all (which means no one's in particular) and imposes national coercion, where obligations of an individual towards the society and the state dominate. Thus, in the modern Lithuanian (as well as in any other post soviet country) legal system the balance of rights and obligations, of private and public law has shifted from one extreme to the other. The principle of private law: *everything which is not forbidden is allowed* has started to be applied to the public domain since this is exactly the place where it is more favourable to various fraudsters. Meanwhile, the basic principle of public law: *only explicitly permissible actions are allowed* has been forgotten and is remembered only when it is useful for somebody (by introducing prohibitions which are favourable for spreading corruption, meaningless, and easily circumvented). In such circumstances it is easy to imagine a situation whereby a publicly declared or unadvertised yet obvious for reasoning people private interests of a single natural or legal person may outweigh interests of a community or even a larger part of society (widely known examples of actions of monopolists in the areas of energy, retail and other areas). Doubtful privatisation of unique objects; total disregard of national interests; deregulated "wild" market disregarding interests of consumers; uncontrolled chase for excess profits in socially sensitive economic and finance markets – these are examples of hypertrophied private interest. Sudden invasion of private property acquired in one way or another into an objective reality meant sudden changes in law – sunset of the Lithuanian public law. Getting into a systemic trap of imbalance of subjective rights and obligations towards state, public law cannot be protected neither by the prosecutors nor by constitutional jurisprudence.

Because the law is considered to be the basis for a state (*Justitia est fundamentum regnorum*), the sunset is directly extrapolated into the state itself. Weakening of public law mutually correlates with the abovementioned negative influence of globalisation and thusly (should the negative circumstances occur) may evoke a direct threat

towards national security under such a scheme: 1) global multinational corporations, large banks and local monopolies using any means available and ignoring social aspects constantly lobby for favourable political and economic decisions, and influence legislature, which in extreme cases may result in total destruction (bankruptcy) of small economically weak states; 2) it resonates with global financial economic crisis (spontaneous or deliberately generated) which occur in the integrated world's economy and which in a several months time ruin the long-time efforts of generations developing national economies; 3) it is followed by "draconic" and subtly politicised demands of new global nongovernmental international actors – international financial organisations (International Monetary Fund, World Bank) towards states by providing financial support and rendering them non-competitive and systematically dependent upon the will of creditors; 4) an independent yet real threat for legal sovereignty and economic stability of a state is posed by rigid membership requirements of international unions into which a state enters based on good will or in order to avoid larger threats, i.e. under conditions of essential necessity (in author's opinion, as such should be considered the accession of Lithuania into the European Union). Having all such conditions present and hostile external action of some sorts equals to almost non-existent possibilities for a state to survive.

Therefore, globalisation which is unavoidable reality in a modern world (unavoidable evil, from the perspective of a national public law), should encourage states to integrate into global systems, to foster and protect their ethnic identity, national law, and sovereignty and seek that respect for such values would remain as the main basis for international law as long as possible.

THE GLOBALIZATION OF DISABILITY RIGHTS LAW – FROM THE AMERICANS WITH DISABILITIES ACT TO THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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NEĮGALIŲJŲ TEISIŲ GLOBALIZACIJA – NUO AMERIKOS NEĮGALIŲJŲ AKTO IKI KONVENCIJOS APIE NEĮGALIŲJŲ TEISES

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THE PRESENTATION

The term 'globalization' often has an economic meaning attached to it. This can be a purely economic meaning – for example, the outsourcing of production from a high cost labor market in a wealthy country to a low cost one in a developing state. Or, it can be a mixed economic/cultural meaning - the dominance of certain multinational corporations in certain fields (particularly entertainment, other services, food) throughout the world, which has a homogenizing effect on local cultures. Depending upon one's point of view, such globalization may be very good for world society, very bad, or somewhere in between. Discussions on the 'law of globalization' understandably are often devoted to national or supra-national legal regulation of such economic globalization.

However, there is an aspect of globalization in the field of law that is not directly rooted in economic concerns. Certainly, one aspect of globalization has been the radical expansion and development of communications systems throughout the globe, particularly through the internet. Thus, "a letter carried on horseback 150 years ago would have moved information at a rate of .003 bits per second (the average note carrying, say, 10 kilobytes of data, though of course that measure didn't yet exist. As late as the 1960s those same 10 kilobytes might have moved at 300 bits per second. Today global telecom cables transmit

at a rate of billions of bits per second, a many-billion-fold increase in speed over 150 years."[8] This has led to a level of interconnectedness between societies that we have not seen before. Importantly, this level of interconnection does not only operate to benefit business transactions, but it also quickens – exponentially – the spread of ideas, including ideas about laws protecting certain civil and human rights.

Admittedly, the process of the globalization of laws protecting civil rights has not moved as fast as the globalization of laws protecting free trade: The right of a multinational corporation to move production to Indonesia, or to sell its products in Indonesia, has developed at a much faster pace than the right of an Indonesian worker to receive certain minimal working conditions (which is often seen as a matter of local, and not global, concern). However, in certain areas of civil rights law, particularly the field of disability rights, globalization has led to a dramatic expansion of the legal protection of disabled people throughout the globe, all in a relatively short period of time.[9]

Perhaps the universal nature of a disability is one reason that the legal concept of disability rights has found such fertile ground throughout the globe. It is estimated that there are an "estimated 650 million men, women and children with disabilities around the world who seek vindication of their preeminent human rights in an ever challenging-world."[10] The existence of a disability cuts across issues of race, gender and even class and level of education. Tomorrow, anyone may be the victim of an unforeseen accident that leaves them permanently disabled. This may be one reason why champions of disability rights sometimes come from even politically conservative quarters, not otherwise known for their support of a broad expansion of human rights.[11]

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[8] Joshua Cooper Ramo, *The Age of the Unthinkable*, Little, Brown and Co., New York, 2009, at pp. 15-16.

[9] *See* Christain Courtis, *Disability Rights in Latin America and International Cooperation*, 9 Sw. J.L. & Trade Am. 121-122 (2002).

[10] Dick Thornburgh, *Globalizing a Response to Disability Discrimination*, 83 Wash. L. Rev. 439 (2008).

[11] Thus, the landmark Americans with Disabilities Act was signed into law in the United States by a Republican administration. The Attorney General of that administration, and strong advocate of the passage of this legislation, Dick Thornburgh, had a personal connection to the subject matter of this law. His son has suffered from intellectual and physical disabilities since he was 4 months old, after receiving a serious brain injury as a result of an automobile accident. *See* id. at 441.

Even apart from the broad acceptability of the idea of protecting the rights of disabled people throughout the world, there is another factor that explains the rapid global spread of disability rights law. Not only was disability rights a good idea whose time had come, but it was effectively put in use by the United States for the legal scholars, lawyers, politicians and civil rights advocates around the world to see and judge for themselves. As a legal system, as a law, the Americans with Disabilities Act [12] ("ADA") worked, and therefore could be used as a basis for subsequent disability rights legislation on a national, regional and ultimately global level.

Thanks to globalization, and the resulting speed of communication and spread of ideas through the internet (and through international conferences, of which many attendees became aware through the medium of the internet), disabilities rights advocates were able to present to their respective nation or region a law which was not abstract, but one that actually was effective. As succinctly explained by Dick Thornburgh, who was the attorney general of the United States in 1990 when the ADA was passed into law:

> [S]ince 1990 we have made remarkable progress that is not only celebrated here at home, but also recognized abroad. Because of our adoption of the ADA and other disability rights legislation, the United States is viewed internationally as a pioneering role model for disability rights. Disability rights activists have taken the ADA to their governments and said, 'This is how it should be done. We need to do this here in our country.' And governments around the world have responded.[13]

The use of the ADA as a model of sorts for subsequent disability rights legislation enacted through the world can be seen as a harbinger of the spread of other, effective legal ideas on a global level, and not only ones involving mergers and acquisitions. Consequently, not only for the further analysis of global disability rights law, it is useful to examine more closely, from a legal perspective, what were the special characteris-

[12] 42 U.S.C. Section 12101 *et seq*.

[13] *See* Thornburgh, *Globalizing a Response to Disability Discrimination*, 83 Wash. L. Rev. 439 at 443.

tics of the ADA that made it a model for other nations and international groups to follow.

The ADA has three significant components, grouped into "titles": Title I protects disabled people from discrimination in employment; Title II ensures that the disabled have access to transportation, government services and services which are publicly funded; and Title III guarantees such access to public services operated by private entities, such as hotels, etc.[14] The then-radical concept of the ADA was to integrate disabled people into everyday life as fully as possible, whether it be through taking a bus, getting a job, or shopping at a store.

This objective was itself a sea change from the traditional concept of legal protection for disabled people, to the extent any protection existed at all, in various parts of the world. They may generally be described as a paternalistic[15] or a medical model[16] for treating people with disabilities. Under such models, "people with disabilities have been isolated, stigmatized, mistreated or marginalized. People with disabilities have been viewed as objects of pity, in need of medical cure or charity, but not as individuals capable and willing to contribute to society through work."[17]

The ADA, then, represented a shift from such paternalistic models of assisting the disabled (for example, through the receipt of a modest disability pension or stipend each month) to a human rights model.; i.e., the inherent rights of disabled individuals to participate in society.[18]

How the ADA accomplished its objective as a civil rights law was equally innovative. Who exactly, as a matter of law, is considered to be 'disabled'? And what does it mean to 'discriminate' against such a person? In providing definitions to these terms, thereby answering these questions, the ADA provided an effective roadmap for future global disability rights legislation.

The ADA defines a person as disabled if he or she has 1)a physical or mental impairment that substantially limits the person in one or more major life activities, or 2)has a record of such impairment, or 3) is

[14] *See* 42 U.S.C. Section 12101 *et seq*.

[15] *See* Courtis, *Disability Rights in Latin America and International Cooperation*, 9 Sw. J. L. & Trade Am. at 110.

[16] Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 Syracuse J. Int'l. L. & Com. 241, 246 (2003).

[17] *Id*. at 245.

[18] *Id*. at 247-248.

regarded as having such an impairment.[19] Under the first prong of this definition, the ADA excludes environmental, cultural, and economic disadvantages, homosexuality and bisexuality, pregnancy, physical characteristics, common personality traits, normal deviations in height, weight, or strength, and the current use of illegal drugs.[20] Even with these exclusions, the definition of the term disability is quite broad under the ADA (and has been made more inclusive still under recent amendments to the ADA effective January 1, 2009).

The term impairment is defined as "is a physiological disorder affecting one or more of a number of body systems or a mental or psychological disorder."[21]

A "major life activity" includes is defined as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and mental and emotional processes such as thinking, concentrating, and interacting with others."[22] The recent amendments to the ADA expand this definition to include reading, bending, and communicating, and also including major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions").[23]

An impairment "substantially limits" such major life activities if "if it prohibits or significantly restricts an individual's ability to perform a major life activity as compared to the ability of the average person in the general population to perform the same activity."[24] In general, an impairment is only substantially limiting if it is permanent or long-term.[25] Thus, a common cold or a broken arm would normally not qualify as disabilities within the meaning of the ADA.

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19 29 CFR Section 1630.2(g).

20 *See* United States Equal Employment Opportunity Commission (EEOC), *Executive Summary: Compliance Manual Section 902, Definition of the Term 'Disability'*, http://www.eeoc.gov/policy/docs/902sum.html (last updated March 5, 2009)

21 *Id.*

22 *Id.*

23 *See* United States Equal Employment Opportunity Commission (EEOC), *Notice Concerning the Americans with Disabilities Amendments Act of 2008*, http://www.eeoc.gov/ada/amendments_notice.html (last updated March 10, 2009).

24 *See* EEOC, *Executive Summary, supra.*

25 *Id.*

The ADA therefore uses a flexible approach to ascertain what is and what is not a disability, apart from the few, specific exclusions listed in the statute (homosexuality, current drug use, etc.). Mental illnesses, psychological conditions, alcoholism, past drug addiction, and other conditions all may be "disabilities" under the ADA, so long as they meet the statutory definition – i.e., they are an impairment that substantially limits one or more major life activities. Such a flexible approach also obviates the need to draft a comprehensive list of all know illnesses or medical conditions. These kinds of lists have a tendency of being chronically incomplete, and in any case would need to be updated as new illnesses and medical conditions appear.

The second and third prongs of the ADA's definition of a disability also further the already expansive reach of the statute. Individuals are protected from discrimination if they have a record of a qualifying disability (i.e., a past disability that is in remission or otherwise have recovered from their condition) or are regarded as having such an impairment (i.e., the employer fires an employee because it believes he has AIDS, even though in reality he does not).[26] These prongs have the effect of removing false prejudices and stereotypes about disabled people from society. In essence, it is unlawful to discriminate against people upon whom an employer projects such false stereotypes, even if these people are not, under the legal definition of the term, in fact disabled.

The second "definitional" innovation of the ADA was to create a commensurately flexible definition of the term discrimination, and in so doing popularized the concept of a reasonable accommodation in disability rights law[27]. Title I of the ADA protects disabled individuals from employment discrimination so long as the individual is an otherwise *qualified individual* with a handicap. In order to be so "qualified", the individual must be able to perform the "essential functions" of the job with or without a "reasonable accommodation." It is a form of unlawful discrimination for the employer to refuse to make such a reasonable accommodation, unless it would be an "undue hardship" for it to do so.

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[26] *Id.*

[27] In the context of disability rights, the term reasonable accommodation was actually used previously in the Rehabilitation Act of 1973, and the Fair Housing Act, as amended in 1988, but the scope of these laws was far less than that of the ADA. In the broader civil rights context, the 1964 Civil Rights Act also referred to an accommodation for employees' religious beliefs at work.

The interpretive regulations of the ADA further define the "essential functions" of a job as the fundamental duties of the position.[28] Thus, one the essential functions of a trial lawyer in the United States is to have the ability to represent clients in court. To do so, one must have a license to practice law. If a person permanently in a wheelchair (and thus, "disabled" under the ADA – she is has a substantial impairment in the major life activity of walking) applies for a job as a trial lawyer, the law firm is not guilty of unlawful discrimination by not hiring her if she does not possess a license to practice law, because she is not qualified for the job. On the other hand, making color copies on a Xerox machine would not be one of the essential functions of the job of a trial lawyer – it is only a marginal component of the job, and the law firm could not refuse to hire an otherwise qualified candidate for a trial lawyer position if she was color blind.

However, it determining whether a disabled person can perform the essential functions of a job, the test is whether she can perform them with or without a reasonable accommodation from the employer. Reasonable accommodation may include "making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials or policies; providing qualified readers or interpreters; [and/or] reassignment to a vacant position."[29] Thus, even assuming word processing on a computer is an essential function of the job for many types of lawyers, an applicant with no arms may still be able to perform that function if the law firm gives him some form of reasonable accommodation - for example, voice recognition software to perform word processing, or access to a secretary who can type her dictation.

There may be many forms of a reasonable accommodation, and the employee is not entitled to the most reasonable accommodation, only a reasonable one. Moreover, an employer does not have to provide a reasonable accommodation if it creates an undue hardship upon the employer. An undue hardship occurs when the accommodation requested or proposed would cause significant difficulty or expense for

[28] 29 CFR Section 1630.2 (n).

[29] United States Equal Employment Opportunity Commission (EEOC), Enforcement Guidance: *Reasonable Accommodation and Undue Hardship under the Americans with Dsiabilities Act*, http://www.eeoc.gov/policy/docs/accommodation.html (last modified October 22, 2002).

the employer, including, for example, if the accommodation is beyond its financial resources.[30]

The effect of the reasonable accommodation requirement of the ADA is to make employers work with their disabled employees to come up with some solution that would enable them to perform the essential functions of the job. If the accommodation is too costly relative to the financial resources of the employer, the employer is not required to make such an accommodation. This flexible approach helps, to a great extent, integrate disabled individuals into the American workforce to the maximum extent possible, and rewards creative thinking on both the part of the employer and the disabled applicant or employee.

The ADA's impact on global disability rights law has been accurately described as enormous:

> Since the passage of the ADA in 1990, approximately 40 countries have enacted their own disability discrimination laws, some of which reflect a shift in approach from a welfare model to a civil rights law, as the ADA exemplifies.[31]

To take two examples, regional disability rights standards in Europe and Latin America both draw heavily from the text of the ADA, and purposefully so.

Thus, the European Equality Directive adopted by the European Community in 2000 prohibits, among other forms of discrimination, discrimination on the basis of disability. Article 5 of this Directive goes on to require employers to provide a "reasonable accommodation" for disabled persons, "unless such measures would impose a disproportionate burden on the employer."[32]

As pointed out by one scholar, the ADA:

> directly influenced the drafting of Article 5 of the Equality Employment Directive. In particular, it is submitted that the term "reasonable accommodation"… was determinant of the terminology

[30] *Id.*

[31] *See* Kanter, *The Globalization of Disability Rights Law*, 30 Syracuse J. Int'l. L. & Com. at 248-249.

[32] Lisa Waddington, *When it is Reasonable for Europeans to be Confused: Understanding when a Disability Accommodation is 'Reasonable' from a Comparative Perspective*, 29 Comp.Lab. L. & Pol. J. 317, 319 (2008).

