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Rīgas Stradiņa universitāte

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## Cienījamie žurnāla "Socrates" lasītāji!

Kopš 2022. gada 24. februāra mēs dzīvojam kara apstākļos. Krievijas Federācija izrāda agresiju pret savu kaimiņvalsti – Ukrainu. Drošības situācija Ukrainā strauji pasliktinājās pēc Krievijas Federācijas militārās ofensīvas uzsākšanas vismaz astoņos apgabalos (reģionos), tostarp Kijivas apgabalā un galvaspilsētā Kijivā un Doņeckas un Luhanskas austrumu apgabalos, kurus konflikts jau bija skāris iepriekš. 2022. gada 24. februārī Eiropas Starptautisko tiesību biedrības valde un tās prezidents publicēja paziņojumu par Krievijas agresiju pret Ukrainu, kurā tika norādīts, ka "Krievijas Federācija kā valsts ir pilnībā atbildīga par šo agresīvo darbību pret savu kaimiņu. Prezidenta Putina lēmums karot pret suverēnu, neatkarīgu Ukrainu ir krimināli nosodāms".

2022. gada 2. martā ANO Ģenerālā asambleja ar pārliecinošu balsu vairākumu pieņēma rezolūciju par prasību Krievijai nekavējoties izbeigt militārās operācijas Ukrainā. Šajā sanāksmē 141 valsts nobalsoja par rezolūciju, kas atkārtoti apstiprina Ukrainas suverenitāti, neatkarību un teritoriālo integritāti. Tikai piecas valstis – Baltkrievija, Korejas Tautas Demokrātiskā Republika (plašāk pazīstama kā Ziemeļkoreja), Eritreja, Krievija un Sīrija – balsoja pret, bet 35 citas valstis atturējās. Rezolūcija pieprasa, lai Krievija "nekavējoties, pilnībā un bez nosacījumiem izved visus savus militāros spēkus no Ukrainas teritorijas tās starptautiski atzītajās robežās".

Rīgas Stradiņa universitātes Juridiskā fakultāte pauž stingru nosodījumu Krievijas agresīvajam karam pret Ukrainu. Akadēmiskā sektora pārstāvji nevar klusēt, kad tiek iznīcināta starptautiskā, uz noteikumiem balstītā kārtība; tiem jārunā, lai uzvarētu patiesība.

Rīgas Stradiņa universitātes Juridiskā fakultāte ir solidāra pret vardarbību, ar kuru saskaras mūsu Ukrainas kolēģi un Ukrainas civiliedzīvotāji. Tā aicina Krievijas kolēģus runāt patiesību un iestāties pret acīmredzamo starptautisko tiesību pārkāpumu.

Profesors Jānis Grasis,
Rīgas Stradiņa universitātes
Juridiskās fakultātes dekāns

**Dear readers of the journal "Socrates",**

since February 24, 2022, we have been living in war-like circumstances. The Russian Federation has displayed aggression against its neighbouring country – Ukraine. The security situation in Ukraine deteriorated rapidly following the launch of the Russian Federation military offensive in at least eight oblasts (regions), including Kyivska oblast and the capital city of Kyiv, and the eastern oblasts Donetsk and Luhansk which had been already affected by the conflict. Already on February 24, 2022, the President and the Board of European Society of International Law published the statement on the Russian Aggression against Ukraine, where it was indicated that "The Russian Federation, as a State, is squarely responsible for this act of aggression against its neighbour. The decision of the President Putin to wage war on a sovereign, independent Ukraine is criminalistic".

The UN General Assembly overwhelmingly adopted a resolution on demanding that Russia immediately ends its military operations in Ukraine on March 2, 2022. In this meeting, 141 countries voted in favour of the resolution, which reaffirms Ukrainian sovereignty, independence, and territorial integrity. Only five countries – Belarus, the Democratic People's Republic of Korea (more commonly known as North Korea) Eritrea, Russia, and Syria – voted against it, while 35 other countries abstained. The resolution demands that Russia "immediately, completely and unconditionally withdraws all of its military forces from the territory of Ukraine within its internationally recognised borders."

Faculty of Law of Rīga Stradiņš University in strongest terms expresses the condemnation of Russia's aggressive war against Ukraine. Academia cannot remain silent when international rule-based order is being destroyed and should speak the truth to power.

Faculty of Law of Rīga Stradiņš University stands in solidarity against the violence they face with our Ukrainian colleagues and the people of Ukraine. The Faculty of Law also calls on our Russian colleagues to speak truth to power and speak out against the manifest breach of international law that is taking place.

Professor Jānis Grasis,
Dean of the Faculty of Law,
Rīga Stradiņš University

# Saturs / Contents

# Priekšvārds

*Covid-19* pandēmijas apstākļi zinātnisko un pētniecisko darbu intensivitāti nav mazinājuši. Ir pat izveidojies jauns izziņas virziens, kurš ir saistīts ar pandēmijas izplatības un to seku sociāli tiesisko izvērtējumu. *Covid-19* ir izveidojis dabiska eksperimenta areālu, kura izpēte turpināsies vēl ilgstoši. Lasītāju vērtējumam tiek piedāvāts kārtējais *Socrates* izdevums. Dažādu problēmu analīzei krājumā ir ietverti sešu valstu pētnieku darbi, kas atspoguļo elektroniskā juridiskā žurnāla internacionalizāciju.

Pašreizējai situācijai īpaši aktuālu problēmas analīzi ir veicis Somijas tiesību zinātņu doktors **Vladimirs Jilkins**. Autors skata grozījumus, tai skaitā Somijas Infekcijas slimību likumā, kuri ir virzīti uz pacientu un citu personu veselības un dzīvības aizsardzību. Nozīmīga ir *Covid-19* vīrusa, t. sk. omikrona paveida, izplatības tendences un nepieciešamo izmaiņu veikšana virknē Somijas tiesisko aktu, to atbilstība cilvēku pamattiesībām, kuras ir noteiktas Konstitūcijā un starptautiskajā normatīvajā regulējumā.

Lasītāju uzmanību var saistīt raksti, kas veltīti specifiskam un nozīmīgam problēmu lokam – medicīnas tiesībām. Piemēram, tiesību zinātņu doktore **Līga Mazure** (Latvija) analizē pacientu pienākumu izpildes principu ārstniecībā. Autore ir skatījusi dažādas minētā principa piemērošanas kritērija interpretācijas, kas izraisa neskaidrības un diskusijas. Uzmanības vērti ir rakstā izvirzītie priekšlikumi normatīvā regulējuma pilnveidošanai. Zināmā mērā līdzīga rakstura tēmai ir veltīts *Ph.D.* grāda pretendenta (Aberdīna, Skotija) **Anatolija A. Ļitviņenko** un tiesību zinātņu doktores **Tatjanas I. Jurkevičas** (Latvija) raksts par ārsta un pacienta attiecībām ārstniecības pakalpojumu kontekstā. Autori atzīst, ka mūsdienās civiltiesību kontekstā attiecības starp pacientu un ārstu vai slimnīcu ir balstītas uz līgumu par medicīniskajiem pakalpojumiem. Rakstā tiek pievērsta uzmanība līguma slēgšanas iespējamajiem nosacījumiem, tai skaitā pacientu informētajai piekrišanai kā daļai no līguma satura.

Veselības aprūpes jomā atbilstoši ES Regulai 2017/745 (MDR) tiek ieviestas medicīnas ierīces (SaMD). Atsevišķu minētās jomas aspektu izpētei ir veltīts **Līgas Svempes** (Lavija) raksts. Autore pamatoti atzīst, ka izteikti palielinās medicīnisko ierīču skaits un stingrāki kļūst sertifikācijas noteikumi. Rakstā tiek secināts, ka jauno prasību īstenošana nosaka nepieciešamību palielināt finansiālos un citus resursus jauno inovatīvo tehnoloģiju ieviešanai. Īpaša nozīme ir mākslīgā intelekta tehnoloģiju ieviešanai, kas var radīt paaugstinātus riskus. Loģisks ir pētnieces secinājums par to, ka normatīvā regulējuma izstrādei jāatbilst, jāseko tehnoloģiju attīstībai, lai netiktu apdraudēta pacientu drošība.

Šajā *Socrates* izdevumā vairāki raksti ir veltīti izmeklēšanas un tiesu ekspertīžu tematikai. Tiesību zinātņu doktore **Ērika Krutova** (Latvija) sniedz ieskatu personu meklēšanas kārtībā, analizējot tiesiskā regulējuma pamatojumu meklēšanas uzsākšanai valsts līmenī un aprakstot nosacījumus personu meklēšanai ārpus Latvijas robežām. Autore atzīst, ka nacionālās tiesību normas, kas reglamentē meklēšanas darbības, būtu jāuzlabo, lai veicinātu efektīvāku sadarbību valsts un starptautiskā līmenī. Savukārt tiesību zinātnieks, *Ph.D.* grāda pretendents **Oļegs Kurdess** no M. S. Bokariusa Kriminālistikas institūta (Ukraina) skata tiesu medicīnas ekspertu profesionālās apmācības juridiskā atbalsta uzlabošanas pasākumus Ukrainā. Autors analizē Ukrainā spēkā esošos noteikumus par Centrālo ekspertu kvalifikācijas komisiju, kas nosaka tiesu ekspertu profesionālās apmācības veikšanas kārtību un tiesu ekspertu sertifikāciju. Viņš atzīst par nepieciešamu izstrādāt un pieņemt atsevišķu tiesisko regulējumu, kurš reglamentētu visu tiesu ekspertu profesionālās sagatavošanas procesu. Tiesību zinātņu doktori **Silvija Kaugia** (Igaunija) un **Lembit Auväärt** (Igaunija) ir analizējuši tiesu psiholoģijas ekspertīžu tiesisko regulējumu un tiesu praksi Igaunijā, kas ir saistīta ar fizioloģiskās ietekmes izziņu. Tiek atzīts, ka Igaunijā ir pietiekama teorētiskā bāze tiesu psiholoģisko ekspertīžu (tai skaitā fizioloģiska afekta) veikšanai. Tomēr dažādu iemeslu dēļ praksē tās netiek pietiekami bieži izmantotas.

No cilvēktiesību īstenošanas aspekta interesants ir Azerbaidžānas tiesību zinātņu doktora, Baku Valsts universitātes asociētā profesora **Dashqina Ganberova** raksts par pilsoniskas sabiedrības veidošanos biedrošanās tiesību īstenošanas kontekstā. Neapšaubāmi, ka jebkuram cilvēkam ir tiesības uz miermīlīgu pulcēšanās un biedrošanās brīvību. Autors ir pievērsies cilvēku biedrošanās un apvienošanās tiesību īstenošanas modeļa analīzei Azerbaidžānas Republikā.

Gan kopējā tiesību sistēmā, gan cilvēktiesību aspektā aizvien nozīmīgākas kļūst militārās tiesības. Tiesību zinātņu doktore **Vita Upeniece** (Latvija) savā rakstā analizē problēmu, kas praktiski nav pētīta – par tiesībām atteikties no militārā dienesta pārliecības dēļ. Kopš 2007. gada atteikšanās no militārā dienesta pārliecības dēļ Latvijā nacionālajos normatīvajos aktos nav tieši reglamentēta. 2021. gadā Latvijas Republikas Augstākā tiesa skatīja lietu par atteikšanos pildīt dienestu Nacionālo bruņoto spēku rezervē, pamatojoties uz personas pacifistisko pārliecību. Tiesvedības process atklāja tādu juridisko instrumentu trūkumu Latvijas militārā dienesta noteikumos, kas nodrošinātu indivīdu cilvēktiesību ievērošanu, un šo trūkumu novēršanas nepieciešamību.

Tiesību zinātņu doktora grāda pretendente **Žaklīna Ieviņa** (Latvija) savā rakstā analizē problēmu, kas ir saistīta ar Eiropas Savienības Vispārīgajā datu aizsardzības regulā ietverto jautājumu par pienākumu dzēst personas datus vai tos anonimizēt. Autore aplūko, kā regulā noteikta terminu "dzēšana" un "anonimizācija" izpratne un kādas prasības tiek izvirzītas, lietojot tos personas datu plašā tvērumā. Rakstā tiek skatīts aspekts par to, vai lielajiem datu apstrādātājiem varētu atļaut paturēt datus, kas tiem faktiski būtu jādzēš, vai turpmāk tos varētu izmantot anonimizētā veidā lielo datu analīzes vai mākslīgā intelekta lietojumprogrammās.

Saimnieciskās darbības attīstības kontekstā liela nozīme ir kapitālsabiedrībām, kuras cenšas nodrošināt finansiālo labumu to dalībniekiem. Kapitālsabiedrību valdes un to locekļi nedrīkst rīkoties pretēji sabiedrības interesēm. Tiesību zinātņu doktora grāda pretendents **Andrejs Ņikiforovs** (Latvija) savā rakstā ir pieskāries kapitālsabiedrību valdes locekļu darbībai atbilstoši Latvijas Komerclikuma 169. pantā ietvertajam krietna un rūpīga saimnieka standartam. Tas sabiedrības dalībniekiem nosaka paplašinātu tiesisko aizsardzību no iespējamas ļaunprātīgas valdes locekļu darbības, uzliekot pēdējiem par pienākumu darboties vienīgi sabiedrības interesēs. Rakstā pamatoti tiek secināts, ka valdes locekļiem ir pienākums būt akurātiem sabiedrības lietās, izslēdzot subjektīvo faktoru ietekmi uz lēmuma pieņemšanu.

Praktiski Latvijā nepētītas, bet tajā pašā laikā aktuālas problēmas analīzei ir pievērsies doktora zinātniskā grāda pretendents **Jānis Joksts**. Reiderisms un ar to saistītie teorētiskie un praktiskie aspekti mūsdienu sociāli ekonomiskajā vidē kļūst aizvien nozīmīgāki. Autors savā rakstā pamatoti cenšas iezīmēt kritērijus reiderisma gadījumu identificēšanā, analizē biežāk sastopamās tā izpausmes veidus, apskata tiesību aktus minētajā jomā. Atzinīgi ir jāvērtē tas, ka reiderisms kā nelabvēlīga sociāli tiesiska parādība tiek skatīta no dažādu tiesību apakšnozaru skatupunkta. Metodiski nozīmīga ir labāko iespējamo komersantu darbības tipu izvērtēšana, lai izvairītos no reideru uzbrukumiem.

Elektroniskajā juridiskajā žurnālā *Socrates* ir iekļauti raksti no dažādām tiesību zinātnes apakšnozarēm un jomām. Publikācijām ir starpdisciplinārs un internacionāls raksturs. Pozitīvi vērtējams ir tas, ka izdevumā ir iekļauti arī tiesību zinātnes doktora grāda pretendentu izsvērti un aprobēti pētnieciskā darba rezultāti, zinātniskās publikācijas. Raksti ir izstrādāti galvenokārt angļu valodā, kas dod iespējas ar to saturu iepazīties plašam lasītāju lokam visā pasaulē. Mēs ceram, ka krājumā ietverto autoru paustie viedokļi raisīs tālākas zinātniskās diskusijas.

Profesors Andrejs Vilks,
Rīgas Stradiņa universitātes
Juridiskās fakultātes prodekāns

# Foreword

Circumstances of the COVID-19 pandemic have not reduced the intensity of scientific and research work. Even, a new direction of cognition has emerged, which is related to the socio-legal assessment of the spread of the pandemic and its consequences. COVID-19 has created a natural experimental area that will continue to be explored for a long time. Yet another edition of *Socrates* is offered to its readers. To analyse the various problems, the collection includes works by researchers from six different countries, thus reflecting the international scope of the electronic legal journal.

**Vladimir Jilkine**, a Finnish Doctor of Law, has conducted a particularly relevant analysis of the problem for the current situation. The author is considering amendments to the Finnish Infectious Diseases Act, which are aimed at protecting health and lives of patients and other people. The necessary changes of the COVID-19 virus prevalence trends, including omicron type, are important in various Finnish legal acts, as are their compliance with fundamental human rights, which are enshrined in the Constitution and international legal framework.

The readers' attention can be drawn to articles devoted to a specific and important range of issues in the Medical Treatment Law. For example, the Doctor of Law **Līga Mazure** (Latvia) studies the principle of fulfilling patients' responsibilities in medical treatment. The author has looked at different interpretations of the criteria for applying this principle, which frequently causes confusion and discussion. The proposals for improving the regulatory framework put forward in the article are noteworthy. A somewhat similar topic has been addressed by **Anatoliy A. Lytvynenko**, a *Ph.D.* candidate in Aberdeen (Scotland), and the Doctor of Law **Tatjana I. Jurkeviča** (Latvia) in their article on the doctor-patient relationship in the context of medical services. The authors acknowledge that in the context of the Civil Law today, the relationship between a patient and a doctor or hospital is based on a contract for medical services. The article draws attention to the possible conditions for concluding a contract, including the informed consent of patients as part of the content of the contract.

In the field of healthcare, medical devices (SaMD) are being introduced in accordance with the EU Regulation 2017/745 (MDR). An article by **Līga Svempe** (Lavia) is devoted to the study of certain aspects of this field. The author rightly admits that the number of medical devices is significantly increasing, and the certification rules are becoming stricter. The article concludes that implementation of the new requirements necessitates an increase in financial and other resources for the introduction of new innovative technologies. Of particular importance is the introduction of artificial

intelligence technologies, which can pose increased risks. The researcher concludes that the development of the regulatory framework must comply with the development of technologies in order not to endanger the safety of patients.

In this edition of *Socrates*, several articles are devoted to the subject of investigations and forensics. The Doctor of Law **Ērika Krutova** (Latvia) provides an insight into the procedure for search for persons, analysing justification of the legal framework for starting a search at the national level and describing the conditions for searching for persons outside Latvia. The author acknowledges that national rules governing search activities should be improved in order to promote a more effective cooperation at a national and international level. However, the lawyer *Ph.D.* candidate **Oleg Kurdes** from the National Scientific Centre "Hon. Prof. M. S. Bokarius Forensic Science Institute" (Ukraine) considers measures to improve the legal support of professional training of forensic medicine experts in Ukraine. The author studies the regulations in force in Ukraine on the Central Commission for the Qualification of Experts, which determines the procedure for conducting professional training and certification of forensic experts. He acknowledges the need to develop and adopt a separate legal framework governing training of all forensic experts. The Doctors of Law, **Silvija Kaugia** (Estonia) and **Lembit Auväärt** (Estonia) have studied the legal framework for forensic psychology examinations and case law in Estonia related to the study of physiological effects. It has been acknowledged that Estonia has a sufficient theoretical basis for conducting forensic psychological examinations (including physiological affect). Nevertheless, for various reasons, in practice they are not used often enough.

From the point of view of implementation of human rights, the reader will find interesting an article by **Dashqin Ganberov**, an associate professor at Baku State University (Azerbaijan), on the formation of civil society in the context of implementation of the right of association. Undoubtedly, everyone has the right to freedom of peaceful assembly and association. The author focuses on the analysis of the implementation model of people's right of association in the Republic of Azerbaijan.

Military rights are becoming increasingly important, both in the common legal system and in terms of human rights. In her article, the Doctor of Law **Vita Upeniece** (Latvia) studies a problem that has been little explored so far – the right to conscientious objection to military service. Since 2007, conscientious objection to military service in Latvia has not been directly regulated by national laws and regulations. In 2021, the Supreme Court of the Republic of Latvia considered a case of refusal to serve in the reserve of the National Armed Forces based on a person's pacifist beliefs. The litigation revealed a lack of legal instruments in the Latvian military service regulations that would ensure respect for the human rights of individuals, and the need to address these shortcomings.

In her article, **Žaklīna Ieviņa** (Latvia), a *Ph.D.* candidate in law, studies a problem related to the issue of the obligation to erase or anonymise personal data contained in the General Data Protection Regulation of the European Union. The author explores how

the Regulation defines the terms "erasure" and "anonymisation" and what the requirements are when using them on a broader scope of personal data. The article looks at whether large data processors could be allowed to keep the data that they would need to delete, or whether it could be used anonymously for large data analysis or in artificial intelligence applications in the future.

In the context of economic development, capital companies play an important role in providing financial benefits to their members. The boards of companies and their members may not act against the public interest. **Andrejs Ņikiforovs** (Latvia), a *Ph.D.* candidate in law, has touched upon the activities of the members of the board of capital companies in accordance with the standard of a good and diligent owner included in Article 169 of the Latvian Commercial Law. It provides members of the company with extended legal protection against possible abusive conduct by members of the board, obliging them to act solely in the public interest. The article rightly concludes that the members of the board have a duty to be accurate in public affairs, excluding any influence of subjective factors on decision-making.

**Jānis Joksts**, a *Ph.D.* candidate, has focused on the analysis of a problem that has been merely explored but remains topical in Latvia. Raiderism and related theoretical and practical aspects are becoming increasingly important in today's socio-economic environment. In his article, the author rightly tries to mark the criteria for identifying cases of raiding, studies the most common forms of its manifestation, examines the legislation in this area. Raiding as an unfavourable socio-legal phenomenon has been viewed from the point of view of various sub-sectors of law. It is methodologically important to evaluate the best possible types of activity of merchants in order to avoid raider attacks.

The electronic legal journal *Socrates* contains articles from various sub-disciplines and fields of law. Publications are interdisciplinary and international in nature. The publication also includes the results of research work weighed and tested by the applicants for the degree of Doctor of Law. The articles have been written mainly in English, which provides for a wide range of readers around the world. We hope that the views expressed by the authors in this collection will lead to further scientific discussions.

Professor Andrejs Vilks,
Vice-Dean of the Faculty of Law,
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# COVID-19 Pandemic and Changes to Finland's Legislation in Line with the WHO Guidelines

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## Abstract

The article analyses new legislative amendments in Finland, including an interim amendment to the Infectious Diseases Act, which aims to protect the life and health of clients and patients using social and medical services. The rapid spread of the number of cases of coronavirus infection in Finland, including the new Omicron strain, required urgent measures and new amendments to the legislation.

Therefore, in the context of the overall fight against the coronavirus pandemic in the world, these provisions of the Finnish Constitution are a transition from the absolute priority of universally recognised norms of international law to the priority of the Basic Law, subject to the condition of the inadmissibility of guaranteed restriction of human rights. Finland's desire to comply with the global integration processes in the context of persisting risks of the spread of coronavirus infection has led to digital harmonisation of legislation and legal norms in accordance with the principles of international law. The amendments to Finnish legislation were based on the enshrined provisions of the Constitution and the existing international legal framework, considering possibilities for responding to pandemic and transboundary emergencies in accordance with WHO guidelines.

*Keywords:* coronavirus, EU legislation, Finland, global health, International Health Regulations, pandemic, priority of the Constitution.

## Introduction

Sharp increase in the number of diseases and the fight against the coronavirus and the rapid spread of the number of cases of coronavirus infection in Finland, including the new Omicron strain, required urgent measures and new amendments to the legislation. Thus, in March 2020, the Government of Finland adopted several decrees

introducing the powers provided for by the Emergency Preparedness Act. Additionally, on March 27, 2020, the Government issued a decree implementing amendments in accordance with section 118 of the Emergency Preparedness Act.

The purpose of the Emergency Preparedness Act is to secure the livelihood of the population and the national economy, maintain legal order, maintain constitutional and human rights and safeguard territorial integrity and independence of Finland in emergency situations. It legislates the state authorities' preparation to state of emergency as well as the authorities' powers during a state of emergency.

The implementing decrees included, for example, sections on

1) functioning and protection of health care and social welfare units;
2) derogations from the terms and conditions of employment relationships;
3) suspension of education;
4) restricting the sale of medicines, goods and services used in health care services nationally (Finnish Parliament, 2020).

The constitutional aspect of the issue was considered during consideration of the draft law by the Government of Finland. The principle of equality before the law, enshrined in the Chapter of Fundamental Rights of the Constitution, is also applicable to legal entities, in particular, when regulation may indirectly affect the legal status of individuals.

## 1 Amendments in Finnish Legal System During COVID-19 Pandemic

Government Decree on the use of powers in section 86 of the Emergency Powers Act lays down provisions on functioning of healthcare and social welfare units, in section 88 – on healthcare and social welfare services and health protection, in section 93 – on derogations from terms and conditions of employment relationships, in section 94 – on restricting the right concerning dismissal, in section 95 – on obligation to work, and in section 109 – on provision or suspension of instruction and education.

Many restriction measures have been implemented under the Emergency Powers Act, the Communicable Diseases Act (Tartuntatautilaki, 21.12.2016/1227) and other relevant legislation.

So, in the government proposal HE 22/2021 submitted on March 8, 2021, restrictions were intended to protect the right to life and freedom guaranteed by Article 7 (1) of the Constitution, as well as to ensure and promote health of the population, enshrined in Article 19 of the Constitution (The Constitution of Finland). Deliberations in the plenary session of the Parliament were based on the reports of the Constitutional Committee regarding amendments to Articles 86, 88, 106 (1) and 107 of the Law and Emergencies.

On May 28, 2021, the Finnish Parliament approved a government proposal (HE 73/2021 vp) to amend section 58 d of the Infectious Diseases Act (1227/2016) and to temporarily amend the Infectious Diseases Act (Tartuntatautilaki).

Despite the exceptional measures introduced by the government in accordance with Article 3 (5) of the Emergency Situations Act, the number of cases in Finland increased rapidly and reached 1,024 COVID-19 cases on August 12, 2021. Almost all infections are attributed to the Indian "Delta" strain of the SARS-CoV-2 coronavirus, included by the World Health Organisation (WHO) in the group with the highest threat assessment Variants of Concern.

According to the Finnish Ministry of Health and Social Affairs, as of August 15, 2021, there were 116,996 cases and 1,002 reported coronavirus-related deaths (COVID-19 Map, Johns Hopkins Coronavirus Resource Center).

On October 13, 2021, a new bill was introduced to the Parliament to introduce temporary amendments to the Infectious Diseases Act (Tartuntatautilaki, 21.12.2016/1227). The explanatory note to the draft law, containing the subject of legislative regulation and outlining the concept of the proposed draft law, contained references to Articles of the Finnish Constitution, including Article 6 on equality, the right to life and personal security guaranteed by Article 7, freedom of movement guaranteed by Article 9, protection of privacy guaranteed by Article 10, protection of property ensured by Article 15, cultural rights guaranteed by Article 17, linguistic and Sami rights granted by Article 17, rights to work and freedom of doing business guaranteed by Article 18, and obligations to protect fundamental rights stipulated in Article 22 of the Constitution, as well as some international human rights obligations and provisions of the Law on Self-Government of the Aland Islands.

Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that exercise of the rights and freedoms recognised therein shall be without discrimination on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, membership of a national minority or property, birth or other grounds (Convention for the Protection of Human Rights and Fundamental Freedoms). Discrimination occurs when a person is treated differently in the media or in the state without any objective reason, when this has not previously caused any legal problems in assessing whether the person is vaccinated or not.

On December 16, 2021 the Department of Health and Social Development (THL) announced detection of 34 cases of infection with the new omicron coronavirus strain in Finland. On December 15, 2021, a new maximum for coronavirus infections in Finland was set at 2,225 people, and on December 3, 2022, 17,047 infected people were recorded.

It is important to note that more than a third of those vaccinated with the Pfizer vaccine were twice vaccinated in Finland (Hara, 2021).

According to a risk assessment published by the European Agency for Disease Prevention and Control (ECDC) on November 24, 2021, the rapid spread of the delta virus in the EU could lead to a significant increase in the spread of the disease at the turn of 2021–2022 if restrictive measures were not taken immediately (ECDC, 2021).

A new increase in reported cases of SARS-CoV-2 infected and admissions to intensive care units was observed in October and early November in most EU/EEA countries

and was caused by the spread of Delta variant of COVID-19 (B.1.617.2). The rapid spread of the number of cases of coronavirus infection in Finland required urgent action and the introduction of new temporary amendments to the legislation.

To scrutinise the limitations of the situation of COVID-19 in Finland, it is necessary to review several amendments introduced by the Government of the Republic of Finland regarding the declaration of an emergency situation; mention should be made of Preparedness and Emergency Response Act (Emergency preparedness law, Walmiuslaki, 29.12.2011/1552).

Thus, on December 8, 2021, the Government submitted to the Parliament a bill on the adoption of a law on temporary amendments to the Law on Infectious Diseases, the purpose of which is to protect life and health of clients and patients using social and medical services (HE 230/2021 vp.). The bill provided for mandatory vaccination of healthcare workers, as well as the right of an employer in the field of social and medical services to access information from their employees about vaccinations or COVID-19 disease. The amendments were aimed at protecting health and safety of social and medical workers, as well as improving the quality and accessibility of social and medical services. Under the bill, employers can require all doctors, nurses and service personnel to provide a certificate of vaccination or previous illness, or confirmation of PCR testing 2–3 times a week.

Note that in 2020, according to Statistics Finland, 402,000 people were employed in social and health care service sector, of which 132,000 were in the private sector and 268,000 in the public one. Of these, 174,000 worked in health care, 95,000 in social welfare institutions and 133,000 in outpatient social services. The number of employees in these sectors in 2020 was 381,000. According to employment statistics in 2019, there were about 42,000 childcare workers, almost all of whom were full-time employees. Statistics also include workers in preschool education and persons in positions that do not require social and health education.

According to the Department of Health and Social Development, about 55,000 health workers were not vaccinated against COVID-19 in the fall of 2021. In practice, patients at risk are treated in close contact in any social and medical institution, especially in nursing homes and in intensive care units. Therefore, the employer must assess, on a case-by-case basis, the risks of infection as a result of direct contact with persons infected with COVID-19 or who have previously been in close contact with an infected person.

The employer should ensure that work shifts are planned in a timely manner and that a sufficient number of qualified personnel is available in health departments. According to the explanatory note to the draft law, the employer must in all cases ensure that safety of clients and patients is not jeopardised by an insufficient number of staff in the department.

The draft law regulation on the processing of personal data refers to the provision of section 5 of the Privacy Law; however, the proposed amendment will differ in that the employer's right to process the employee's vaccine data does not require the employee's

consent. All costs associated with testing and health care at health facilities and vaccination points will be fully charged to extrabudgetary costs in 2021–2023.

Vaccination against COVID-19 in Finland is carried out in accordance with a government decree issued on the basis of section 45 of the Infectious Diseases Act. That is, application of section 48 (1) of the Law on Infectious Diseases requires a separate interpretation of the mandatory vaccination against COVID-19 for medical and social personnel, as well as assessment of the need for other possible legislative changes and a revision of the definition of persons responsible for vaccination against COVID-19.

Simulations carried out by the Department of Health and Human Services have shown efficiency of pre-shift testing of social and health care workers, which could be one way to reduce the risk of infection for clients and patients in health care or elderly care units. Based on these studies, vaccination and regular 48- or 72-hour PCR tests are considered equally effective in preventing the spread of infections.

During the preparation of the Draft Law, it was found that the proposed regulatory model in general provides a better and more complete protection of fundamental human rights than the model based on vaccination and testing. The chosen model of vaccination of medical personnel and social workers will also be able to better protect the health of staff and increase their safety.

These legislative amendments will ensure the obligation of public authorities to take care of the protection of the labor force, as stipulated in Article 18 (1) of the Constitution of Finland, and they fully comply with EU law:

> "The right to work and the freedom to engage in commercial activity. Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice. The public authorities shall take responsibility for the protection of the labour force." (The Constitution of Finland).

For example, a Digital COVID-19 Certificate or testing is required for everyone applying to work in Italy, Greece, Cyprus, Latvia, Lithuania, France, Slovakia, Slovenia, and from February 1, 2022 in Austria. In Germany, on November 18, 2021, Bundestag approved amendments to the Law on Infectious Diseases, which allow to go to the workplace vaccinated or with a negative test result no older than 24 hours. Bulgaria and Switzerland oblige unvaccinated workers to wear face masks. In many countries, unvaccinated workers are required to be tested regularly. Belgium and Estonia, however, have passed legislation requiring nurses and junior nurses to be vaccinated against COVID-19.

The leaders of the countries at a meeting of the European Council agreed to reduce the validity of vaccination certificates in the European Union from 12 to nine months.

On December 28, 2021, the Finnish Parliament approved an interim amendment to the infectious diseases law. The opposition "True Finns" and "Christian Democrats" voted against the adoption of the law. The interim amendment was approved with 107 votes in "favor" and 32 "against".

Deputies of the opposition "True Finns" and "Christian Democrats" voted against the law with a proposal to expand the use of rapid tests. Simultaneously, representatives of the ruling parties and the opposition Coalition Party stressed that this is not about forced vaccination.

In the field of social and medical services, only medical workers associated with the risk of close contact with COVID-19 patients, only vaccinated or with a previous illness for a period of no more than 6 months, are allowed to work. A healthcare professional who is medically unable to get vaccinated may present a negative COVID-19 test taken up to 72 hours before going to work.

With reference to section 5 (2) of the Labor Confidentiality Act, the employer has the right to receive and process information about the health status of an employee or student undergoing an internship in relation to compliance in the performance of the tasks specified in subsection 1 of section 1 of the Act.

Constitutional aspect of the issue was considered during the consideration of the draft law by the Government of Finland. The principle of equality before the law, enshrined in the Chapter of Fundamental Rights of the Constitution, is also applicable to legal entities, in particular, when regulation may indirectly affect the legal status of individuals. According to article 18 of the Constitution, everyone has the right to work and freedom to choose their occupation.

Amendments to the Law are based on provisions of the articles of the Finnish Constitution and the existing international legal framework in terms of the ability to respond to pandemic and transboundary emergencies, as well as in accordance with WHO guidelines. A major reform of the Infectious Diseases Law is planned for 2022 and 2023, based on amendments to section 48 and discussions with medical and social departments.

According to the THL Department of Health and Social Development, on Decenber 24, 2021, a record high number of new infections was registered in Finland – 3.223, and on December 1 the same year THL already reported 9.616 new cases of coronavirus infection (COVID-19 Map, Johns Hopkins Coronavirus Resource Center). As of this writing, on January 10, 2022 a new record was reported in Finland – 23,325 new cases with 18 deaths.

In comparison, on the same day the U.S. reported 1,364,418 new confirmed cases COVID-19 in one day January 11, 2022. However, in two days the Supreme Court blocked the Biden administration's rule requiring larger businesses to ensure that workers are vaccinated against COVID-19 or wear masks and get tested weekly (Johns Hopkins University Indicators).

On January 18, 2022, the Government of Finland held an extensive discussion on the need to update the COVID-19 strategy in response to changes in the situation caused by the rapidly spreading Omicron version. The discussions were based on expert assessments the Government received on the epidemiological situation and the burden on medical care in the coming weeks, and on views about the need to amend the current operating strategy.

## 2 Rule of Law and Access to Justice in Finland During COVID-19 Pandemic

An independent judiciary is the cornerstone of the rule of law and access to justice. Article 19 (1) of the Treaty on European Union, read in connection with Article 47 of the Charter, establishes a right to an effective remedy and fair trial before an independent and impartial court. The Council of Europe, particularly through European Court of Human Rights rulings relating to Articles 6 and 13 of the European Convention on Human Rights, also plays an important role in ensuring respect of these principles. The UN, in its 2030 Sustainable Development Goals (Target 16.3), similarly expects Member States to promote the rule of law at national and international levels and ensure equal access to justice for all.

In 2020, judicial independence was also highlighted as one of the crucial prerequisites for effective oversight of proportionality and legality of Member States' emergency measures adopted to combat COVID-19. The Venice Commission, for example, highlighted that all Member States' actions to address the COVID-19 crisis must be subject to meaningful judicial review by independent courts at national and European levels. The President of the Council of Europe's Consultative Council of European Judges (CCJE) equally underlined that the principle of judicial independence should not be called into question during the pandemic or any other emergency situation (The CCJE adopts Opinion).

It is important to note that in the COVID-19 pandemic period, restrictive measures affected the work of courts in the EU Member States. This also had an impact on people's access to justice, which is important for ensuring the right to effective remedy and fair trial.

Overall, the pandemic accelerated digitalisation of justice. In this process it is crucial to ensure respect of the minimum standards developed under Articles 47 and 48 of the Charter and Article 6 of the European Convention on Human Rights (ECHR), regarding effective participation in proceedings, particularly criminal ones, including one's right to be present, and the principle of publicity.

Victims have rights to initiate investigation and be heard during proceedings, under Article 47 of the Charter and Articles 10 and 11 of the Victims' Rights Directive (Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012). Despite restrictions on freedom of movement due to the COVID-19 pandemic, Finnish Criminal Sanctions Agency took steps to enforce these rights.

To mitigate the effects of the pandemic and ensure continuity of justice as much as possible, digital and videoconference tools were used. However, challenges emerged with respect to the judicial system's ability to work remotely using electronic devices for communication, to access files through databases, and conduct proceedings by videoconference.

The aim of the restrictive measures is to prevent the spread of infections. The restrictive measures aim to protect both prisoners and their relatives and the staff of the prisons. For example, visits have been restricted in all 26 prisons in Finland since the beginning of the pandemic. It is important to note that due to the COVID-19 pandemic in the spring of 2020, the commencement of sentences of up to six months was restricted. This also led to changes in distribution of prisoners' main offenses and anticipated institutional hours. According to the statement of the Health Care Services for Prisoners, the risk of spreading is significant and restrictions are necessary. A prisoner's advocate or other attorney or counsel referred to in Chapter 15(2) of the Code of Judicial Procedure as well as other authorities contact the prison staff when they want to arrange a visit with a prisoner, strictly in masks.

It should be noted that all prisons have contingency plans for the coronavirus epidemic. The preparedness group of the Criminal Sanctions Agency actively monitors the coronavirus situation. If need be, new measures can be introduced to the units in accordance with the law and WHO guidelines.

The Chief Physician and head of the Infectious Diseases Department at Helsinki and Uusimaa hospital district, the Finnish Institute for Health and Welfare, on March 22, 2022 reported that Finland recorded 25,705 new lab-confirmed coronavirus cases over one weekend (Järvinen, 2022). The Minister of Family Affairs and Social Services Krista Kiuru on January 7, 2022 said: "There is a threat that Finland will see the emergence of the largest, or one of the largest, new groups of chronic diseases, and that not only too many adults will suffer from a long-term COVID-19, but, at worst, also children" (Kiuru, 2022).

## 3 Scientific Research by Finnish Legal Scholars and Lawyers During the COVID-19 Pandemic

The pandemic in Finland has accelerated development of legal thought. In the context of a difficult epidemiological situation and restrictions, all events of the Forums of legal scholar and lawyers in Finland were held using a video conferencing system. The online format allowed lawyers from Europe and other countries to join the discussion.

Adjunct Professor for Fundamental and Human Rights, Doctor in Social Sciences from Lapland University Stefan Kirchner believes that in a few cases the European Court of Human Rights already has to deal with the effects of the pandemic, including its effects on national judicial systems (Kirchner, 2020). Most of these cases are currently pending at the Court in Strasbourg, but the pandemic has been taken note of in the context of enforcement actions. The COVID-19 pandemic continues to lead to significant human rights challenges, from the duty of States to take positive action to safeguard the right to health to temporary restrictions on rights such as freedom of assembly, which are considered necessary to limit the spread of the SARS-CoV-2 virus.

The COVID-19 pandemic has highlighted vulnerability of the rule of law in the Finnish health care system. Matti Muukkonen in his research indicates violations of human rights during the period of application of restrictive measures and Digital COVID-19 Certificate (Muukkonen, 2022).

Although developed countries have quite functioning legal systems, coherent legal response suitable for every country in the form of adequate damage payments would offer some sort of justice for the injured parties and lower litigation costs. Henna Holtinkoski conducts a comparative research since the paper assesses differences between English and Finnish claimants' access to justice by using the H1N1 scandal as an example to show the obstacles Finnish claimants face due to legislative and precedential differences between the countries (Holtinkoski, 2021).

## Conclusions

In the context of the rapid spread of the coronavirus, its waves and various strains, the global legal community could not foresee and did not have time to develop a universal formula and find an extreme variety of options for resolving the issue of interaction between international law and domestic law when adopting amendments to legislation. Therefore, in the context of the overall fight against the coronavirus pandemic in the world, these provisions of the Finnish Constitution are a transition from the absolute priority of universally recognised norms of international law to the priority of the Basic Law, subject to the condition of inadmissibility of guaranteed restriction of human rights.

In late autumn 2021, development of the epidemic in Finland has rapidly deteriorated. Earlier measures have been insufficient to prevent the epidemic from taking a turn for the worse. In managing the COVID-19 epidemic, Finland has returned to extensive restrictions and recommendations which are guided by national legislation.

Legal regulation, which will impose restrictions such as non-provision of services, access to supermarkets, medical institution, work place, or getting free health services, causes certain differences between social groups, and allows for a reasonable argument considering discriminatory manifestations, indicating violation of human rights and freedoms to choose with no pressure involved, which mismatches the compliance with the EU resolution on COVID-19 vaccines.

The emergency brake system will introduce measures that are in line with current legislation and also measures that require legislative amendments. Perhaps most important, European countries may have breached the International Health Regulations (IHR) by failing to work together to combat COVID-19. The regulations require States to "*collaborate ... to the extent possible*" (IHR, Article 44) by coordinating medical, logistical, financial, and legal responses to public health emergencies. Only by united efforts of international health cooperation, and the international law used for health purposes the global community can reduce the chance that the next pandemic will be as devastating.

According to Peter Pitts, the president and cofounder of the Centre for Medicine in the Public Interest, "the first step in envisioning an end to the COVID-19 pandemic is to disabuse ourselves of a view of the future where humans have completely vanquished SARS-CoV-2. … The pandemic is over, does not mean that the COVID-19 virus has been eradicated like smallpox." (Grant, 2022)

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# Principles of Fulfilment of Patient Duties in Medical Treatment

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## Abstract

Nowadays contract law tends to be applied to the medical treatment contract. This causes the normative value of patient duties to grow, which is also consolidated in the legal system.

However, the medical treatment relationship is special, and absolute transfer of the principles of contract law to the medical treatment contract is problematic. Uncertainties and clashes are observed when evaluating the interpretation of the principles of fulfilment of patient duties and the criteria for their application. The *pacta sunt servanda* principle which dominates in contractual law governing the fulfilment of patient duties is to be adapted, considering the specific features of the medical treatment relationship.

The research aim is to analyse the principles of fulfilment of patient duties in medical treatment, find deficiencies in interpretation and application in respect of these principles and propose specific solutions for the improvement of the principles of fulfilment of patient duties. The following primary research methods were used in the study: analytical, systemic, teleological.

The result of the study provides evaluation of the principles of fulfilment of patient duties, specifying the circle of persons related to patient duties when these duties are established and terminated, as well as the limits for the fulfilment of patient duties. Based on this evaluation, a proposal is put forward for the improvement of normative regulations.

*Keywords:* duty, health condition, medical treatment, patient, principles of fulfilment.

## Introduction

In the evaluation of the legal relationship in medical treatment, nowadays more and more attention is given to patient duties. This is explained by re-evaluation of the legal statuses of the parties in medical treatment with the objective to bring these legal statuses to a balance. It is argued that predominance of one party does not promote and may even hinder the reaching of the goal of medical treatment, i.e. restoring or preserving health. Thus, the orientation is observed that the idea of patient duties needs to be specified and strengthened together with patient rights.

Considering that the legal relationship in medical treatment is nowadays interpreted as contractual, where each contractual party has its own rights and duties, a tendency is observed where the principles of contractual law are also applied to the medical treatment contract. This causes the normative value of patient duties to grow, which is also consolidated in the legal system.

However, the medical treatment relationship is special, and absolute transfer of the principles of contract law to the medical treatment contract is problematic. Uncertainties and clashes are observed when evaluating the interpretation of the principles of fulfilment of patient duties and the criteria for their application. The *pacta sunt servanda* principle which dominates in contractual law governing the fulfilment of patient duties is to be adapted, considering the specific features of the medical treatment relationship.

The research aim is to analyse the principles of fulfilment of patient duties in medical treatment, to find deficiencies in the interpretation and application in respect of these principles and to propose specific solutions for the improvement of the principles of fulfilment of patient duties. The following primary research methods were used in the study: analytical, systemic, teleological.

The result of the study provides evaluation of the principles of fulfilment of patient duties, specifying the circle of persons related to patient duties when these duties are established and terminated, as well as the limits for the fulfilment of patient duties. On the basis of this evaluation, a proposal is put forward for the improvement of normative regulations.

## 1 Persons Related to Patient Duties

The question that needs to be answered is on which persons patient duties are binding. First, any person has the duty to take care of their health (See: Satversme, 1993, Preambula), considering that health is the highest intangible good every person is entitled to. Moreover, a person's health, directly or indirectly, affects the person's opportunities for self-realisation, as well as the legal relationships in which the person is involved (e.g., family, employment, education legal relationship). Thus, the person has to take responsibility for their health, taking measures for its preservation and improvement.

Second, when a person obtains the legal status of a patient, i.e. when the person requests or receives a medical treatment service (Ārstniecības likums, 1997, *1. p. 11. pk.*), patient duties are established on the basis of law with legal consequences that follow these duties. Third, normative regulations provide for an exhaustive number of exceptions where patient duties are also provided for specific persons who do not have the legal status of a patient, for the benefit of public safety.[1] Although patient duties are mainly attributed to persons with a special status, i.e. a patient, still, considering the features of health as a public good (Müller, Ganten & Larisch, 2014, *A1901*; Büchs & Koch, 2019, *162*; Australian Institute of Health and Welfare, 2014, *1*; Aginam, 2002, *949*), some patient duties are also provided for other groups of persons in certain cases. It is worth noting that this article analyses the principles of fulfilment of patient duties that only apply to a special subject of rights, i.e. the patient.

## 2 Establishment and Termination of Patient Duties in Medical Treatment

An opinion has been expressed that patients with the capacity to act have duties (Evans, 2007, *690*). However, this idea needs to be clarified. First, all patients have patient duties within their ability (e.g., the duty to be involved in medical treatment, the duty to provide information about changes in their health (Pacientu tiesību likums, 2009, *15. p. otrā d.*), and capacity to act is not an obligatory precondition for the fulfilment of patient duties. Still, one has to agree that only patients with the capacity to act may face negative consequences for failure to fulfil patient duties. Thus, a patient's capacity to act is the criterion for occurrence of negative consequences if patient duties are not fulfilled rather than for the establishment of duties.

Moreover, patient representation is allowed in the fulfilment of certain patient duties. Considering that representation is provided for the performance of legal tasks in legal transactions or in operations similar to a transaction (Civillikums. Ceturtā daļa: Saistību tiesības, 1937, *1410. p.*; Balodis, 2007, *278*), the representative may also fulfil the patient's duties which have the nature of a legal operation (e.g., the duty to identify oneself (Pacientu tiesību likums, 2009, *15. p. ceturtā d.*), the duty to pay (Pacientu tiesību likums, 2009, *15. p. piektā d.*)), with the exception of patient duties which are directly related to the patient's involvement in the actual medical treatment process (e.g., the duty

[1] E.g.: a person having signs of infection or if infection is suspected; contact persons under medical observation; a person who has got infected with an infectious disease or if infection is reasonably suspected (Epidemioloģiskās drošības likums, 1997, 18. p. trešā d., 19. p. otrā d., 20. p. pirmā d.); a person diagnosed with infection or if infection is reasonably suspected (Kārtība, kādā veicama personu obligātā medicīniskā un laboratoriskā pārbaude, obligātā un piespiedu izolēšana un ārstēšana infekcijas slimību gadījumos, 2005, 3. pk., 4. pk.); a person employed at a certain workplace (Noteikumi par darbiem, kas saistīti ar iespējamu risku citu cilvēku veselībai, un obligāto veselības pārbaužu veikšanas kārtība, 2018, 9. pk.).

to comply with the orders of a medical practitioner (Pacientu tiesību likums, 2009, *15. p. trešā d.*)).

Second, patient duties acquire legal effect for a person when the person has become a patient. According to the general principle, a person can acquire the legal status of a patient with the appearance of legal capacity, i.e. at birth (Civillikums. Ceturtā daļa: Saistību tiesības, 1937, *1406. p.*; Torgāns u.c., 1998, *20*). However, there is a clash in the legal system because normative regulations also provide for medical treatment of a conceived person (Mātes un bērna veselības uzlabošanas plāns 2018.–2020. gadam, 2018; Simič, 2018, *256*, *257*), which is objectively possible and is performed at the modern stage of development of the medical science.

As a result, a conceived person is the patient in medical treatment; however, legally it cannot currently acquire the legal status of a patient until it is born. If a conceived person is given medical treatment, the mother of this conceived person is considered the patient because currently a conceived person, in the legal interpretation, is a part of the mother's body (Kennedy & Grubb, 1998, *189*, *193*). However, in the legal science, an ever-stronger opinion is expressed that a conceived person is not to be viewed as a part of the pregnant woman's body.

Two main arguments are proposed: (1) a conceived person is genetically unique (McHale, Fox & Murphy, 1997, *705*; Liholaja, 2004, *28*) and thus different from the genetic characteristics of the pregnant woman; (2) unlike a pregnant woman's body part, an embryo develops into a being which is able to exist independently (Liholaja, 2004, *28*), or "the potentiality argument" (by J. Harris; see Sīlis, 2006, *106*). Thus, the conceived person and the pregnant woman are two distinct organisms living in symbiosis (Kennedy & Grubb, 1998, *189*). Considering that a conceived person is not recognised as a subject of rights, an expansion of the legal characteristics of a conceived person is expected in the future in medical treatment as well. Thus, there are grounds to believe that the acquisition of the legal status of a patient is the only criterion required for the establishment of patient duties for a special subject of rights, i.e. the patient, where the patient's representation in their duties also acquires the legal effect.

It is also necessary to clarify when patient duties are terminated and when the patient is released from the legal consequences of such duties. On the one hand, patient duties are important during the patient's medical treatment, and this also largely affects the result of medical treatment. On the other hand, patient duties do not lose their effect during the patient's life after the completion of medical treatment if the patient's health disorders or the risk of their occurrence continue, creating the requirement for certain behaviour on the part of the patient for the benefit of their health in accordance with the orders of a medical practitioner. After death of the patient, patient duties of legal nature remain (e.g., the duty to identify oneself (Pacientu tiesību likums, 2009, *15. p. ceturtā d.*), the duty to pay (Pacientu tiesību likums, 2009, *15. p. piektā d.*)) where it is possible to transfer their fulfilment to the patient's representatives (See: Čakste, 1937, *13*; Civillikums. Pirmā daļa: Ģimenes tiesības, 1937, *377. p., 378. p.*; Civilprocesa likums, 1998, *286. p. otrā, trešā d.*;

Torgāns, 2008, *202*; Civillikums. Ceturtā daļa: Saistību tiesības, 1937, *2316. p. trešā d.*). Considering that a person's dignity does not end with death, and it needs to be protected after the person's death (Eiropas Ekonomikas un sociālo lietu komiteja, 2007, *3.4.1.7. pk.*; Vācijas Federālās Konstitucionālās tiesas 1971. gada spried. lietā Nr. BVerfGE 30, 173. Mephisto; Baumgarten, 2000, *66*, *68*, *87*; Osipova, 2020, *133*; Satversmes tiesas 2019. gada 5. marta spriedums lietā Nr. 2018-08-03), due performance of duties is expected and encouraged, which is one of the elements that form a person's dignity. Thus, validity of patient duties is not limited to the medical treatment period of the patient, and groundwork is observed for expansion of the period of validity of patient duties.

## 3 The Moment Patient Duties are Fulfilled and Scope of Duties to Be Fulfilled

Considering the legal nature of patient duties, a question remains when these duties are considered fulfilled. There are four types of patient duties depending on the time of their fulfilment. First, there are certain duties that need to be fulfilled immediately after acquiring the status of a patient (e.g., the duty to identify oneself). Second, there are duties that need to be fulfilled during medical treatment (e.g., the duty to comply with the orders of a medical practitioner). Third, there are duties that need to be fulfilled after receiving treatment (e.g., the duty to pay). Fourth, there are duties that need to be fulfilled after the patient's death where it is possible to transfer their fulfilment to the patient's representative (e.g., the duty to identify oneself, the duty to pay). Thus, patient duties are established for the patient when the legal status of a patient is acquired, with the duties being different in terms of the time of their fulfilment.