> used in Article 5. A conscious choice was made to use the term "reasonable accommodation" in the Directive because of the level of familiarity with this particular element of the ADA among relevant commission staff, some Member States, and disability non-governmental organizations, which lobbied for the inclusion of such a requirement in the Directive.[33]

Similarly, the related terms used by individual European states in transposing Article 5's requirements into their respective national laws – "adjustments" (United Kingdom), "steps" (Finland) or "appropriate measures" (France, Ireland, Lithuania and Slovakia) - all stem from the ADA's concept of "reasonable accommodation."[34]

In Latin America, the Inter-American Convention for the Elimination of all Forms of Discrimination against Persons with Disabilities ("Inter-American Convention"), adopted in 1999 and entered into force in 2001, also was strongly influenced by the ADA.[35] The Inter-American Convention's definition of disability, for example, includes as a disability an impairment "that limits the capacity to perform one or more essential activities of daily life…." This is quite similar to the ADA's definition of a disability as an impairment that "substantially limits one or more major life activities."[36] The Inter-American Convention's definition of disability also includes those who have a "record of disability, condition resulting from a previous disability, or perception of disability, whether present or past." This corresponds with the ADA's protection of those who have a record of an impairment or are regarded as being impaired. Thus, both the ADA and the Inter-American Convention "encompass a broad definition of disability, intending to prevent and eradicate social prejudice against persons with disabilities or persons perceived as having disabilities[,]" and thus the text of the Inter-American Convention is a "clear example[] of the influence of the social model of disability on anti-discrimination legislation."[37]

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[33] *Id.* at 320.

[34] *Id.* at 321.

[35] *See* Courtis, *Disability Rights in Latin America and International Cooperation*, 9 Sw. J. L. & Trade Am. at 114.

[36] *Id.* at 115.

[37] *Id.* at 115-116.

At the same time that more and more disability rights laws have been enacted at the national or (through applicable treaties) regional level since the passage of the ADA in 1990, the area of disability rights have also been moving forward as a matter of international law.

Prior to 1990, the United Nations had of course adopted various declarations and covenants relating to human rights. However, neither the 1948 Universal Declaration of Human Rights nor the International Covenant on Economic, Social and Cultural Rights ("ICESCR", adopted in 1966 and entered into force in 1976) specifically mention the rights of disabled persons.[38]

In 1993, this situation was somewhat remedied by the adoption of resolution 48/96 by the U.N. General Assembly, which set forth Standard Rules on Equalization of Opportunity for Persons with Disabilities ("Standard Rules"). The Standard Rules stressed that disabled persons should be "empowered to exercise their human rights, particularly in the field of employment." Rule 7 goes on to require that national labor and employment laws "not discriminate against persons with disabilities or raise obstacles to their employment," and called on member states to integrate disabled persons in the workplace, among other measures.[39] In 1994, the U.N. Committee on Economic, Social and Cultural Rights ("CESCR") attempted to link the Standard Rules to the ICESCR, as an interpretive tool to apply ICESCR to disabled persons. Still, as a formal matter, the Standard Rules were not legally binding upon member states.[40]

The need for more comprehensive, and specific, international protection of the rights of disabled persons led to the drafting and adoption of the U.N. Convention on the Rights of Persons with Disabilities in 2006 ("Convention").[41] After Ecuador became the 20th member state to ratify the terms of the Convention in April, 2008, the Convention came into force following a 30 day waiting period.[42]

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[38] *See* Eric G. Zhang, *Employment of People with Disabilities: International Standards and Domestic Legislation and Practices in China*, 34 Syracuse J. Int'l. L. & Com. 517, 520-522 (2007).

[39] *Id*. at 522-523.

[40] *Id*. at 523-525.

[41] *Id*. at 528-529.

[42] Thornburgh, *Globalizing a Response to Disability Discrimination*, 83 Wash. L. Rev. at 439-440.

The Convention broadly sets forth the:

> core values and principles essential to ending discrimination against people with disabilities in any society. It provides governments with guidance and direction now lacking under general provisions of international law. Article 9, for example, requires governments to 'take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications… and to other facilities and services open or provided to the public, both in urban and in rural areas.' Article 24 recognizes the right of persons with disabilities to education and requires governments to provide "an inclusive education system at all levels… [e]nabling persons with disabilities to participate effectively in a free society.'[43]

In addition, Article 27 of the Convention prohibits discrimination against disabled persons in employment, in part by requiring that states take appropriate steps to "[e]nsure that reasonable accommodation is provided to people with disabilities in the work place."[44]

To be sure, the Convention is not the final step in the development of disability rights law. Among other issues, it still lacks an effective enforcement mechanism. Yet, the Convention is another – and this time truly global – signpost for nations and regional organizations to look up to and use as an impetus to develop their own stronger and enforceable disability discrimination laws.[45]

As can be seen, the landscape of global disability rights law has radically changed – for the better - in 28 years between the passage of the ADA and the adoption and entrance into force of the Convention. Globalization – especially in the sense of the widespread improvement of global communications and the ability to share information almost instantaneously – deserves much of the credit for this welcome development. We are in an age where a good idea in the field of law may

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[43] *Id*. at 445-446.

[44] Zhang, *Employment of People with Disabilities: International Standards and Domestic Legislation and Practices in China*, 34 Syracuse J. Int'l. L. & Com. at 532, quoting the Convention, Article 27(1)(j).

[45] Thornburgh, *Globalizing a Response to Disability Discrimination*, 83 Wash. L. Rev. at 447.

be readily adopted and further developed in many parts of the globe. This certainly presents challenges for legal professionals and academics, but, of course, many opportunities, particularly in the area of international labor and civil rights law. For scholars and practitioners in these fields, the globalization of disability rights law in the past two or three decades may provide a useful roadmap.[46]

The author has prepared and published the research article based on the presentation.
See: http://versita.metapress.com/content/541064357g171177/fulltext.pdf.

[46] Professor Courtis lists 1)training and exchanges between NGOs, 2)collaboration in human rights monitoring, 3)pressure to incorporate disability rights issues in U.S. international policy, and 4)direct pressure on U.S. corporations that conduct business in the U.S. and abroad as ways to advance disability rights issues internationally. *See* Courtis, *Disability Rights in Latin America and International Cooperation*, 9 Sw. J. L. & Trade Am at 121-129. These suggestions could also be used to advance other civil rights and labor laws at a global level.

IMPACT OF THE GLOBAL FINANCIAL CRISIS ON CAPITAL MARKET REGULATION

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THE SUMMARY (THESES)

Current crisis is a very interesting example of how global financial and economic trends may influence legal systems on a global scale. While we talk about state sovereignty on one hand, on the other hand we have global finance and economics which do not take consideration of state frontiers.

Securitisation is a legal mechanism which, so widely used in global finance and so little known about in general public, is an excellent example of economic-financial-legal perplexities, which tend to test whether well established legal concepts would succumb to the economic reality.

In a simplified scheme of securitisation a pool of receivables is assigned by the originator to the special purpose vehicle/company (SPV), which finances the acquisition through the issuance of securities. Typically, such transactions involve several jurisdictions: receivables may originate from different countries, originator may be a global scale bank or company, SPV is usually located in some offshore jurisdiction and investors come from all over the world. Using this technique originators

send their receivables off-balance, thus improving, for example, their liquidity ratios, refinancing their further lending/activity, etc.

In current crisis securitisation mechanism is subjected to a severe financial and legal test. The results of such test will be an excellent illustration of how global financial mechanisms, through their malfunction, may influence general legal concepts or contribute to their formation or evolution.

It is obvious that current financial crisis will impact specific regulation of financial markets. Supervision structures will change, liquidity requirements will be modified, etc. No doubt, there will be interesting legal changes in financial markets regulation and we await for the decisions to be made by main global powers of how this system should be shaped in the future. But this is only a technical side of the whole picture. Another side of the story is even more interesting – this is to see how well established legal principles of general law might suffer an impact of the crisis. Securitisation illustrates this process as it represents a financial instrument which is largely based not only on specific financial regulations but also on general principles of law.

One of the most crucial issue in securitisation is "true sale" of receivables. This combination of words illustrates well the fears of securitisation lawyers - the sale of receivables to an SPV must resist any attempt to question the validity of the sale itself. Otherwise a whole scheme would succumb as the SPV would discover that the assets were not transferred in reality. Also, if the sale is annulled, the originators could see all the receivables back on its balance sheet, etc. In financial crisis attacks on the "true sale" concept could be severe and originate from many interested parties (creditors of the originator, for example). In such a situation we could observe the evolution of the general concept of sale in many legal systems as courts might be questioned hard on the issue.

On the other hand, we could see an interesting evolution of principles of bankruptcy laws in jurisdictions where the originators and SPVs were established. SPVs, for example, were to be construed as "bankruptcy remote" and thus secure the interests of investors (which have purchased the securities issued by SPVs). The eventual bankruptcy of originator had to have no impact on SPV and its obligations towards investors.

Also, malfunction of securitisation mechanisms could contribute to the evolution of legal concepts related to the receivables themselves.

For example, it would be interesting to know for a bankruptcy trustee whether the receivable assigned was already a valid asset to be transferred. Future receivables can generate quite a number of legal questions on the matter.

The presentation is meant to briefly introduce and discuss the evolution of the issues mentioned above. It would focus thus not on a "pure" and direct financial market regulation but rather on indirect regulation of the global scale financial instruments via the evolution of different branches of civil law, such as contract law or company law.

GLOBALIZATION OF LAW FIRMS

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TEISĖS FIRMŲ GLOBALIZACIJA

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THE SUMMARY (THESES)

The sequence of globalization is that people around the globe are more connected to each other. Obviously, lawyers, law firms and consumers of legal services are more connected to each other too.

Generally, the globalization is regarded as a phenomenon of outspread of western standards of life. And the globalization in the sphere of law firms, the significance of these international, universal and western standards is not an exception.

The object of this discourse are the processes of globalization in the legal system of Lithuania that directly influence the professional activity of lawyers, formation, merger of law firms and processes of their activity from the point of view of certain essential factors. The issues of the globalization of law firms in Lithuania and the globalization of *legal profession are related to the questions of legal specialization, international codes of ethics, protection of the consumers of legal services, education (education of young lawyers, lawyers qualification), advertising and fee*.

Since the professional activity of lawyers, as any other professional activity in the state, is primarily controlled by law; a part of this discourse is dedicated to the change of the provisions of the Law on the Bar of the Republic of Lithuania regulating the professional activities of lawyers.

IMPACT OF GLOBALIZATION TO THE CORPORATE GOVERNANCE

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GLOBALIZACIJOS ĮTAKA BENDROVIŲ VALDYMUI

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THE SUMMARY (THESES)

Even though corporate governance or the corporate governance framework has no universally accepted and uniform definition, corporate governance should be understood as a framework of the company's management and control. The aim of presentation is to identify governance conceptions globally and particularly in Lithuanian joint-stock companies and actual situation. In presentation it is contented that good corporate governance exerts effect on the company's performance and ability to attract capital necessary for the growth of the company. By comparing different structures of Corporate Governance schools, still it is affirmed that globally good corporate governance is a key factor with a view to attracting both domestic and foreign investment, retaining investor confidence. Also, author agrees that globally enhancing awareness of companies about the standards of corporate governance based on best practice analysis encourages development of good corporate governance. Such standards are of crucial importance especially to public companies. Particularly Lithuanian situation is analyzed in global context, where National Stock Exchange of Lithuania took the initiative in 2004 to codify principles and standards of corporate governance and to propose the listed companies on the National Stock Exchange of Lithuania and from 2007 there is obligation to disclose how companies follow those principles. These standards and public disclosing of information ensure protection of interests of shareholders, adequate balance and distribution of functions between corporate bodies, adequate disclosure of corporate information.

LEGALITY OF THE ACTIVITIES OF THE ENERGY MONOPOLIES: LEGAL REGULATION AND COURT PRACTICE

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ENERGETIKOS MONOPOLIJŲ VEIKLOS TEISĖTUMAS: TEISINIS REGULIAVIMAS IR TEISMŲ PRAKTIKA

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THE SUMMARY (THESES)

The single market concept was not implemented in the energy sector a long time after the Treaty establishing the European Community had come in force. Member States were unwilling to delegate their powers in energy sector to the European Commission for two reasons: firstly, the energy sector was considered by the Member States as being related to national sovereignty and national survival, and secondly, the Member States used fundamentally different methods to manage national energy sectors. However, the emerging new technologies and increasing global competition forced the Member States to create a more competitive European energy market.

Therefore, this presentation aims to analyze the legal regulation and the landmark cases regarding energy monopolies in the European Union and Lithuania.

The main issue from the lawyer's perspective is the ambiguity of the Treaty language – Treaty establishing the European Community declares the economic freedom, but at the same time recognizes the legitimate

existence of monopolies: article 86(1) obliges the Member States not to regulate monopolies in a way that would make monopolies breach the rules of the Treaty, however, Article 86(2) provides derogation from these rules for state monopolies in order to maintain core public service function. The key provision of Article[47] 86(2) allows derogation not only from competition rules but, as seems sometimes assumed, from all rules of the Treaty. All conduct or existence of monopolies (or special enterprises entrusted with the public services by the state) need to be examined under Article 86(2).

The relevance of the examination under Article[48] 86(2) is discussed in energy cases—both trade and monopoly regulation. Analysis proceeds, firstly, by determining the compliance of applicable rule with free trade and competition, secondly, by stating the existence of legitimate public service function and the necessity to maintain the exclusivity—i.e. non-compliance with the Treaty's rules to deliver such services.

Lithuanian electricity sector was and still remains a monopoly in many aspects. Before 2002 the Lithuanian electricity sector could be described as a single vertically integrated monopoly Lietuvos Energija AB and the State Enterprise Ignalina Nuclear Power Plant as the largest electricity producer, both owned by the state. On the 1st of January 2002 vertically integrated monopoly Lietuvos Energija AB was divided into several companies: two companies producing electricity Lietuvos Elektrine AB and Mažeikiai Thermal Power Plant AB, one transmission system operator also acting as a market operator Lietuvos Energija AB and two distribution network companies Rytu Skirstomieji Tinklai AB and VST AB. On the 20th of May 2008 national investor LEO LT AB was established. The Republic of Lithuania remains the owner of 61.7 percent of shares in the national investor, the rest of LEO LT AB shares is owned by the private company NDX Energija UAB. LEO LT AB is a parent company of Lietuvos Energija AB, VST AB, Rytu Skirstomieji Tinklai AB, Visagino Atomine Elektrine UAB, InterLinks UAB.

The relation of monopolistic operator and the free market requirement is discussed in the decisions of Constitutional Court of the Republic of Lithuania. These decisions are also represented in this presentation.

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[47] Consolidated Version of the Treaty Establishing the European Community.

[48] *Ibid*.

JURISDICTION OF THE INTERNATIONAL CASES IN FAMILY LAW

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TARPTAUTINIŲ ŠEIMOS BYLŲ TEISMINGUMAS

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THE SUMMARY (THESES)

The mobility of persons increases the amount of international marriages and international divorces. One of the first questions is to determine which court will have jurisdiction to solve international divorce matter. In 2003 European Council adopted *Regulation (EC) No. 2201/2003 on Jurisdiction and the Recognition and the Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility*. Regulation determines jurisdiction in matters relating to divorce, legal separation or marriage annulment. Regulation does not provide for parties to reach agreement which court will be competent to solve divorce case. Jurisdiction agreement are not allowed pursuant Regulation. Regulation establishes seven equal alternative jurisdiction criterions. Neither criterion of jurisdiction is preferred more that others Plaintiff has right to chose competent court according to alternative criterions. In order avoid parallel proceeds in several states Regulation sets principle of *lis pendens*. Regulation determined that if a case has already begun in one state then courts of other states do not have the competence to judge that case. The diversity of jurisdiction criterions can lead to forum shopping where parties may seek more convenient forum. The application of Regulation in Lithuanian court practice is new. In recent decision of Kaunas County Court the claim for divorce was rejected because plaintiff and defendant were residents of U.K. even thought they both were Lithuanian nationals. Some of the jurisdiction criterion such as domicile or habitual residence of respondent is sufficient ground for jurisdiction. But jurisdiction criteria based on

residence of applicant is criticized because does not guarantee sufficient link between case and the court.

The author has prepared and published the research article based on the presentation.
See: http://versita.metapress.com/content/m2p28373n14802g8/fulltext.pdf.

UNIFIED ENFORCEMENT OF COURT DECISIONS IN THE UNIFIED SPACE OF JUSTICE OF THE EUROPEAN UNION: EUROPEAN EXECUTIVE LETTER, EUROPEAN PAYMENT ORDER, EUROPEAN PROCEDURE FOR SMALL VALUE CLAIMS

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VIENINGAS TEISMŲ SPRENDIMŲ VYKDYMAS VIENINGOJE EUROPOS SĄJUNGOS TEISINGUMO ERDVĖJE: EUROPOS VYKDOMASIS RAŠTAS, EUROPOS MOKĖJIMO ĮSAKYMAS, EUROPOS IEŠKINIŲ DĖL NEDIDELIŲ SUMŲ PROCEDŪRA

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THE SUMMARY (THESES)

Litigation is, obviously, unpleasant; however, it is, in principle, the only means to defend one's rights and interests and legitimately regain one's debt. If you have a promissory note, it can be that you will be able to avoid the court: you can simply contact the notary to make an enforcement clause in the non-paid promissory note and submit it to the bailiff for enforcement. Even if the debtor who does not settle under the promissory note departs abroad, you can ask to issue a certificate of the European Enforcement Order, which you will be able to submit for enforcement in any member state of the European Union (except for Denmark) under the procedure laid down by 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.