When evaluating the legal consequences of patient duties, it is important to establish the scope of patient duties and the expected degree of performance of them. First, the scope of patient duties when the patient enters a medical treatment relationship is determined by normative regulations where, according to the general principle, it is the same for patients with a similar health condition. However, it is worth noting that there may be special patient groups with different scopes of duties, i.e. narrower (for example, the duty to provide information is narrowed down for military personnel and incarcerated persons (Moskop, 1998, *78*)) or wider (for example, additional duties for the control of health are established for organ recipients (Kelley, 2005, *195*)).

Second, the patient is expected to get involved in the performance of the scope of their duties where such a degree of performance of patient duties is established which does not create negative consequences for the patient. The patient has the duty to get actively involved in medical treatment if their health so allows (Pacientu tiesību likums, 2009, *15. p. otrā d.*), and this duty is a criterion for establishing the degree of performance of patient duties. Thus, if the patient's health is appropriate, the patient is expected to actively fulfil all patient duties, which is supported by the idea that almost any medical treatment will be effective if the patient is involved in it (Lūse, 2007, *60*).

Considering that patient duties are established for a person with health disorders, i.e. for a patient, the impact of the disorders on the fulfilment of patient duties needs to be considered when determining the principles of fulfilment of such duties. On the one hand, a limit for the fulfilment of duties is established at which the fulfilment of duties becomes objectively difficult, and thus it is justified without negative consequences. This limit is the patient's health condition (Pacientu tiesību likums, 2009, *15. p. otrā d.*; Charter of patient's rights and obligations of Trinidad and Tobago, 2007, *a. 2.2.*) because it is important to protect the patient as the weakest party in the legal relationship in medical treatment in the fulfilment of duties (Löschke*, 2017, 10*). However, normative regulations do not provide a specific explanation as to which criteria are to be used to assess whether the patient's health allows the fulfilment of their duties.

These are likely to be the following three criteria: (1) the patient's capacity to act (Civillikums. Ceturtā daļa: Saistību tiesības, 1937, *1405. p.*); (2) the effect of objective circumstances on a patient with capacity to act which take away the legal effect of their actions (Civillikums. Ceturtā daļa: Saistību tiesības, 1937, *1409. p.*; Torgāns u.c., 1998, *24*; Hartkamp & Tillema, 1995, *74*); (3) other circumstances which have a significant effect on the patient's fulfilment of duties for health reasons (e.g., infection (English, 2005, *149*), special needs (The Australian Commission on Safety and Quality in Health Care, 2008, *s. 3.5.*), capacity for work for financial security).

On the other hand, there are still patient duties that must be fulfilled regardless of the effect of the patient's health condition on the fulfilment of the duties (e.g., the duty to pay). Here one could speak of the duties which follow from general civil rights and also apply to medical treatment as one of the types of civil relationships where the principle of civil stability prevails over the principle of patient protection in medical treatment. It is not advisable that such an absolute principle of fulfilment has an effect on the patient duties which follow directly and exclusively from the legal relationship in medical treatment. It is being concluded that a specific objectively necessary limit to the degree of fulfilment of patient duties exists which, under the influence of the legal system, still cannot be evaluated unequivocally, even allowing for deviation from it.

## Conclusions

1. Patient duties are binding on the special subject of rights, i.e. the patient, with the goal to protect health as a private good, as well as on the wider circle of persons with the objective to protect health as a public good. The expansion of the circle of persons related to patient duties outlines two directions. First, patient duties are applied to all society for continuous maintenance and improvement of health. Second, in case of a threat to public health, these duties are established for a specific circle of persons, initially without the legal status of a patient. This provides ground for belief that patient duties are more related to health as intangible good rather than to a specific subject of rights. If protection of health is required, , on the basis of the law, patient duties are established for the subject of rights related to this particular intangible good.

2. The validity of patient duties is not limited to the medical treatment period of the patient with legal capacity while the person has the legal status of a patient. When evaluating the time when patient duties are established and terminated, three possible directions of expansion are found for the period of existence of these duties. First, patient duties continue to apply to a person during their life after medical treatment is completed if such duties are objectively required for the person's health. Second, it is possible to transfer a deceased person's duties of legal nature to the patient's representatives in order to protect the dignity of the deceased patient, meaning that patient duties exist even when the patient's legal capacity ends. Third, preconditions for the understanding of the validity of patient duties are formed before the patient's legal capacity appears, thus expanding the legal principles concerning the actual medical treatment of a conceived person.

3. Normative regulations provide for an objectively required limit for the fulfilment of patient duties, i.e. the patient's health which justifies non-fulfilment of patient duties without negative consequences for the patient. Still, two significant principles of the fulfilment of patient duties need to be clarified in relation to such a limit. First, normative regulations do not provide a specific explanation as to which criteria are to be used to assess whether the patient's health allows the fulfilment of their duties. These are likely to be the following three criteria: (1) the patient's capacity to act; (2) the effect of objective circumstances on a patient with capacity to act which take away the legal effect of their actions; (3) other circumstances which have a significant effect on the patient's fulfilment of patient duties for health reasons. Second, there are still patient duties that absolutely have to be fulfilled regardless of the effect of the patient's health on the fulfilment of the duties.

## Recommendations

Amend the Law on the Rights of Patients to add Section $14^1$ as follows:

"Section $14^1$. Establishment and Fulfilment of Patient Duties

(1) Patient duties are established for a person in the cases specified in the normative regulations if this is objectively required in the interests of the patient's health or public health.

(2) If the patient's health so allows, the patient has the duty to get actively involved in medical treatment within their ability, including the fulfilment of patient duties, with the exception of patient duties which absolutely have to be fulfilled.

(3) When assessing the effect of the patient's health on the fulfilment of their duties, the following three criteria shall be considered:
   1) the patient's capacity to act;
   2) the effect of objective circumstances on a patient with capacity to act which take away the legal effect of their actions;
   3) other circumstances which have a significant effect on the patient's fulfilment of patient duties for health reasons.

(4) Patient duties that absolutely have to be fulfilled are patient duties that follow from general civil rights.
(5) The patient still has patient duties during their life after medical treatment is completed in accordance with the orders of a medical practitioner if the patient still has health disorders or the risk of their occurrence.
(6) Those patient duties are binding on the patient's representative where the transfer of their fulfilment is possible.
(7) The duties of a deceased patient shall be fulfilled, or their fulfilment shall be completed by the patient's representative."

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# Freedom of Contract and Informed Consent as Part of Contract for Healthcare Services

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## Abstract

Relationships between patient and physician did not possess a clearly-established form until the late 19th century, being primarly based upon a reciprocal trust. In terms of contemporary civil law, relationship between the patient and the physician or a hospital is based upon a contract for medical services. Thus, liability of the physicians for negligence within exercising their duties is either based on contract (in case such contract is concluded by the parties), or on tort (when there is no such contract). This study discusses freedom of contract with the focus of the patient's informed consent as a part for a contract for medical services between the patient and a physician or a hospital. The aim of this article is to discuss doctrinal views of patient-physician relationships and the informed consent as an inalienable part of a contract for medical services.

*Keywords:* informed consent, law of obligations, medical liability, patient's rights, patient-physician relationships.

## Introduction

It may happen that a healthcare institution proposes the patient to conclude a contract for the provision of healthcare services (under a different name, the gist and the content of the said deed remain the same), and provision of informed consent is

already included into the contract. Usually the contractors choose with whom they will conclude the deed. As known, a contract is a bilateral, or a multilateral deed, and a deed is an act concluded in a legitimate order, which is a result of will that is an expression of the will. The participant of the deed assesses the expression of the will of the other participant, upon which they structurize their acts. Hence, an undoubted principle arises as follows: the deed always corresponds the will of the one who concludes it (*Jāna Liskopa pilnv. ...*, 1931).

The term 'freedom of contract' is both a philosophical and a legal category. The Latvian Civil Law (*Civillikums*) has no provisions which precisely provide for freedom of concluding contracts or observing the forms of expressing this freedom. Legal anchoring of the freedom of contract derives from a surplus of Civil Law provisions, which confirms the right of the contracting parties to a free choice in terms of concluding contracts, its content and form, as well as defines the boundaries in which these rights may be exercised (i.e. limitations). Article 1511 of the Civil Law holds that "A contract within the widest meaning of the word is any mutual agreement between the two or more persons on entering into, altering, or terminating legal relationships. In a narrower sense, a contract is thereby applied as a mutual expression of intent made by two or more persons, based on an agreement with the purpose of establishing obligatory rights" (*Civillikums,* 1937).

In this study, the following research methods have been used: the hermeneutic method for discussing the freedom of contract as a legal concept, the historical-legal method to define the history of the development of patient-physician relationships and the comparative method to discuss the applicable case law.

The main principle of contractual principles in the law of obligations, namely the principle of freedom of a contract holds that the contract may not be concluded or performed without the freedom of the contracting parties. Therefore, this fundamental principle predominantly defines the freedom of forming the will and its expression. Thus, the freedom of a covenant is characterised by the following elements:

1) freedom of choice to conclude, or not to conclude the contract; in conjunction with this, people are considered to be free to conclude the contract. A compulsory contract is not legitimate unless the obligation to conclude a contract is stipulated by law, or is accepted voluntariliy;
2) freedom of choice of a contracting party;
3) freedom of choice of the content of the contract, as the contracting parties are free to define the conditions of the contract which is concluded. The only mandatory rule is that the conditions of the contract must not contradict the law;
4) freedom of choice of the form of the contract (*Torgāns,* 2014, p. 41).

It is indisputable that each of the elements listed above is not perceived absolutely, exceptions are permissible. According to philosophers, freedom is a conscious necessity, and unlimited freedom does not exist at all. When concluding a contract, much attention is paid to the relationship between the contracting parties, and less attention is paid

to circumstances that affect or even limit the free will of each counterparty. In civil law, a contract is interpreted on the basis of a conditional abstraction that the parties are equal in their rights and choice. This treatment is applicable in the legal sense; however, the parties to the contract differ in their financial position and economic capabilities, as well as in the degree to which one or another is interested in concluding the planned contract. This circumstance can be illustrated as follows: if the loan applicant had another chance to receive money, he would not be in a hurry to quickly agree to the strict conditions set by the lender for the borrower (*Torgāns,* 2014, p. 47). In addition, scientific findings describing the project of unification of European contract law should be mentioned (*Torgāns,* 2013, p. 47). Within the framework of the European contract law project, it is established that the parties freely enter into contractual relations and determine their content in compliance with the requirements of good faith and justice and the norms ordering these Principles (Art. 1:102) (*Commission on European Contract Law*, 2002).

## 1 Development of Patient-Physician Contractual Relationships in History of Civil Law

M. Carril mentioned that in Ancient Rome, the relationships between the patient and the physician were based upon an 'act of kindness' (Fr. '*fait d'obligeance*') providing reciprocal promises – skill and care from the medical practitioner and the remuneration of costs from the patient, and the only responsibility the physician could incur is the so-called Acquillan fault that is a fault for gross negligence (Carril, 1966, pp. 1–2). One of the oldest judgments on the physician's liability in France, which are well-preserved in the case books, namely *Leullier c. Calle* (1768) and *Foucault c. Helie* (1830) showed that doctors could be liable for damages in case of gross negligence, but courts did not discuss the issue of relationships between the patients and physicians and deduced the liability of physicians in civil reparation order, and occasionally, the doctors were punished (mostly fined) in penal order for causing severe injuries to patients due to gross negligence (*La Dame David*, 1817).

In the following decades, responsibility of physicians was transformed into a primarily civil fault under Art. 1382–1383 of the Civil Code (*Cour de Cassation* (France), 1862), and penal liability could be incured only in case of severe negligence, which caused the death of the patient, or the doctor's negligence (or omission to provide medical assistance) brought hazard to his life and health (*R… c. Docteur X…,* 1927). The issue of informed consent arose in French and Belgian law mainly upon the case of *Demarche c. Dechamps* (1889–1890) heard before the Civil Court of Liege (and the Liege Court of Appeals on appeal), where the courts firmly recognised that medical interventions must be performed only with the patient's consent, or the consent of his legal representatives).

*Demogue* (1932) in his sixth volume of the treaty of obligations held, that in principle, the doctor has a duty to provide the patient with information on the gravity of

the forthcoming medical intervention (usually a surgical operation), unless there is a specific reason for not providing such information (he indicated emotionality of the patient (*Demogue*, 1932, p. 187). The emergency state was firmly recognised to be an immunity from civil liability, in case the doctor proceeded to extend the operation, being unable to interrupt the already ongoing medical intervention in order to ask for the patient's consent to extend it, as he did his best to save the life and health of the patient, i.e. well displayed by the case of *Epoux N. c. docteur Lanormant* (1923).

In fact, a contract for medical services, as a form of agreement between the patient and the physician was known in France in the 19th century; for instance, the Amiens Court of Appeals ruled in a 1889 judgment that remuneration of medical expenses may be calculated by the courts in case of absence of a contract between the patient and physician (*Loisel c. Duchéne*, 1889). In the case of *Mercier* (1936), the French Court of Cassation denoted that the issue of patient-physician relationship was not clearly defined (as contractual, or anyhow else) in case law, and most claims against doctors for negligence were based upon Art. 1382–1383 of the Civil Code, thus alleging tort or quasi-tort liability for negligence. The Court of Cassation discussed the past doctrine, outlining that the authors have confirmed the contractual nature of the patient-physician relationship: "I note the agreement of all the authors to recognise the existence of a contract between the client who seeks care and pays the fees and the doctor who receives the fees and provides the care." (*Docteur M. c. Epoux Mercier,* 1936)

Simultaneously, the Court of Cassation held that the doctor does not possess and obligation of result but an obligation of means that in terms of the case at stake, the presence of the doctor by the patient, and the provision of medical care. The fact that the patient was not successfully cured from the illness, or an injury would not mean that the doctor was negligent, but it could be caused by other factors, i.e. the severity of the illness (*Docteur M. c. Epoux Mercier,* 1936). The Court also cited *Demogue* (1932), who concluded that the patient-physician relationship is contractual upon the judgment of the Swiss Federal Tribunal in 1892. This case has been examined within the context of the present study. This was a case, where a cabinetmaker litigated with a physician, who undertook an anticeptic syphilitic treatment, which did not succeed. The plaintiff's condition got worse in the course of the treatment, plaintiff was diagnosed with cancer, and his penis was amputated in the hospital. When the defendant appealed to the Federal Supreme Court of Switzerland, his appeal was dismissed, and the court held that the doctor was not only liable for the damages deriving from a failure to perform his contractual obligations, but for a moral damages as well (*Meister c. B.*, 1893). In fact, the Federal Supreme Court of Switzerland defined the patient-physician relationships as contractual a year earlier in the case of *Dormann* (1892) (*Dormann gegen Hochstraßer*, 1892).

Very little is known concerning relationships between patients and physicians in the First Republic of Latvia (1918–1940). The treatment of patients in hospitals was a public-legal obligation of the Latvian cities, which contracted the hospitals (or medical

universities which governed the hospitals) to provide medical assistance for the patients (from the judgment of the Senate in the cases of *White Star Dominion Line v. City of Riga* (1930) and *Grzibovsky v. City of Riga* (1937) (*Rīgas pilsētas pilnvarnieka...*, 1930; *Prasītāja Vacslava Gržibovska...*, 1937).

Provision of the medical treatment was free of charge in terms of contagious diseases (Ministry of Interior, Regulations for the free-of-charge hospital treatment (Iekšlietu ministrija, 1921); de-facto superseded by the provisions of the 1928 Law on Social Maintenance (*Latvijas Saeima*, 1928), and the provision of medical assistance and all treatment costs in terms of treating patients from contagious diseases was born by the local governments, which frequently caused disputes relating to define the municipality, which is under an obligation to pay the treatment costs of the patient who was treated not in his municipality but in a different city (*Zigismunda Cirīša...*, 1928; *Ventspils pilsētas...*, 1930). The nature of such disputes was quite justified owing to the costs of the treatment which were relatively high (*Cesvaines piensaimnieku...*, 1934).

In terms of medical malpractice cases, the plaintiffs usually filed complaints against doctors for negligent treatment by starting a private prosecution for a misdemeanor, but frequently failed to provide sufficient evidence for the defendant to be fined and to recover damages, and mostly they joined the case as civil plaintiffs (*Ermana Kurta sūdzība...,* 1935). Not much medical malpractice cases were heard by the Senate, with *Grzibovsky* as as one of the few outstanding examples, who, however, chose to sue for loss of working capacity rather than complain for the doctors' negligence (*Prasītāja Vacslava Gržibovska...*, 1937). In a 1924 case, an owner of a horse, which unfortunately died several weeks after an operation by a veterinarian employed to operate and treate the horse, recovered damages arising from the defendant's non-performance of a service contract (*Jazepa Megņa lūgums...*, 1924).

## 2 Legal Nature and Peculiarities of Contract for Healthcare Services and Place of Informed Consent in It

M. Carril found that the model of relationships between the patient and physician developed into a contractual one, supposing to be qualified as: (1) mandate for receiving a remuneration; (2) an employment contract; (3) a contract for services; (4) management of business; (5) a *sui generis* contract, whose ill-performance may result in damage deriving from a breach of contract (Carril, 1966, pp. 1–4). Thus, when a physician performs the medical procedures within the medical contract, they perform an *acte matériel utile dans l'intérët d'une autre personne*, e.i., a "useful material act in the interest of another person", which lets Carril presuppose that such relationships could be described as a "quasi-contract of business management". Carril also explained that it may be incomprehensible to invoke the contractual theory in case the doctor has to intervene in emergency situations (Carril, 1966, pp. 2–3).

Canadian case law gave a certain answer to this question: in the 1957 case of *X. v. Mellen*, the Quebec Court of Queen's Bench (per. Bissonnette, J.) held that "…from the time the patient enters a doctor's consulting room, there arises by itself and for itself a contract of professional care between the doctor and the patient" (*X. v. Mellen*, 1957). Upon W. G. (1974), an anonymous commentator in the case report of *G… c. Societe Anonyme "Le Lloyd Belge", W… et V.* (1974), adjudicated by the Belgian Court of Cassation, held that in case a doctor has concluded a contract with the patient, they become a "debtor of obligation" towards him, and bear personal responsibility for their acts.

This principle was approved by the French Court of Cassation earlier in a 1960 judgment, where a surgeon was held responsible for bringing for assistance an anesthesiologist to replace his duties for anesthesia within a hysterectomy operation; the injection caused an edema with a hematoma in her right hand, causing permanent paralysis; the assistant was called upon the choice of the surgeon without authorisation or notice of the plaintiff; the Court held that the one who has concluded the contract would be responsible for the faults of their "substitute", concluding to dismiss the surgeon's appeal. Concerning the actual legal nature of the contract between the patient and the physician, the Court declared: "Whereas the surgeon, invested in the confidence of the person [the patient], upon whom he is going to perform and operation, is obliged, by virtue of the contract binding him to this person, for the whole of the [medical] intervention, [and] the conscientious, attentive care in conformity with the data of the [medical] science", adding the following: "That he [the doctor] therefore responds for any faults that the doctor to whom he [delegated] the [injection] of anesthesia may commit, and that he replaces himself, outside any consent of the patient, for the accomplishment of an inseparable part of his obligations" (*Cour de Cassation* (France), 1960).

Inasmuch as there is usually no contractual relationship between the patient and the physician, who acts as a substitute of the physician with whom the patient concluded the contract, the second physician is considered as an executive agent, and thus the physician who concluded the contract with the patient is liable for the faults done by the substituting physician – this notion was affirmed in Belgian case law by the judgment of the Civil Court of Bruges in 1996 (*Trib. civ. de Bruges*, 1996).

The obligation of *result* is usually not applicable to physicians. The French Court of Cassation in its 1986 judgment held, that the doctors are obliged for the provision of the means but not of the result (*Cour de Cassation* (France), 1985). Simultaneously, an exception may be made in terms of medical interventions, which presuppose a specific action by the physician, which does not pose a scientific difficulty for carrying out the medical intervention, according to the *dictum* of the Liege Court of Appeals in its 1998 judgment. In the case at stake, determining of whether a caesarian section was an *obligation of means*, or an *obligation of means and result*, the court found that the performance of the caesarian section should be considered as an obligation of means, but not result, as such medical intervention is performed in case normal birth cannot take place, and may involve unexpected accidents and complications (*P., s.a. Royale Belge*, 1998).

In civil law, a contract is interpreted based on a conditional abstraction that the parties are equal in their rights and choice. This is how it looks in the legal sense, but in fact the parties to the contract differ in their financial situation and economic capabilities, as well as in the degree to which one or another is interested in concluding the planned contract. This circumstance can be illustrated as follows: if the loan applicant had another chance to receive money, he would not be in a hurry to quickly agree to the strict conditions set by the lender for the borrower (*Torgāns*, 2013, p. 47).

According to the authors, this is a good example that can also be used in the case of informed consent: if the patient were not sick, he would not go to the doctor and would not sign anything to receive medical services and ensure access to treatment. It is understandable and objective that in real life the interests of each party cannot be fully respected. However, the legality of contracts should be assessed based on whether the most influential party to the contract abuses its superiority to force the other party to act contrary to its interests (Furmston *et al.*, 2012, p. 98).

Examining the elements of the principle of freedom of contract with regard to the patient and the contract for healthcare, the following can be concluded: the patient has no choice to enter into a contract with a medical institution, consent (which in the case described in this Chapter shall be included in the text of the contract) which shall be drawn up in writing at the request of the patient or the attending physician (Art. 1(2) (1) and Art. 6 (1)–(2) of the Law on the Rights of Patients (*Pacientu tiesību likums*, 2009).

Nevertheless, the authors' practice allows to state that comonly before performing more serious medical manipulations rather than treat runny nose or undergo analyses (oddly, such activity is not treated as medical intervention), this informed consent is offered in writing and included in the contract for healthcare services, as in the event of a dispute this is undeniable written evidence. The choice of medical institution is influenced by the economic factor or the factor of the treating doctor (good reviews, etc.). The content of the healthcare contract is not discussed with the patient: if there is an objection, the patient is free to go without treatment and another patient will come (without objection) and sign – such conditions do not create equity. Only the form of the contract remains, and, as stated, the written form usually remains as well.

When evaluating the European case law on informed consent, it should be noted that within the proceedings relating to disputes on lack of informed consent, the court must ascertain whether the patient's informed consent was based on relevant documents. There is an overall support for the idea that informed consent should be in writing, with as detailed a description as possible of the doctor's explanations, otherwise the patient may complain that he did not have enough information to make the will and expression unreasonable. A written document is always better evidence than giving oral informed consent: this fact has been repeatedly ascertained in various court decisions: for instance, a number of judgments by the Supreme Court of Czech Republic are a good example of the aforesaid statement (*Nejvyšší soud České Republiky*, 2007; 2012; 2015).

## Conclusions

If the text of the informed consent is included in the contract for healthcare services, only two of the four elements of the principle of freedom of contract listed above are respected: the freedom of choice of contractor and freedom of the form of the contract. However, the following elements are not respected: the freedom to choose whether to conclude a contract and the freedom to choose the content of the contract. This leads to the conclusion that the fundamental principle of contractual principles in contract law, namely the principle of freedom of contract, is not fully complied with the result that the freedom of the contractor, which includes the text of informed consent, cannot be concluded, and obligations in the context of law cannot be fulfilled. Namely, the institute of informed consent cannot be realised within the concept of freedom of contract this way. In addition, the inclusion of informed consent in a healthcare contract does not make such consent an integral part of the contract but confers on it the status of a distinct clause.

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# Regulation and Its Impact on Innovation in Healthcare: SAMD Case

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## Abstract

Digitalisation in healthcare can transform the industry, thus a new product development shall be supported and promoted by stakeholders. Healthcare is also a heavily regulated industry to ensure safety of the end-users – the patients.

The aim of this article is to analyse regulation of software as a medical device (SAMD) in Europe in the light of recently introduced Regulation (EU) 2017/745 (MDR). The analysis starts with defining what SAMD is and how it is classified, as well as how the classification has changed according to the new regulation. As the new rules significantly change the classification for most of the SAMDs, their impact on the innovation process is explored from the perspective of the innovators and the market. Furthermore, the regulation of AI solutions in the medtech industry is also explored.

The analysis also covers how the SAMD can launch updates to be compliant with the regulatory requirements. Several obstacles in the innovation process have been identified and explored.

*Keywords:* AI solution, machine-learning solution, Medical Device Regulation, medtech, Software as a Medical Device.

## Introduction

Digitalisation is inevitable and the healthcare industry sees a growing number of various solutions available in the market every day, being used for both medical and non-medical purposes. The COVID-19 pandemic has also catalysed the creation and adoption of various digital health solutions. There are no signs of returning to the old practices, but rather the exponential growth in demand and offer of newly developed digital solutions. The promise of each of those is to make a process more efficient, be it quicker or more precise diagnosis or a cheaper and more user-friendly patient appointment management system. Whichever the solution it is, the patient is always at the center of the development.

Currently, there are more than 33,000 medtech companies in Europe. The leader is Germany with the largest number of medtech companies, followed by Italy, the UK, France, and Switzerland. 95 % of those companies are small or medium-sized with less than 50 employees (The European Medical Technology Industry in figures, 2021). Since November 2019, Germany is also the first European country to reimburse the costs of certain digital health solutions under its Digital Healthcare Act. One could challenge the benefits of the Act on the healthcare industry, as there are several limitations to be reimbursed (Gerke *et al*., 2020); nevertheless, it is the first official recognition of digital healthcare solutions at the state level. Germany was later followed by Belgium, and soon France will launch a reimbursement scheme similar to the Germany's (Lovell, 2022). Recently, Latvia has also taken a step forward to reimburse digital healthcare tools (Asare, 2021), and most probably more and more countries will follow the lead.

The rapid growth of digital healthcare tools is supported also by recent statistics: 47 % of apps in 2020 are focused on health condition management rather than wellness management, up from 28 % in 2015 (Digital Health Trends, 2021). This is the proof that the role of the regulatory framework will not diminish but rather grow.

The healthcare industry is regulated on an international and state level. In the European Union, the regulatory texts are formulated by the European Commission, and up until very recently, there were three most important directives regulating the market – the Active Implantable Medical Devices Directive 90/385/EEC (1990), the Medical Devices Directive 93/42/ EEC (1993) and the In Vitro Diagnostic Medical Devices Directive 98/79/EEC (1998).

Yet due to the rapid advancements in technologies, progress in science, interpretation risks, and other reasons "*a fundamental revision of those Directives is needed to establish a robust, transparent, predictable and sustainable regulatory framework for medical devices which ensures a high level of safety and health whilst supporting innovation*". The 2017/745/EU Regulation (MDR) replacing the existing directives "*aims to ensure the smooth functioning of the internal market as regards medical devices, taking as a base a high level of protection of health for patients and users, and taking into account the small- and medium-sized enterprises that are active in this sector. At the same time, this Regulation sets high standards of quality and safety for medical devices in order to meet common safety concerns as regards such products.*"

It is worth mentioning that the Poly Implant Prothese scandal has been credited for being one of the causes of the regulatory changes in the EU. The case is an example of how risks might be widely interpreted and wrongly managed without sufficient regulatory oversight (Greco, 2015) thus harming the human body.

The new MDR is intended to eliminate any safety concerns as it introduces increased requirements for the CE certification process, especially the documentation process, and the clinical tests are of greater importance. For most software products the MDR will also mean up-classification. The European Commission also expects that the MDR will increase industry transparency as the data about the devices will be

publicly available in the new EUDAMED database (Factsheet for manufacturers of medical devices, 2018). In comparison, the U.S. Food & Drug Administration (hereinafter – FDA) approved devices have had publicly available data summaries; while for the CE-marked devices, before introducing the new MDR, all the data have been confidential.

The changes will inevitably impact the innovation and medtech development process, as well as the time to bring new (and updated) medical devices into the market. While the strict standards promise increased safety and efficacy for the patients, keeping up with the regulatory standards will require extra personnel, financial resources, and time, which will be the biggest challenges to the small and medium-sized medtech companies, especially new start-ups which are often considered as innovation front-runners.

This paper includes analysis of the European regulatory framework for medical devices, as well as comparison to the U.S. regulatory framework. The paper explores the definition and classification of software as a medical device, separating AI (Artificial Intelligence) solutions and their specific regulatory framework.

## 1 Definition of SAMD

The recent 2017/745 regulation defines Medical Device (MD) as "*any instrument, apparatus, appliance, software, implant, reagent, material or other article intended by the manufacturer to be used, alone or in combination, for human beings, (...) and which does not achieve its principal intended action by pharmacological, immunological or metabolic means*", thus differentiating MD from drugs. The regulation officially states that software alone can be a medical device, in contrast to MDD 93/42/ EEC where software was not defined.

Another, yet similar definition is provided by The International Medical Device Regulators Forum (IMDRF), which is an international voluntary group of medical device regulators building grounds for standardised medical device regulations, including the EU Commission, the FDA, Health Canada to name a few. The IMDRF defines SAMD as "*software intended to be used for one or more medical purposes that perform these purposes without being part of a hardware medical device*" (Software as a Medical Device (SAMD): Key Definitions, 2013). This definition is promoted also by the FDA (Software as a Medical Device (SAMD)), and it clearly supports the same understanding as it is represented in the EU regulation 2017/745/EU.

When discussing digital solutions and software as medical devices, it should be considered that a significant part of computer science is Artificial Intelligence (AI). Its importance is growing as AI can potentially transform the industry. Therefore, a separate, more precise definition might be needed to distinguish and better describe such a solution. AI solution as per general definition is an evaluated and validated model consisting of computer algorithms to perform tasks that are usually executed by human intelligence. Machine learning (ML) is an AI technique that uses a large amount of training data with little human guidance to perform its task and achieve the goal.

While the EU regulation does not provide a separate definition, the IMDRF defines it as a Machine Learning-enabled Medical Device (MLMD) – *"a medical device that uses machine learning, in part or in whole, to achieve its intended medical purpose*" (Machine Learning-enabled Medical Devices ...). Thus, by definition, MLMD is a medical device and a part of the SAMD group, but it is important to highlight that not all SAMDs are MLMDs. Most probably in the future, both these definitions will be used in the future to better separate the solutions, their complexity, and also the applicable regulation.

## 2 Intended Use of the Device

An inseparable part of the definition of MD is the intended use of the device. Article 2(1) of the Regulation states that medical purpose is:

1) diagnosis, prevention, monitoring, prediction, prognosis, treatment or alleviation of disease,
2) diagnosis, monitoring, treatment, alleviation of, or compensation for, an injury or disability,
3) investigation, replacement or modification of the anatomy or of a physiological or pathological process or state,
4) providing information by means of in vitro examination of specimens derived from the human body, including organ, blood and tissue donations.

Any medical device shall be intended for at least one of the purposes above. Respectively, not all software used in healthcare are medical devices and shall not be treated like ones. Accounting, financial, patient appointment management, and other systems, which are not used for any purpose stated above shall not comply with the MDR rules and do not undergo the certification process.

However, if a non-medical software contains a module that has a medical purpose, such module might be classified as a medical device and thus is required to be certified.

## 3 Classification and Up-Classification

The new MDR introduces a new and definite classification for software, which was unspecified in the previous directives. While the fact of defining SAMD is welcome, the new rulings mean up-classification for most of the software to at least class IIa, while class I will be appropriate only for rare cases.

Rule 11 (Annex VIII, Chapter III, Article 6.2) states that "*software intended to provide information which is used to take decisions with diagnosis or therapeutic purposes is classified as class Iia*". If those decisions can cause a downturn in health conditions or even death, the software shall have a higher risk class. The same class IIa is assigned to software that monitors physiological parameters, except in cases when it could result in danger to the patient (class IIb). The other software that does not fall into these categories can be classified as class I.

Therefore, by comparing the rule 11 conditions to the definition of intended use, the rule can be applicable to almost all SAMDs, and the class I would be an exception. The Medical Device Coordination Group gives an example of a class I app which calculates a user's general fertility status based on the user's data input, predicting ovulation (Guidance on Qualification and Classification of Software in Regulation (EU) 2017/745 – MDR and Regulation (EU) 2017/746 – IVDR).

For most SMEs the up-classification will be a challenge. If up until the MDR the software could be self-declared (as in class I), according to the new rulings, the certification will require a considerably larger amount of resources for the complex certification process. In some cases, the software might fall into the higher class IIb or III, though further guidance would be needed to define the incidence of health deterioration for the device to be up-classified.

## 4 Changes in a Medical Device

Any medical device and especially software have various updates throughout its lifecycle. While some hardware might have no updates at all, software is dynamic and is updated regularly, sometimes it can be just a day between the versions. Therefore, the new MDR ruling can significantly impact product development.

According to the MDR Article 120 (2) and (3), the products which were certified under previous directives remain valid until the end of the certification period unless they have significant changes in the design or intended use. The Medical Device Coordination Group has created a guidance document on which changes are considered significant (Guidance on significant changes regarding the transitional provision under Article 120 of the MDR regarding devices covered by certificated according to MDD or AIMDD, 2020), yet the document is not an official position of the European Commission and is not legally binding. Thus, following the guidelines does not guarantee rightfulness in case of a dispute.

Nevertheless, the guidance document provides easy-to-follow steps to understand which changes are considered significant and shall be approved. Those range from changes in design or performance specifications to algorithm or architecture changes to new target audiences. E.g., a software that was classified in class I under MDD and is now up-classified under MDR (which happens in most cases) must undergo a full certification process to make the intended changes. Such requirement can jeopardise the innovation process.

When a medical device is already certified under MDR, the regulation sets the requirement to inform the Notified Body of the planned changes and then the body assesses if an audit is required. When developing a SAMD, the involvement of the body on a regular if not daily basis seems inevitable. While there are no specifics on which changes are considered substantial and thus need approval, one might consider the same guidelines mentioned above are applicable in these cases.

## 5 AI Solutions

AI solution is an evaluated and validated model consisting of computer algorithms to perform tasks that are usually executed by human intelligence. It would allow processing large data in short time and could be used in healthcare from diagnostics to personalised therapies to new drug development. For example, MIT researchers cooperating with Massachusetts General Hospital staff have developed an AI model to significantly improve cancer screening and its early detection, by far in tests outperforming existing practices. This would allow to improve patient outcomes, as well as minimise screening volume and costs (Yala *et al*., 2022). Another solution – the ML model facilitates the prediction process of how two proteins will attach, which could help to speed up the drug development process (Zewe, 2022). The two examples provide a potential insight of how AI solutions can drive healthcare development.

When it comes to AI product development, these solutions require more resources, namely financial, time and expertise, with the most crucial component being the data. The quality of a valid AI solution is interdependent on the quality of training data and lack of biases.

The new MDR does not provide any specifications or guidelines for AI solution development and certification in Europe, nor is there such a pathway in the USA. Yet, while in Europe there is no working initiative, particularly for medical device AI solutions, the FDA is currently working on and reviewing how those solutions could be regulated. The regulatory framework would include Predetermined Change Control Plan, Good Machine Learning Practice guidance, methodology for evaluating and improving algorithms, and other initiatives (Artificial Intelligence / Machine Learning (AI/ML)-Based Software as a Medical Device (SAMD) Action Plan, 2021), which shows that Europe is one step behind the US regulatory development. However, the European Union is working on general AI regulations which would also impact medical devices in the EU and beyond, introducing additional requirements on the use of AI (Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts, 2021).

## 6 Comparison Between European and U.S. Regulatory Framework

Researches also show that among the devices which have been approved both in the USA and Europe, in most cases those were approved in Europe first, naming the less rigorous and decentralised evaluation process for CE mark as one of the reasons, yet leading also to higher recall rates (Muehlematter *et al*., 2016). While an easier approval process benefits the developers, those devices can be associated with greater risk and might undermine safety of a patient. However, it should be noted that the research has been published up until the year 2021 when the new MDR with more strict rules has not been fully in place, thus the results of a similar research after 2021 most probably differs, using data about devices approved within the MDR framework.

## 7 Regulatory Agencies

In Europe, the regulatory approval process is decentralised, and the devices are audited and certified by Notified Bodies (except the lowest risk category allows self-declaration). Currently, there are 27 authorised organisations, with 7 bodies in Germany and Italy each (Nando Information System, 2022), which is not a surprise considering that those countries also host a vast number of med-tech companies. This number (27) is nearly a half of the number of authorised bodies compared to the number of bodies under the previous Directive 93/42/EEC-50. This means that the capacity is half of what it was before yet knowing that the process is more complex and more demanding, this clearly results in longer approval processes and slower innovation.

Meanwhile, many European countries do not have even a single body. Some countries with developed medical device industries do not host such bodies. For example, Denmark positions itself as a leading medtech hub in Europe with around 1000 companies operating in medtech, and more than 250 dedicated medtech companies which employ 15,000+ people (excluding contractors), thus being the fourth largest medtech employer in Europe per capita (Ministry of Foreign Affairs of Denmark, Invest in Denmark). Yet, Denmark does not host a Notified Body.

In the Czech Republic their Association of Manufacturers and Suppliers of Medical Devices represents 140 companies with 9000 employees, reaching 760-million-euro turnover a year (Peter *et al*., 2020). Nonetheless, currently they do not host a local Notified Body (the Czech Republic had 2 bodies designated under Directive 93/42/EEC).

None of the Baltic States host a Notified Body, thus a medtech company willing to undergo an audit and receive a CE mark shall turn to a body located in another European country. Fair to note, the medical device markets in these countries are significantly smaller. According to the data by the State Medicine Agency of Latvia (State Medicine Agency of Latvia, 2022), 32 devices have received CE marks within MDR framework, and all of those are in the lowest risk category (I), yet one being recalled afterwards. There is no detailed information if any of these medical devices is SAMD. If compared to other European countries, having a Notified Body in Latvia would be an extraordinary situation, and most probably it would serve as an example to many foreign companies.

Presumably having a Notified Body in a country might push the development of the medtech industry, although there is a lack of supporting evidence for this argument. The current shortage of Notified Bodies is a challenge for entire Europe, not a single country.

## Conclusions

The number of medical devices is increasing, along with stricter certification rules, yet the number of notified bodies within the new MDR is half the number it was within the early directives creating a scarce gap. This raises a reasonable concern of possible complications for industry development and innovations. While the more complex requirements demand more resources from the developer companies, the small number of notified bodies prolongs and hinders the innovation launch in the market even more. There shall be some mechanisms introduced by the European Commission or on the state level to promote the arrival of new bodies and support innovation.

The new MDR also means up-classification for the most SAMD. If within the previous regulatory framework software were mostly class I and thus able to self-declare, now, according to the MDR, most will be at least class IIa, needing to undergo more complex procedures and audit. This will require more financial and time resources, which are less available to small companies (start-ups), and it is a setback to innovate.

Also, the requirement to approve most changes in SAMD is alarming; as a dynamic product, a software experiences a large number of updates, and the need for approvals definitely slows down the innovation, also taking into account the little number of Notified bodies. While the approval process ensures safety of the product, the current regulation might turn out to be overprotective and burdensome, especially for ML-based solutions.

A growing number of medical device software are AI driven, and those can have the most significant impact on healthcare industry development, especially as the AI discipline itself is developing at a tremendous speed. Yet, AI also brings increased risks, thus the regulatory framework development shall keep up with the development of the discipline so as not to lag and eventually undermine the product and patient safety.

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# Search for Persons in Latvia and Abroad

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## Abstract

People disappear for different reasons: someone avoids legal proceedings or punishment, another one has been kidnapped or killed, lost, or someone else wants to start their life again elsewhere. The aim of this publication is to evaluate the procedure of search for persons, providing an insight into the legal basis for starting search at a national level and describing the conditions for search for persons outside the borders of Latvia. In order to implement the intended, the author evaluates national and international legal norms that affect the process of searching for persons, describes possible problems and provides recommendations for their solution. Incorrect understanding and application of legal norms creates violations of rights. Respect for the rule of law, on the other hand, is a precondition for respect for human dignity, freedom, democracy, equality, and human rights. In performing the set tasks, the author used analytical, comparative, descriptive methods.

The study has led to conclusions that at a national level it is possible to initiate search for a person for various purposes within the framework of criminal proceedings, operational activities, administrative offence proceedings, and resoric test. However, the inclusion of data in the SIS is allowed only in the framework of criminal proceedings and operational activities. National regulations should provide for procedure for the implementation of Regulation 2018/1862 alerts for the purpose of "travel ban". The imprecise legal provisions need to be improved to facilitate cooperation at a national and international level.

*Keywords:* information systems, police, search for persons, Schengen Information System.

## Introduction

Many researchers have devoted their work to the problem of disappearing of people (Perkins & Roberts, 2011; Ferguson & Picknell, 2021). People disappear for different reasons. In most countries search for persons is a matter for the police (Harrington, Brown, Pinchin & Sharples, 2018; Ferguson & Gaub, 2021). Free movement has facilitated mobility and has accordingly changed the procedures of search for persons. The aim of this publication is to evaluate the procedure of search for persons, providing an insight into the legal basis for starting search at a national level and describing the conditions for search for persons outside the borders of Latvia. For the study, the author has used analytical, comparative and descriptive methods.

On December 23, 2019, the State Police of Latvia adopted the Internal Regulation No. 16 "Regulation on Search for Persons" (hereinafter – Internal Regulation of the State Police), which determines organisation of search, actions of officials, and procedures by which the police perform search for persons.

When starting analysis of the search process and procedures, the author firstly points out that, in the world practice, the "wanted person" is a person being searched for by the police in connection with a crime that has been committed (Reverso Dictionary, 2021).

Data on persons of such category is being included in the INTERPOL Criminal Information System, thus declaring search at an international level. In the Schengen Information System (hereinafter – SIS), this category of persons is referred to as persons wanted for arrest for surrender or extradition purposes. The competent authorities of Latvia are entitled to issue such an alert if the Prosecutor General's Office accepts the European Arrest Warrant. Thus, the search process is limited to the Member States of the Schengen area. In the Internal Regulation of the State Police, the term "wanted person" means a suspect, accused, convicted person, a person who has suddenly and without obvious reason left their place of residence (hereinafter – missing person), and an unidentified person, the body of an unidentified person and a person summoned in search of a court or judge's decision.

Thus, the procedural status of a person, physical characteristics, as well as a person's activities are mentioned in this definition. Such practice should not be supported, because considering the category of persons, the search procedures and record keeping are different, as well as conditions to declare search for a person outside the borders of Latvia differ as well. The only unifying factor of the diversities listed is the need to find a person. Meanwhile, the search aims, objectives and the follow-up are different. The police action when determining the location of a person must be consistent with the search target set.

Nowadays the process of search for persons is not possible without the inclusion of data in information systems. It is a more important part of the process of search for persons at a national and more specifically at an international level.

## 1 Internal Regulation of Search for Persons

Describing national legal norms in the field of search for persons, it should be noted that on January 21, 2020, the Cabinet of Ministers of the Republic of Latvia adopted the Regulation No. 41 "Provisions on Information to Be Included in the Integrated Interior Information System for Location of a Person, Property or Document or a Person Identification or Identification of the Body of an Unidentified Person" (hereinafter – Regulation No. 41). Regulation No. 41 is issued pursuant to Section 382.[1], Paragraph three of the Criminal Procedure Law (*Kriminālprocesa likums*), Section 130, Paragraph three of the Law on Administrative Liability (*Administratīvās atbildības likums*), Section 8.[1], Paragraph three of the Operational Activities Law (*Operatīvās darbības likums*) and Section 14.[2], Paragraph three of the law "On Police" (*Likums "Par policiju"*). In all these cases the legislator provides for the right to disseminate information through the Integrated Interior Information System *to identify the location*. In turn, Regulation No. 41, as well as the Internal Regulation of the State Police set different objectives, namely identifying the location of a person, clarifying the actual place of residence of a person, determining the actual location of a person. Until now, the author has not been able to find legal discussions on compatibility of the search purpose, the category of a person to be searched for and further actions in the search process. However, taking into consideration the legal framework of the European Union concerning the procedure for search for persons, it should be noted that determining the location of a person and identifying the actual place of residence requires different police action. In addition, national regulation provides for a wider range of persons who can be searched for when disseminating data in information systems. In such cases, police action must be "in accordance with national laws and regulations". Further, without applying for an absolute assessment, the procedure for search for persons at a national level and the conditions for search outside the borders of Latvia will be studied by the author.

It should be noted at the beginning of the study that the national regulation provides for search of persons within the framework of police resoric tests, within the framework of administrative violation cases, the framework of criminal proceedings, as well as within the framework of operational activities to identify the location. The relevant Regulation No. 41 determines the scope, basis, purpose of the data, the procedures for inclusion, use and deletion of the data, as well as the authorities who access to the included data shall be granted to. The legislator envisages that the Cabinet also determines the action when establishing a person regarding whom the information is included in the Integrated Interior Information System.

In turn, the Internal Regulation of the State Police determines the procedure for search for persons. It should be noted here that the Internal Regulation of the State Police was adopted on December 23, 2019, while Regulation No. 41 was adopted on January 21, 2020 and entered into force on July 1, 2020. Development of national framework involves adoption of Regulation (EU) 2018/1862 (Regulation (EU) 2018/1862 of the European

Parliament and of the Council of November 28, 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, 2018) of the European Parliament and of the Council (hereinafter – Regulation 2018/1862), which must be applied in full at the latest from December 31, 2021. The subject of Regulation 2018/1862 is the conditions and procedures for entering and processing alerts in the SIS issued in respect of persons and objects for the purpose of police and judicial *cooperation in criminal matters*. Here is one of the conditions for announcement of persons in search outside the borders of Latvia.

## 2 International Search of a Person

Internal Regulation of the State Police provides that officials perform a search within the framework of criminal proceedings if there is information that a person may have committed a criminal offence; if the presence of a person is necessary for the performance of procedural activity; if the wanted person is accused of committing a criminal offence; to obtain information about the corpse of an unidentified person. Regulation No. 41 stipulates that the purpose of inclusion of information in the Integrated Interior Information System within the framework of criminal proceedings is to ensure the execution of a coercive measure or punishment related to deprivation of liberty; to ensure the execution of coercive measures of a medical nature; to identify the actual place of residence of a person for performance of procedural activity; to identify the location of a missing person for *performance of procedural activity*; to obtain information regarding the corpse of an unidentified person for performance of procedural activity. Accordingly, the purpose of clarifying the whereabouts of a missing person is not included in cases where no procedural activity is required.

Regulation 2018/1862, in turn, provides for the possibility to enter the SIS data on missing persons or vulnerable persons who need to be prevented from travelling. The purpose of the prohibition is that individuals may endanger themselves or they may threaten public order. In this case, action to protect is required. Simultaneously, such categories of persons are identified as children who are at risk of being abducted by their family members, children who are at risk of becoming victims of trafficking or terrorist activities; also, vulnerable adults who need to be prevented from travelling to protect them. At a national level, this shortcoming may disappear if such categories of persons are within the scope of the operator.

Regulation No. 41 provides that within the framework of the operational activity, an official may decide on the inclusion of data in the Integrated Interior Information System to clarify the actual place of residence of a person; to find a missing person and detect whether their health and life are not threatened; forcibly to transfer a person to a medical treatment institution or a place of care. Within the operational activity

the Internal Regulation of the State Police provides for search for a person who has been charged or convicted of a criminal offence in accordance with the law, or a foreign country has announced search for a person in the SIS or in the Interpol database or has issued a request for temporary arrest or extradition and it is required to perform operational activities; a separate task of the person directing the proceedings has been received or support must be provided in the search for a missing child; looking for a missing person. Accordingly, it can be stated that within the operational process there are the widest possibilities to include data in the Integrated Interior Information System. There is a tendency that family and civil law issues need to be addressed in a non-traditional way. At a national level, search for missing persons has been identified as one of the tasks of operational activities, but a category of persons such as the "vulnerable" has not been defined. Consequently, the task of "protecting persons against criminal offences" should be mentioned.

There are more opportunities to enter data into information systems at a national level. Within the framework of administrative offence proceedings, Regulation No. 41 provides for the purpose of clarifying the actual place of residence of a person. The Internal Regulation of the State Police provides for search in an administrative violation case to identify a person's location or place of residence. Section 130 of the Law on Administrative Liability also mentions the purpose of clarifying the location. It is important to note here that clarifying the location and identifying the actual place of residence are different aims. Determination of the actual place of residence must be based on the facts, which means that the place of residence is real, right. On the other hand, identifying the location does not require proof of authenticity. It follows from the above that search for persons within the framework of an administrative violation case may be initiated, but the data is not allowed to be entered into the Integrated Interior Information System. Regulation 2018/1862 provides for a category of persons who are missing or vulnerable persons who need to be prevented from travelling. In this case, the purpose of entering information is to define where a person is, not their actual place of residence. On the other hand, one of the conditions for entering data in the SIS is that there must be a criminal process or operational activity process. Thus, the data entered in the Integrated Interior Information System within the administrative proceedings cannot be entered in the SIS.

Another national peculiarity is a resoric test. Within the framework of a police resoric test, a police officer performing it may decide on the inclusion of the relevant data in the Integrated Interior Information System to clarify a person's actual place of residence; to find a missing person and define whether their health and life are not endangered; forcibly to transfer a person to a medical treatment institution or a place of care; to obtain information about a person who is unable to provide information about themselves in order to establish their identity; obtain information to identify the corpse of an unidentified person. Within the framework of a resoric test, the Internal Regulation of the State Police provides for the search for missing persons if no information has been obtained which indicates a possible criminal offence. In addition, within the framework of

a resoric test, the Internal Regulation of the State Police provides for search of a child who has left their place of residence, a childcare institution. The data entered in the Integrated Interior Information System in the framework of a resoric test cannot also be included in the SIS. The corresponding data on a missing child who has left their place of residence, a childcare institution, will not be entered in the SIS. Such situation counters the ideology of the SIS and should be remedied to comply with international obligations.

At a national level, the aim of finding a missing person and finding out whether their health and life are not endangered can be achieved within the framework of a police resoric test or operational activities by obliging the competent authorities to choose the correct process for entering the data in the SIS.

"International search of a person" is marked in the Internal Regulation of the State Police. It gives the right to the search initiator to enter a report on a person in the SIS to detect their whereabouts for performing procedural activity based on a decision of the person directing the proceedings or of the court and to identify the location of a missing person based on the decision of the search initiator. The objectives stated are clearly narrower than those set out in Regulation 2018/1862. This situation limits possibilities of the use of international mechanisms.

It is positive that the content of the search initiator's decision has been agreed upon if an international search is initiated through the International Cooperation Department. However, the reasons of search are not in line with those set out in Regulation 2018/1862, they are narrowed. The information contained in the SIS enables search in the Schengen Member States.

A person is announced in international search through the Interpol. To do it, the person directing the proceedings should address the request on international search for a person to the Prosecutor General's Office of the Republic of Latvia. The Prosecutor General's Office, evaluating the request and acknowledging that it is a proportionate measure, sends a request to the International Cooperation Department of the Central Criminal Police Department of the State Police (hereinafter – ICD) to announce a person in international search. It should be noted that these are the officials of ICD who, after evaluating the available information, decide which search will be the most effective: report, circular, individual request. The Interpol reporting system was established in 1947. The first Red notice was issued in search of a person who killed a police officer (Interpol, Key dates, 2021).

Concerning search for persons, the Red notice provides for the aim of locating a person for the purpose of extradition; the Blue notice – to locate or obtain information about the person to be involved in the investigation; the Green notice – to warn that a person may threaten public order; the Yellow notice – to disseminate information for search for missing persons; the Black notice – to report on unidentified human corpses.

Another way that the Interpol announces a person in international search is a circular, or Diffusion report. In terms of content, it is similar to the Red notice. These are the Interpol officials who have the right to decide how to make a request. One of

the conditions for making a decision is that a person's possible whereabouts are known. In this case, the search must be restricted to a limited number of countries.

If no such restriction is specified in the request, the Interpol may decide which countries the Diffusion report is sent to Interpol's Rules on the Processing of Data, 2011 (2019). It should be noted that the Interpol has its own zoning of countries, and when specifying the addressee, not all the countries should be addressed, but the relevant zone.

Thus, if it is necessary to announce a person in international search, the Red notice must be used. On the other hand, knowing the possible location of a person the search circle can be narrowed. In certain cases, where the whereabouts of a person are known, the request for extradition is addressed to the country without the involvement of the Interpol General Secretariat.

It is important for police officers to know that there is always priority in comparison with reports (alerts) and the information exchange through the Interpol. This is especially important in cases where there is a discrepancy between reports (alerts) (European Union, 2013).