In order to protect your interests, even before signing business contracts, consideration should be given to potential cases of non-performance and breach and most favourable terms and conditions for dispute resolution should be negotiated. Nobody would disagree that litigation, if negotiations on contract disputes or debt recovery from foreign business partners fail, is easier in national courts. If the contract does not have a special provision that disputes relating to the contract

should be settled in Lithuanian courts, a general rule is normally applied: a claim should be filed to the court of the place of residence or domicile of the debtor and this means that in case your business partner is a German or British company, you will have to claim the debt recovery through courts of these states according to their national law, which, certainly, is not easy.

In order to facilitate the solution in such situations and ensure en effective enforcement of court judgments and the mechanism of debt recovery in the entire Europe, since 12 December 2008, the European Union suggests making use of two new legal instruments, which remarkably facilitate both litigation in courts of other member states of the European Union and the enforcement of Lithuanian court judgments in other EU member states; they also supplement a well known, but not so speedy procedure of the recognition of Lithuanian court judgments abroad and the procedure of a European Enforcement Order, which, unfortunately, can be applied not to all court judgments, but only in the cases when the debt has not been disputed by the debtor before the court. The new procedures are:

- the European order for payment procedure, which came into effect from 12 December

2008; and

- the European Small Claims Procedure (less than 2,000 euros, i.e. 6,905.60 litas), which is valid from 1 January 2009.

The instruments of the European Union can be used both in Lithuanian courts and in the courts of any other member state of the European Union, if your place or residence or domicile and that of your debtor differ, that is, if you are in Lithuania and your debtor is, for example, in Spain. You only have to complete the standard forms attached to the EU legal acts defining these procedures (Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure or Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure) and apply to the court. If your application is reasoned and satisfies the requirements of the regulations of the European Union, the court will issue a standard-form European order for payment procedure or would pass a decision under the European small claims procedure

and will issue a relevant certificate. For example, for the issuance of the European order for payment procedure, a stamp duty is charged; the amount of the stamp duty is equal to lA of the fee that you would have to pay for the hearing of your claim under the litigation procedure before the court. In any case the stamp duty cannot be less than 10 litas. Thus, this procedure is not only convenient, but also cheaper compared to the customary litigation.

Mention should also be made of the fact that in case the court refuses to issue the European order for payment procedure or hear the claim under the European small claims procedure, you will have the right to use the usual procedure and file a claim to the court according to the Lithuanian or specific national foreign law. In this case, if the decision passed by the court has to be enforced abroad, you will be able to use the European enforcement order procedure (in case the debtor does not dispute the claim) or apply for the recognition and enforcement of this decision of the Lithuanian court abroad.

The EU law offers quite many instruments facilitating the enforcement of court judgments and decisions in other member states of the European Union and to recover debts from debtors abroad. It is only important to make use of these instruments in a proper manner and to choose the instrument suitable for your specific situation from the very beginning in order to save money and time, as well as in order to avoid the situations when the debtor, after finding out that you have made recourse to judicial remedies, conceals the assets. Even if your litigation takes place before Lithuanian courts, the regulations of the European Union (Brussels I and Brussels Ubis regulations) envisage an opportunity to impose interim measures on the debtor's assets abroad, which would later be used for the recovery of the debt, if the court passes the decision or issues the European order for payment procedure.

The instruments described before can be submitted for enforcement in any other member state of the European Union where the debtor resides or his or her assets are located without any intermediary procedures, that is enforcement takes place without the exequatur procedure. However, it should be borne in mind that the very enforcement in each member state takes place in accordance with the national law of the relevant state. In addition, you should not forget that Lithuanian bailiffs cannot recover debts when a cross-border element is involved, that is, if

your debtor is abroad or if he or she is in Lithuania but has no assets here, although has a significant amount of money in a bank account abroad, Lithuanian bailiffs, unfortunately, would not be able to help you much. You will have to apply to bailiffs or other enforcement officials abroad. It is here where most of the problems are faced: court judgments are recognised between member states of the European Union, opportunities to refuse enforcing the judgment given by a court of another member state have been minimised, nevertheless, when it comes to enforcement proceedings, they have been left for the exclusive national regulation of each individual member state and the enforcement regulations in the 27 member states of the European Union differ to a great extent.

PERSPECTIVES OF THE HARMONIZATION AND UNIFICATION OF FAMILY LAW IN EUROPE

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ŠEIMOS TEISĖS HARMONIZAVIMO IR UNIFIKAVIMO PERSPEKTYVOS EUROPOJE

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THE SUMMARY (THESES)

Law rules regulating marriage and family relations are influenced by the culture and religious norms of every country. Thus, for a long time such institutions as "marriage", "family" were not interpreted internationally. The family and marriage law was not included into the definition of "international law", and there were no efforts put in order to control family law disputes at the international level. But European integration, fast globalization processes, social, economical and political changes have created a new challenge for the private law. As yet there is no uniform family law for Europe, however, there are efforts to create standardisation in some aspects of family law through European Law and Conventions related to respect for family life, the equal treatment of men and women, the equal treatment of legitimate and illegitimate children and the recognition of divorce, maintenance and custody judgements. There is lively comparative law research activity in this field. Most of these efforts are academic. Besides, in September 2001 an international group of scholars established the *Commission on European Family Law* (CEFL consist of two groups: the Organising Committee (7 members) and the Expert Group (26 members). The main objective

of the CEFL is to launch a pioneering theoretical and practical exercise in relation to the harmonisation of substantive family and succession law in Europe. In short, CEFL's main goal is the creation of Principles of European Family Law. The Principles may serve two purposes: first, they could be considered as recommendations to the legislators and, second, legislators could use them as a model for the applicable law. The CEFL has tried to propose rules which are functionally common to a significant majority of the legal systems involved. Due to the growing convergence of divorce laws in Europe (and in particular revised Brussels II), the CEFL began its activities in this field and started with the grounds for divorce and some of the consequences of divorce, such as maintenance between the former spouses. The second working field was parental responsibilities (CEFL drafted 63 questions for the Parental Responsibilities questionnaire). Upon the basis of the comparative material the Commission on European Family Law has formulated the *Principles of European Family Law regarding Divorce, Maintenance between Former Spouses (published in 2004)* and *Parental Responsibilities (published in 2007)*. In order to prepare the third set of Principles of European Family Law the expert members of the CEFL have once again drafted a detailed questionnaire in the field of property relations between spouses (published in 2009). We hope on the basis of the comparative material the CEFL will be able to draft *Principles of European Family Law regarding Property Relations between Spouses*. So the CEFL hopes to create a source of inspiration to legislators who may be in the process of modernising their national family laws. Moreover we can talk about "comparative family law" and "international family law", because social, economical, political changes influence a whole range of relationships belong to family law.

IMPACT OF REFERENDUM TO THE PROCESS OF THE EUROPEAN INTEGRATION

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REFERENDUMO ĮTAKA EUROPOS INTEGRACIJOS PROCESAMS

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THE PRESENTATION

Direct democracy is becoming more and more significant in political life. Not only does it give citizens the right to choose the government, it also gives them the right to contribute to making important decisions, thus improving the quality of citizens' participation in politics.

One of the most popular and most commonly used forms of direct democracy used in politics is referendum, the significance of which is still increasing. Both in the countries of Western Europe, where tradition of democracy is well established, and these in Eastern and Central Europe - referendum is an effective tool to complement representative power.

Recently there has been a significant increase of referendum importance noticed while constructing unifying Europe. The essential influence of referendum on European integration process is obvious.

The aim of this speech is an attempt to present the influence of referendum on European integration process.

Referendum is a social dimension of European integration. It is the only way to have a direct influence on political decisions being taken for societies of EU member states. Since the moment when European Communities appeared their development has been observed on two levels. Firstly, it is intensifying the co-operation between the signatories of agreements in the areas which they did not concern before (so called integration deepening by accepting other treaties). Secondly, the co-operation is widened by including new states within the agreement

(so called integration widening). Relevant decisions are often taken by referring to the will of citizens through referendum.

Table 1. Accession referendums

Country	Date	Result of Referendum
Danmark	1972	For
Ireland	1972	for
Norway	1972	Against
	1994	Against
Austria	1994	For
Finland	1994	For
Sweden	1994	for
Malta	2003	For
Slovenia	2003	For
Hungary	2003	for
Lithuania	2003	for
Slovakia	2003	for
Poland	2003	for
Czech Republic	2003	for
Estonia	2003	for
Latvia	2003	for

Impact of referendum to the process of the European integration is significant. Referendum is a tool, which approves building the European Union in an intergovernmental agreement. Taking into consideration citizens' participation while taking decision concerning the accession of a particular country to the Community became permanently a part of informal accession procedures and it is an indispensable stage of gaining EU membership. Fifteen of 27 EU member states organized referendum concerning EU membership. Among "old 15" members of the EU accession referendum took place in 6 countries, and soon before

the widening in 2004 referendum was organized in 9 states of Middle – East Europe[49].

It was referendum results, not political establishment, which was a critical factor to join this organization. It is stressed here, that political leaders in public speeches made the latest decision about accession to the EU dependent on the results of referendum. In some countries there was a constitutional requirement of organizing referendum concerning membership in overnational organization, such as EU (e.g. Austria, Ireland, Denmark). In other countries the decision to make the accession issue be consulted with the society was the result of the government's good will (e.g. Norway, Sweden, Finland, countries of Middle – East Europe).

Table 2. Referendum on Maastricht Treaty

Country	Date	Result of referendum
France	1992	For
Ireland	1992	For
Danmark	1992	Against
	1993	For

Maastricht Treaty of 1992 created the European Union. France, Ireland and Denmark organized referendum concerning the ratification of EU treaty. Negative result of referendum in Denmark resulted in certain concessions to this country and another referendum, in which Danish citizens approved of Maastricht treaty. Danish rejection of Maastricht treaty caused serious political crisis as well as it endangered

[49] Cyprus was the only coutry where the referendum did not take place as its constitution does not consider this institution. It needs to be emphasised that on 24th April. 2004 a referendum concerning Cyprus reunification was held in Cyprus. The result of the vote was negative due to the attitude of the Cyprian Greek who, unlike Cyprian Turks, rejected the idea of the reunification of the island.. Only the Greek part of the island entered the EU as a result of the referendum, www.euractiv.com (27.04.2004). A former President of Cyprus George Vassiliou suggested calling the next referendum concerning reunification of the island before the end of 2004 in order to enable its Turkish part to enter the EU, www.euractiv.com (07.05.2004). In other countries of Central and Eastern Europe the sequence of accession referenda was the following: Malta (9.03.2003), Slovenia (23.03.2003), Hungary (12.04.2003), Lithuania (10-11.05.2003), Slovakia (16-17.05.2003), Poland (7-8.06.2003), the Czech Republic (13-14.06.2003), Estonia (14.09.2003), Latvia (20.09.2003).

the process of EU formation and Danish membership[50]. The conditions of membership were changed in Edinburgh 11-12 December 1992. Danish Government negotiated some *opt – out* in Maastricht treaty: introducing EURO, participation in the EU defense policy, some matters of internal affairs and European citizenship These *put – outs* had convinced citizenship of Denmark to approve of the EU treaty.

In Danish parliament (*Folketing*) there was a majority voting for ratification of Maastricht treaty. According to Danish constitution it allowed avoiding another referendum. However, the Parliament decided that due to political reasons it is indispensable to repeat the referendum. The corrected-referring to Denmark - version the Treaty (known as the Edinburgh Agreement) was submitted to referendum on 18th May 1993[51].

Referendum is an unpredictable instrument - even if the subject of the vote is the same, it does not bring the same results in different countries. Moreover, even when it is held in the same country, the vote can bring different results dependent on the circumstances or the time[52].

The impact of referendum on the EU integration process can be considered in the context of its informative function. Pre-referendum campaign organized by the governments, mass media and NGOs was supposed to convince the citizens to support the EU integration idea as well as to indicate all the advantages and disadvantages being the result of the integration. It is worth mentioning that along with accession referenda there were other referenda organized, ratifying treaties and modifying previous premises of European Communities. Those referenda are referred to as deepening the EU integration process. They give the citizens of a particular member state the right to take part in decision-making process concerning accepting the essential changes in the EU functioning, and thus they continue the desirable direction of development by EU organs.

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[50] E. Glistrup, *Le traité sur l'Union européenne: la ratification du Danemark*, « Revue du Marché commun et de l'Union européenne » janvier 1994, no. 374, p. 13. It would not be possible, in fact, due to the lack in appropriate legal regulations concerning leaving the organization by the member state.

[51] Formally the new referendum concerned the Treaty of Maastricht again, this time, however, the subject of vote was complemented with an appendix to the Edinburgh Agreement , K. Siune, P. Svensson, O. Tonsgaard, *The European Union: The Danes Said 'No' in 1992 but 'Yes' in 1993: How and Why?*, "Electoral Studies" 1994, vol. 13 (2), p. 108.

[52] T. Jeantet, *Démocratie directe, démocratie moderne*, Paris 1991, p. 112

Table 3. Referendum on others EU Treaties and Issues

Subject of referendum	Country	Date	Result
Single European Act	Ireland	1987	for
	Danmark	1986	for
Amsterdam Treaty	Ireland	1998	for
	Danmark	1998	for
Nice Treaty	Ireland	2001	Against
		2002	for
Lisbon Treaty	Ireland	2008	against
Euro	Danmark	2000	Against
	Sweden	2003	Against
European Economic Area	Switzerland	1992	Against
Beginning of negotiations concerning the EU accession	Switzerland	2001	Against
Remaining in the European Economic Community	Great Britain	1975	For

The negative result of the Nice Referendum had a big impact on the relations of Ireland with other Member States and Candidate Countries[53]. Irish "no" did not refer to the Treaty of Nice and the Treaty of Lisbon - it referred rather to the lack of activity of the government and the unwillingness or inability to explain the sense and consequences of the decisions being taken. The Irish citizens were also worried about the effectiveness of EU institutions functioning while widening the integration[54]. The source of the anxiety was EU widening, having shared security and defense policy[55] and including the Charter of Fundamental

[53] B. Laffan, *The Nice Treaty: The Irish Vote*, http://www.notre-europe.asso.fr/fichiers/laffan-en.pdf.

[54] J. Zieliński, *Doświadczenia ostatnich głosowań w referendum europejskim: Norwegia i Irlandia* [in:] *Wymiar społeczny członkostwa Polski w Unii Europejskiej*, (ed.) T. Mołdawa, K. Wojtaszczyk, A. Szymański, Warszawa 2003, p. 375.

[55] The Nice Treaty declared one Union policy of security and defence The opponents of the Treaty assumed it could involve Ireland into future international conflicts with the EU as the part. , A. Szostkiewicz, *Tygrys szczerzy kły*, "Polityka" 2002, no. 42

Rights into national legislation systems which, while changing the number of those making decisions, will significantly reduce the sovereignty and neutrality of the decisions of the Member States.

The Swiss were anxious mainly to lose their national sovereignty; they associated EU membership with losing the right to use referendum and people's initiative institutions[56]. They insisted they had more to lose than to gain by EU membership since Switzerland was doing better economically than EU states: it had a lower rate of inflation and unemployment, higher pace of economic growth and, the most significant factor, the strong currency which they did not want to have replaced by EURO. Moreover, the accession to the EU could result in other negative changes, e.g. taxation increase.

Table 4. Referendum on EU Constitutional Treaty

Country	Date	Result of referendum
Spain	20.02.2005	For
France	29.05.2005	Against
Netherlands	01.06.2005	Against
Luxemburg	10.07.2005	For

The impact of referendum seems to be the most noticeable concerning the ratification of the EU Constitutional Treaty. At the Laeken Summit in 2001 the leaders of the Member States stated that the EU was at the crossroads. The European Convention was convened, the aim of which was to prepare appropriate changes which could include accepting the "Constitution for European Citizens". It took two years to prepare EU Constitutional Treaty. The Treaty establishing the Constitution for Europe was signed in Rome on 20th October 2004. Then the President of the European Convention, former French president ***Valery Giscard d'Estaing remarked*** "***Not*** all of this is ***perfect***, but still beyond our expectations."

The European Constitution was to be a replacement for other European treaties. However, it did not replace national constitutions of par-

[56] P. Mahon, Ch. Müller, *Adhésion de la Suisse à l'Union européenne et démocratie directe*, [in:] *L'adhésion de la Suisse à l'Union européenne*, (eds.) T. Cottier, A.R. Kopše, Zürich 1998, p. 449-450.

ticular EU Member States. The Constitutional Treaty establishing the transnational structure was supposed to exist beside national constitutions of the states.

The Constitutional Treaty assumed appointing the President of the European Council, EU Minister of Foreign Affairs and reducing the number of members in the European Commission. It introduced the EU symbols.

The President of the European Convention, *Valery Giscard d'Estaing, insisted on organizing referendum in all EU Member States. Several EU Member States decided to organize a national referendum due to breakthrough importance of the Constitutional Treaty for the EU and the need to legitimize it democratically*[57]*. There were only three countries which refused to organize the referendum: Malta, Sweden and Germany*[58]*. In Malta and Sweden the government decided this issue to be too complex for an average citizen. The requirement to know the Constitutional Treaty might be beyond the capacity of an average European. In Germany the Constitution of 1949 does not allow organizing referendum (unless it concerns changing borders between Lands).*

The Spanish, who were the first to vote, were in favor of accepting the European Constitution, and so were the citizens of Luxemburg. In France and the Netherlands the Treaty was rejected. In order to come into force the Treaty has to be ratified by all Member States. The objection of two Member States made it impossible to introduce the Constitution to Europe and, thus, changed the direction of European politics. The results of the referendum were interpreted as the discontent of EU widening. The voters did not achieve the answer to their question: Does Europe offer any clear vision of future to its members? If yes, what is it like? Not only the politicians involved in creating the Constitution, who did not explain the reasons and the need to establish the Constitutional Treaty, are to blame. Partially, the media are to blame, as they publicized only several parts of it, referring to certain selective articles and not showing the whole context of the Treaty[59].