The search for persons with the support of the Interpol also envisages implementation of various projects and targeted operations. The European Union is also strengthening cooperation in searching criminals who have committed serious crimes. In 2010, with the support of the European Union funding European Network of Fugitive Active Search Teams (hereinafter – ENFAST) was established. Such cooperation form is also necessary, as the competent services set up fact sheets with the basic information on the Member States' legislation, police methods for tracing persons. ENFAST offers staff exchange programmes. There is an undeniable public contribution to the search for persons and a platform has been developed at www.eumostwanted.eu, where information on the most wanted criminals is published. This system is anonymised and operates on the principle of sending information; the message is received by the competent services, which are available 24/7 and ready to engage in the capture of criminals. The publicity of the site is also supported by the Europol, and shortly after its establishment, ten criminals were arrested with public support (Europol, 2016).

A human being is the core value of modern society. The reasons for disappearance of people are also changing, so it is worth considering the possibility of making greater use of over national resources in search for persons, especially in the case of the disappearance of minors.

## Conclusions

It is not possible to determine exactly how many people are wanted for extradition, how many are missing and how many are being searched for due to some other reason. For example, in 2019, 62,000 Red notices were issued by the Interpol, and 40,322 alerts were included in the SIS with the requested action – arrest (alerts on persons wanted for arrest for surrender or extradition purposes). These figures show how relevant the search for

persons is. At a national level, it is possible to initiate search for a person for various purposes within the framework of criminal proceedings, operational activities, administrative offence proceedings, and resoric test. However, the inclusion of data in the SIS is allowed only in the framework of criminal proceedings and operational activities. National regulations should provide for procedure for the implementation of Regulation 2018/1862 alerts for the purpose of "travel ban".

Regarding international search at a national level, there are no arrangements made for reporting to the Interpol notification system. Law enforcement officials from other law enforcement authorities except the State Police are not familiar with search methods and do not focus on them.

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# Directions for Improving Legal Support of Vocational Training of Forensic Experts in Ukraine

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## Abstract

Current Regulations on Central Expert Qualification Commission under the Ministry of Justice of Ukraine and certification of forensic experts establishing the procedure for conducting professional training of forensic experts have been analysed. Necessity of elaboration and adoption of a separate legal regulation that should regulate all components of professional training procedure of forensic experts has been proved.

Directions of development of professional training system of forensic experts have been indicated: traditional system of training that consists of two parts: professional training in higher education and postgraduate education majoring in Forensic Science.

A new type of structure of postgraduate education of forensic experts has been proposed that should consist of initial professional training, advanced training, retraining and specialised training. In order to adapt to new working conditions and accelerate professional training of experts, the need to introduce the institute of mentoring has been emphasised. Given the specifics of forensic science activities associated with psychological stress while forensic research, emphasis has been placed on psychological training introduction. The ways of reforming structure of subjects of administrative and legal support of professional training of forensic experts have been indicated.

*Keywords:* advanced training, forensic expert, initial vocational training, internship, vocational education, vocational training.

## Introduction

Vocational training of forensic experts plays an important role in their professional activities. It directly affects ability of these experts to draw qualitative and objective forensic expert conclusions to provide the State law enforcement system with the necessary evidence in courts. High level of professional training increases their efficiency. Moreover, a well-established system of professional education has a positive effect on adaptation of new employees to the specific conditions of forensic science, and it accelerates the process of acquiring specific expertise and practical skills.

A professionally untrained expert cannot successfully use equipment available in laboratories, objectively draw up a forensic expert conclusion and provide comprehensive answers to questions. Professional readiness to perform functional duties in combination with specific expertise, skills and abilities does not automatically arise in graduates of higher education institutions but is purposefully and systematically formed throughout forensic expert professional activity. Postgraduate education becomes an important stage in the specialist's continuous improvement of their specific expertise, skills and abilities, mastering new forensic expert specialisation. Progress forces specialists to professional development.

A forensic expert is a procedural person. Forensic expert conclusions are an important type of evidence in courts. This imposes certain requirements among which is the appropriate level of their professional training. Therefore, this training, followed by certification for the right to conduct forensic research in certain forensic expert specialisations, should be regulated by the State and be under its direct control, regardless of whether forensic expert works in a State specialised institution or belongs to the category of professionals who are not their staff.

Systematicity, consistency, combining theory with practice, regulations and control of the professional level of forensic experts by the State should be the basis of their professional training. This requires development of modern progressive system of training of forensic experts as a procedure, its legal consolidation, in order to form a high level of training as a quality that should lead to timely provision of law enforcement system quality and objective forensic expert conclusions.

Such scientists as N. M. Tkachenko, O. M. Kliuiev, E. B. Simakova-Yefremian, I. A Petrova, O. V. Agapova, and O. V. Kurdes paid attention to the issue of improving training of forensic experts in Ukraine. K. Palkova and O. Agapova carry out research for the use of open educational resources in training forensic experts. Therefore, it is obvious that the process of training a future forensic expert covers several stages of training and combines different degrees of difficulty of the training programme. New challenges related to technological progress impact the education of forensic experts and require new and unique skills (Palkova, Agapova & Zīle, 2021).

Given these scientists' best practice, the purpose of this article is to outline the main directions of improving the legal framework for training forensic experts in Ukraine

that should become scientific basis for reforming the entire system of training of this category of professionals, regardless of whether they work in state specialised institutions or independently perform forensic science activity.

## Research Results and Discussion

Currently Ukraine is heading for full accession to the Commonwealth of European Countries and building a rule of law in Ukraine where human rights are guaranteed by law. Compliance of state legislation with international norms and European standards should become prerogative of rule-making activities. Regulation of professional training of forensic experts that provides State law enforcement bodies by forensic research conclusions and who are procedural persons in legal proceedings should be regulated and simultaneously comply with the international norms.

In accordance with Art. 16 of the Recommendations on Vocational Guidance and Training in Human Resources Development of the International Labor Organisation No. 150 dated on June 23, 1975 (Rekomendatsii Mizhnarodnoi orhanizatsii pratsi, 23.06.1975) (hereinafter referred to as ILO Recommendations No. 150 dated on June 23, 1975) defined types of vocational training: initial training (for persons who have no work experience or have little experience); further training (for the purpose of advanced training), retraining (in case of obtaining a new qualification in another field of professional activity); further education ( complementing existing education); on-the-job training on occupational safety and health; obtaining information about the rights, responsibilities of employee and his social security. It is worth noting division of further training to improve skills performed in order to improve knowledge within one specialisation and further training carried out to obtain new knowledge within one specialty. According to Art. 18 of the ILO Recommendations No. 150 dated on June 23, 1975 initial training consists of: general training (divided into theoretical training and practical training); basic education; area of specialisation (specifying existing specialisation); introduction to working environment.

In Ukraine, the Law On Professional Development of Employees (Zakon Ukrainy, 12.01.2012) regulates the structure of vocational training. Thus, for categories of managers and professionals the following types of training are provided: retraining, internships, specialisation and advanced training. However, this Law does not provide definitions of these types of training that is its significant shortcoming.

The Law of Ukraine On Education (Zakon Ukrainy, 05.09.2017) defines the general structure of education in Ukraine that includes vocational training; postgraduate education; retraining and/or advanced training courses; continuous professional development. The law provides for continuous professional development of a person after obtaining higher and/or postgraduate education, as a continuous learning process in order to improve professional knowledge, skills and abilities. Article 18 of the Law defines the structure of postgraduate education, which consists of specialisation (specialised

training within area of specialisation); retraining (education aimed at mastering another profession); advanced training (acquisition of new and/or improvement of existing specific expertise within a certain field of knowledge); internship (gaining practical experience in a particular professional activity).

Professional training of forensic experts under the control of the Ministry of Justice of Ukraine (hereinafter referred to as Minjust) is regulated by the Regulations on the Central Expert Qualification Commission under the Ministry of Justice of Ukraine and certification of forensic experts (Nakaz Ministerstva yustytsii Ukrainy, 03.03.2015) (hereinafter referred to as Regulations on CEQC). According to Section III of the Regulations on CEQC, professional training of forensic experts consists of training and internships. As a shortcoming, it should be noted that the Regulations on CEQC do not contain an interpretation of the terms *training* and *internship*. In accordance with paragraph 1 of Section III of this Regulation, training (internship) of forensic experts is conducted in order to obtain and/or confirm the qualification of a forensic expert in training programs on theoretical, organisational and procedural issues of forensic science and relevant expert specialisation. Due to the analysis of this norm, it can be concluded that professional training of forensic experts consists of training and internship, as well as two stages of the educational process: course on theoretical, organisational, procedural issues of forensic science and relevant expert specialisations. Based on the general norms of administrative legislation, internship of forensic experts should be understood as practical training in certain expert specialisations.

Therefore, the current Regulation on the Central Expert Qualification Commission under the Ministry of Justice of Ukraine and certification of forensic experts in terms of legal regulation of professional training of forensic experts are considered imperfect and in need of revision towards improvement.

E. R. Rosinskaya offers a classification of forms of professional training of forensic experts:

1) traditional expert training consisting of two parts: professional training in a higher education institution, and postgraduate education in certain expert specialisations;
2) obtaining higher education in the Forensic Science specialisation (Rossinskaia, 2019).

In Ukraine, training of forensic experts in higher education institutions is provided to the Ministry of the Interior and the Ministry of Healthcare. Training of forensic experts under the control of the Ministry of Justice is carried out according to the so-called "traditional" system. Use of two forms of professional training of forensic experts is considered the most optimal. Thus, training for popular expert specialties should be carried out in higher education institutions and for less popular in postgraduate courses after receiving a diploma of higher education in a particular specialty corresponding to the expert (Rossinskaia, 2019). This requires the regulatory

and legal settlement of this issue at the level of the Cabinet of Ministers of Ukraine. This is the first direction of improving legal support of professional training of forensic experts in Ukraine. Introduction of a new specialisation Forensic Science in Ukraine that should provide professional training in higher education institutions requires research used by J. Almirall and K. G. Furton. Thus, scientists give an example of accreditation of training programmes for forensic experts in the United States: "The American Academy of Forensic Sciences (AAFS) formed a group in late 2001 to continue the work of the TWGED by organising an accreditation commission for academic programmes in forensic science… The primary function of the committee is to develop and maintain standards and administer an accreditation programme that recognises and distinguishes high quality undergraduate and graduate forensic science programmes" (Almirall & Furton, 2003). It is impossible to disagree with L. Quarino and T. A. Brettell who emphasised that "with the development of the an accreditation system, forensic science education has improved dramatically in the last decade and continues to do so" (Quarino & Brettell, 2009).

The second direction of improving professional training of forensic experts should be to improve the structure of postgraduate education in accordance with the general norms of international and Ukrainian law. The procedure for organising professional training of forensic experts should be derived from the Regulation on CEQC and regulated by a separate legal act for the following reasons:

1) the main task of the Regulation on the CEQC is to certify forensic experts for the right to conduct expert research and resolve the issue of bringing them to disciplinary responsibility, which is quite sufficiently regulated;
2) the procedure for postgraduate education is extensive, thus it cannot be limited to one section of the legal act.

The following structure of postgraduate education of forensic experts has been proposed:

1) *initial vocational training* (conducted to obtain the qualification of a forensic expert in a particular expert specialisation);
2) *advanced training* (conducted to confirm the qualification of a forensic expert at statutory intervals);
3) *retraining* (conducted in the case of a certain expert specialisation to obtain another expert specialisation).

Each type of postgraduate education should consist of two courses of vocational education:

1) *first course*: training on theoretical, organisational and procedural issues of forensic science;
2) *second course*: training in a certain expert specialisation.

In turn, training in a certain expert specialisation is proposed to be divided into two components: theoretical part for a certain expert specialisation and internship. V. V. Bondarenko defines internship as professional training conducted after theoretical

training within a certain specialty in order to form and consolidate professional competencies in practice (Bondarenko, 2018). Thus, internship, as an integral part of training in a particular expert specialty, is a systematic practical training under guidance of an experienced specialist, which aims to acquire knowledge, skills and abilities to conduct expert research in the relevant expert specialisation.

Vocational education of forensic experts is an ongoing process aimed at acquiring new specific expertise, skills and abilities to perform expert research. I. V. Shrub proposes to allocate a separate type of training, the so-called "service training", that in his opinion should be planned, aimed at consolidating and updating existing knowledge, skills and abilities (Shrub, 2016). After undergoing initial vocational training, advanced training or retraining, forensic expert should continue to study legislation related to forensic science activities, new methods of expert research, special literature, etc. This issue should be solved by introduction of specialised training in the system of postgraduate education of forensic experts carried out continuously regardless of the time of their initial professional training, advanced training or retraining.

Vocational training specifics of forensic experts should be the subjectivist principle of its organisation that combines individual and group approach to vocational training (Kovalchuk, 2016). The group approach means possibility of conducting classes on theoretical, organisational and procedural issues of forensic science, as well as lectures on types of expert specialisation with a wide range of professionals. Individual approach means training with each specialist in a particular expert specialty. In addition, an individual approach means organising a learning process with each professional depending on the level of their professional knowledge, skills and abilities. Individual approach also means additional training of forensic experts who have undergone initial professional training in other domestic and foreign institutions of forensic science and criminalistics.

The conclusions of S. Köpsén and S. Nyström, who emphasise "becoming a forensic expert is a learning process in practice where supervision plays a decisive role in maintaining the professional knowledge in the judicial system" (Köpsén & Nyström, 2012), deserve attention and should be embodied in the training of forensic experts.

While organising vocational education of forensic experts, the principle of dividing all types of this training into two parts – theoretical and practical – should be observed (Pokaliuk & Nesterenko, 2016). This applies to training in theoretical, organisational and procedural issues of forensic science, as well as training in certain expert specialisations. Theoretical part is needed if it is necessary for a forensic expert to perform their practical duties. In addition, theoretical and practical parts of the training should be in a harmonious combination where theory is the basis of practical activities of a forensic expert. This applies to training in a specific expert specialisation which should consist of the theoretical part of training in the expert specialisation and internship carried out in availability of theoretical foundations of expert research methods.

Continuity of professional training (Ildiko, 2019) is the next principle of professional training of forensic experts. Primary vocational training; advanced training at regular intervals; retraining in case of obtaining qualification of a forensic expert in another expert specialisation; profile specialised training carried out constantly and self-training create a balanced system of professional training of a forensic expert. This allows forensic expert to consolidate their existing specific expertise, skills, abilities and master new ones.

Introduction of innovative methods in professional training of forensic experts will accelerate process of acquiring new knowledge, skills and abilities, significantly improving the quality of their training (Protsevskyi, 2014). Interstate cooperation in the field of professional training of experts is one of the conditions for raising professional level of experts. It is better if this cooperation is not one-time but is mainatined in accordance with concluded interstate agreements in the field of forensic science, as well as direct agreements between forensic science institutions of different countries (Simakova-Yefremian *et al.*, 2018). Conducting classes by video conferencing by foreign professionals; exchange of scientific, educational literature and methods of expert research; development of video materials of methods of expert research; joint conferences, symposia and workshops are not a complete list of international cooperation in the field of vocational training of forensic experts (Kurdes, 2021c).

Special attention needs to be paid to the normative regulation of the issue of adaptation and acceleration of vocational training of hired experts. This problem can be solved by introducting a mentoring institute in the system of vocational training of forensic experts practiced by leading domestic and foreign companies. In addition, a mentoring institute can be introduced for retraining and advanced training of forensic experts with experience. After all, training under guidance of an experienced professional will significantly accelerate assimilation of new material in accordance with the training programmes. Mentoring will have a positive impact on improved productivity for professionals of forensic institution staff due to reduced adaptation time to specific working conditions of forensic activities; accelerating the process of acquiring new knowledge, skills and abilities; saving working time of the institution management for training and supervision of professionals qualified as forensic experts in a particular expert specialisation (Kurdes, 2021a, 1021b). The main condition for successful functioning of mentoring institute is the development of a mechanism to encourage mentors depending on the results of mentee vocational training. Material component of this incentive should be a priority.

Another direction of improving regulatory and legal support for training of forensic experts should be regulating the procedure for internships. Thus, in Ukraine internship of forensic experts is conducted for:

1) obtaining (confirmation) qualification of a forensic expert in a certain expert specialisation in accordance with the Regulation on CEQC (Nakaz Ministerstva yustytsii Ukrainy, 03.03.2015);

2) advanced training in other forensic science institutions in accordance with the annual Project of the Ministry of Justice of Ukraine.

It should be noted that procedure for conducting internships for forensic experts under control of the Ministry of Justice of Ukraine is not regulated. If the internship to obtain or confirm the qualification of a forensic expert is stipulated by the Regulation on CEQC, in accordance with the annual Plan of the Ministry it is not provided by any legal act. Currently it is important to develop the procedure for internships of forensic experts as a practical part of vocational training taking into account domestic and foreign experience. In forensic science of the Ministry of Justice of Ukraine, it is necessary to create training bases for certain expert specialisations, the list of which should be approved by the Ministry. The condition for functioning of such bases should be availability of highly qualified forensic experts with experience in the expert specialisation for at least three years and a developed material and technical base of practical laboratories.

Specifics of forensic science activity are related to psychological stress on forensic experts during expert research. Thus, being at the scene, conducting a review of physical evidence has a certain negative impact on human psyche. Introduction of psychological training in the system of professional training of forensic experts should improve this situation. In addition, such training will significantly accelerate the process of adaptation of new professionals to the specific working conditions of forensic expert, improve moral and psychological climate in the team and promote creation of corporate culture in the forensic institution. Psychological training should take place in practical classes with the use of innovative technologies, methods and interactive forms of learning; for instance, trainings simulations and business games to name a few. Professionals from psychological research laboratories of state specialised institutions, as well as professionals from higher education institutions and specialised institutions (Kurdes, 2021) can be involved in classes.

An example of successful reform of the system of professional training of forensic experts is creation in National Scientific Center "Hon. Prof. M. S. Bokarius Forensic Science Institute" of the Ministry of Justice of Ukraine of Department of Professional Development (hereinafter referred to as the Department), the main tasks of which are to organise professional training of forensic experts of state specialised institutions and forensic experts who are not full-time employees of these institutions. Thus, the department has a license to conduct educational activities in postgraduate education in the field of knowledge: *08 Law* in the specialisation: *081 Law* in the educational programme: Theoretical, organisational and procedural issues of forensic science. Order No. 256-L of the Ministry of Education and Science of Ukraine dated on November 23, 2020.

According to the Regulation, the department performs the following functions:

1) management of classes on theoretical, organisational and procedural issues of forensic science, as well as for certain expert specialisation of forensic experts of state specialised institutions and professionals who are not employees of these institutions;

2) preparation and sending to the Central Expert Qualification Commission at the Ministry of Justice of Ukraine documents for persons who have completed a full course of training, in order to consider obtaining or confirming qualification of a forensic expert;
3) management of internships for forensic experts of state specialised institutions in accordance with the annual Plan of the Ministry of Justice of Ukraine;
4) development of educational and methodological support for vocational education of forensic experts in accordance with the standards of the Ministry of Education and Science of Ukraine;
5) management of internships in certain expert specialties of specialists of foreign institutions of forensic science and criminalistics;
6) ensuring review of forensic expert conclusions performed by forensic experts of research institutions of forensic examinations of the Ministry of Justice of Ukraine, their analysis and providing proposals to improve the quality of their preparation;
7) preparation of documents to the Ministry of Justice of Ukraine to resolve the issue of assigning a forensic expert qualification class;
8) management and conducting of lectures on theoretical issues of forensic science and certain expert specialties in the mode of videoconferencing with foreign partners;
9) preparation of documents on assignment of professionals who are trained in certain expert specialisations, training leaders that has the characteristics of mentoring;
10) management of classes with forensic experts to study legal framework related to forensic activities, new methods of expert research characteristic of specialised training.

Conducting classes with the teaching staff of National Scientific Center "Hon. Prof. M. S. Bokarius Forensic Science Institute" is based on the principle of interactive vocational education, consisting of individual approach to each student, flexibility, providing an opportunity to choose the direction of the learning material, teacher-student cooperation, student activity. Successful implementation of the training programme contributes to intrinsic cognitive motivation, mastering new specific expertise and skills, ability to plan the learning process, ability to self-organise and self-control.

Gateway to successful educational process is its proper logistics that should be considered within two criteria – qualitative and quantitative. Classes should be held in equipped training and laboratory facilities. Students should have access to library funds of forensic science institutions. Provision of educational and methodological literature, computer and other organisational equipment is an important condition for vocational training quality of forensic experts. Material and technical measures are ancillary to educational process. However, without proper level of this provision, it is impossible

to manage vocational education of the future specialists being able to conduct expert research and provide comprehensive answers to questions. Logistical support for training of forensic experts depends on available material resources that can be classified as follows (Subbot, 2012):

1) material ones: educational and laboratory premises, special equipment and devices, special and scientific literature, stationery, etc.;
2) technical: means of video communication, computer and other office equipment;
3) financial ones: budget funds and funds received for provision of vocational training services for professionals who are not full-time employees of state specialised institutions.

Development of material and technical base for vocational training of forensic experts should be planned and consist of the following (Zhuk, 2016):

1) strategy design for development of material and technical base for vocational training of forensic experts and implementation of appropriate measures;
2) financing of capital expenditures for material and technical support of vocational training;
3) use of funds from special fund of state specialised institutions to improve material and technical base of educational process.

Material and technical measures depend on financial measures that are part of the system of financial relations of state and depend on centralised distribution of budget funds. The purpose of financial measures to ensure vocational training of forensic experts is to provide forensic science institutions with sufficient financial resources for professional training of forensic experts. Thus, funds for vocational training of forensic experts come to the subjects of this training in two areas:

1) budget financing;
2) special fund of forensic science institutions from legal entities and individuals for vocational education of professionals who are not employees of state specialised institutions.

The funds received on special account of forensic science institutions for vocational education of professionals who are not employees of state specialised institutions should be spent to cover overhead costs associated with educational process and development of material and technical base of vocational training.

Particular attention needs to be paid to improving structure of administrative and legal support for vocational training of judicial experts under the control of the Ministry of Justice of Ukraine. Currently there are the following levels of subjects of administrative and legal support for vocational training of forensic experts:

1) *general level*: Ministry of Justice of Ukraine;
2) *territorial and departmental level*: forensic science institutions and their territorial branches.

In the Ministry of Justice of Ukraine, administrative and legal support of vocational training of forensic experts is provided by the Department of Expert Support of Justice

(hereinafter referred to as the Department) and its structural unit – the department of the Central Expert Qualification Commission at the Ministry of Justice of Ukraine. At the general level (Ministry of Justice of Ukraine), normative work is carried out on administrative and legal support of professional training of forensic experts under the control of this Ministry, general management of their vocational training and control over the state of this training (Postanova Kabinetu Ministriv Ukrainy, 02.07.2014). It necessary to reorganise the department of the Central Expert Qualification Commission under the Ministry of Justice of Ukraine and create a department for vocational training of forensic experts and organise work of the Central Expert Qualification Commission under the Ministry of Justice of Ukraine.

Particular attention needs to be paid to reforming and improving professional training of forensic experts at territorial level, which includes research institutions of forensic science and their territorial branches that directly conduct professional training of forensic experts and state specialised institutions and non-employees of these institutions. As a positive experience of National Scientific Center "Hon. Prof. M. S. Bokarius Forensic Science Institute" of the Ministry of Justice of Ukraine in terms of creating specialised units for professional training of forensic experts licensed by the Ministry of Education and Science of Ukraine for postgraduate education, such units should be established in each forensic science institution through expansion of their powers in vocational training of forensic experts.

Formation of highly qualified forensic experts should be facilitated by introduction of a modern model of vocational training in the educational process consisting of the following (Kademiia, 2008):

1) in the center of educational process: personality;
2) basis of education: cooperation of teacher and student;
3) key to quality training: listener activity;
4) independent training as an important element of educational process;
5) availability of communicative communication;
6) software use for training and control of the level of professional knowledge, information support of educational process;
7) cooperation of teaching staff in conducting classes, exchange of pedagogical experience;
8) promoting access of all participants in educational process to domestic and foreign educational and research funds

Availability of a motivating factor during the study process is a powerful incentive for students to master new specific expertise, skills and abilities. Motivational factors include: interesting and meaningful information, relevance of learning topics and its practical significance, use of innovative learning technologies, self-esteem and self-knowledge. Use of training in the educational process is one of the effective methods of vocational training if logical communication, collective discussion, self-analysis and self-comparison have been used (Lukianova, 2012).

## Conclusions

To improve the training of forensic experts in Ukraine, there is an urgent need to improve administrative and legal support of this training. The current Regulation on the Central Expert Qualification Commission under the Ministry of Justice of Ukraine and the certification of forensic experts on conducting vocational training of forensic experts is imperfect. It is important to develop and adopt a separate legal act that should clearly regulate the procedure for vocational training of forensic experts, taking into account domestic and foreign experience.

Reforming and developing the vocational training system of forensic experts under the control of the Ministry of Justice of Ukraine should be carried out in two directions: traditional training system that consists of two parts: professional training in higher education and obtaining higher education majoring in Forensic Science. Simultaneously, training of experts by higher education institutions should be carried out in relation to the most popular expert specialisations. Improving the structure of postgraduate education of forensic experts in accordance with general norms of international and Ukrainian legislation is a necessary condition for raising professional level of forensic experts. A specific structure of postgraduate education of forensic experts is proposed that should consist of initial vocational training(for obtaining qualification of a forensic expert in a certain expert specialisation), advanced training (to confirm the qualification of a forensic expert at statutory intervals), retraining expert specialisation is conducted to obtain another expert specialisation), specialised training (conducted constantly to study the legal framework of forensic science and new professional readings).

To adapt and accelerate vocational education of hired experts, it is necessary to introduce mentoring institute in the system of vocational training of forensic experts. Mentoring can be introduced for forensic experts undergoing advanced training or retraining. Given the specifics of forensic science, associated with psychological stress during expert research, it is advisable to introduce psychological training in the system of professional training of forensic experts that will accelerate the adaptation process of new professionals to specific working conditions of forensic science and improve morale an ambiance in the team.

Adequate logistical support for training of forensic experts is an important condition for such training. For this purpose, budget from the special fund of forensic science institutions that come from legal entities and individuals for professional training of specialists should be used.

Reforming the structure of subjects of administrative and legal support for professional training of forensic experts is a current requirement for both staff of the Ministry of Justice of Ukraine and research institutions of forensic science that directly conduct vocational training of forensic experts. Using the positive experience of National Scientific Center "Hon. Prof. M. S. Bokarius Forensic Science Institute" of the Ministry of Justice of Ukraine on creation of a specialised unit of professional training of forensic experts should be extended to entire Ukraine.

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# Forensic Psychology Expertise in Legislation and Case Law of Estonia: Based on Physiological Affect

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## Abstract

Expertise is the study and solution of a professional issue or the expression of an opinion on it by an expert. In procedural law, expertise means examination of materials to establish factual information. Expert examination is performed by an expert and the research results are formalised in an expert report. Circumstances established in the course of expert examination, which have been fixed in accordance with the procedure prescribed by procedural law, are the evidence in the preliminary investigation and in court resolution procedures.

*Keywords:* affective state, expertise, forensic psychology examination, forensic psychology examination management, killing in a state of mental agitation.

## Introduction

It is the goal and task of each country to ensure that behaviour of people is within the framework defined by social norms, so that social anomalies, including offenses and crimes, are kept to a minimum. In order to achieve this general goal, it is important to take into account the peculiarities of the human psyche, both in legislation and legal proceedings. Forensic psychology is one of the fields used here. It examines the psyche of

a mentally healthy person. In the case of persons with borderline conditions and, when a complex examination is required, in addition to the psychologist, a psychiatrist-expert should also participate. Psychological expertise is based not only on people but also groups of people and normative acts, involving their legal consciousness and law as a system of norms. This article deals with the organisation, appointment and performance of forensic psychological examination in Estonia. Development of the concept and treatment of physiological state of affect in its historical continuity is viewed retrospectively in Soviet/era Estonian criminal law and criminal proceedings. Research methods include concept of forensic psychological expertise based on professional literature and analysis of its practical development. Analysis of legislation and psychological expertise of the USSR and the Republic of Estonia has been included as well. The empirical aspect is based on analysis of the case law. The purpose of this article is to show that management of psychological expertise at a state level is deficient.

## 1 Examination Bodies and Experts in Estonia

In the Republic of Estonia, forensic examinations are performed on the basis of the Forensic Examination Act (Forensic Examination Act, 2002), the current wording of which was adopted on March 15, 2019. In individual areas of proceedings, expertise is specified in the relevant procedural laws: 1) Sections 95–109 of the Code of Criminal Procedure (Code of Criminal Procedure, 2004) (current version adopted on December 2, 2017) regulate the examination; 2) Sections 293–306 of the Code of Civil Procedure (Code of Civil Procedure, 2006) (current version adopted on June 30, 2020) deal with expert examinations.

Pursuant to the Forensic Science Act, forensic science is a professional activity of a person appointed as an expert in a procedural matter, the purpose of which is to examine the submitted material and provide a scientifically substantiated expert opinion based on the expert task. An expert opinion is a categorical or probable expert conclusion made on an important fact to be proved and expressed in the expert report. An expert is a person who uses non-legal expertise in performing forensic examinations, and in the case provided by law, also legal expertise. The expert may be a forensic expert, a state-recognised expert or another person appointed by the person conducting the proceedings.

A forensic expert is a person working in a state expert institution whose task is to perform expert examinations. It is a person who has active legal capacity, speaks Estonian to the extent established by law, or on the basis of law has acquired the required higher education in the field of expertise at a higher education institution of Estonia, or has worked at an expert or research institution or other workplace in the defined field of expertise for at least two years immediately before employment as a forensic expert. A person who has acquired a foreign professional qualification may also work as a forensic expert if his or her professional qualification has been recognised in accordance with the Foreign Professional Qualifications Recognition Act.

A person may not work as a forensic expert if:

1) they have been convicted of an intentionally committed criminal offense;
2) they have been punished for violating the anti-corruption law by misdemeanor proceedings;
3) they have a close relative (grandparent, parent, brother, sister, child or grandchild) or a relative (spouse, parent of the spouse, brothers, sisters or children of the spouse) with an employee directly supervising the workplace or an immediate superior;
4) they, due to health, cannot work as a forensic expert. In case of doubt, the medical condition of the person shall be determined by a medical commission.

Upon entering into an employment contract, a forensic expert shall take an oath to the employer:

> "I, (name), promise to perform the duties of a forensic expert honestly and give an expert opinion impartially, in accordance with my special knowledge and conscience. I am aware that knowingly giving an incorrect expert opinion is punishable in accordance with paragraph 321 of the Penal Code."

The forensic expert will sign and date the oath. The text signed by the oath shall be attached to the copy of the employment contract held by the employer.

A national expert body is a state body whose main purpose is to perform expert examinations. The statutes of an expert body shall be established by a regulation of the minister responsible for the field. In the Republic of Estonia, the central state expert institution is the Estonian Forensic Science Institute, which is administrated by the Ministry of Justice (List of national expert bodies, 2002).

In carrying out its tasks, the Institute represents the state. The institute is located in Tallinn, the capital of Estonia.

The main activity of the institute is to conduct forensic examinations and research. In addition, the institute carries out research and development activities supporting expert activities, organises training and performs other tasks related to the fields of expertise.

The institute conducts many types of research and various expertise. The examinations performed at the institute are named forensic examinations; forensic biology expertise; forensic chemistry expertise; forensic psychiatric examination; forensic expertise. Nevertheless, the institute does not provide for forensic psychological examinations, and psychologists are not considered as assistants in these examinations (Auväärt & Engalichev, 2018).

## 2 Physiological Affect in Soviet Criminal Law

It is known that social sciences such as sociology, psychology and paedology ceased to exist in the Soviet Union. The problems included in the research subject of psychology merged with the object of research in psychiatry. Psychology as an independent science began to develop again in the Soviet Union in the middle of last century. Legal psychology emerged as an independent branch of psychology.

A. Ratinov`s "Researcher of Forensic Psychology", published in 1967, can probably be considered a groundbreaking work. Psychological expertise emerged as a branch of independent forensics. One of the founders of this direction is M. M. Kotšenov with his seminal work "Introduction to Forensic Psychological Expertise" published in 1980. In 1991, he defended his Thesis in legal psychology.

I. Kudryavtsev presented a comparative analysis of legal psychiatry and legal psychology in 1988 and defended his doctoral dissertation on the same topic in 1992.

Works of O. Sitkovskaya "Forensic Psychological Expertise" in 1983 and "Psychology of Criminal Liability" in 1998 must also be mentioned. Noteworthy are also works of V. Engalichev, especially his and Shipshsin`s "Forensic Psychological Expertise" (Kaluga, 1997).

The Criminal Code of the Estonian SSR was adopted on January 6, 1961. Paragraph 131 provided for killing in a state of mental agitation: "Deliberate killing in a state of sudden severe emotional agitation caused by violence or severe insult by the victim is punishable by up to five-year imprisonment or up to one year in correctional work" (Criminal Code of the Estonian SSR, 1980). Ilmar Rebane, one of Estonia`s best-known and most recognised criminal law specialists at the time, has commented on this code. Following revised and supplemented edition of the comments have been used.

This crime is a less dangerous type of killing. It is important that this condition is caused by the victim's own unlawful conduct. It qualifies as a murder under this section if the offender committed the crime in a state of sudden agitation – a physiological affect. This section refers only to a physiological state of affect caused by the victim himself, either through violence or serious insult. Violence or severe insult by the victim can be directed not only against the offender themselves but also against their relatives.

Under this section, intentional killing means that violence or serious insult directly (suddenly) causes strong emotional arousal to the offender and results in an intention to kill the victim and the crime is committed immediately. Killing carried out after a long break cannot be qualified as intentional according to this section. From a subjective point of view, the crime in question presupposes intent.

The author of the comments was also the initiator in identifying the physiological affect through psychological examination. Several dissertations written under his supervision have been also dedicated to it.

This article emphasises that Rebane was of the firm opinion that a physiological state of affect can be identified by means of psychological, not psychiatric, examination. The described comments were based on works of legal psychology of the USSR.

## 3 Analysis of Physiological Affect by Estonian Researchers

In the independent Republic of Estonia, legal psychology developed independently. The following authors and works should be mentioned:

- August Kuks "Ideals of Estonian school youth" published in 1922. This book was later formatted by the author into a doctoral dissertation;
- Hans Madisson's doctoral dissertation in 1924 "Sexuality and Juvenile Delinquency in Estonia", the combination of research methods used of which is unique and has not been repeated (Auväärt & Maripuu, 1994);
- Bjerre "Zur Psychologie des Mordes" published in Tartu in 1925;
- J. Tork's doctoral dissertation "Estonian children's intelligence" published in Tartu in 1939. Based on his dissertation, Tork also compiled a monograph of the same name which was published in 1940. It was this work that provoked special anger of the occupying Russian forces, and an attempt was made to completely destroy the work by burning and cutting it to pieces. There was still the view in Soviet science that intellect does not depend on innate qualities, but is formed in the process of socialisation.

At the beginning of the occupation, however, these studies were suppressed, and psychology ceased to exist in Estonia as in entire Soviet Union. Rebirth of Estonian psychology could be considered to start in the sixties of previous century.

Under the guidance of I. Rebane, forensic psychological expertise was studied and practiced by his students in the late 1970s.

Under the supervision of Professor Rebane, R. Maruste defended his candidate dissertation in law. On the basis of this dissertation, he published the brochure "Use of Psychological Expertise in Criminal Proceedings". According to R. Maruste, the expert's study must include the following:

1) analysis of a crime situation;
2) analysis of permanent characteristics of the personality of the offender;
3) mental state of the subject before and during the commission of the crime;
4) analysis of the subject's behavior at the time of crime;
5) analysis of behavior after the act was committed;
6) the subject's attitude towards the event that took place (Maruste, 1982).

There is just one question to diagnose affect whether the accused was in a state of physiological (anger, rage, fear) affect at the time of the crime(s) (indicating which ones).

Maruste was later the Chief Justice of the Supreme Court of the Republic of Estonia, a judge of the European Court of Human Rights and a member of the Parliament (Riigikogu) of the Republic of Estonia. While working in these positions, his interest in psychological expertise waned, and many of the views expressed in this decor have been forgotten.

As a student of Professor I. Rebane, Lembit Auväärt defended his candidate`s dissertation "Role of Family and Friends in the Legal Socialisation of Young People"

in 1982; "Communication in Legal Proceedings" published in Tartu in 2002. L. Auväärt has also published numerous publications on psychological examinations and conducted numerous psychological examinations, including examinations of emotional states (Auväärt, 2008). He has also addressed identification of mental characteristics in testimonies (Auväärt, 2002).

In 1986, the last all-union congress of legal psychologists of the USSR was held in Tartu. In 1992, P. Pruks`s brochure "Criminal Procedure: False Scientific Detection Using a False Editor" was published. He also successfully defended his doctoral dissertation on the same topic. Hans Raudsik has written about circumstances causing false statements based on V. Kudryavtsev's treatment (Raudsik, 2001).

## 4 Physiological Affect in Criminal Law of the Republic of Estonia

The Estonian Penal Code was passed by the Parliament (in Estonia: Riigikogu) on January 6, 2002 and entered into force on September 1, 2002. The current version has been adopted on July 7, 2020. Compared to the so-called Soviet legislation, there are several changes in both the text of the law and its interpretations. Paragraph 57 of the Penal Code, which provides a list of mitigating circumstances, is more related to the topic. Of particular importance are paragraphs 1 (4) (commission of an offense under the influence of a difficult personal situation) and 6 (commission of an offense under the influence of strong agitation caused by unlawful conduct).

In 2015, comments prepared by well-known Estonian lawyers J. Sootak and P. Pikamäe appeared on the Penal Code. According to these comments, the impact of a difficult personal situation means a situation or condition due to economic, family, personal reasons (such as illness) or other similar circumstances that have influenced the person to commit the offense. These circumstances do not have to be the direct cause of the offense (Penal Code: executive edition, 2015).

To exemplify, paragraph 115 of the Penal Code has been chosen:

> ***Paragraph 115. Provoked killing***
> Killing, if committed in a state of sudden severe emotional arousal caused by violence or insult by the victim against the killer or a person close to him, is punishable by 1- to 5-year imprisonment.

Commentators stress that provoked killing is a lighter composition of killing. It is a privileging fact that the victim themselves has clearly killed the perpetrator with their grievous assault on the person and provoked them. Therefore, the perpetrator's anger and counterattack are to some extent justified, more humanly understandable.

In addition, the reason for reduction of punishment is the fact that in a state of mental or emotional arousal, a person's ability to control their behavior has decreased (Penal Code: executive edition, 2015).

A strong state of agitation is a constituent characteristic of the offender's mental state, which must be proven by forensic psychiatric examination. If the killing has been committed as a result of violence or insult, but the perpetrator's state of agitation is not identified, this section cannot be applied (Penal Code: executive edition, 2015).

Development of a state of strong mental isolation for the offender is causally related to the victim's violence or insult. If there is no such connection, i.e., if the excitement of the offender is caused by something else, this section cannot be applied.

To define a killing as killing in the state of emotional arousal, the effect of violence or insult on the perpetrator should be immediate. The state of emotional arousal and the consequent desire to kill must have arisen suddenly, i.e., immediately after an act of violence or insult (Penal Code: executive edition, 2015).

According to J. Sootak, the issue with the state of affect is that it raises the question of terminology, making it questionable in legal language, at least in this context. It was common in the literature to describe the state of arousal with the term "affect", more precisely "physiological affect", opposed to a pathological affect (temporary severe mental disorder). To date, the Estonian Supreme Court has relied on the complex examination of forensic psychiatry-forensic psychology that the definition "physiological affect" is not a psychological term describing a specific emotional state, and therefore the examination cannot answer the question whether the accused had such a condition. Reference is made to the decision of the Supreme Court of the Republic of Estonia 3-1-1-46-11 (Sootak, 2017). However, this article avids being so categorical in interpreting this Supreme Court decision (Auvaart & Kaugia, 2000). There, a committee of psychologists and psychiatrists found that they were unable to determine a physiological effect, but that did not mean that there was no physiological affect nor that it could not be determined.

The discussion about emotional states has led to the publication of several interesting articles in Estonian professional literature. The article "Assessment of emotional states by psychological examination" by Tiina Kompus, a long-term psychology expert, should be mentioned; article by Paavo Randma, Supreme Judge of the Republic of Estonia, "Affect as a state of agitation and temporary severe mental disorder"; article by *Ph.D.* in Legal Psychology Jüri Saar and Priit Pikamäe "State of Spiritual Excitement"; Jüri Saar is the Professor Emeritus of the University of Tartu and Priit Pikamäe is a lawyer at the European Court of Justice.

In the discussion, Tiina Kompus suggests that lawyers consider the term "state of agitation" to be broader than the term "physiological affect". Detection of a physiological affect during an examination does not automatically lead to reclassification of the act, but other legally important features must be taken into account (Kompus, 2000).

J. Sootak notes that affect itself as a psychic phenomenon describing a strong state of agitation within the meaning of paragraph 57 (1) (6) and paragraph 115 of the Penal Code is still used in the literature and may displace the notion of "heightened mental state" without scientific content. The bases for such assumption is the book "Psychology: a book for lawyers" by Talis Bachmann (Bachmann, 2015), a well-known Estonian psychologist.

## 5 Physiological Affect in the Case Law of Estonia

### Supreme Court of the Republic of Estonia May 2, 1995. Decision No III-1/1-26/95

The Supreme Court of Estonia is considering the decision of the Criminal Chamber of the Tallinn Circuit Court, according to which R.N. killed his wife in a state of sudden agitation by violence or serious insult by the victim. By serious insult, the Criminal Chamber of the Circuit Court meant O.N.'s ethnicity-related insult to the defendant. Whether the insult was serious or not, remains a question of fact and any court hearing the substance of the matter has jurisdiction to decide. Simultaneously, in classifying the crime, the circuit court has relied solely on the hypothetical opinion contained in the forensic psychological examination report regarding the physiological affect in the defendant and the inconsistent statements of the defendant himself. The assessment of other evidence in the criminal case is not reflected in the decision of the circuit court, nor is it provided with a legal assessment of the analysis of this evidence in the decision of the city court. By violating the requirement of a comprehensive and complete review of the facts and basing the judgment on the hypothetical opinion of an expert in forensic psychology conducted on the basis of an illegal regulation, the violation of procedural law has led to incorrect application of criminal law by the District Court Criminal Chamber.

In order to carry out a comprehensive, complete and objective examination of the facts of a criminal case, it is necessary to order a complex forensic psychiatric and forensic psychological examination of R.N. Based on the above, the Supreme Court of Estonia annulled the decision of this circuit court. This decision of the Supreme Court of Estonia became the basis for hearing other similar cases.

In Estonia, it is possible to find court decisions using keywords. One such keyword is physiological affect. Following are the decisions traced based on the keyword.

### Tallinn Circuit Court of 23.02.2010. Decision No 1-09-1603/18

The appellant considers that M.K. acted in a state of sudden strong agitation caused by violence on the part of the victim. It is clear from the forensic expert's opinion that M.K.'s attack caused a concussion and numerous injuries to the head. The Forensic Psychiatric and Psychological Complex Examination Act states that M.K. was in a state of emotional tension that was not pathological in its extent and strength (physiological state of affect). Contrary to the positions set out in the judgment of the Supreme Court 3-1-1-63-08, it is not possible to observe in the expert report what data and methods were used by experts in order to reach such a conclusion. Physiological affect and state of strong agitation are not overlapping concepts, no position has been taken on the occurrence of such a state. The expert did not provide clear answers to the questions asked during the hearing. What has been overlooked by M.K. due to the activity of his partner before the trip to Tallinn and the nervous tension that caused the trip, an unexpected aggressive

attack by L.K., which caused him to have concussion and led to further uncontrolled actions. M.K. was unable to adequately describe his activities during the pre-trial investigation or at the hearing, which in turn indicates that he acted in a heightened mental state. In this case, it was a complex forensic psychiatric and psychological examination, where a physiological affect was identified, but the court did not consider the views of the experts.

**Harju County Court of March 12, 2013.**
**Decision No 1-12-11410/14**

As described in the expert opinion in the outpatient forensic psychological examination report, O. did not have a state of physiological affect at the time of the crime on the basis of the available information. He was intoxicated then, i.e., he was able to understand that his actions were illegal and to direct his behavior according to that understanding. As a rule, intoxicants preclude a mental state in which the so-called physiological affect belongs.

**Harju County Court May 3, 2013.**
**Decision No 1-13-1833/38**

It is clear from the expert's statements that he maintains the opinion reflected in the expert's report. He rules out the possibility that there was a physiological affect or any other affect, let alone a pathological affect at the time when the criminal offense was committed. The subject was certainly irritated, but this does not constitute a physiological affect. When there is conflict between people, emotionality and irritability are heightened. The subject is extremely sensitive to critical assessments, overreacts. These are long-lasting feelings, which shows the rigidity of the subject's attitudes. The subject is characterised by emotional inflexibility as well as low critical thinking skills. The empathic abilities of the subject are not sufficient and he tends to solve situations with violence. The subject suggested that they could record this as an affective memory loss and then he would receive a lighter punishment. He was completely calm. He also stated that he did not regret the killing.

**Pärnu Country Court November 5, 2013.**
**Decision No 1-13-1300/76**

According to the report of the forensic psychological examination, the perpetrator was not in a state of physiological or pathological affect. The expert found that irritability, including stress, are conditions inherent in human nature that do not deprive him of the opportunity to behave and act purposefully. The expert was of the opinion that at the time of committing crime, N.T. did not show the characteristics of a strong state of agitation (the so-called physiological affect), which would have partially limited his ability to understand that his actions were illegal and would conduct his behavior accordingly. N.T. admitted on August 27, 2013 shooting A.M. (judgment 1-13-1300 21 (26)) with

excitement and aggression. The subject's reaction was due to his personality. N.T. did not show any disturbances of consciousness, symptoms of psychotic state or any other pathological state of mind (pathological affect) at the time of the commission of the alleged crime. The mental and physical violence perpetrated against N.T. by A.M. over several years caused irritation and stress in the subject.

**Tartu Circuit Court June 19, 2014.**
**Decision No 1-13-5033/65**

According to court, classification of killing under the provoked killing section is not justified, because A.S. was not in a state of heightened mental state at the time of the killing, which limits the person's ability to understand and control his actions. It appears from the forensic report of forensic psychiatry-psychology that on December 15, 2012 A.S. did not have such a special emotional state that would have prevented or limited understanding the nature of his actions, including understanding that his actions were illegal and directing his behavior. After the killing, the accused started to change his pants and stuff things in his bag.

**Tartu County Court of October 12, 2015.**
**Decision No 1-12-438/56**

According to the complex examination of forensic psychiatry-psychology, A.J. has no mental disorders. At the time of the act, A.J. was in a state of intoxication, he did not have any mental disorders which would have prevented him from understanding that his actions were illegal nor from controlling his conduct in accordance with that understanding. According to the expert's report, A.J. is also able to participate in the proceedings and serve the sentence due to his mental condition.

**Tallinn Circuit Court November 4, 2015.**
**Decision No 1-15-2168/42**

Experts have given a similar opinion in act No 299 of the complex examination of outpatient forensic psychiatry-psychology performed on June 9, 2015, as a result of which he was unable to understand the prohibition of his act and direct his conduct in accordance with that understanding, or which would have significantly limited his ability to understand that his actions were illegal and direct his conduct in accordance with that understanding.

**Supreme Court of the Republic of Estonia December 14, 2020.**
**Decision No 1-19-8038**

The victim R.R. has had a tense relationship with his ex-wife P.R. for quite some time. They were divorced, but the living area in the joint property was not divided. Communication with their shared children, who lived with P.R., also caused tensions. Communication between R.R. and P.R. became particularly problematic when

R.R. received information about P.R.'s close contact with K.S. in April of 2018. Criminal proceedings had been instituted against R.R. on the basis of threats and physical abuse. K.S. also knew this. R.R. told the witness that "he goes and kicks the man out, beating so hard that he sprays blood". R.R. arrived at midnight on July 18, 2018 unexpectedly to a shared property where P.R., K.S. and three children spent the night. R.R. entered the house with an iron bar.

First, he hit P.R., who was the first to stand up, with an iron bar, then he started beating K.S.,P.R., in his underwear and with a bleeding head injury, managed to escape the house. R.R. began to force K.S. out of the house and continued to constantly threaten and insult him: "if you keep coming back here, next time you leave, it'll be feet first". K.S. asked R.R. to bring him his clothes and the cell phone from the house. R.R. handed the items over to K.S., forced him in the car from the driver's side, forced him to sit behind the wheel and slammed the door shut.

He threw K.S.'s cell phone at the car. R.R. started walking towards the house, but then turned and went in front of the car, waving his hands and shouting at K.S. The car lights went on, the engine started, the car started moving; then there was a loud bang and silence. R.R. died of his injuries.

Chamber of the Court found that the run-off was intentional; the murder committed with intent had been carried out by K.S. in a heightened mental state caused by the victim's own conduct.

Chamber of the Court found that agitation is not a purely medical concept that can be identified in the course of an examination, but that all evidence needs to be analysed. K.S. drove towards R.R. not only because R.R. used physical violence against him, but had previously used intense physical violence against P.R. in their prior relationship. K.S. was in a state of emergency because he also wanted to protect P.R.

Based on the above, the Criminal Chamber of the Supreme Court of the Republic of Estonia acquitted K.S. A psychologist also took part in this process; the list of evidence also includes the act of complex examination of psychiatry-psychology. However, the decision of the Supreme Court does not set this out separately. In the court decision search system this court decision cannot be found under the keyword "physiological affect". The search system needs to be improved so that all things related to physiological affect can be found.

## Conclusions

Analysis of the judgments shows that:

1) during the last 10 years, 10 physiological affect examinations have been ordered in the courts of the Republic of Estonia. No such expertise has been assigned in the last five years;
2) most assigned examinations are complex examinations of psychiatry-psychology. As early as 1982, R. Maruste stressed that administration of justice is primarily interested in how affect affects a person's consciousness and behaviour. While

pathological affect leads a person's consciousness into deep obscurity and the person loses the ability to understand the meaning of their actions and control them, physiological affect causes changes in a person's consciousness, but they are not so profound that the person loses complete control over themselves. While in physiological affect, a person retains the capacity to understand the meaning of their actions and control them, but this capacity is limited, incomplete. However, the authors argue that this status should be considered in administration of justice;

3) in the case of assigned examinations, the experts never found evidence of physiological affect.

According to the author's observations, there are still crimes committed due to sudden heightened mental state, but they have been solved without the opinion of psychological experts.

The authors agree with T. Bachmann, a renowned Estonian psychologist, that there are problems in every branch of psychology for which it is possible and necessary to use psychological expertise. The range of questions that can be asked of a psychologist is practically inexhaustible. To name a few: analysing and assessing human behaviour, assessing credibility of witness testimony, diagnosing affect, analysing aggression, analysing motivation, etc. However, there is no national expertise institute in Estonia that conducts forensic psychology expertise. There are also no normative acts regulating performance of forensic psychology expertise. As a result, many problems have to be solved creatively by courts, even at the Supreme Court level.

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# Main Models of Realisation of the Right of Association in the Azerbaijan Republic

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## Abstract

Establishment and development of civil society is possible under conditions ensured by a legal state. It indicates that legal state and civil society can also be viewed as the embodiment of human rights and freedoms and specifically the right to associate. This is explained by movement of various factors. Features of the historical and cultural development, democratic, political and legal traditions, specificity of the political and legal system, differences in the perception of law as the universal social regulator of public relations. Establishment and ultimately completion of establishment of the legal state is associated with maximum guarantee for human rights and freedoms, responsibility of the government before the citizens and the state, raising the credibility of law and strict observance to it by all state bodies, public organisations, communities and citizens as well as the effective functioning of the law-enforcement bodies. While analysing the current state and perspectives of the right to association in the Republic of Azerbaijan, it is necessary to evaluate the state of the civil society again.

*Keywords:* freedom of association, human rights, non-governmental organisations, political parties, Republic of Azerbaijan, trade unions.