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[57] M. Pobóży, *Holandia* [in:] *Prawno-ustrojowy wymiar Traktatów Wspólnotowych* (ed. K. A. Wojtaszczyk), Warszawa 2007, p. 212.

[58] C. Closa, *Ratifying the EU Constitution: Referendums and their Implications*, U.S.-EUROPE ANALYSIS SERIES, November 2004.

[59] A. Bielawska, J. Wiśniewski, K. Żodź, *Traktat ustanawiający Konstytucję dla Europy w porównaniu z konstytucjami państw członkowskich Unii Europejskie*, Poznań 2006, p. 11.

Conclusions

The impact of referendum on the process of European integration is significant. The number of referenda concerning European issues is increasing. Referendum is a particular instrument to compare the citizens' will and the will of the government concerning the accession of a certain country to the EU. There were several cases when the government and the citizens were not of the same opinion, and despite clear political instructions voters did not follow them; as a result it was citizens' decision that was respected by the government. A striking example of the discrepancy between the government and the citizens was a twice attitude of Norwegian society during accession referendum (1972, 1994)[60] and the Swiss citizens' response to joining the European Economic Area (1992)[61]. Despite pro-European preferences of the government in these two countries the citizens did not follow them, the result of which was closing down the European integration debate in Norway and Switzerland for a long time. It is worth mentioning negative results of Danish and Swedish referenda concerning shared European currency and the referendum in Ireland rejecting the Treaty of Nice and the Lisbon Treaty.

The results of referenda concerning European integration show the discrepancies between public opinion and political elite. They prove there are different opinions of the governments and the governed ones concerning essential matters. They demonstrate that the enthusiasm of political elites and business towards the European integration is not always shared with the attitude of the public. The society taking part in a referendum rejected the idea of participation in the European integration offered by the government several times. The most recent example refers to Dutch and French vote concerning the Constitution for Europe.

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[60] See. L. Svåsand, U. Lindström, *Sliding Towards EC Membership: Norway in Scandinavian Prespective*, "Government and Opposition" summer 1992, vol. 27, no. 3, p. 339, T. Bjørklund, *The Three Nordic 1994 Referenda Concerning Membership in the EU*, "Cooperation and Conflict" March 1996, vol. 31, no. 1, p. 16

[61] See:. A. Landau, *Swiss neutrality: burgeoning policy or obstinate continuity?*, "Studia diplomatica" 1993, vol. 46, nr 6, p. 80, C. Dupont, P. Sciarini, *Switzerland and the European Integration Process: Engagement without Marriage*, "West European Politics" April 2001, special edition *The Swiss Labyrinth. Institutions, Outcomes and Redesign*, vol. 24, no. 2, p. 231.

Referendum regulates the pace of widening and deepening within the European Union very well. In those countries where the government is unwilling to make a decision the result of which could be the change in a legal status of the country - they refer to the will of the citizens. In this case the referendum relieves the government at decision-making process. According to David Butler, the most frequent reason to use this instrument of direct democracy in the situation it is not required by the Constitution is the lack of a univocal opinion concerning a particular issue as well as internal divisions within the parties[62]. However, it is not the only reason since there is a strong pressure in Brussels to organize a referendum in the matters concerning European integration. These are the citizens of the EU Member States, not the technocrats, who are given the right to vote, which contributes to reducing 'democracy deficit' in the EU and the direction of the EU reforms[63].

At present referendum is getting greater and greater importance. We are witnessing the era of the choice, of taking decisions by citizens which is called "referendomania" by these who are skeptical about this approach. Referendum is an unusual institution in a dual meaning[64]. Firstly, it is established in a political system of few countries but it has often been used in a lot of states. Secondly, referendum faces the challenges of the EU integration process. It is referendum that is an instrument either to introduce or to block radical changes[65], accepting or rejecting new solutions in the issue of the EU integration. Referendum can act as a catalyst of these changes as well as stop innovative ideas.

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62 D. Butler, *Referendums in Northern Europe* [w:] *Le Référendum en Europe. Bilan et perspectives. Actes du colloque organisé les 28-29 janvier 2000 à la Maison de l'Europe de Paris*, (ed.) F. Hamon, O. Passelecq, Paris 2000, p. 64.

63 In several member states the government announced the referendum concerning the Constitutional Treaty. In Denmark and Ireland calling a referendum is obligatory according to the Constitution but In Great Britain it was Tony Blair and his Cabinet who decided that European Constitution must be consulted with the society before being ratified. Constitutional referendum will take place in Luxemburg, beside Denmark, Ireland and Great Britain. Citizens of the Nethelands, Germany, France and Spain would also like to be consulted about the Constitutional Treaty through the referendum (Polish citizens as well), but the decisions to call it have not been taken yet., www.euractiv.com (29.04.2004).

64 S. Sur, *Un bilan du référendum en France*, "Revue du droit public et de la science politiques en France et l'étranger" 1985, no. 3, p. 592.

65 D. Butler, A. Ranney, *Practice*, [w:] *Referendums around the World. The Growing Use of Direct Democracy*, (ed.) D. Butler, A. Ranney, Washington 1994, p. 4.

ON THE JUDICIAL ACTIVISM IN THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES OF AMERICA AND LITHUANIA: LESSONS TO LEARN

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TEISMINIS AKTYVIZMAS JUNGTINIŲ AMERIKOS VALSTIJŲ IR LIETUVOS KONSTITUCINĖJE JURISPRUDENCIJOJE: PAMOKOS ATEIČIAI

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THE PRESENTATION

Today perhaps nobody doubts that not only American, but also Lithuanian constitutional jurisprudence has undergone the period of judicial activism. As a deeper analysis of judicial activism, itself being a rather vague conception, is beyond the limits of this presentation, therein we will only try to react to two very general statements in favor of judicial activism in the constitutional jurisprudence of Lithuania.

The first general statement is related to Justice John Marshall. In Lithuania, Justice John Marshall could be and is usually presented as a founder of the constitutional review – with the consequence of the invalidation of law, if it contradicts Constitution – as an immanent part of the powers of the court institutionally involved in constitutional adjudication (hereinafter – constitutional court). Favoritism of judicial activism in the constitutional jurisprudence is, among other things, based on the authority and ideas of Justice John Marshall. Nevertheless, such basis reveals only "one side of the coin", as Justice John Marshall – his activity and ideas – are criticized in the United States; thus, some aspects of the "other side of the coin", especially as generally relevant, should be revealed.

Much of Marshall's ideology is concentrated in two very well known cases – *Marbury* and *McCullock* – which are thoroughly analyzed not

only by American scholars, but probably all over the World. Here I will focus on the fragment of a well-known text by Sanford Levinson "Law as Literature". Contemplating on the importance of the writtenness of the US constitution, Levinson directs his thoughts to Marshall's ideas in *Marbury*, where Marshall writes as follows:

> "the powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"; then Marshall goes on to say, "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained". Marshall, however, [as Levinson asserts,] undercut his argument in Marbury when he decided McCulloch v. Maryland … . So far are words from having obvious meanings that Marshall reminds us that "such is the character of human language, that no word conveys to the mind, in all situations one single definite idea; and nothing is more common than to use words in a figurative sense" … . And the "writtenness" of the Constitution becomes a far more complicated issue once one supplements the *textualism of Marbury* with the "texturalism" of McCulloch … . [Levinson concludes that] the very multiplicity (if not promiscuity) of Marshall's approaches to constitutional interpretation … calls into question whether interpretation for Marshall (or for anyone else) ever transcended a desire *to achieve specific political results.*" (Sanford Levinson, "Law as Literature," *Texas Law Review* No. 3, Vol. 60, 1982, p. 374-375) (italics – T. B.)

What we could learn from these observations by Levinson? First of all, the Marshallian foundations of the judicial power of the constitutional review are fundamentally textualistic – an argument in *Marbury* is the argument about the supremacy of the written text of constitution over the texts of other written laws. Therefore, if this is the argument on which this power is based at the very fundamental level, the textualistic approach itself should be the basic approach of the court making the constitutional review – that is approach it is founded on. And if we perceive the Marshallian foundations of constitutional review as an authoritative example, we shall also adopt the inherent textualism therein.

The second aspect is related to inconsistency of Marshall's approaches while comparing *Marbury* and *McCullock*, what leads to at least a suspicion that all the Marshallian process of the consolidation of the powers of the court is a political process (therefore, not theoretical, not based on the text of American Constitution or some nature of general constitutional process). And when Egidijus Kūris, reacting to Petras Ragauskas's anti-activist and anti-interpretativist position (generally see Petras Ragauskas, „Konstitucinio teismo vaidmuo įstatymų leidyboje", *Teisės problemos*, Nr. 1 (43), 2004, pp. 8–54) alleges that, "starting from the era of *Marbury v. Madison*, constitutional justice has been developing into a different direction" (Egidijus Kūris, „Konstitucinis Teismas ir įstatymų leidyba: žvilgsnis „iš vidaus", *Teisės problemos*, Nr. 1 (43), 2004, p. 120), we should also have in mind, that the development into this direction was the result rather of a political than a judicial process, and that should be correspondingly reflected in the academic discourse.

But, as it has already been mentioned, even *Marbury's* ideology may support anti-activist position because of textualism, that this case, even as a representation of a political process, is fundamentally based on. However, this kind of textualism could be criticized by another reasoning, and this is the second general statement, I am going to react to. It is as follows: the reality or, otherwise, law at the behaviorist level is always much more complicated than the legal norms or, otherwise, law at the normative/textual level, and this is even more valid to the constitutional text which has the characteristic traits of ambiguity, vagueness, *lacunae* and the like; therefore, the constitutional jurisprudence could not avoid taking the form of precedent, the creation of law rather than interpretation of law.

Now, I would like to rebut some stereotypes related to the ideas inscribed in or related to this general statement. In the first place, nobody questions the notion that reality is more complicated (or contingent) than the norms could cover. Although, the relationship between reality and norms/laws is more complicated than this simple insight presents, and I will shortly return to this aspect later. Secondly, sometimes this statement is also reaffirmed by the so-called argument of the necessity of the finitude of interpretation, and especially of the finitude at the institutional level – some judicial interpretation (event if it has traits of

a creation) should be institutionally finite and unquestionable, and this notion in Lithuania has a form or name of the "official constitutional doctrine". Once and again – nobody questions this notion. In other words, nobody questions authoritative, institutional supremacy of the interpretation of constitution made by the Constitutional Court, as this is related to the specific, technical aspect of the political framework of the state. Exactly in the same way we have the notion of the unquestionability of the parliament's acts – no one can allege in court that we do not abide some specific parliament act because we do not agree to it; whether we agree or not, we have to abide it. And whether we agree to some decisions of the constitutional court, or not – we have to abide them and that is the only meaning of the "officiality" of "official constitutional doctrine". But we can not only criticize one or another decision of the constitutional court at the academic level, as Kūris points (Egidijus Kūris, p. 122); we can also inquire what some constitutional doctrine, taken as a generalization of the case-law of one or another period, means at the level of the political theory and what impact does it have to the political framework of the state.

In the United States, it has already been observed for a long time that their political system has substantial traits of aristocratism as reflected in the activity of the courts. Judges are not democratically elected, they are appointed based on the principles of professionalism, which quite usually are under their own control (notorious example on this aspect in Lithuania is the Decision of the Constitutional Court of the 20th of February, 2008). Therefore, if judges create law, the political framework of the state entails a substantial element of what we may call "professional aristocracy", even containing the forms of a closed guild of professionals carefully guarding "the gates" of the profession. Figuratively speaking, courts then "play kings" (Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation*, Princeton, New Jersey: Princeton University Press, 1998, p. 7). This aspect of American political structure is criticized. Such critique is reflected in the ideas of Justice Antonin Scalia, who offers to stop creating the judicial precedents in the future as it is simply not democratic (Antonin Scalia, p. 3–14). Accordingly, the Lithuanian system should also acquire a substantial element of the other form of the government – that kind of

aristocratism with its problems – if the judicial precedent as a noticeable element of the political system would be accepted.

But then we should not react to this situation by democratic, anti-interpretativist or anti-activist radicalism, what is handy exactly for the pro-activists. We should talk not about some absolute, scientific rules of "democratic" adjudication, but about the *ethics of adjudication* that should be the ethics of restraint, but not activism. Judicial activism (as creation of law in courts) should not be encouraged (although in some exceptional cases probably unavoidable) in the democratic form of government, and this should be *the rule of the inner point of view of judges* in the Hartian sense, also the rule of a mature legal society.

And two last issues concerning the relationship between reality and law (as text). Some might say that in this way law may become frozen, not adapted to the realities of a changing/dynamic society. But in the contemporary political configuration the general role for making law dynamic is prescribed to other institutions – parliament and people (if a referendum is needed). Today courts are not the institutions having the role of the dynamic/societal adaptation of law. Of course, what concerns constitution, the process of this adaptation is procedurally more difficult and therefore constitutional adjudication, *as a matter of exception*, may take form of this adaptation, but, again, that is only the matter of level, which should not, if we accept the aforementioned ethics, transgress the sphere of being an exception: the court must stick to the text of constitution as much as possible.

And the second issue – the relationship between reality and law[s] has been complicated already from the times of Hume, when he opened the gap between *is* and *ought*. Reality is not capable of providing us with laws; laws are in one or another form the product of a creative/rational activity of human beings, either of the members of parliament or judges. But we also have this notion that law is essentially a matter of language (John Gibbons, "Language Constructing Law," in *Language and the Law*, ed. John Gibbons, London, New York: Longman, 1994, p. 3) – we may call legal society, with the rule of law, a project of language, also rationalistic and humanistic project. This entails much of a meaning of an allegation that the role of a court, especially as a so-called "guardian of the constitution", is to preserve some fundamental norms, to fix some fundamental system of values for the future generations not to change

them so easily. The intensity of a law as projected against the contingency of reality/societal behavior is especially clear at the constitutional level, where it is still clear that even *by writing the constitution* men were not able to solve Rousseau's impossible task of putting the law above man (Martin Loughlin, *The Idea of Public Law* (New York: Oxford University Press, 2005), p. 115). But, as alleged by Loughlin, basing his thoughts on Tocqueville, there is no better solution in this situation than to appoint this impossible task to judges. Judges, as having "certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connections of ideas, which naturally render them very hostile to the revolutionary spirit and unreflecting passions of the multitude" (Martin Loughlin, p. 129), are best suited for this task of preserving fundamental, constitutionally inscribed values of our society, especially the human rights. But, as opposing "their aristocratic propensities to the nation's democratic instincts" (*ibid.*), judges should exactly preserve them, not change.

To summarize, there are two lessons to learn from all that has been mentioned:

1. The American foundations of the judicial power of the constitutional review and the corresponding development are based on intrinsic textualism, and also far from being clear in relationship to the political neutrality of the process.

2. The constitutional jurisprudence should not be based on the celebration of judicial activism, but on the ethics of restrained/value-preserving adjudication.

The author has prepared and published the research article based on the presentation.
See: http://versita.metapress.com/content/0r08w526u4671v22/fulltext.pdf.

DEMOCRACY VERSUS CAPITALISM IN RUSSIA

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DEMOKRATIJA PRIEŠ KAPITALIZMĄ RUSIJOJE

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THE PRESENTATION

A specific vagueness character of interests of the post totalitarian society, alongside clear and concrete interest of elites seems to be an important and typical feature of Russia's politics. In consequence, the society has been almost completely marginalized as the political subject, and its role has been taken over by the corporate interests groups of the "big business". Political regime of present Russia has been, to some degree, founded basing on models known from developed democracies including the institution of the president, council of ministers, independent courts, and freedom of the press or political parties. But considerable differences occurred in the application of those mechanisms in Russia. For instance, parties in Russian political system did not succeed in becoming the channels of articulation of social needs. Such situation was caused by the fact, that majority of political parties and other political and social organizations has been dominated by various interests groups and has had a very exclusive character. Those interest groups, represented by political parties, pursued their goal with means of private and public pressure towards states decision-making institutions. Thus, both state's and society's priorities have been pushed aside.

The ideological void that was created after the fall of USSR, as well as ever changing social and political situation caused that the following governments of non-communistic Russia were incessantly changing

state's official ideology. Such inconsistence was surely intensifying confusion among Russian citizens and revealed the intellectual crisis that the political elites were suffering from. In a country in which society was raised in the spirit of ideological omnipotence of the state it was extremely dangerous. Citizens stood in opposition to the state and the civil society was associated with movements which fought the regime. It is difficult not to notice the antinomy that has raised between the western path of modernization promoted by the regime and actual consequences of this process in Russia which did not fostered individualistic and rationalistic ideas nor strengthened liberal values and institutions.

Although political and social reforms were conducted under such auspices, the society remained collective, instead of a normal, capitalistic economy founded on competition and free-market, a criminal capitalism emerged and instead of democratic institutions of the civil society, "clans", "casts" and wassail systems appeared. A woulbe civil society fell apart into a criminal and semi-criminal elite on one hand, and the "handicapped" masses on the other. Governments were not interested in more active stimulation of the development of social institutions. Instead of cooperation with the society, they chose to build up a political system based on the clan and oligarchic structure.

The aim of our analysis is to show direct negative impact which Russian capitalism has had on the democratization of public life in Russia and firming civil society. The main cause of such situation was a transformation of Russian business community which took shape of a specific "oligarchic structure". In 90's public, political and economic life had been dominated by Oligarchs and related interest groups what has seriously limited political subjectivity of the society. Politics lost its natural character of struggle for votes and turned into a battle over the political and economic domination. Distinction between Russian politics and economic became vague and ambiguous. Pluralism was not characteristic of Russian society and was seen, if anywhere, only among conflicted social and economic elites. Vladimir Putin's election to president put stop to oligarchy's spontaneous growth but not to the oligarchy itself. The fight against oligarchy and corrupted elites became an important element in consolidation of new regime in Russia. This way Russian capitalism, or rather its elements which stayed beyond direct control of the government, has contributed to establishing

Russian authoritarian regime. The current political- business elite is living its own life and does not pay an attention to the public, expect when the society becomes the cause of "an increased concern". Although elections are conducted regularly, they do not provided opportunities for the transfer of power and serve only as a legitimization of *status qou*. Creating a parallel political and economic reality consisting of two, completely separated from each other worlds of elites and society, became a way to maintain control over the system.

Ownership transformations in Russia resulted in new economic structures, and thus contributed to the creation of many new interest groups associated with large business. Some of them represented a new financial group resulting from systemic change (as well as from access to power), and part of them were old nomenclature lobbies generated from the former Soviet financially-economic groups[66]. The game of interests of different kind of "cartels" and their relationship with the authorities often decided the fate of individual politicians, the emergence and decline of large fortunes, and even to some extent the activity in the field of foreign policy[67]. In the early ninties, Russia began the fight to take charge of the most lucrative sectors of the economy of former Soviet Union and wanted to ensure the profits from the new distribution of wealth. Fight was not detrmined by free market, but by the access to different levels of power. Every significant political force was associated with various economic and financial groups. Regardless the fact who seized the power, the system continued unchanged. It consisted of industry interest groups. Between them the most important were financial and industrial lobbies, media and groups related to raw materials. They were forming a transitional alliances and fighting to access the power and also to the system of incentives and concessions. For instance from 1990 untill 1993 fractions like "Agricultural Union" or "Industrial Association" were established and acted in the Russian quasi- parliament. That was one of the obstacles to the development of real pluralism. Deputies were seen more as representatives of the interests of corporations than the

[66] И. Клямкин, В. Лапкин, В. Пантин, *Между авторитаризмом и демократией*, "Polis" 1995, No 2, pp. 72.

[67] Por.: Я. Паппэ, *Нефтяная и газовая дипломатия России*, "Pro et Contra" 1997, No 3.

interests of the state or society[68]. Interest groups gradually had begun to control the media, economy and politics. Vladimir Lepiechin argued that the Russian political system of the nienties was structered in a specific way and consisted of two parallel layers. At the top there were legal institutions and political organizations and on the bottom illegal interests.[69].

American Diplomat Thomas Grecham as one of the first pointed out that Russian political system had never been democratic neither authoritarian nor reelective. It became an "oligarchic-clan"[70].

Grechem claimed that post communist Russian society was unable to participate in political life. He assumed that the society was characterized by:

- gathering around well know political figures,
- free access to mass media,

controlling the military and paramilitary service[71].

Connection between politics and financial elites played and active role through all period of Boris Yeasting presidency. Thanks to the mechanism provided by the constitution the President often changed the personal configurations of the cabinet in order to adjust the candidates to his conceptions of redistributing economic power. It is common to consider that the appointment of Czernomyrdin as a prime minister was the crucial moment of the process of penetration of politics by the financial elites But on the other hand various lobbies began to form in the times of Jegora Gajdara government[72]. This was an incentive to the government's practice of paying for the support of different interest of groups which was more important than the votes of society[73]. Groups of economic and political interest were internally

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68 P. Саква, *Режимная система и гражданское общество в России*, "Polis" 1997, No 1, pp. 72-73.

69 В. Лепехин, *Группы интересов как основной субъект современной российской политической системы [w:]Формирование партийно-политической системы в России*, ред. М. Макфол, С. Марков, А. Рябов, М.: Моск. Центр Карнеги, 1998, s. 98-99.

70 Т. Грэхэм, *Новый российский режим*, "Независимая газета" 23.11.1995.

71 *Ibidem*.

72 Я. Паппэ, *Отраслевые лобби в правительстве России* (1992-1996), "Pro et Contra" 1996, No 1, t. 1, pp. 62.

73 С. Павленко, *Правительство реформ у дотационного корыта*, "Московские Новости" 18.04.1993.

divided and that corresponded to the conflict that took place within Russian political system.

In mid- nineties, the conflict between new holdings concentrated around banks and former lobbies connected to the administration industry and natural raw materials was very well visible Old groups dominated until around 1995. Later on- until financial crisis of 1998- new capital groups. gradually gained a superior position. This was a result of "political simulation" (new groups were connected with power) and development of capital market in Russia. Economic crisis in the middle 1998 leaded old lobbies- mainly administrative and connected with natural sources to regain its influence By the year 1996 "balance of power" was established between the particular lobbies and each of them took their place in executive power. Russian government was dominated by three major economic centers that supported interest of different groups. First of these groups was the industrial group that gained the support of Oleg Soskowiec and Władimir Kadannikow. Second - financial group was supported by Anatolij Czubajs. Between them was the raw materials industry group bucked up by prime minister Wiktor Czenomyrdin. Central authority (Kremlin) was monitoring the balance between these groups. The presidential election of the year 1996 caused the change of the economic forces and established the predominance of new economic groups around Czubajs.

Between the years 1995 and 1996 oligarchs faced the need of obtaining of power. While there was no doubt as to the candidate for president the "business" could not decide who would represent its interests in the Kremlin. Finally oligarchs supported Viktor Iliuszyn[74]. In this period The program of the Russian elites was determined by two imperatives. Firstly everyone who was connected to the governing system depended on the elections. Secondly - Yeltsin victory would strengthen those who had actively supported him. Yeltsin victory could be considered as the result of compromise between groups of oligarchs but not as a sovereign decision of the electorate.

After the presidential elections in 1996 and after the denationalization of the property privatization of power followed. *Financial capital was transformed into political capital*[75]. Than the phenomenon of

[74] В. Лепехин, *op.cit*., pp. 120.

[75] B. Jelcyn, *Prezydencki marato*, Warszawa 2001, pp. 86.

institutionalization of new interest groups could be noticed. Oligarchs began to seek a direct impact on power because they were not satisfied with their position behind the scenes[76]. When Putin was Deputy Prime Minister in his bank big sums of state money. began to flow in his bank Boris Bieriezowski became the deputy secretary of the Security Council, and later executive secretary of the Commonwealth of Independent States. Direct influence on the political authorities reorganized the secret services. Among the "oligarchs" who were fighting to take position near the power, Boris Bieriezowski took particular importance. The most important for the development of his fortunes was the relationship with the Yeltsin's surrounding, largely president daughter - Tatiana. The second very important "oligarch" was Gusiński. IN 1996. he actively participated in the presidential campaign of Yeltsin by his NTW television. These were the origins of his power and fortune.

Although large financial-industrial groups had big inspirations and strong connections with state policymakers, they never reached the full authority. Nevertheless, they took a significant impact on a number of policy decisions through a system of personal contacts. For example, in 1997, "Gazprom" executed its influences in order to avoid paying outstanding taxes. However it must be noted that representatives of resource-energy lobbies were less visible in the politics than ordinary "oligarchs" and they were working behind the scene. They fought for influence for their companies, rather than direct political power[77].

It is impossible to deny the fact that mafia groups were around the Kremlin. Yeltsin was aware of this situation. Nevertheless he took no actions to alter it. It seemed that both groups, namely the president and "oligarchs" intentionally tolerated the existence of a specific *status quo* between the state and business as such layout allowed the them to control each other. These arrangement was considered optimal. "Oligarchs" supported regime while the regime allowed them to control the resources of the state and settled them in a illegal market. Elites were the shadows of the public life.

In the light of the upcoming new political events such as parliamentary election of year 1999 and presidential election of year 2000 the business groups again were needed. Putin's success has not

[76] *Ibidem*, pp. 86.

[77] Б. Федоров, *10 безумных лет*, М.: Совершенно Секретно,pp. 213.

translated this time to profit for "oligarchs". Presidential elections can even be considered as the beginning of the end of vigorous political capitalism. "Oligarchs" failed at the outset because they were not able to put someone from their circle. Putin's "election" had sense only when assumed that his authority was sufficiently limited by the "oligarchs". Specific *pacta conventa* was established in the second half of 1999. The essence of the agreement was to preserve the influence of political and business system created around Yeltsin. After Yeltsin resignation "oligarchs" were deprived of their political status. Phenomenon of the "oligarchs" as an independent interest groups from the Kremlin, has almost disappeared. Even ahead of the March presidential elections Putin announced that "all oligarchs will be equally removed from power". At that time it was considered an pre-election gesture. It turned out that the impunity was over. The Russian "oligarchs" lost the immunity that protected them when the former President had power. In addition, they quickly began to lose their political positions and estates[78]. In Moscow prevailed the opinion that when Putin came to power new people -his former colleagues from the special services, would "split" the zone of influence." To review the results of the privatization that took place in nineties was not easy.

For several months between 1999 and 2000 an alliance of old and new team, seemed to last without a threat. The speech of one of the main person of Yeltsin presidency – Bieriezowski was the first sign of impending division between Putin and Yelstins "old nomenclature" as he publicly criticized the Putins idea of reforming the Federation Council. Shortly after that he started an open war with the Kremlin. He accused Putin of building an authoritarian regime[79]. In some way the media owned by Gusiński-especially television NTW - were also against Putin. In the result confrontation ended as a complete success of Kremlin which took control over the media that opposed to the authorities- "Media-Most" and "ŁogoWAZ".

After the first attacks on the "oligarchs", Anatoly Czubajs convinced Putin that as soon as possible he should meet with the representatives

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[78] А. Сикамова, О. Тропкина, Е. Мазин, П. Орехин, *Олигархи на перепутье. Соратники не торопятся поддержать Михаила Ходорковского*, "Независимая газета" 28.10.2003.

[79] В. Третьяков, *Голиаф и левиафан*, "Независимая газета" 1.06.2000.

of big capital in order explain the rules of the game. His "emissary" – Niemcow – presented a list of 24 most powerful names in the Russian economy. The round table took place in the Kremlin at the end of July 2000[80]. Putin did not agree to a meet all the "oligarchs" especially Gusiński and Bieriezowski[81]. He already had elaborated a specific plan to dismantle the system of uncoordinated and irresponsibility "oligarchs" that was created in the times of Yeltsin and was destroying structure of the state and caused a dramatic weakening of the central government. The compromise between the government and business was not universal. However a total breaking through agreement that was created before the 1999 election could not take place. The "oligarchs" "powers were still needed. Business without obstacles from the state had to deal with the economy, but without interference in politics.

Actions taken by the president were quite right. The image of Putin's activities in the fight against "oligarchs" had one very important element: the fight against them did not affect businessmen closely linked to the Kremlin. Some of them were visibly favored in its relations with the authorities. That concerned in particular, the "oligarchs" associated with high officials of the Presidential Administration - Roman Abramowicz ("Sibnieft" group), Alexander Mamut "treasurer of Kremlin's family" ("MDM-Bank") and Peter Aven ("Alpha" group). This indicated that Putin did not oppose to the "oligarchs" as a group of rich people. Obstinately he was fighting with all independent political centers and all those who were too strong.

After the struggle of 2000-2001, with the political autonomy of the media empires Kremlin slightly changed its policy towards to representatives of big business. This "oligarchs" who resigned from excessive political ambitions, could count on the support of government. Kremlin began a policy of active supporting the expansion of foreign corporations, mainly in the sectors of raw materials and defense industry. At the same time sought to avoid unnecessary conflicts with big business and expand the dialogue with the biggest entrepreneurs. In 2003, Putin was ready to make the final revalue the

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[80] Л. Романова, М. Волкова, *Власть поговорила с деньгами*, "Независимая газета" 29.07.2000.

[81] Л. Романова, *Кремль приступает к селекционному отбору олигархов*, "Независимая газета" 25.07.2000.

content of previous compromises and set new rules for big business in the authoritarian regime.

Before the elections of year 2003/2004 the owners of oil holdings Michal Chodorkowski – the president of "Jukos" and Roman Abramowicz leading "Sibnieft" and "RusAl" (the aluminium industry) remained as the greatest opponents. Their empires raised to be considered as independent domains not submitted to control of any kind. To attack the oligarchs was the straight consequence of the rules of Russian political system. When Bieriezowski and Gusiński did not continue to participate in the Russian political scene it seemed the had been clearly understood that the power indivisibly lingers Kremlin while the oligarchs were only to maneuver the business. Any eventual connection between the two – politics and the business – could only take place with the Kremlin's approval and within the area strictly determined by the political authorities. Balance maintained in such a way were disturbed by Chodorkowsky`s act of betrayal when he supported the opposition – the center and the right wing of the Russian political scene. And what is more his actions were considered as a sign of his grooving interest in the politics as he was also getting bored wit the business. In addition he announced to withdraw from the business and lean to the politics in the year 2008 – so in the year of the future presidential election which probably were to establish Putin's successor. That made him too influential and too dangerous[82]. Chodorkowski announced to the public that before the elections of the year 2003 he would support the "Apple" party which was independent and strongly criticized Kremlin's actions. On of his assistants claimed that he would have supported the party with great amount of financial aid. On one hand it was common that the business in Russia financially supported various political forces but on the other hand never before it had been done officially. Putin reacted categorically. Firstly Lebiediew- a close co-worker of Chodorkowski had been arrested and than the Chodorkowski`s arrest followed. That could be considered as the symbolic end of the apparent symbiosis of the authorities and the society. The upper proved that a totally new formation was being established at the very top of the power

[82] И. Родин, Д. Симакин, В. Терлецкий, *Депутаты пытаются добить юкос, Нефтяная компания готовится к новым арестам топ-менеджеров*, "Независимая газета" 15.07.2003.

structure – "the platform of strengthener"[83] that aimed to eliminate from the politics and business the people who used to be influential in the times of President Yeltsin what in consequence might have lead to the total take over of the power. This newly formed group consisted of Vice- Director of The President's Wiktor Iwanow administration, the general attorney Wiktor Ustinow, the "Zbir" secretary, Powel Borodin, the president of "Mieżprombank" Siergiej Pugaczow and the corps of actual and former workers of Russian secret service. On 24 of march 2005 the President of Russia I hosted at the Kremlin 26 representatives of the great business and he appeased theirs disquiet as to the revision of the acts of privatization that took place in the nineties and informed them of the act of shortening the period of negative prescription in that respect from 10 to 3 years[84]. That allowed the businessmen to continue to prospect freely.

The Chodorkowsky`s process proved that the Kremlin had the necessary capacity to destroy any of the oligarchs. It equally manifested the ability and the lack of will to execute it. No more than complete and unconditional loyalty was required.

Simultaneously wit the "Jukos" caste the problems in the banking sector followed. The panic among the bank clients caused the mass withdrawal of the deposition from the two main private financial institutions "Guta Bank" that was linked to Łużkow and "Alfa Bank". "Guta Bank" was not any more financially fluent and in consequence was acquired by the national "Wniesztorgbank". While "Alfa Bank" suffered from financial loss and the crisis of confidence among its clients. It is very probable that that this difficulties were intentionally provoked by the Kremlin[85] as to be consider as "serious warning" directed to the business.

Disruption and re-nationalization of "Jukos" did not put the definitive end to "oligarchic capitalism" in Russia. Rather it seems that with the power take over the new political equip gave a try to re-shift the sphere of

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[83] Г. Павловский, *Сценарии электорального цикла. В Кремле сформировалось влиятельное аппаратное меньшинство*, "Независимая газета" 3.09.2003

[84] *Бизнес и Власть*, "Известия" 25.03.2005.

[85] The President of the Federal Financial Monitoring Agency Żubkow informed that the banks which did not comply to the financial requirements referring the safety of the individual clients` investments would have had the license taken away. List of the banks that were facing such a threat was not precise, nevertheless it was speculated that such a threat is directed towards the two banks.

influence in the economy. This excluded any far-going change. Actually the division of the economy had remained unchanged except the media. Still Russia was ruled by the military and mining industry where the leading role took "Gazprom", "Agroprom" represented the agriculture and few other huge industrial and financial groups that were connected to the Kremlin. Some of Putin` s closest co-workers – strengtheners – joined the business.

The 2007 elections had shown that Kremlin was still using social reluctance towards oligarchs to consolidate the sphere of economics within its own political camp. This time, the oligarch-enemy number one became Mikhail Guceriew – owner of the youngest oil company in Russia – "Russnieft" (created in 2002). His trouble began when contradictory the Kremlins will he bought oil deposits which had been owned by Jukos. Furthermore he did not the accept the "unrefusable" offer to sell his company to Olegow Deripasce - a man closely connected to Kremlins regime. Wagit Alekpierow, owner of the biggest private oil company in Russia – Łukoil, could be pointed out as another, potential "enemy" of the regime. Process of taking over and redistribution of the capital goods in Russia was far from being over, and seemed to step in to a new phase. Thus, Russian "oligarchies" continued to evolve.