## Introduction

As shown by the analysis in the previous research of the author, establishment of a union is a means of achieving common goals. In this case, the basic principle is voluntariness. In other words, it means that no one can be forced to join a union. People realise their common interests and decide on joint action in order to protect them. At this point, they establish trade unions to function more efficiently. Both, in countries around the World and in the Republic of Azerbaijan the most common type of such associations are trade unions. Article 11 of the **European Convention on Human Rights**

specifies possibilities for establishing public associations. It also establishes the right to be a member of public associations. Yet, establishment of relationships between public associations and government, which has not been reflected, is worth the emphasis. It must be acknowledged that this, however, often leads to formation of certain controversies. Thus, necessity of working towards further improvement of the right to associate remains relevant. According to the European Convention on Human Rights, activity aimed at establishing a union and protecting common interests is allowed, unless the terms of Article 11 are violated. Also, it should be noted that the strike of employees intending to protect their joint interests is deemed to be a right of the same category. Restriction of the right to association in the Republic of Azerbaijan is legally admissible by Article 11 of the European Convention on Human Rights. Such restrictions may generally apply to certain categories of people. For example: military, police, administrative bodies' staff.

Topicality of the research topic at this stage is determined by the fact that building of civil society or developing civil society ideas is a priority for any state that has taken the path of democratic development. The ideas of civil society based on the realisation of the right to association, the research on the normative-legal and practical bases of the realisation of these ideas are of great importance not only for individual countries, but also globally. This is due to such studies creating a complete picture of strengths of civil society, thus fully confirming the crucial role of the right to association in the human rights system.

* * *

**Constitution of the Republic of Azerbaijan** specifies both the right to associate and the right to strike. It is guided by provisions of effective international conventions, i.e., Article 58 of the Constitution indicates that everyone has the right to establish and join a union (Constitution of the Republic of Azerbaijan, 2013, *12*). The Article provides for political parties, trade unions and other public associations. Their common feature is that they all are established to protect common interests and achieve common objectives. The Constitution of the Republic of Azerbaijan also contains a provision guaranteeing free activity of all unions. Paragraph 3 of Article 58 of the Constitution states: "No one can be forced to join a union or remain a member thereof." This is also consistent with the standards of the European Convention on Human Rights.

It should be noted that despite joining international conventions and undertaking of specific obligations, certain limitations exist in relation to realisation of the right to associate. In accordance with international instruments, the right of association can be restricted in a reasonable manner and in special cases. Thus, international conventions envisage preventing establishment of associations posing threat to public order and capable of violating the rights of others. In other words, the possibility of restriction of the right to associate is set forth. This is expressed in paragraph 4 of Article 58 of the Constitution of the Republic of Azerbaijan (2013, *12*) as follows: "Activity of

unions intended for forcible overthrow of legal state power on the whole territory of the Azerbaijan Republic or on a part thereof is prohibited. Activity of unions which violates the Constitution and laws can be terminated by courts only."

It should be mentioned that the Constitution of the Republic of Azerbaijan contains a provision on the right to strike as well. The right to strike is enshrined in Article 36 of the Constitution of the Republic of Azerbaijan, i.e., paragraph 1 of Article 36 of the Constitution states: "Everyone has the right to strike alone or together with others." Also, relevant article of the Constitution clarifies the issue of restriction of the right to strike. Paragraph 2 of Article 36 of the Constitution reads as follows: "The right to strike for those working based on labour agreements might be restricted only in cases stipulated by law." Soldiers and civilians employed in the Army and other military formations of the Republic of Azerbaijan have no right to go on strike. Thus, it should be noted that currently the issue of the removal of restrictions in relation to the rights of association of certain categories of employees is being widely discussed.

Establishment of the rights to associate and strike in the Constitution of the Republic of Azerbaijan is not the final act. In other words, numerous documents governing realisation of the related rights are drafted and adopted in Azerbaijan.

The following documents directly related to realisation of the right to associate can be mentioned:

- Law of the Republic of Azerbaijan on Political Parties which was adopted on June 3, 1996;
- Law of the Republic of Azerbaijan on Trade Unions which was adopted on February 24, 1994;
- Law of the Republic of Azerbaijan on Non-Governmental Organisations which was adopted on June 13, 2000.

Analysis of the **Law of the Republic of Azerbaijan on Political Parties** shows that this law is intended for realisation of the right to associate, which pertains to the category of fundamental human rights, i.e., Article 1 of the law clarifies the concept of a political party: "A political party is a non-commercial legal entity established by the citizens of the Republic of Azerbaijan for the purpose of participating in the political life of the country, forming and expressing the political will of the citizens."

As seen, political parties are also public associations established to realise citizens' rights to associate. Here, the basic principle is again the one of voluntariness. This has been expressed more clearly in Article 3 of the Law. This Article reads as follows: "Political parties shall be established and function on the basis of the principles of freedom of association, voluntariness, equality of rights of their members, self-government, legality and publicity. Within their activities political parties may not restrict the fundamental rights and freedoms of human and citizens, enshrined in the Constitution of the Republic of Azerbaijan, in international agreements which the Republic of Azerbaijan is a party to and in other legislative acts of the Republic of Azerbaijan." (Law of the Republic of Azerbaijan on Political Parties, 1996)

As noted, the right to (freedom of association) associate to establish political parties is underlined. Inadmissibility of restricting participation in political parties is enshrined in the law. Thus, restriction of citizens' membership in political parties on any ground is not allowed. It can be viewed as a guarantee of the right of association. Reviewing the Law of the Republic of Azerbaijan on Political Parties, possibilities restricting the right to associate can be identified. Nevertheless, it has provided for possibility of restriction of the activity of political parties in certain cases considering the objective such as ensuring stable development of society, as well as national security and interests. In other words, to some extent it can be reviewed as a restriction of the right of association. International regulatory acts also justify restriction of the right to associate under certain conditions. Such possibility of restriction is expressed in Article 4 of the Law of the Republic of Azerbaijan on Political Parties. Article 4 of the Law states: "Establishment and functioning of political parties aiming or seeking to change the constitutional order and secular nature of the Republic of Azerbaijan, to violate territorial integrity, to promote war, violence and brutality, to instigate racial, national and religious hatred, shall be prohibited. Establishment and functioning of political parties of foreign States, as well as their branches and subsidiaries in the territory of the Republic of Azerbaijan shall not be allowed".

The **Law of the Republic of Azerbaijan on Non-Governmental Organisations** regulates the issues related to establishment and functioning of public associations and foundations. A number of important provisions related to the right to associate are also reflected in the Law of the Republic of Azerbaijan on Non-Governmental Organisations. The law also clarifies the essence of the concept of non-governmental organisations. Paragraph 1.3 of Article 1 of the Law of the Republic of Azerbaijan on Non-Governmental Organisations reads: "This Law establishes rules for establishment, functioning reorganisation and liquidation of non-governmental organisations as legal entities, as well as activities of non-governmental organisations, their management and relations with public authorities". Therefore, the Law of the Republic of Azerbaijan on Non-Governmental Organisations can be reviewed as a form of state guarantee for the right to associate. As stated above, existence of public associations, i.e. non-governmental organisations, are assessed as the embodiment of the right to associate within society. Non-governmental organisations are a key component of civil society. Also, the issues such as establishment, functioning and termination of non-governmental organisations in the process of civil society building in the Republic of Azerbaijan are also governed by related legislation.

Provisions allowing restriction of the right to associate of the Law of the Republic of Azerbaijan on Non-Governmental Organisations can also be specified. Paragraph 2.3 of Article 1 of the Law reads: "Non-governmental organisations can be established and function with the purposes not forbidden by the Constitution and laws of the Republic of Azerbaijan." Establishment and functioning of non-governmental organisations, as well as branches or representative offices of non-governmental organisations of foreign countries

in the Republic of Azerbaijan, the purpose or activity of which is aimed at changing the constitutional order and secular nature of the Republic of Azerbaijan, violation of its territorial integrity, propaganda of war, violence and cruelty, provoking racial, national and religious hostility is prohibited. Upon closer scrutiny, those provisions of the Law that deal with the restriction of the right to associate are similar to the provisions specified in the Conventions of International Labour Organisation and other international regulatory acts. In other words, it is also noted in these documents that restriction of the right to associate is possible under special conditions. This once again proves that corresponding provisions of international regulatory acts are referred to upon development of the legal framework in the relevant fields in the Republic of Azerbaijan.

In 1999, National NGO Forum was established in Azerbaijan. Development of NGO sector has stipulated serious changes in the area of realisation of the right to associate. Thus, various laws and programmes have been adopted for efficient organisation of protection of human rights and freedoms in general. Legal framework for realisation of almost all rights and freedoms of people from all layers of the society is in place and improve continuously. For example, in addition to the documents already considered, the Law on Child Rights is adopted. Alongside with other child rights, the law also establishes children's rights to associate. Article 19 of the **Law of the Republic of Azerbaijan on Child Rights** adopted on May 19, 1998 states: "Children have the right in the order established by the legislation of the Republic of Azerbaijan, to create in their place of study or residence public associations or public bodies of independent action and associate within them. It is not allowed to involve children in political acts of public associations and public bodies of independent action.

**Law of the Republic of Azerbaijan on Trade Unions** serves as an important regulatory framework for realisation of the right to associate. Mechanisms and principles for employees to establish basis their own unions on voluntary to protect their common interests and achieve common objectives and involve in the activity of these unions are expressed in the law. It should be noted that Preamble of the Law of the Republic of Azerbaijan on Trade Unions establishes the guarantee for activity seeking to protect employee interests and benefits in accordance with Universal Declaration of Human Rights, Conventions of International Labour Organisations and European Social Charter. Paragraph 1 of Chapter 1 of the Law of the Republic of Azerbaijan on Trade Union entitled General Provisions of the Law of the Republic of Azerbaijan on Trade Unions clarifies the nature of trade union organisation. Article 1 of this chapter shows that trade unions constitute the appropriate platform in realisation of the right to associate. Article 1 of the Law of the Republic of Azerbaijan on Trade Union reads: "Trade union represents independent public non-political organisation that joins employees, engaged in production and non-production sphere, as well as pensioners and persons, being educated, on a voluntary individual membership principle for the protection of their labour, social, economic rights and legal interests at working places, professions, branches and on the general republican level." Establishment of trade unions is directly linked to the right

to associate. In circumstances of failure to realise the right to associate, the possibility of establishing a trade union cannot be discussed at all. As stated, the principles of establishment and functioning of trade unions in the Republic of Azerbaijan are directly harmonised with the Conventions of International Labour Organisation and refer to the relevant international laws in the field.

Article 3 of Chapter 1 of the Law on Trade Unions deals with the right of association. Article 3 is entitled The Right to Organise in Trade Unions. Article 5 of the Law reads: "Employees, pensioners, studying persons, without any distinction, have the right to voluntarily establish trade unions at their choice without preliminary permission, to join trade unions to protect their legitimate interests, labour, socio-economic rights and engage in trade union activity." Analysis of this Article shows that the provisions contained in the Charter of International Labour Organisation are reflected here. It also testifies to the fact that in accordance with the preamble of the law, mechanisms and principles for establishing, functioning and engaging in the activity of trade unions are based on international conventions. It should be noted that in the Conventions of International Labour Organisation, the right to associate is presented as an employee's possibility to voluntarily associate with others to protect common interests. Accordingly, Article 3 of the Law on Trade Unions of the Republic of Azerbaijan states: "Trade unions may on voluntary basis establish sectoral, regional and other associations (councils, federations, confederations) to fulfil the tasks specified in their charter."

Thus, establishment and activity of trade unions in the Republic of Azerbaijan is governed by Article 58 of the **Constitution of the Republic of Azerbaijan**. The second part of this Article establishes the right owned by everyone to organise and engage in activity of any association including trade unions. In addition to the Constitution of the Republic of Azerbaijan, the right to organise in a trade union is clearly stated in the **Labour Code of the Republic of Azerbaijan**. Article 19 of the Labour Code of the Republic of Azerbaijan is titled as Trade Union. The first paragraph of Article 19 of the Labour Code of the Republic clearly expresses the right to associate. Paragraph 1 of Article 19 states: "A trade union may be established on a voluntary basis without discrimination among employees or without prior permission from employers. Employees may join the appropriate trade union and engage in trade union activity in order to protect their labour and socioeconomic rights and legal interests."

Nevertheless, a broader definition of the right to associate in the Labour Code of the Republic of Azerbaijan would be more appropriate. As mentioned, only one Article in the Labour Code deals with trade unions. Accordingly, the right to associate is only reflected in Article 19. Thus, a separate chapter in the Labour Code about trade unions also stipulates expression of the right to associate in more detail. The Law on Trade Unions of the Republic of Azerbaijan can be deemed to be a quite important document in this regard. The document expressly specifies the possibility for employees to associate for their common interests and objectives. In this regard, in particular the Labour Code should be noted.

Articles 19 and 20 of the Labour Code of the Republic of Azerbaijan deal with relevant unions of employees and employers. It should be noted that, alongside with points related to establishment of corresponding associations and their activity, possibilities for restricting their activity are also set forth in these documents. Similar principles are noticeable in almost all laws containing points related to realisation of the right of association and in general establishment of public associations. For example, as in all relevant international documents, receipt of additional authorisation and the principle of voluntariness is highlighted in corresponding domestic legislation of the Republic of Azerbaijan in relation to realisation of the right to associate or establishment of public associations. Thus, currently the right to associate in the Republic of Azerbaijan is based on the principles set forth in international instruments. In general, joining almost all effective international agreements and conventions, the Republic of Azerbaijan has undertaken obligations in protection of human rights and freedoms and specifically, realisation of the right to associate. With the establishment of the legal framework for realisation of the right to associate, development of an effective mechanism to this effect is also in the centre of attention and contributions of international cooperation is used in this area as well.

In general, a new era has begun in the Republic of Azerbaijan in implementation of reforms in legal system. It can be noted that the recent years in Azerbaijan can be characterised as a period of large-scale reforms in the legal system.

Examining the current status and prospects of the right to associate in the Republic of Azerbaijan, undoubtedly the state of civil society has to be re-analysed. The progress in realisation of the right to associate is directly linked with the civil society building. Currently, building an active civil society is in progress in the Republic of Azerbaijan. The central pillar of civil society is various non-governmental organisations built on the right to associate. As can be indicated from the above stated, the necessary legal framework to ensure the free functioning of trade unions in the Republic of Azerbaijan is in place. There are reasonable grounds to say that the situation in this area complies with the provisions of the international conventions and agreements. To substantiate this, it is enough to look at the current activity of Azerbaijan Trade Unions Confederation (ATUC). It should be noted that the Trade Unions Confederation was established in February 1993. This gives a good cause to review the Trade Unions Confederation as an arena where realisation of the right to associate is most effective.

Trade Unions Confederation includes 18,610 trade union organisations and coordinates their activity. Existence of a community of this scale indicates on the better prospects for protection of human rights and specifically the right to associate. Existence of such a confederation enables easier coordination of the efforts aimed at protection of the interests and rights of employees engaged in various areas of activity. It should be noted that 26 branch trade unions existing in the Republic of Azerbaijan are gathered namely in Trade Unions Confederation and a total number of members is 1,600,000 people.

Azerbaijan Trade Unions Confederation (ATUC) takes an active part in the large system of international cooperation in the field of effective protection of workers' rights. ATUC became a member to the International Confederation of Free Trade Unions already in 2000. The most important point to be noted is that ATUC has been represented in International Labour Organisation since 1992. Boundaries of ATUC activities are not limited to what has been already mentioned. Having all these in mind, further substantiation is needed that current scope of ATUC activities generates a good understanding about the status of the right to associate in the Republic of Azerbaijan. Currently, in the Republic of Azerbaijan the right to associate is realised in accordance with principles and requirements expressed in international agreements and Conventions of International Labour Organisation. As already mentioned, by joining international conventions, the Republic of Azerbaijan has undertaken to realise human rights and freedoms including the right to associate. These obligations are related to both establishments of the legal framework and implementation of necessary practical measures. Thus, the situation in the stated fields is satisfactory and the necessary conditions are met for carrying out further measures.

The above provides evidence that the legal framework for realisation of the right to associate in the Republic of Azerbaijan is guided by certain international legislative acts. The Parliament of the Republic of Azerbaijan ratified two important Conventions (No. 87 and 98) of International Labour Organisation on July 3, 1993 (Gasimov, 2016, *827–828*). It should be noted that Convention No. 87 of International Labour Organisation is entitled Freedom of Association and Protection of the Right to Organise and was adopted on July 9, 1948. Another important Convention No. 98 on the Right to Organise and Collective Bargaining was adopted in 1949. Ratification of both Conventions by the Republic of Azerbaijan had a forceful impact on establishment of the basis of national legislation in the field of realisation of the right to associate. Ratification of these Conventions also implies undertaking by the Republic of Azerbaijan of certain obligations related to realisation of the right to associate. It enables a more efficient and reliable realisation of the right to associate in the country.

## Conclusions

Existence and establishment of the civil society is not possible without new social-individual institutions reflecting equal civil rights and independence of individuals. A person can become a citizen only by having high moral values based on democratic principles, personal dignity, independence, sense of individuality, as well as the high merits such as respecting the rights and freedoms of others and following universal laws and regulations in full obedience. This new type of person is created in different type of relationship with public associations and institutions. New social individuals do not dissolve in collectives, on the contrary they gain social importance, have high moral values and establish their relations with others as honest true citizens.

To this effect, people's psychology, outlook, economic and social status has to change fundamentally.

To have such citizens, society should strive for following principles:

1) equality of rights and freedoms of all people in the political arena;
2) protection of citizens' rights and freedoms in accordance with international legal norms;
3) economic independence of individuals based on the right of everyone to own property or equitable remuneration for honest work;
4) guaranteeing by law the possibility for citizens to associate in unions in accordance with interests and professional status, regardless of state and parties;
5) freedom of citizens in formation of political parties and civic movements;
6) creation of necessary material, technical, psychological and moral conditions for the development of science, culture, education and upbringing institutions for forming free, polite, morally justified and socially active citizens who are responsible before society;
7) existence of a mechanism that governs and stabilises the relationship between the state and civil society and ensuring security of the latter. This mechanism, formal or informal, includes statutes, democratic elections of people's representatives to various authorities, self-governing institutions, etc.

## Recommendations

Society acting based on the principles listed above can stay up in unity with the democratic and legal state that has replaced a totalitarian regime.

Such a state should have the following key features:

1) the main feature of such a state is the rule of law; observance of those laws by all members of the society without exception;
2) separation of powers and functions between structures; building civil relations between government and opposition for regulating functioning of the state mechanism;
3) accurate identification of the place of parties and movements in the political system and determination of their area of activity different from duties of the state. This primarily refers to representatives of the ruling party, which are in the office. Complementarity of the party and state mechanism strengthen the backing of society within the political system and leads its property into a controllable channel (Ganberov, 2020);
4) establishing tried-and-true and reliable mechanism of relations between central government agencies and lower structures of federation (or unitary state);
5) thinking of a practical system that will ensure control over state administrative apparatus by civil society; regular study and timely elimination of the causes

leading to the formation of bureaucracy that has obtained chronic form in the political system (Gasimov, 2016);

6) a stable legal state is hard to imagine without and accurate, constructive settlement of the relations between the individual, society and state trio. The point in question is not supremacy of civil society over state and dissolution of the latter, but establishment of the necessary social environment – the basis capable of ensuring balanced prosperity of human society.

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# Right to Conscientious Objection to Military Services: International to National Perspective

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## Abstract

The international regulation (United Nations Universal Declaration of Human Rights) stipulates that everyone has the right to freedom of thought, conscience and religion and that this right includes freedom to change their religion or belief and freedom to manifest their religion or belief. The U.N. Human Rights Committee concluded that the right to conscientious objections could be derived from Article 18. Article 9 of the European Convention on Human Rights also extends to the cases of the opposition to military service. In Latvia the question of conscientious objection was regulated in the Alternative Service Law which expired in 2007 when the compulsory military service was completely abolished. Since then, the question about the conscientious objection to the military service has not been directly regulated in the national normative acts and has not also been raised in the courts of Latvia.

In 2021, the Supreme Court of the Republic of Latvia heard the case about the refusal to be a reserve soldier and to perform service in the National Armed Forces' reserve on the ground of the pacifist beliefs of the applicant. This case revealed the lack of legal tools in Latvian military service regulations to respect the human rights mentioned therein.

The purpose of the article is to propose the possible solutions to the identified gaps in Latvian regulation by analysing the international and national regulation, other countries' experience and judgments of the European Court of Human Rights.

The historical, analytical, systemic and teleological method has been used in the preparation of article.

*Keywords:* conscientious objections, reserve soldier, military service.

## Introduction

Although international regulation protects the right of persons to act according to their conscience, since the abolishment of the compulsory military service in Latvia in 2007 the question about the conscientious objection to the military service has not been directly regulated in the national normative acts and has not been raised in the courts of Latvia. Only in March, 2021 the Supreme Court of the Republic of Latvia heard the case about the applicant's refusal (the former professional soldier) to be a reserve soldier and perform service in the National Armed Forces' reserve on grounds of the pacifist beliefs.

The applicant was the former professional who asked to be exempted from the military service in the National Armed Forces' reserve. The applicant started the performance of the professional service in the beginning of 2016 and during the military training course suffered health damage which required a long-term medical treatment. In 2017, the applicant decided to terminate the professional service contract prior to the end of the term and explained this decision with the acquisition of pacifist conviction during this relatively short period of military service. The applicant had gained confidence that no military action was acceptable to her. The professional service contract was terminated before the end of the term by the agreement of the parties. However, according to the Military Service Law (Militārā dienesta likums, 2002), the applicant was included in reserve, as the former professional soldier (Latvijas Republikas Augstākās tiesas …, 2021).

According to Article 65 of the Military Service Law (Militārā dienesta likums, 2002), a reserve soldier has a duty:

1) to arrive to military training at the place and time determined in the summons;
2) to arrive to medical examination at the place and time determined in the summons;
3) to maintain and improve the battle knowledge, skills and preparedness necessary for military specialty determined during the time of active service.

It was revealed that the list of the cases (mentioned in Article 68 of the Military Service Law) when a reserve soldier and reservist can be removed from the military service records did not contain the situation when the participation in military activities restricted the person's freedom of thought and conscience. Thus, the applicant complained that her inclusion in the reserve soldiers list violated her rights under Article 99 of the Constitution of the Republic of Latvia (Latvijas Republikas Satversme, 1922) and under Article 9 of the European Convention on Human Rights (Latvijas Republikas Augstākās tiesas …, 2021).

The Court drew attention to the case-law of the European Court of Human Rights, namely to the cases "Bayatan *vs.* Armenia", "Papavasilakis *vs.* Greece" and "Dyagilev *vs.* Russia", and pointed out that the previous case-law, according to which the admissibility of conscientious objection to military service was only a matter of choice of each state,

was changed. The Court also mentioned that the competent national authorities may interview the person in order to assess the seriousness of their convictions and prevent attempts to abuse the guarantees provided for in Article 9 of the European Convention on Human Rights (Latvijas Republikas Augstākās tiesas ..., 2021).

The court concluded that in this case, being in a service whose methods and means are contrary to a person's conviction, the obligation to obey orders (for the violation of which a liability arises), the obligation to maintain combat knowledge, military skills and training significantly restricts a person's right to freedom of conscience. Simultaneously, the legitimate aim of the restriction (protection of other people's rights and public safety) can be achieved by less restrictive means, considering the total number of reserve soldiers; the fact that the applicant's case is the first (therefore atypical); the fact that the applicant has only completed a basic training course and has not acquired additional knowledge; and the fact that during the service, the applicant suffered an injury which caused the applicant not only physical but also mental sufferings, and this still has consequences, namely, due to her present health condition, the applicant is not currently expected to be called up for military trainings as a reserve soldier (Latvijas Republikas Augstākās tiesas..., 2021).

This judgment revealed shortcomings of the Latvian regulation that had long been invisible due to the lack of relevant cases. Despite the fact that this is the first case to be directly examined in the court, the judgements of the European Court of Human rights and the experience of other countries underline the need to provide for solutions to such cases in national regulation.

The aim of this article is:

1) to analyse provisions of the international regulation, conclusions and recommendations of international institutions and experience of other countries in the field of the right to conscientious objection to military service;
2) to evaluate Latvian regulation of the military service and detect its shortcomings regarding respect for the right of individual to refuse to perform military service on the grounds of freedom of thought, conscience, or religion;
3) to provide solutions to improve Latvian regulation of the military services on the base of the previously mentioned analyses.

## 1 International Aspects of the Right to Conscientious Objection to Military Service

In 1993, the Human Rights Committee, in its general comment No 22 (1993), stated that although Article 18 of the International Covenant on Civil and Political Rights (which guarantees the right to freedom of thought, conscience and religion or belief) does not directly protect the right of conscientious objection, these rights could be derived from Article 18, because the duty to use weapons may seriously conflict with freedom of conscience and the right to manifest religion or belief (U.N. Human Rights Committee,

1993). In 2013, the Human Rights Council, in its resolution 24/17 (A/HRC/24/17), recognised that the right to conscientious objection to military service can be derived from the right to freedom of thought, conscience and religion or belief and encouraged states to allow conscientious objection to military service before, during and after military service including reserve duties (U.N. Human Rights Council, 2013).

Consequently, according to the mentioned information, it is necessary to ensure the right to conscientious objection in the following three situations:

1) in the case of compulsory military service;
2) during the military service (both in the case of compulsory military service and in the case of professional service);
3) after the end of the military service (service in the reserve with the ensuing obligations of military service in the event of military training and mobilisation).

In 2006, the Human Right Council stressed that states should adopt specific provisions on conscientious objection to military service in order to ensure that this right can be effectively exercised. The states should also ensure that the information about its implementation is properly disseminated to all citizens to the entire population (U.N. Human Rights Council, 2006). In 2010, the Human Right Council also mentioned that states should explain the criteria for accepting or rejecting applications for alternative military service and should take appropriate measures to ensure the exercise of the right to conscientious objection to military service (U.N. Human Rights Council, 2010).

In 2013, the Human Rights Council mentioned that the information about the right to conscientious objection to military service and the means of acquiring conscientious objector status must be available to all persons affected by military service. It also encouraged states to provide such information not only to conscripts but also to persons serving voluntarily in the military services (U.N. Human Rights Council, 2013).

In 2019, the Human Rights Council stressed that although the Commission on Human Rights and the Human Rights Council, the Human Rights Committee and regional human rights courts recognised the right to conscientious objection, individuals seeking to exercise this right still face certain challenges. Namely, a number of states still do not recognise this right and, as a result, do not have a legal framework for conscientious objection to military service, but in those states that recognise the right to conscientious objection to military service, some implementation gaps remain that prevent full realisation of this right (U.N. Human Rights Council, 2019).