As recent sociological surveys show, almost 60% of Russians citizens, still stay in the position that Russian privatization should be revised and that oligarchs should administratively be deprived of at least a part of their property. This makes a firm social foundation for Putin's war against "oligarchs" and – as a president – he has been using it quite often. To some degree it might be related with efforts of reestablishing states power in Russians strategic spheres of economy. "Oligarchs", who came to their wealth during Yelstins presidency, were of course in favour of complete liberalization and privatization of the national resources[86]. As owners of large capital they felt predestinated to have a significant influence on political and social changes.[87] Such situation was not a result of their bad will but of the domination of the new specific capital ideology according to which the state serves the "oligarchs", while they

[86] Patrz: M. Олкотт, *Владимир Путин и нефтяная политика России*, "Рабочие материалы", МЦК 2005, nr 1, pp. 10.

[87] L. Shevtsova, *Putin's Russia*, CarnegieEndowment for International Peace, Waszyngton 2003, pp. 126-128.

can refer to this issue more selectively. The paradoxical is the fact, that liquidation of groups of oligarchs independent of Kremlin - which was expected and supported by the society - deprived Russia of remains of quasi-pluralism in Russian politics and thus contributed to strengthening the quasi-authoritarian regime.

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GLOBALIZATION AS A HISTORICAL PHENOMENON AND ITS IMPACT ON PUBLIC INTERNATIONAL LAW

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GLOBALIZACIJA KAIP ISTORINIS REIŠKINYS IR JO ĮTAKA TARPTAUTINEI VIEŠAJAI TEISEI

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THE PRESENTATION

1. Introduction

Globalization is not a new phenomenon but today the internet is one of the most visible facets of globalization. In his bestselling book "The World is Flat", Thomas L. Friedman offers a good description of the development of globalization which, although one which is somewhat U.S.-focused and obviously inspired my modern technology. Starting point for Friedman is the so called discovery of the Americas by Christopher Columbus in 1492.[88] The following centuries Friedman refers to as "Globalization 1.0", covering the timeframe until the year 1800.[89] The era between Industrialization and Internet, roughly from the year 1800 to the year 2000 he refers to as "Globalization 2.0".[90] In this phase, he sees multinational firms and transnational companies (TNCs)[91] to have a dominant role,[92] supported by the expansion

[88] T. L. Friedman – The World is Flat – The Globalized World in the Twenty-First Century, 2nd ed. (2006), p. 9.

[89] Ibid.

[90] Ibid.

[91] As we will see later, TNCs played an important role far earlier than Friedman claims and I disagree with Friedman's phases of globalization and see five, rather than two eras. But apart from such details, Friedman is right to see the discovery of America as a starting date for the phenomenon of a globalization which truly deserves the name.

[92] Ibid.

of infrastructure such as road, railway and sea traffic as well as by sinking costs of long-distance communication.[93] It was the new role of telecommunication and in particular the increased access to means of telecommunication which started the next level of globalization. At the same time the current era of globalization has contributed significantly to the creation of a global "level playing field". Although a large part of the world's population still lives in inacceptable poverty, millions now have, for the first time, the chance to participate in the global marketplace. This marketplace also is no longer merely economic but is becoming all-inclusive, involving basic education as well as scienctific research. Many examples come to mind easily, from access to news from the most remote corners of the earth at your fingertips, to mobile-phone-banking in Africa, from affordable distance education to affordable loans and any list of examples I can give here will propably already be outdated by the time this text goes to print. Mobile phones, Internet and Email are only some technical aspects, but they empower many, in particular since everybody can create and access content online.[94] The current wave of globalization has a dramatic impact on billions of people around the world. This development has led Friedman to conclude that the world has, in his words, become "flat". This was not a planned development, it just happened.[95] It happened because we are making use of the opportunities we have. At this point in history, globalization is no longer the exclusive realm of states or transnational corporations. At some point, this globalization fell into the hands of ordinary people and they, we, are driving globalization now. This could be called "globalization 3.0", to use Friedman's terminology.[96] I disagree somewhat with Friedman in that I see five major eras of globalization rather than three, but agree with him in principle. For the purposes of this paper, I suggest that the five eras of globalization were or are 1st an Iberian Phase from 1492 until around the French Revolution, 2nd an Imperial Phase between the French Revolution and World War I, a time in which the great powers attempted to become empires rather than mere states, 3rd World War II as a form of globalization based on

[93] Ibid.

[94] T. L. Friedman (op. cit.), p. 10.

[95] T. L. Friedman (op. cit.), p. 11.

[96] Ibid.

military rather than economic cooperation, 4th the time between 1945 and 1989 which saw increased economic cooperation between states at a time when the world as a whole was separated in two major blocks, and our current age of globalization which was made possible due to the fall of the iron curtain two decades ago and the technological developments of the last years.[97] While this might be a question for future historians, as lawyers we are facing important questions today, in particular in the field of international economic law,[98] which is particularly affected by globalization, but also for Public International Law (PIL) as a whole. The question which remains open as globalization progresses is how to describe the emergent international community which is born from the current era of globalization in terms of legal theory and philosophy?

2. Global Law and Legitimacy: the subjects of Public International Law in a globalized world

2.1 General overview

Law always is a mirror of the conditions and cultural traditions of the society to which it applies.[99] Changes in the membership in this society or community can be spontaneous and affect the law as a whole.[100] Since the end of the Cold War, the "importance of actor perception"[101] has increased, which leads to the question who is a subject of this globalizing legal order. After all, the range of issues covered by Public International Law is immense, ranging literally from the exploitation of resources at the bottom of the ocean to the use of Outer Space and covering virtually all interests of contemporary international life.[102] An entity is a legal subject of Public International Law, if it is legally able to hold rights and obligations and to claim such rights on an international stage.[103]

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97 S. Hobe / O Kimminich – Einführung in das Völkerrecht, 8th ed. (2004), p. 61.

98 Ibid.

99 M. Shaw – International Law, 4th ed. (1997), p. 36.

100 M. Shaw (op. cit.), p. 36.

101 Falk, Richard A. – Legal Order in a Violent World (1968), p. 82.

102 M. Shaw (op. cit.), pp. 36 et seq.

103 Brownlie, Ian – Principles of Public International Law, 5th ed. (1998), p. 57.

But although all states are equal,[104] not all subjects of international law are equal.[105] Not only have different subjects of international law different rights and obligations, they enjoy subjectivity to different degrees.[106] Traditionally international law scholars differentiate between partial and particular subjects of international law. Partial subjects are those subjects the extent and limitations of the capability to enter into legal relations under international law are depending on themselves. A typical example are international intergovernmental organizations which only enjoy the capability to enter into legal relations as far as their respective constitutive documents, usually international treaties between states, allow.[107] Particular subjects of international law on the other hand are such subjects of international law which only enjoy the capability to enter into legal relations with regard to certain other subjects of international law.[108]

Capability to enter into legal relations with other subjects of international law	full capability	
	partial	particular
	Limitation with regard to potential issues	Limitation with regard to potential partners

Partial and particular subjects of Public International Law

For example is recognition by other states not a requirement for statehood, but as John Dugart has explained in the case of the Bantustan states,[109] collective non-recognition is a serious impediment to the capability of a legal entity to enter into legal relations with others.

I am of the opinion that this concept applies to all potential subjects of international law: they get their factual power from the ability to play

[104] The general priciple of sovereign equality of states is codified in Art. 2 no. 1 of the Charter of the United Nations.

[105] M. Shaw (op. cit.), pp. 137 et seq.

[106] cf. M. Shaw (op. cit.), p. 138.

[107] cf. S. Hobe / O Kimminich (op. cit.), p. 66.

[108] Ibid.

[109] John Dugart – International Law – A South African Perspective, 2nd ed. (2000), pp. 445 et seq.

a role. In other words, they act because they dare to raise their voice and because they are heard.

I therefore suggest a fundamentally new type of differentiation: between those subjects which have rights and obligations under international law (*subject to the law*) and those subjects which are involved in the creation of new law (law makers, *subject in the active sense, like the subject in the linguistic or grammatical sense is the active part of a sentence*). This does not mean that the existing differentiations become obsolete, but that we add an additional dimension to it – the differentiation between mere subjects to the law and those subjects which have a chance to actually change the law.

Full subjects	states	universally recognized states
Partial subjects	individuals	international organizations
Particular subjects	states recognized only by some subjects of international law	
	subject to the law	law makers

Adding a new dimension to the Matrix (examples only, not meant to be exhaustive)

2.2 The State

Since the Peace of Westphalia, which ended the Thirty-Years-War in 1648, the State has been *the* key player in international law. Even in an era of massive globalization like we experience it today, the needs and characteristics of the existing international political system remains raison d'être and determining factor of Public International Law,[110] and in this political system the state continues to play the leading role. But it no longer has the stage all for itself. States are more and more integrated in communities, such as the European Union, which leads to a transfer of sovereignty. But for many of us, the national state is simply "the" form of human organization on a large scale, despite the fact that many of you will vote in a few days for a far-away parliament which transcends borders which were impenetrable just two decades ago.

[110] M. Shaw (op. cit.), p. 37.

But if we look elsewhere, we can see that other large scale legal communities exist, such as the Pashtuns in the Afghanistan-Pakistan border area who live under the Pashtunwali, a law which applies to all Pashtuns, making the artificial border between Afghanistan and Pakistan irrelevant. As a matter of fact, we do not have to look that far back, neither into history, to realize that many Lithuanians for example, and also myself, are part of a large community which transcends borders and has done so for almost 2,000 years. The Catholic church is also a legal community and its Code of Canon Law applies to all Roman Catholics,[111] regardless of their nationality or location. And finally are the European Union is growing ever closer together, so close that the question can be asked if Europe has already achieved such a degree of closeness as to have lead to the creation of a European body politic.[112] These are just some examples which challenge us to think outside the narrow confines of the national state.

2.3 Classical non-state actors in Public International Law[113]

But the state has never been completely alone on the international stage, although it dominated it for a long time. In the pre-Westphalian era, what we would now call "international" treaties often were treaties between sovereigns, like the treaty between Hattusilis III, king of the Hittites, and Ramses II from the year 1269 B.C.,[114] a replica of which is today on display at UN Headquarters in New York.[115] But already the oldest known international treaty, between the leaders of the Mesopotamian city states Lagash and Umma, dating back to the year

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[111] Code of Canon Law: can. 1; can 12 § 1.

[112] cf. R. Herzog, Verfassungsfragen der Zukunft, in: J. Limbach / R. Herzog / D. Grimm – Die deutschen Verfassungen: Reproduktionen der Verfassungsoriginale von 1849, 1871, 1919 sowie des Grundgesetzes von 1949 (1999), pp. 30 et seq., at p. 39; H. Kieger / I. P. Karolewski / M. Munkel – Europäische Verfassung: Zum Stand der europäischen Demokratie im Zuge der Osterweiterung (2004), p. 102; D. Grimm – Braucht Europa eine Verfassung? (1994), p. 44.

[113] On non-state actors and their role in international law cf. also the new monograph by A. Bianchi – Non-State Actors and International Law (2009).

[114] E. J. Osmańczyk / A. Mango – Encyclopedia of the United Nations and International Agreements, 3rd ed., Taylor & Francis (2003), p. 1115.

[115] Ibid.

3100 B.C.[116] linked the signatories to their respective functions in their communities. A remnant of this age is found today in the person of the Pope who, as the Holy See[117] (not to be confused with the state of the Vatican City ![118]), is one of the oldest non-state actors in Public International Law. Often it is the Holy See which is party to international treaties. In contrast, the state of the Vatican City is an international legal subject of its own, on par, due to the principle of the sovereign equality of states, with all other states, despite its small geographical size. Unlike the Holy See, the state of the Vatican, as we know it today, only came into existence a mere 80 years ago with the Lateran Treaties between the Holy See and the Italian Republic, which date back to 11 February 1929 and which were concluded to resolve the so called "Roman Question" which arose after the Papal States had been conquered by Italian forces on 11 September 1870. Until that day the pope had had his own state since at least the Sutri donation in the year 728.[119] Only in May 1871 Italy accepted the sovereignty of the pope over the Lateran, the Vatican gained statehood only in 1929 and in fact Italian laws directly applied in the Vatican City (unless in violation of church laws) until the end of 2008. During all this time, the international legal status of the Holy See was not affected.

A number of other non-state actors have been subjects of international law for some time, at least partially. Among them the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta (also known as the Sovereign Order of Malta),[120] insurgents,[121] war-farring groups,[122] national liberation movements,[123] international

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[116] Ibid.

[117] M. Shaw (op. cit.), p. 172.

[118] cf. also ibid.

[119] The Sutri Donation was in fact also an "international" treaty between two sovereigns, Luitprand, king of the Lombards, and Pope Gregory II.

[120] M. Shaw (op. cit.), p. 171.

[121] M. Shaw (op. cit.), S. 173.

[122] Ibid.

[123] cf. A. Cassese, International Law (2001), pp. 75 et seq. and M Shaw (op. cit.), pp. 173 et seq.

Organisations,[124] international public companies,[125] transnational corporations (TNCs)[126] and individuals.[127]

The latter two groups are of particular interest in the context of globalization. I want to show you today that both transnational corporations and individuals have had some role on the international stage for much longer than many seem to assume today.

2.4 Transnational Corporations[128]

Transnational corporations are often seen as the driving force behind the current era of globalization. Although they do not play an exclusive role, their impact certainly is undeniable. So far, Public International Law fails to take the role of TNCs into account in an adequate manner. TNCs should at least be covered by codes of conduct like those which have been created by the ILO or the OECD[129] and which are intended to bring TNCs to respect the sovereignty of their respective host states,[130] in particular in the developing world. Until today, though, the necessary consensus between industrialized and developing countries regarding such obligations remains missing. Consequently most rules in this field only amount to soft law.[131]

All of this seems to imply that transnational corporations are a new phenomenon and that international law is not yet fully equipped to deal with this issue, although there is some progress, in particular in the field of international economic law: Today, international economic law is taking into account the interests of private businesses and gives

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[124] Siehe hierzu A Cassese (op. cit.), pp. 70 et seq.

[125] M. Shaw (op. cit.), pp. 175 et seq.

[126] M. Shaw (op. cit.), pp. 176 et seq.

[127] Siehe hierzu A. Cassese (op. cit.), pp. 77 et seq.

[128] Cf. also F. Johns – The Invisibility of the Transnational Corporation: an Analysis of International Law and Legal Theory, in: 19 Melbourne University Law Review (1993-1994), pp. 893 et seq.; L. Catá Backer, Multinational Corporatiopns, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsbility in International Law, in: Columbia Human Rights Law Review 2005, pp. 101 et seq.

[129] S. Hobe / O Kimminich (op. cit.), p. 157.

[130] Ibid.

[131] cf. e.g. the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

corporations the opportunity to participate in international disputes. Since the decision of the World Trade Organization (WTO) Appellate Body in the Shrimp Turtle case,[132] corporations can participate in dispute settlement proceedings under Art. 13 of the WTO Dispute Settlement Understanding and Annex VI Art. 20 Sec. 2 of the International Convention on the Law of the Sea (LOSC) envisages a legal status for corporations involved in deep sea mining.[133] For the time being, though, TNCs neither have the status nor the obligations under international law which would be adequate given their factual economic power.

Interestingly enough, this is actually a large step backwards. Transnational Corporations are also not as new a phenomenon as one might think. As early as in the year 1600 the English East India Company (E.I.C.) and, more importantly, two years later, the Dutch United East India Company (V.O.C.) were the the first multinational corporations. The more successful V.O.C.[134] operated from 1602 until 1798. It was the first company based on shares. Its business was based on a monopoly for trade between the Netherlands and the entire area east of the Cape of Good Hope and West of the Magellan Strait, including the Indian and Pacific Oceans. It was a company under Dutch law, not owned by the Dutch state. It was run by traders who in turn represented local trade groups from different Dutch cities, the Heren XVII. But the V.O.C. differed fundamentally from modern TNCs in that it not only established bases abroad, the V.O.C. even waged war against Portugal and conquered Malakka in 1641 and supported the Sultans of Banten in Western Java in their wars in return for more monopolies. In a footnote of the history of the V.O.C., a trading post was established at the Cape of Good Hope in 1652, eventually leading to the establishment of what we now know as the Republic of South Africa. There we have a TNC which makes war and establishes trading posts. Although there was some domestic Dutch control over the V.O.C., the latter acted at least as a proxy for the Netherlands and in many respects acted in their own right. Thereby the V.O.C. at least had a role in both international affairs and international law. This cannot be said to the same extend of

[132] Cf. D. Johnson / C. Turner – International Business (2003), p. 301.

[133] S. Hobe / O Kimminich (op. cit.), p. 158.

[134] On the role of the V.O.C. cf. J. I. Israel – The Dutch Republic – Its Rise, Greatness, and Fall 1477-1806, pp. 934 et seq.

todays's TNCs. Yet their impact on the lives of many is not much less, if we think of the poor working conditions in sweat shops in Asia or maquiladoras in Latin America, if we think of child labour and unpaid wages. Today's TNCs can enjoy many freedoms due to their economic power but also enjoy the sheltering walls of their home states if they feel compelled to do so, thus often avoiding responsibility for their actions abroad.

2.5 Individuals

Just like TNCs, individuals are being mediated in classical PIL.[135] Although Westphalian PIL includes rules concerning the conduct of states vis-à-vis individuals, but the latter were at best beneficiaries of the rights of their home state against an other rather than holders of rights in their own right and they required diplomatic protection of their interests by their home state[136] because they were unable to claim these rights themselves.[137] In other words, diplomatic protection meant that the interests of the state are inseparable from those of the citizen.[138]

With the emergence of international human rights law after World War II, individuals have been given the opportunity to sue states, including their own, for violations of their own rights under international law, for example at the European Court of Human Rights in Strasbourg. But if this opportunity does not exist (and, despite emerging changes in the African Human Rights system, this opportunity still does not exist

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[135] S. Hobe / O Kimminich (op. cit.), pp. 153 et seq.

[136] On the fundamental nature of diplomatic protection in international relations cf. I. Brownlie (op. cit.), pp. 391 et seq. as well as the refernces given there; W. K. Geck, Diplomatic Protection, in: R. Bernhardt (ed.) – Encyclopedia of Public International Law, Volume I: Aalands Islands to Dumbarton Oaks Conference (1944) (1992), pp. 1045 et seq., at p. 1046. On the relatively small practical importance of international litigation for diplomatic protection cf. K. Hamilton / R. Langhorne – The Practice of Diplomacy – its evolution, theory and administration (1995), p. 238. Also P. R. Baehr – The Role of Human Rights in Foreign Policy, 2nd ed. (1996), pp. 31 et seq. does not mention diplomatic protection among potential policy instruments for human rights protection, cf. A. Hurrell – Power, principles and prudence: protecting human rights in a deeply divided world, in: Dunne, Tim; Wheeler, Nicholas J. (eds.) – Human Rights in Global Politics (1999), pp. 277 et seq., who also concentrats on human rights of local citizens abroad rather than rights of aliens abroad.

[137] German Federal Supreme Court, BGHZ Vol. 155, pp. 279 et seq., at pp. 291 et seq.

[138] International Court of Justice, United States v. Italy – Elettronica Sicula S.p.A. (ELSI), Judgment of 20 July 1989, ICJ Reports 1989, pp. 15 et seq., at pp. 42 et seq.

for the vast majority of people, in particular in Asia), diplomatic protection is still relevant today.[139]

The position of the individual (as well as the position of other non-state actors) in the matrix of PIL is shifting. Until the advent of international human rights law, individuals did not register within this matrix at all, they were at best mere beneficiaries. Today they are partial subjects of international law. But modern technology, in particular in the field of telecommunication, enables individuals to take a greater role in the creation of new rules of Public International Law, albeit often through the mediation of other actors. Unlike in the past, the state is no longer the only mediator but other actors, for example NGOs or TNCs, take an ever increasing role in this context. Two recent examples involve the Ottawa Convention which led to the Ban of Land Mines and the Rome Statute establishing the International Criminal Court, both of which profited greatly from the involvement of individuals and NGOs.

3. Conclusions

In a world in which actors, as we have seen, derive their influence from communication with other actors, this increased role of non-state actors is the logical consequence of the movement away from the state-centered, Westphalian, system of PIL. Modern technology and economic globalization only hasten this process and we are reminded that the state, the dominant actor in international law for the last 350 years, is only a collection of people, a human creation,[140] a fiction, a necessary abstraction. In the past, we have decided to organize ourselves in states[141] - big tribes, essentially. In a sense, the emergent international legal community is similar to the one described by Francisco de Vitoria around 500 years ago,[142] who saw a community which includes both states and individuals. Modern, communication-based PIL, actually goes a step further as to include groups of people which are organised

[139] German Federal Supreme Court, BGHZ Vol. 155, pp. 279 et seq., at pp. 291 et seq.

[140] J. Llompart – Proklamation der Volkssouveränität in den modernen Verfassungen, in: W. Krawietz / E. Garzón Valdés / A Squella (op. cit.), p. 143.

[141] P. Allott (op. cit.), p. 7.

[142] F. de Vitoria,– De indis, in: U Horst / H-G Justenhoven / J Stüben – Francisco de Vitoria – Vorlesungen II (Relectiones) – Völkerrecht – Politik – Kirche (1997), pp. 370 et seq.

in non-state organisations, for example NGOs or TNCs. This new PIL still observes the sovereign equality of states but gives a place for new actors, without putting them on an equal level with existing actors. But the latter is not absolutely necessary, since all actors gain their power from the ability to communicate. Therefore the right to be heard will become an ever more important aspect of PIL. In a world which is driven by communication, it is up to all actors to safeguard this elementary prerequisite of the new PIL.

The author has prepared and published the research article based on the presentation.
See: http://versita.metapress.com/content/1n5116824q014266/fulltext.pdf.

CONSENSUAL MEANS OF RESTORATIVE JUSTICE AS A SYMPTOM OF GLOBALIZATION OF LAW

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ATSTATOMOJO TEISINGUMO KONSENSO PASIEKIMO PRIEMONĖS KAIP TEISĖS GLOBALIZACIJOS POŽYMIS

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THE SUMMARY (THESES)

The process of globalization has a few faces. Globalization of law is one of them. It refers to harmonization and unification local legal rules into one global system of law. Such a system can be created in the way of enacting laws by an international organization or by consensus of the states. An alternative way of globalization of law is the parallel development in all parts of the globe.

Globalization of law is not evident in criminal law as in other fields of law. Generally, the state is not interested in giving up its power to punish. However, the ways of solving of penal conflicts without intervention of the state become more and more popular. Such practices base on consensus of victim and offender mainly. In that context the main aim of criminal justice evolves from philosophy of punishment towards philosophy of restoration. Restorative justice gains consistently recognition as a real alternative to retributive justice.

From among various restorative justice practices the most significant are victim-offender mediation, group conferencing, peacemaking, sentencing and community circles as well as community boards and panels. The most commonly used and examined form of restorative justice, especially in Europe, is victim-offender mediation. Group conferencing, although less popular, is in the strongest position in the legal systems of Anglo-Saxon countries. Peacemaking, sentencing and community circles and community boards still remain on the local level of some communities in North America.

The aim of this paper is an attempt to show the above-mentioned consensual means of restorative justice as a symptom of globalization of law.

THE STABILITY OF THE STATUTE: THE CONCEPT AND THE FACTORS OF ENSURING

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ĮSTATYMO STABILUMAS: SAMPRATA IR TAI UŽTIKRINANTYS POŽYMIAI

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THE SUMMARY (THESES)

There are two understandings of stability of law: first, as an invariability of law (an unchanging law is a stable law), and, secondly, as a stable approach of regulating public relations with the possibility of systematic and evolutional changes to legislation (a law can be changed, though remaining stable). To our opinion, the second concept of understanding the stability of law is more substantiated.

Stability of law may be defined as a sign of law, which characterizes its ability to be an adequate regulator of public relations for a long period time without any conceptual changes.

The purpose of stability of law is in forming and putting together system of legislation. Stability of law provides valuable implementation of law; in fact citizens have an opportunity to learn the when implementing their rights and duties for a long period of time. The prolonged implementation of law brings out its imperfect elements and gives an opportunity to prepare adequate and systematic changes to it.

The basis of stability of law is founded at its creation – during a legislative process. The basis for estimating the influence of any factors on the future law was the next replacement of legislation in its quantitative expression.

At the legislative stage out of all legal factors the most important for stability of law are applying the conceptual approach to legislation,

abidance of the rules of the legislative technique when creating a law, and a high legal level of Ukrainian people's deputies.

Intensification of the use of conceptions in a legislative process would substantially promote its quality and would contribute to passing stable laws.

The definition of the «conception of project of law» must be included in the Law of Ukraine «On normative acts» (or in the Law of Ukraine «On laws and legislative activity») and can be worded as following: «A conception of project of law is a system of theoretical principles, which contains the feasibility, reference structure and the principles of the future project of law, approved by all privies, and also the determinations of possibilities for implementing the law».

The expansion of the use of the conceptual approach in lawmaking may lay in:

- Introducing in the legislative process an additional substage of creating a bill, namely there is a creation and acceptance in form of a decision of Verkhovna Rada of Ukraine of the conception of the future law. Such substage would be optional and would be used mainly for development of projects of new laws, prioritized.

- Developing and passing the conceptions of work of the committees of Verkhovna Rada of Ukraine (during first-year of a new convocation), where the priorities of legislative policy, conceptual positions of basic bills (which must be developed and accepted in the concrete sphere of the legal adjusting according to the subject of each subcommittee), would be formulated. Such conceptions of work of Committees must be approved by the parliament in the form of a decision of Verkhovna Rada of Ukraine.

- Bringing in the Order of Verkhovna Rada of Ukraine: a) an additional requirement concerning the content of an explanatory note, in which it is necessary to specify the accordance of the bill to an existent conception of the bill; b) an additional requirement to the conclusion of the Main Scientific and Expert Administration of the apparatus of Verkhovna Rada of Ukraine, in which it is necessary to include an accordance of the project of law to the approved conception of work of the related Committee of parliament, and also a conception of law (if such is passed); c) an additional requirement to the conclusion of the main bill on agenda of the Committee of Verkhovna Rada of Ukraine

concerning the correspondence/disparity of a bill to a conception of work of the Committee.

The biggest impact on the stability of law plays the deviation of the lawmaking technique when making a law and making amendments to it.

The model of law and, accordingly, the basis of stability of law are formed by general norms: norms-basis, norms-principles, norms-aims, norms-definitions, competence norms, norms, which determine the basic principles of legal responsibility. The general norms will be more stable, than specified orders. Amending the general norms of law results in instability of legislation.

The dynamics of development of public relations can be taken into account through the complex approach to the changes to law, namely – through gradual development of new version of law, summarizing all of the suggestions, which were accepted during a certain period.

The analysis of legislation affirms that negative influence on stability of law make:

- extremes in detailizing the text of law when planning, namely: the surplus of details on the principles of law or even the presence of a big number of general norms;
- the use of blanket rules when planning the law. In fact they are meant for the stable legislation, when the amendments are rare, and mostly planned. In the other case the blanket rules lead to gaps and collisions in legislation;
- changes in legal definitions when realizing the norms of law.

The positive influence on stability of law can make the use of evaluative concepts in law: their presence requires an interpretation of sublaws and when realizing the law. The use of evaluative concepts (without extremes) protects the law from changes.

In order to create a stability of laws, the level of legal culture of people's deputies of Ukraine is important. Today the deputies do not feel the value of laws, in fact for the member of parliament a law is often only a material for work. In order to increase the level of legal culture of people's deputies corps it is necessary to set periodic special courses «System of law and the system of legislation of Ukraine», «The basis of lawmaking and its techniques», «Constitutional law of Ukraine. Theory of distribution of powers» and «The bases of parliamentary culture. The

Order of Verkhovna Rada of Ukraine. Ethics of people's deputies» for people's deputies and their consultants and assistants in order to give them a possibility to capture the basic legal knowledge, legal tools for legislative activity. These courses can be read by the consultants of Committees and other specialists of the apparatus of Verkhovna Rada of Ukraine, specialists of Institute of legislation of Verkhovna Rada of Ukraine. Such approach will increase the level of legal knowledge of people's deputies.

Taking into consideration all the found problems of the lawmaking process, we will make a conclusion, that in order to pass stable laws we need a stable legislative process in which a primary position would be taken by long-time strategic planning of legislative initiatives. The change of the composition of the parliament must only cause a change in approaches when determining the level of social protection of population, clarification (but not change) of foreign-policy course and priorities in the improvement of legislation. New composition of parliament must not require (and aim) a change of principles and models of the legal adjusting without the detailed scientific researches.

POLICING PUBLIC ORDER: NEW CHALLENGES IN LATVIA

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VIEŠOSIOS TVARKOS PRIEŽIŪRA: NAUJI IŠŠŪKIAI LATVIJAI

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THE PRESENTATION

The violence of the first half of the 20th Century has given way to a period of peace and stability unprecedented in European history. The creation of the European Union has been central to this development. It has transformed the relations between our states, and the lives of our citizens. European countries are committed to dealing peacefully with disputes and to co-operating through common institutions. Over this period, the progressive spread of the rule of law and democracy has seen authoritarian regimes change into secure, stable and dynamic democracies. Successive enlargements are making a reality of the vision of a united and peaceful continent.[143]

After the cold war period security consists of a number of elements and can be viewed from various aspects. 5 security threats can be singled out. Firstly, **military threat** that refers to external security. Secondly, **political threats** that are related to both internal and external security and include subversive or antidemocratic activities against state institutions, symbols and ideology. Thirdly, **social threats** created by cultural integration process of ethnic or other socially related groups. Fourthly, **economic threats** included threats caused by competition and unemployment. Fifthly, **ecological threats** that refer to both internal and external security, for instance, cross-border environmental pollution.[144]

[143] A Secure Europe in a Better World. European Security Strategy. Brussels, 12 December 2003, p. 2. http://ue.eu.int/uedocs/cmsUpload/78367.pdf

[144] Buzan B. 1991. People, States and Fear. An Agenda for International security Studies in the Post-Cold War Era. New York. Also. Anderson M., den Boer M., Gilmore W., Raab C. Walker N.1995. Policing the European Union. Oxford, p. 157-158.

In nowadays we recognise police as one of the state functions – **to maintain public order, detect, combat and prevent crimes, provide assistance and service functions to the inhabitants**. Police are traditional public police forces or police services, or to other publicly authorised and/or controlled bodies with the primary objectives of maintaining law and order in civil society, and who are empowered by the state to use force and/or special powers for these purposes.[145] Police concerns with flow of drugs across national state borders, illegal immigration and related concerns of border control, the criminal opportunities enabled by an ever-expanding arsenal of computer technologies, and, since September 11, more importantly than anything else, the patterns and dynamics of international terrorism.[146]

The Republic of Latvia joined European Union and Schengen acquis on 1 May 2004. New challenges for police are concerned with abolition of border control at internal borders as aresult.[147] Policing public order after renovation of independence of the Republic of Latvia till January 13, 2009 was successful and there were no serious riots. New challenges are concerned after riots in central part of Riga on January 13, 2009. Latvian former prime minister I. Godmanis said that it "is another Latvia" after the January 13 riots in Riga and that "other methods" would be used to quell violent protests. Godmanis hinted that further mass rallies in Riga's Old Town could be restricted or forbidden. Awareness of new challenges in policing public order in Latvia after this date is made.

The Department of Police Law and Special Tactics of the Police Academy of Latvia contributes research in field of policing public order. In the framework of European Police Academy (CEPOL) activities seminar for senior police officers of European Union countries on topic policing public order Riga on October 2006 occurred. One of aims of

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[145] The European Code of Police Ethics. Recommendation Rec(2001) 10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum. Strasbourg: Council of Europe Publishing, March 2002,

[146] Deflem M. Policing World Society. Historical Foundations of International Police Cooperation. Oxford: University Press, 2002, p.2-3.

[147] See Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code). Official Journal of the European Union, 13.4.2006, L 105/1.

this seminar was to provide assistance for Latvia in organizing NATO summit in Riga. The Police Academy of Latvia supported with research and summarizes practical recommendations for successful policing. Main conclusions are incorporated in study programme for senior police officers in the Police Academy of Latvia.

Main theoretical conclusions are following.

The primacy purpose of the police in a democratic society are to protect and respect the individual's fundamental rights and freedoms and to help and develop a society in which everybody can enjoy safety and freedom by maintaining law and order in society. Considering the values of democratic society the police must handle their duties in a rational and non-violent way in case of any potential conflict. The police are also empowered by state to use force and/or special powers for these purposes in a number of cases.

Thus police function contains contradictions: police has to protect democratic society by using force and duress in some specific cases, thus disregarding the basic values of this non-violent democracy. Thus the police face with a paradox: they have to protect the basic rights by restricting them. This paradox could be solved by using the police's coercion right in a very cautious way: legal aim, legal basis and social necessity and by always referring to the universal reference framework which will be shortly described henceforth.

The notions of public security and public order have some very important interactions. In other words it means that if there is kept social order then these activities helps to increase the level of public security and conversely if there are violations of public order than level of security decreases. The paradox of policing is such: police trying to restore violations of public order by force (legal activity) could provoke aggressiveness and future escalation of violations so more endangered public security.

Chapter VII of the State Constitution of the Republic of Latvia "Fundamental Human Rights" is in force from November 6, 1998 and consists of 27 articles in which practically all human rights from the European Convention for Protection of Human Rights and Fundamental Freedoms (in force from May 4, 1999) are included. Main legislation for policing public order in Latvia is:

1. Law "On Police" (in force from June 4, 1991 with 27 amendments).

2. Law on National Security Institutions (in force from May 19, 1994 with 15 amendments).

3. State Border Law of the Republic of Latvia (in force from November 24, 1994 with 10 amendments).

4. Law "On Meetings, Processions and Pickets" (in force from February 13, 1997 with 6 15 amendments).

5. National Security Law (in force from January 12, 2001 with 17 amendments).

6. Public Entertainment and Celebratory Events Security Law (in force from July 20, 2005 with 2 amendments).

7. Judgment of Constitutional Court of the Republic of Latvia November 11, 2006 on Law "On Meetings, Processions and Pickets".

Development of legislation for policing public order is going on. New State Border Law of the Republic of Latvia concerted with Schengen Border Code is in preparation. Process for finding best legal solution for maintaining state security in context with legal status of organizers and permissions for public events (meetings, processions, pickets, public entertainments and celebratory) is going on non-stop. Research on community policing implementation aspects in Latvia and development of education of society in contemporary methods of policing public order continues. Study course "Police law" is incorporated in Academic Bachelor study programme Legal Science in the Police Academy of Latvia.

In context with global economical crisis in 2009 there will be realised optimisation of state governance in Latvia and most of aspects of public order policing will be evaluated. The role of self governments and other law enforcement institutions will be examined.

Conclusions

1. Legislation for policing public order is non-stop changing in connection with different practical aspects of policing. Main debatable question is on legality of different restrictions with relation of them to public order and security. It looks impossible to have strict answer on

question is current legislation optimal. Disputable is justification of issuing of permissions for organizing public events and limits of appeal in administrative court in case of refusal.

2. Examination of effectiveness of policing and activities of other law enforcement institutions in field of cross border cooperation after joining Schengen acquis must be made. Finding of new different kinds of more effective and less repressive policing methods is important. Possible appearance of foreign hooligans and protesters for participation in public events must be evaluated more deeply.

3. The Police Academy of Latvia continues research in field of policing public order and develops study programmes for police and border guard senior officers. Education about contemporary democratic methods of policing public order in all higher education establishments is advisable.

INTERSECTION BETWEEN CRIMINAL AND ADMINISTRATIVE LIABILITY OF A LEGAL ENTITY FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SUSTAINABLE DEVELOPMENT

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BAUDŽIAMOSIOS IR ADMINISTRACINĖS ATSAKOMYBĖS ATRIBOJIMAS JURIDINIAM ASMENIUI UŽ APLINKOSAUGOS PAŽEIDIMUS DARNAUS VYSTYMOSI KONTEKSTE

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THE SUMMARY (THESES)

Industrial and other economic activity makes a big influence on environment and quite often such activity determines appearance of harm to nature. The legal entities the major activity aim of which is to seek profit become one of the principal sources of threat to environment. Legal entities striving towards organization activity aims use their economic, political and other social powers, so they are able to make a great negative or positive impact on the life of man, society and state. These objective causes determine the demand of effective legal regulation and environment protection and striving towards ensuring the coordination of economic, social and environmental interests, i.e. realization of sustainable development aims becomes the priority direction of every state.

The implementation of sustainable development the essence of which are mutual harmony and compromise of three equal value environmental, economical and social society aims creates prerequisites not to let to entrench the primacy of economic aim in respect to other

aims by the same not making absolute the environment and creating conditions for coexistence of aims of equal value. Insufficiently effective implementation of sustainable development aims creates legal ecological safety threat which encroaches both to the fundamental principle of legal safety able to ruin the basis of a legal state.

One of the measures able to ensure the implementation of sustainable development aims is the institute of legal entities legal liability in the environmental sphere and its effective application.

In Lithuania three sorts of legal liability to legal entities could be applied – civil, criminal and administrative liability. But civil liability of legal entities in the environmental sphere is not the most effective legal liability sort aiming to implement aims of sustainable development. Aiming to ensure legal entities environmental law violations prevention civil liability institute must be applied together with public liability, i.e. criminal and administrative liability institutes the major destination of which is the prevention of environmental law violations.

In the first view, the criminal liability institute of legal entities in the environmental sphere due to its strict character and hard consequences may seem to be ineffective aiming to keep the combinability of three different and contradicting each other aims.

In the event of calling a legal entity for environmental crimes to criminal liability or consolidating by legal acts very strict criminal sanctions threat for economic and social aims appears, i.e. prerequisites for environmental aims to blanket two aims of society of equal value are created. Criminal liability of legal entities would be effective in the context of sustainable development only if criminal sanctions applied to legal entities will keep the balance between three different and contradicting each other aims.

Potentially most effective legal liability sort in the environmental sphere evaluating from the prospect of implementation of sustainable development aims is legal entities administrative liability in the environmental sphere, however, legal entities administrative liability in the environmental sphere will be an effective measure striving towards sustainable development aims if the institute of administrative liability is not equaled to only application of administrative sanctions. In the context of implementation of sustainable development aims administrative liability in the environmental sphere must become both

state enforcement application mechanism and a measure combining economic, social and environmental society aims.

However in order to answer the question if administrative or criminal liability should be applied to legal entities for offences against environment we should look to the nature and purposes of administrative and criminal law, because both branches of law try to solve social problems existing in a society while applying sanctions.

So in answering the question to which liability – criminal or administrative legislator should render priority protecting environment from illegal actions of juridical persons we need first of all to analyze the object of environmental law and environment protection law, whether vital legal values are going to be infringed.

The authors have prepared and published the research article based on the presentation.
See: http://versita.metapress.com/content/38897237w1250014/fulltext.pdf.

THE PROBLEMIC ASPECTS OF THE CRIMINAL LIABILITY AND THE CRIMINAL LEGAL ESTIMATION IN THE CONTEXT OF GLOBALIZATION

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BAUDŽIAMOSIOS ATSAKOMYBĖS BEI BAUDŽIAMOJO TEISINIO VERTINIMO PROBLEMINIAI ASPEKTAI GLOBALIZACIJOS KONTEKSTE

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THE SUMMARY (THESES)

While the trends of globalization are of considerable importance worldwide, the analysis of criminal legal impact on them is not yet widely discussed. The globalization, as the process of maximizing profits and operating businesses is crucial in modern economy. The trends of economy are determined by logic of growth and profits. In a time of worldwide globalization legal regulations are not necessary in tact with dominating trends.

Lithuanian lawmaker is trying to create legal mechanisms on the basis of existing data and current social circumstances. The forecasting of future social circumstances does not necessarily lead to proper legal regulations. As Lithuanian experience shows, implementing of criminal responsibility of legal persons does not lead to a substantial change in criminal investigations or criminal statistics. Such responsibility even though much advocated by international agreements and institutions does not play major role in evaluating criminal behavior. Another considerable drawback of legal evaluation is to be related to narrow and formal approach to the legal processes which should be changed in favor of wider and more up to date case law approach. The standards of relative ethics also play negative role for proper legal establishment.

The presentation addresses problems related to legal evaluation of criminal side of processes of globalization and presents the point of

view on three problematic areas: the responsibility of legal persons and entities, the acting person as a special offender of criminal act and confiscation of property obtained from criminal transactions.

From the pint of view of the author, the norms and regulations of Criminal Code of Lithuania should be considered modern and up to date as they provide for detailed listing of those all specific spheres. Nonetheless the reality is rather static. The regulations of law are sometimes considered as too modern and too inoperable as there are no practical or theoretical basis form such implementation.

Criminal evaluation of acts thus should be considered in wider social scope with the emphasis on the future.

FIGHTING ORGANIZED CRIME AND RIGHT TO FAIR TRIAL UNDER THE ARTICLE 6 PART 1 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

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KOVA SU ORGANIZUOTU NUSIKALSTAMUMU IR TEISĖ Į TEISINGĄ TEISMĄ PAGAL EUROPOS ŽMOGAUS TEISIŲ KONVENCIJOS 6 STRAIPSNIO 1 DALĮ

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THE SUMMARY (THESES)

Today the organised crime does not limit within one country's boundaries. Thus, in order to fight it, the use of special investigative methods that would be the most effective, is inevitably used. On one hand, by the use of such special investigative methods it is aimed to protect the rights and fundamental freedoms of persons and secure society. However, on the other hand, the use of such investigative methods may violate the rights of persons with regard to whom such methods are applied. In the context of different international organisations such as the Council of Europe, United Nations, European Union a number of conventions are adopted that allow special investigative methods, including undercover agents, wiretapping, interception of telecommunications and access to computer systems and etc. that would facilitate to gather evidence in such sphere. It should be noticed, though, that all the members of the Council of Europe are the member states of the Convention for the Protection of Human Rights and Fundamentals Freedoms that must obey and fulfil the obligations under this international document, i.e. protecting one of the most important conventional right – the right to a fair trial established in Article 6 of the above-mentioned Convention. As the case-law of the European Court on Human Rights proves the right to a fair trial is very often violated when the undercover agents are used. It should be noticed that the use of special investigative methods

cannot in itself violate the right to a fair trial under this Convention, however when applying the undercover agents there always remains risk that persons with respect to whom such undercover agents are used will be incited to commit criminal acts. Thus their use must always have clear limits and in no way it cannot violate the rights of the person with regard to whom undercover agents were used. The case-law of the European Court on Human Rights proves that the most problematic issues with regard to the use of undercover agents are the following: the limits of undercover agents' activity, the use of evidence obtained using undercover agents and the protection of the principles of equality of arms and adversarial process. Therefore today, on one hand the member-states of Council of Europe must be especially careful when using undercover agents; on the other hand, the developing standards of the European Court on Human Rights in this field prove that it becomes more complicated to apply such secret investigative technique in order to fight all types of criminal offences, from the most straightforward to the most complex – organised crime.

The author has prepared and published the research article based on the presentation.
See: http://www.mruni.eu/lt/mokslo_darbai/jurisprudencija/archyvas/dwn.php?id=213050.

THE ISSUES OF THE SUFFICIENCY OF DATA IN THE PRE-ADJUDICATORY INVESTIGATION IN THE CONTEXT OF GLOBALIZATION

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DUOMENŲ PAKANKAMUMO IKITEISMINIAME TYRIME PROBLEMOS GLOBALIZACIJOS KONTEKSTE

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THE SUMMARY (THESES)

The term "globalisation" came on the scene in the seventh decade of the last century and nowadays is broadly used. Although scientists are still at variance regarding the conception of globalisation; but if to analyse the term itself **linguistically**, it should be defined as the whole of the universal processes, which include various social phenomena – starting with technological processes and concluding with the rules of law.

When people expand their relations, the principles of law, provisions constantly migrate from one legal system into another, from one country into another. Consolidated version of the Treaty establishing the European Community, dated 24 December 2004, Directive 2007/64 of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market could serve as the examples of the influence of globalisation on rules of law and legal terminology.

New threats such as cyber crimes, terrorism, and organised crime came along with globalisation. While conducting the investigation of the mentioned crimes, the majority of data are received while applying the pre-trial investigation acts of non-public character and using the data which were received while conducting methods and acts of intelligence services.

Many countries signed, ratified conventions accepted on the international level of the United Nations Organisation, European Union and incorporated them into their national legal systems. For example, Articles 39-41 of the Convention implementing the Schengen Agreement regulate the surveillance of a person who is caught while committing or participating in the commitment of criminal acts enumerated in Article 41 part 4 of this Convention in the territory of another country. The decision regarding the surveillance of a person is taken by officers of pre-trial investigation, who sum up the information they have and make a decision. However the question arises: What amount of information (data) is sufficient in order to take procedural decisions, which may alter person's procedural status, make invasions into one's private life? The information does not appear out of nowhere. It should be found out from information carriers or otherwise called sources of information. Each criminal act leaves traces in the surroundings, e.g. the person saw the criminal act. However, it is possible that during the pre-trial investigation a person may not provide information for various reasons or provide knowingly misleading information. In order to solve the issue regarding the performance of the procedural act or appliance of the procedural coercive measure, an officer of the pre-trial investigation, Prosecutor, Judge of pre-trial investigation should have a certain amount of information, named data sufficiency. However, legislation of criminal procedure does not answer the question considering the sufficient amount of data.

THE ANALYSIS OF THE CONTENT OF THE EFFICIENCY OF POLICING

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POLICIJOS EFEKTYVUMO TURINIO ANALIZĖ

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THE SUMMARY (THESES)

The police in the world is one of the oldest institutions, its importance has always been and still is of a vital significance both for the society as a whole and for all political regimes without exception. First of all is defined by the social and political significance of its extensive immediate law enforcement functions to ensure the established legal order.

Theoretical and organizing legal models of the police functioning undergo a continuous evolution, moreover, the relevant processes are intensifying.

But viewpoints as to the police tasks and organization are various depending on national peculiarities and problems to be settled by a specific state at a definite period of time.

Just these peculiarities have been and are predominating in every nation's choice of one or other political regime, so also in choosing the organizing legal principle for the police work.

The dependence of the police from a specific political regime they are serving as 'a force guarantor' when the regime is changed leads to sweeping reforms of its legal basis, staff, organizing models, work strategy and tactics.

State sanctioned application of enforcement is the basic hallmark of the police determining the police place and role in the executive institutions system.

In addition, the significance of the police activity and its role constantly increases during the difficult political, economical and

criminal situation. Especially when the establishment seeks to settle the existing problems in a radical way. It is not an accidental coincidence that the police becomes the main instrument for retention of power in authoritarian and totalitarian states where a violent radicalism is deemed to be the optimal means to prevent obstacles in the implementation of official domestic policy doctrines.

In such circumstances the police turns into a strong politicized, militarized, centralized apparatus with very extensive powers oriented to perform many – sized control over the society and criminals. The police is rather successful in performing these tasks.

Principal features of the police organization and work, developmental tendences in totalitarian regims (and in a slightly 'mitigatory way in authotarian regimes) are universal on its merits. If we treat history as a permanent opposition of two ideas – democracy and authoritarianism it is impossible to maintain that the research of organizing and legal principles of police activities in authoritarian states has a theoretical importance only.

Considering the issue of the activities of the police institutions in contemporary democratic states it may be concluded that the results of the police work are not very impressive, e.g., a rather law level of crime detection and inability for an effective neutralization of mafia activities, especially in the field of economy, purports it.

But, nonetheless that have chosen democracy believe that such a situation is admissible; a high police social rating is indicative of it. It is based on the attachment to democrative values deep – rooted in the society's consciousness, trust in the state and its institutes, conviction that the police will take maximum efforts in the existing situation, and at the same time the society disapproves the methods characteristic for authoritarianism and used to take away stress created by the criminal situation because it is inevitably related to serious and mass abridgements of person's rights and freedoms.

It should be stressed that the police social rating is the most objective criterion establishing the efficiency of police activities; this is to be taken into consideration when choosing a state which experience may be interesting in the perfection process for organizing a legal basis of the work of police institutions. However, the before mentioned factors that

affect the public assessment of the police performance of its functions must be taken into account.

It is typical developed countries that they have national and regional programmes for the police activity encompassing juridical, organizing, administrative and other interconnected measures with programmes having a sufficient financial support. Creative use of these problems can be very perspective. But is may be just prospects because relevant programmes function where social economic and political conditions are rather stable and there vast financial opportunities for their implementation.

The aforesaid must be called back to one's mind during the theoretical and practical analysis of any experience elements of the police work in democratic countries and must be considered when developing recommendations for their practical application.

As to the findings it may be concluded that the principal objectives of the police in a democratic and legal society are the following:

- to maintain the public order and peace, the rule of law in a society;
- to protect and observe person's fundamental rights and freedoms, especially those provided for in the European Convention on Human Rights and fundamental freedoms;
- to prevent and combat crime;
- to render help and to serve the public.

One of the most important police aims ensuring a democratic order in the state. Chief characteristic marks for guar- anteeing a democratic order:

- the police forces must observe the rule of law and they must act according to the professional Code of Ethics;
- when ensuring a democratic order and an effective public protection an observance of human rights must be secured – simultaneously;
- the police responsibility must be transparent, ensured by internal and external control mechanisms.

Securing of a democratic order is a vertical process ("from above downwards") responding to the needs and concern of certain persons and community groups and looking for a society's confidence, consent and support. Thus it is based on transparency and a dialogue. For this purpose in a number of states the police is decentralized in order to respond to legal needs adequately and rapidly.

Development of a new police organizing legal model must be commenced by:

- legal regulation improvement of the police area of responsibility, e.g. specifying police objectives, tasks and functions;
- consolidating police powers by legal standards, their implementation mechanism, as well as organizing cooperation for settling their tasks;
- optimal link of imperative mandatory an prohibiting rules of the police organization and activity in a legal regulation with dispositive legal provisions encompassing positive and stimulating guidelines.

REFORMING MODERN PRE-JUDICIAL CRIMINAL MANUFACTURE OF LATVIA: CALLS AND OPPORTUNITIES

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ŠIUOLAIKINIO IKITEISMINIO TYRIMO REFORMA LATVIJOJE: IŠŠŪKIAI IR GALIMYBĖS

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THE SUMMARY (THESES)

The issues on reformation of pre-trial proceeding, including investigation, quite often become a matter of argument to scientists and experts of criminal proceeding. The aim of this research paper is to represent reformation of pre-trial proceeding, in particular – investigation in criminal proceeding of Latvia since the beginning of 90-ies until now, and to emphasize the problems, which are most relevant according to the author.

The current Criminal-Proceeding Law of Latvia (hereinafter referred to as the CPL) clearly stipulates partition of pre-trial proceeding into two integral parts: investigation and criminal prosecution. Furthermore, there is detached a separate stage, which precedes the investigation in the pre-trial process – the beginning of criminal proceeding. Moreover, the Law comprises such a concept like «**the beginning of investigation**», however its content is still unclear. The author concludes that the CPL mixes up the two concepts «the beginning of investigation» and «the beginning of criminal proceeding». The beginning of a criminal proceeding is juridical consequence of stating the cause and the ground to begin a criminal proceeding. In its turn, the beginning of investigation means the beginning of procedural activity by a competent institution (investigatory institution, prosecutor) on finding out the event of a criminal act and immediate formalizing its signs. The author believes, that such an activity stipulates so that authorized persons of the investigative authorities would fulfill or participate in emergency procedural actions,

including emergency investigatory actions, as well as activity of the involved into a criminal proceeding persons, who are participating in these actions at the initial stage of investigation, i.e. from the moment of reception of information on a criminal act from the investigatory institution. This interpretation of the beginning of investigation releases from necessity of existence (and discussions on this regard) of a separate stage of criminal proceeding – the beginning of criminal proceeding. In the process of reformation of pre-trial proceeding there is a threat of establishing of static ineffective investigational bodies, a threat of ensuring the rights of the participants of pre-trial procedure (especially in streamlined procedures), as well a threat of quality of its proceeding. However reconsideration of the existent order of pre-trial proceeding in Latvia (what concerns the beginning of investigation) would allow to form understanding and to raise qualification of legal practitioners – investigators, prosecutors, officers of investigative authorities, as well activate application of streamlined procedures, what would positively influence the effectiveness of investigation in general.

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