In 2011, the European Court of Human Rights recognised the right to conscientious objection in the case "Bayatyan *vs.* Armenia". The court noticed that Article 9 of the European Convention on Human Rights does not explicitly provide for the right to conscientious objection to military service. Nevertheless, the Court considered that the rejection of military service – when the motive for such rejection is a serious and unsurmountable conflict between the obligation to serve in the army and the convictions of a person, or his deep and sincere religious or other views – is a conviction or view that

is so convincing, serious, consistent and meaningful that it is subject to the guarantees mentioned in Article 9 of the European Convention. The Court in this case had no reason to doubt that the applicant's objection to military service was motivated by their religious beliefs, because he was a member of the Jehovah's Witnesses (the religious group whose beliefs include the conviction that it is unacceptable to serve in the army, even if such service is not related to carrying weapons) (Bayatyan *vs.* Armenia, 2011). Thus, the court emphasised the need to examine the facts of each case carefully.

In the case "Erçep *vs.* Turkey", the Court verified whether there were alternatives of civilian service for people opposed to military service for reasons of conscience. The applicant was a member of the Jehovah's Witnesses (the religious group that was opposed to military service, regardless of need to bear arms). Therefore, like in the case "Bayatyan *vs.* Armenia", the Court had no reason to doubt that the person's objection to completion of military service was motivated by sincere religious beliefs that conflicted in a serious and insurmountable way with the applicant's obligation to serve in the military service. The Court found that, so far as there was no alternative civilian service in the state, the conscience objectors had no other option but to refuse to be enlisted in the military service if they wanted to stay true to their beliefs. The Court also mentioned that it was understandable that a civilian, whose case was heard by the military court composed completely from military officers, had doubts about the independence and impartiality of such jurisdiction. (Erçep *vs.* Turkey, 2011)

Thus, the Court again emphasised the need to examine the facts of each case carefully to verify whether and to what extent the opposition to military service is protected by Article 9. Nevertheless, the Court considered the issue of the neutrality of the military court, which heard the case of the civilian's offence under the Military Criminal Code. Thus, in the author's opinion, cases abut objections to completion of military service should be considered by the commission or by a body composed mostly of civilians. In addition, despite the fact that the mentioned case concerned the compulsory military service, the state should also offer an alternative in other areas of military service (such as service in the reserve).

In the cases "Papavasilakis *vs.* Greece" and "Dyagilev *vs.* Russia", the Court examined existence of procedures for verifying requests to replace compulsory military service with its civilian alternative.

In the case "Papavasilakis *vs.* Greece", the special commission considered applications from a conscientious objector brought together only three of its five members, namely two senior officers of the armed forces (one from the recruitment and the other from the armed forces health service) and an assessor from the Council of State (the president of the special commission). The two other members (two university professors specialising in philosophy, social sciences and politics and psychology) were absent and had not been replaced. The Court mentioned that if the special commission had considered the application with all its members, the majority of these would have been civilians. However, in the Papavasilakis' case, only the president and the two officers were present.

Thus, the applicant could legitimately fear that the special commission would not be impartial. (Papavasilakis *vs*. Grèce, 2016)

In the cases "Dyagilev *vs*. Russia", the recruitment commission which considered applications from a conscientious objector was composed of at least seven members (three of them were representatives of the Ministry of Defence, the remaining four members, including the president of the military commission, were officials of public bodies that were structurally independent of the military authorities). According to the judgement, a military recruitment commission consisted of the head or a deputy head of a municipal entity (the president); an officer of a military commissariat (the deputy president); the secretary of the commission; a medical officer responsible for the medical certification of individuals liable to be called up for military service; a representative of a local internal affairs agency (a police body); a representative of an "education governing agency"; and a representative of an employment office. So far as such commission could deliver decisions if no less than two-thirds of its members were present, the Court noticed that such regulation could result in situations where majority of its members were military officials, which could rise doubts about the commission's impartiality. However, after the examination of the Dyagilev's case, the Court concluded that in this case the state established an effective and accessible procedure for determining whether an applicant is entitled to conscientious objector status. The Court also noted that the applicant's request for the replacement of military service was dismissed by the commission as not sufficiently persuasive (the applicant provided a CV and a letter of recommendation from his place of work). So far as the applicant's replacement application was also examined in the domestic courts, the Court accepted that the applicant did not substantiated the existence of a serious and insurmountable conflict between the obligation to serve in the army and his pacifist convictions. (Dyagilev *vs*. Russia, 2020)

The Court also assessed the aspects of the mentioned cases by considering whether the applicable laws guarantee a fair balance between the interests of the state and the rights of the individual (Chmykh, et al.2000). In addition, whatever the system of the military service is in the state, it is recommended to create procedures that allow:

1) the professional military personnel apply for conscientious objector status during their service;
2) reserve soldiers apply for conscientious objector status without waiting until conscription to military training or mobilisation;
3) reservists apply for conscientious objector status without waiting until mobilisation (Conscientious objection to…, 2021).

## 2 Experience of Other Countries

Many states (for example, Denmark, Norway, Slovenia) in their legislation apply conscientious objection to conscripts, but some countries also recognise the conscientious objection of professional personnel (for example, Czech Republic, Germany, Slovenia,

Switzerland (Human Rights of Armed…, 2021), Canada (Government of Canada, 2015), Netherlands, where both professional and reserve personnel can claim conscientious objection (Act on conscientious objection, 1961)). Luck of the regulation in the cases of professional service most likely is connected to the fact that the professional service is performed on a voluntary basis and can be terminated at any time at the request or agreement of the parties.

In different states, claims of conscientious objection are reviewed by civilian, military or mixed body (Human Rights of Armed …, 2021). Applicants' potential doubts about neutrality could be dispelled through consideration of the applications in mixed or civilian bodies. As mentioned before, the commission is mixed in Greece (the European Court of Human Rights recognised it as neutral, provided that not only the military, but also civilian members participate in it).

In Slovenia, during the military service or after it, the conscript may invoke the conscientious objection to military service for religious, philosophical or humanitarian reasons and these reasons must be confirmed by the general way of life and conduct of the person. In this country, neutrality is also ensured by the composition of the commission which considers applications from conscientious objectors. The commission includes a social worker, psychologist and doctor who is not in a regular or contractual employment relationship with the bodies responsible for defense affairs, and a representative of administrative bodies responsible for internal affairs and defense or protection and rescue. The representative of administrative bodies responsible for defense affairs may not be the president of this commission. (Military Service Act, 1991)

## 3 Latvian Regulation and Possible Changes in It

After restoration of Latvia's independence, the law "On compulsory service of the Republic of Latvia" (Par Latvijas Republikas obligāto…, 1991) provided for the persons (subject to compulsory military service) whose confessional affiliation or pacifist convictions prevented them from performing military service (these circumstances had to be proven in court as a legal fact) the right to be assigned to a labour service in places designated by the government.. This regulation was replaced by the Alternative Service law (Alternatīvā dienesta likums, 2002), which entered into force in July 2002. According to Article 1 of this law, the purpose of it was to determine the procedures for the performance of alternative service and to guarantee freedom of human thought, conscience and religious beliefs by linking such freedom with the duty of a citizen towards the state.

The Cabinet established a Military Service Conscription Control Commission which took decisions regarding substitution of mandatory active military service with alternative service. This commission was chaired by a chairperson recommended by the Minister for Defence, and it included a representative authorised by the Ministry of Defence, by the Ministry of Foreign Affairs, by the Office of the Prosecutor, by the Ministry

of the Interior, by the Ministry of Education and Science, by the Ministry of Culture, by the Ministry of Welfare, by the Ministry of Justice, by the Ministry of Agriculture and by the State Human Rights Bureau (Obligātā militārā dienesta likums, 1997).

In general, the alternative service existed in Latvia as an alternative to the compulsory military service until the full transition to the professional service in 2007. Those who were called up for compulsory active military service were called soldiers. Persons subjected to compulsory military service who were unable to perform military service because of their thoughts, conscience or religious convictions could have their compulsory active military service replaced by alternative service. These persons were not called soldiers in the regulation. Both soldiers after compulsory active military service and persons after alternative service were included in the reserve. Persons who were enlisted in the reserve, after completing alternative service, were called reservists. Persons who were enlisted in the reserve, after completing compulsory active military service, were called reserve soldiers. (Obligātā militārā dienesta likums, 1997; Alternatīvā dienesta likums, 2002).

Persons who were retired from the professional service (performed on a voluntary basis) and were assigned to the reserve were also called reserve soldiers (Par Aizsardzības spēkiem, 1992). According to Article 33 of the Mandatory Military Service Law (Obligātā militārā dienesta likums, 1997), reserve soldiers could be called up for military exercises, while reservists could be called up for training. Thus, despite the possibility provided for in the regulation to replace compulsory military service by the performance of prescribed work of a non-military nature, the regulation did not provide for complete exclusion of such persons from the reserve of the Armed Forces.

After the transition to the professional service, the military service in the country is regulated by the Military Service Law (Militārā dienesta likums, 2002), according to which, the military service is a type of state service in the field of national defense that is performed by a soldier and that includes active service and service in the National Armed Forces' reserve. The active service (the direct performance of military service in the status of a soldier) includes professional service, direct performance of military service in case of mobilisation, and military training of reserve soldiers. The National Armed Forcess reserve consists of reserve soldiers and reservists. The reserve soldiers, according to Article 63 of the Military Service Law (Militārā dienesta likums, 2002), are those meeting the requirements for reserve service: soldiers who have retired from professional service; national guards after termination of a contract on the service in the National Guard; Latvian citizens who have voluntarily enlisted for the service in the National Armed Forces' reserve; youth guards who have successfully passed final examinations of a special course of interest education programme for youth guards. Meanwhile, a reservist is a Latvian citizen who has been included in the National Armed Forces' reserve and may be conscripted in the active service in the case of mobilisation. In the case of mobilisation, both reserve soldiers and reservists can be called up for active service (Militārā dienesta likums, 2002; Mobilizācijas likums, 2002).

Professional service is the military service which is performed by a Latvian citizen on a voluntary basis according to a professional service contract entered into by themselves and the Ministry of Defense. According to Article 43 of the Military Service Law (Militārā dienesta likums, 2002), a professional service contract may be terminated before the end of the term at any time by agreement of the parties. However, the person who fulfils the requirements for the service shall be placed on reserve after the retirement from the professional service. Thus, the actual national regulation of the military service does not contain norms directly protecting the right to conscientious objection to military service.

By evaluating the norms of international law, judgements of the European Court of Human Rights and the national regulations of other countries, the author provides the following changes in the national regulations. Although termination of a professional service contract is possible prior to the end of the term at any time by agreement of the parties, it would be desirable to provide in the Military Service Law for the provision that exempts a soldier from their weapons-related duties until their application has been examined and a decision has been made about it.

With regard to the reserve, it would be advisable to adopt the following rules in the Military Service Law (Militārā dienesta likums):

1) a soldier who is retired from the professional service due to conscientious objection shall not be included in reserve;
2) provide for the right of a reservist/reserve soldier to claim their exclusion from the reserve due to conscientious objections;
3) while the issue of reserve soldier is being considered, they shall not be conscripted for the military trainings;
4) provide for the right of a person excluded from the reserve (if they were excluded due to the conscientious objection) to request their return to the reserve due to the change in their genuine beliefs or religious conviction regarding the carry and use of weapons).

The Military Service Law should delegate to the Cabinet of Ministers the right to create a commission to consider the mentioned applications and determine the order of work of this commission (including the range of documents to be submitted to the commission). Decisions of this commission should be subject to judicial review. In the author's view, the Commission could include the following members:

1) a civilian representative, authorised by the Ministry of Defense (for example, an employee with a university degree in law or in political science as a representative of the authority responsible for organisation and co-ordination of the implementation of the national defence policy);
2) a civilian representative, authorised by the Ministry of the Interior (as a representative of the authority responsible for public order and security);
3) a representative, authorised by the Ministry of Justice (as a representative of the authority responsible for development, coordination and implementation of the state policy in the field of religion);

4) a representative, authorised by the State Human Rights Bureau (as a representative of the authority responsible for protection of the human rights of a private individual);
5) representative of the National Armed forces Psychological Service (this service provides psychological support for military personal and is well familiar with the peculiarities of the military service) or Chaplain Service (chaplains are responsible for the spiritual life of the unit);
6) a representative, authorised by the Joint Headquarters of the National Armed Forces (as a representative of the institution of the Commander of the National Armed Forces responsible for ensuring the Commander the possibility of exercising continuous management in the armed forces).

To ensure a comprehensive assessment of the application, the Commission should have the right not only to invite the applicant (to hear their arguments), but also to invite and ask the opinion of experts from other competent institutions or organisations.

The applicant could be required to submit not only a reasoned application but also written statements (about the applicant's lifestyle) of the priest, teacher, employer or other persons who are not directly interested in the outcome of a case. Exemption from the reserve can be difficult for such individuals who are involved in the arms trade, who have the weapons permit (a permit for the possession or carrying of a weapon) or who were involved in illegal activities with weapons.

The national regulation could also provide that the persons excluded from the reserve are included in a separate list of alternative service, which do not require the use of military force. These persons could be conscripted to perform duties according to their education (for example, information technology, medical, transport, engineering etc.) in the situations of mobilisation.

## Conclusions

The actual national regulation of the military service in Latvia does not contain norms directly protecting the right to conscientious objection to military service. Thus, based on the foregoing, the author provides to include in the national regulation the following provisions:

1. The definition of a conscientious objection must be included in the regulation. Therefore, Article 2 of the Military Service Law can be added with paragraph 17. The wording of the amendment may be as follows: "17) conscientious objection – a sincerely held objection, on grounds of freedom of conscience or religion, to participation in war or other armed conflict and to participation in carrying and use of weapons as a requirement of military service".

2. The list of situations when a professional service contract may be terminated before the end (Article 43 of the Military Service Law) can be added with section $1^1$. The wording of the amendment may be as follows: "($1^1$) A professional service contract may be terminated before the end of the term by the decision of the commission

responsible for the consideration of applications to request a voluntary release on the basis of a conscientious objection (hereinafter – Objection commission)."

3. The Military service law can be added with the chapter VII[1] "Conscientious objection", which can contain the following regulation:

a) the right of a professional service soldier, reservist/reserve soldier to claim their exclusion from the reserve due to conscientious objection;
b) a professional soldier must be exempted from their weapons-related duties until their application for conscientious objection has been examined and a decision has been made about it;
c) while the issue of exclusion from the reserve is being considered, the reserve soldier shall not be conscripted for the military training;
d) the right of a person who is excluded from the reserve (if they were excluded due to the conscientious objection) to request their return to the reserve due to the change in their genuine beliefs or religious conviction regarding the carrying and use of weapons);
e) persons excluded from the reserve due to the conscientious objections can be included in a separate list of alternative service, which does not require the use of military force. These persons could be conscripted to perform some duties according to their education (for example, information technology, medical, transport, engineering etc.) in the situations of mobilisation.

According to the mentioned conclusions, the following draft of the chapter VII[1] has been proposed:

"VIII[1] Conscientious objection

44.[1] Right to conscientious objection:

(1) A professional service soldier, a reserve soldier and reservist can request a voluntary release from the military service on the basis of a conscientious objection. This regulation does not apply to the military chaplain service so far as it is regulated by the special regulation.
(2) If an application for release on the basis of a conscientious objection is submitted while a soldier is participating in an operation, the final determination of the request can be delayed until completion of the operation.

44.[2] Performance of Duties:

A soldier, who requests a voluntary release on the basis of a conscientious objection, remains liable to perform any lawful duty until their retirement from professional service or their removal from the military service record of reserve soldiers and reservists. The soldier must not be assigned duties that conflict directly with the stated objection to the extent that the requirements of service allow and while the request for release is under review.

44.[3] Return to the service:

A citizen of Latvia, who has been retired from military service because of termination of a professional service contract before the end of the term or removed from the military service record on the basis of a conscientious objection, has a right to request their return to the professional military service or reserve due to the change in their genuine beliefs or religious conviction.

44.[4] Objection commission:

The Objection commission established by the Cabinet of Ministers may allow termination of a professional service contract before the end of the term or removal from the military service record on the basis of a conscientious objection.

The Objection commission established by the Cabinet of Ministers may allow acceptance into military service or inclusion in reserve soldiers or reservists of a citizen of Latvia who has been retired from military service because of termination of a professional service contract before the end of the term or removed from the military service record on the basis of a conscientious objection.

The Cabinet of Ministers shall stipulate the procedures in accordance with which the Objection commission shall evaluate the issue regarding the provision of the permit referred to in Paragraph 1 and 2 of this Article.

44.[5] Alternative service:

(1) A citizen of Latvia, who has been retired from military service because of termination of a professional service contract before the end of the term or removed from the military service record on the basis of a conscientious objection, is included in an alternative service record, which does not require the use of military force and may be involved in conformity with their profession in the elimination of the consequences of natural disasters or in case of mobilisation.
(2) Registration and record into alternative service shall be performed by the structural unit for the record of the National Armed Forces' reserve in accordance with the procedures stipulated by the Cabinet of Ministers.
(3) The structural units for the record of the National Armed Forces' reserve, for the performance of the functions specified by the law, are entitled to request and receive the necessary information from the Population Register, State administration institutions, local governments, health care institutions and other legal persons free of charge regarding a person subject to alternative service record. The procedures for requesting and issuance of the information shall be regulated by the Cabinet regulations.
(4) A citizen of Latvia shall be in the alternative service record until the attainment of 60 years of age."

4. So far as the current version of paragraph 2 of Article 15 of the Military Service Law determines that "a soldier has no right to refuse to perform military service on religious grounds, and to use his or her service position to impose his or her religious conviction on others", it is necessary to harmonise this paragraph with the newly proposed Article 44². Therefore, the wording of the amendment may be as follows: "(2) A soldier has no right to refuse to perform military service on religious grounds, except for the condition specified in Article 44² of this Law, and to use their service position to impose their religious conviction on others".

5. To prevent these conscientious objectors from their inclusion in reserve, the following changes to Article 63 and 68 of the Military Service Law are proposed:

a) to add Article 63 with the paragraph 4: "(4) A soldier, who is retired from the professional service and National Guard, after termination of a contract on the service in the National Guard due to conscientious objection shall not be included in reserve soldiers";
b) to add Article 68 with the section 6: "6) on the basis of a decision of the Objection commission".

6. The Cabinet of Ministers must create a commission to consider applications about conscientious objection and determine the order of work of this commission (including the range of documents to be submitted to the commission). Decisions of this commission should be subject to judicial review. The Commission could include the following members: three civilian representatives from the Ministry of Defence, the Ministry of the Interior and the State Human Rights Bureau (one from each institution) and two military representatives from the National Armed forces Psychological Service (or Chaplain Service) and the Joint Headquarters of the National Armed Forces. The Commission should also have the right to invite and ask the opinion of experts from other competent institutions or organisations.

7. The Cabinet of Ministers can also stipulate a procedure according to which the applicant could be required to submit a reasoned application and written statements (about their lifestyle) of the priest, teacher, employer or other persons who are not directly interested in the outcome of a case.

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# Erasure and Anonymisation of Personal Data in Context of General Data Protection Regulation

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## Abstract

Many controllers have a desire to be able to continue using personal data instead of deleting them after the processing purpose has been fulfilled. The discussion regularly arises whether the erasure of personal data is required by the General Data Protection Regulation (GDPR) and whether it can also happen by anonymising the data. This article examines how the GDPR regulates the two terms of "erasure" and "anonymisation" as well as what requirements are demanded by using any of these in the personal data lifecycle.

An obligation to delete personal data always requires personal data. In the case of anonymous data, erasure is not required and cannot be claimed. The question to be examined and discussed in the article is therefore: If personal data exist and there is a claim for erasure, can the obligation to erase be fulfilled by anonymising the personal data?

Such question has not yet been addressed in the case law and has only been examined to a limited extent in the literature by different authors with no exact court ruling. Some authors state that the question can be answered in such a way that an obligation to delete can also be fulfilled by anonymising the data (Dierks & Roßnagel, 2021; Taeger & Gabel, 2021); meanwhile, others consider that anonymisation cannot be considered as data erasure. The answer to this question is important because it determines whether large data processors are allowed to keep data that they would have to delete and use in anonymised form for Big Data analysis or Artificial Intelligence applications that are an integral part of the world of technology.

*Keywords:* anonymisation, erasure, personal data, data protection, GDPR.

## Introduction

In the 21st century, as the value of information technologies is increasing rapidly, large data processors need more and more data sets to analyse them for the provision of new core points of Artificial intelligence and Big Data analysis, as well as for cost minimisation and ensuring high resistance to attacks (Primenko *et al.*, 2020). The discussion arises whether anonymisation can replace erasure in the context of the GDPR. As the specific answer has not been granted within the scope of the GDPR, in this context it is not clear whether data processors can further process personal information after it has been anonymised for different purposes. Moreover, it must be considered that personal data after data anonymisation could not be considered as personal data anymore.

The question regularly arises as to whether anonymisation can happen instead of erasure of data. This can play a role, for example, if companies still need certain data to perform historical evaluations. In some cases, certain non-personal data may also still be required to perform legally required calculations or to be able to check them retrospectively, for instance, for balance sheets.

The article examines how the GDPR regulates the terms "erasure" and "anonymisation", differences between both terms, as well as what requirements are demanded by using any of these in personal data lifecycle. As there is no specific answer provided by the case law whether data anonymisation can replace data erasure in the context of personal data within the GDPR, analysis of the literature by different authors has been studied, as well as data analysis method by analysing the context of the GDPR and the opinions of Article 29 Data Protection Working Party.

Researching the question whether personal data exist and there is a claim for erasure and whether the obligation to erase can be fulfilled by anonymising the personal data, legal norms interpretation methods such methods have been used as grammatical, historical and comparative method within several European Union member states' literature and legal norms, analyses of scientific articles from SCOPUS, Web of Science, ERIH PLUS and elsewhere.

The aim of the present study is to define whether upon personal data existing and there being a claim for erasure, the obligation to erase can be fulfilled by anonymising the personal data.

## 1 Term "Anonymisation" in GDPR

The GDPR does not mention or define anonymisation in any provision but assumes this form of processing in several provisions and mentions it in Recital 26 GDPR once.

Recital 26 of the GDPR states that

> "personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable" (Regulation (EU) 2016/679, Recital 26);

however, a more specific definition has not been provided. It is possible to conclude that anonymous data is the opposite of personal data. Anonymisation can be described as a method of identifiers implementation that replaces the values of personal data values with creation of a guide of conformity of identifiers with the initial data (Primenko, Spevakov & Spevakova, 2020). Thus, both terms can be distinguished from each other that anonymised personal data by the fact is not personal data. The decisive factor is that although the data contains information about a specific person, it cannot be used to establish a link to an identified or identifiable natural person.

Re-usage of personal data is important for controllers and it may be necessary to use anonymised personal data for the development of big data or artificial intelligence applications and to extract from it either statistical or general statements, correlations, behavioural patterns or decision proposals as well as to improve algorithms for building a user's profile or performance of the application. For example, a very well-known example is WhatsApp that in its Privacy Policy states that they automatically collect general location information even if the user has not chosen to use precise location-related features such as IP addresses, phone number area codes to estimate the user's general information. Once user profile has been established, the account records randomly generated identifier; it can be considered that analysis of pseydonimised information happens. Additionally, WhatsApp can be employed as a use-case when personal information is being used in a anonymised manner after the user account is deleted by stating that after deletion of the account, copies of certain log records remain in the WhatsApp database but are disassociated from personal identifiers to measure performance, reliability, and efficiency and to operate and improve the Services (WhatsApp Privacy Policy, 2022). Other controllers want to keep the data anonymised for the same purposes as the above-mentioned WhatsApp for improvement of algorithms or performance of application, etc.

In Recital 26, the GDPR specifies the result of anonymisation, it also specifies requirements for anonymisation. According to the relative concept of personal reference, it must be determined in a risk assessment, which considers both the interest of potential data processors and the means of attribution that can be mobilised by them, and whether the data remaining after anonymisation are personally identifiable. The allocation to an identifiable person turns so disproportionate in relation to the effort required for this that identification is not to be expected according to general life experience or the state of the art in science and technology. The existing or acquirable additional knowledge of the controller, current and future technical possibilities of processing, as well as the possible effort and the available time must be considered. An absolute exclusion of the assignment is neither possible nor necessary (Opinion 5/2014 on Anonymisation Techniques, 2014).

The method of anonymisation depends on the structure and content of the respective data set. In addition to the irreversible erasure of explicit or direct identifiers such

as names and addresses, personal identification numbers, and account numbers, other measures are required, such as the replacement of concrete information with generalised substitute information, or the controlled incorporation of various errors. The strengths and weaknesses of anonymisation techniques have been analysed by the *Article 29 Data Protection Working Party* on Opinion 5/2014 on Anonymisation Techniques in a more detailed way (Opinion 5/2014 on Anonymisation Techniques, 2014).

As one of anonymisation methods, a method when instead of data subject-specific data more general data are integrated can be mentioned; for example, instead of using specific city of the data subject's residence, the name of the state is used instead: instead of using Los Angeles (actual location) California (more general region) is used, or instead of using John Smith and Sara Rose, only "men" instead of John Smith and "women" instead of Sara Rose is used. The main objective of such personal data anonymisation, in this case, would be to analyse, for example, gender and region, where specific functions of the application are used more widely. In this case the objective of anonymisation would be reached as it is no more possible to identify a specific person after such anonymisation anymore.

It can be concluded that basis for anonymisation from the controller's perspective can be found in any grounds defined in Article 6 of the GDPR, with emphasis on the controller's legitimate interests, defined in Article 6 (1) of the GDPR, in case the controller has followed Data Protection Working Party's Opinion 3/2013 on purpose limitation (Opinion 3/2013 on purpose limitation, 2013). Anonymisation of personal data can be considered as a special form of data processing and requires a legal basis due to the principle of the reservation of the law (Roßnagel, 2019) a legal basis, which must essentially result from Article 6 of the GDPR (Hornung & Wagner, 2020; Roßnagel, 2021).

## 2 Term "Erasure" in GDPR

The term "erasure" as such has not been defined in the GDPR; however, "Right to erasure ('right to be forgotten')" has been defined explicitly within Article 17 of the GDPR. Article 17(1) grants the rights for data subject to demand from the controller to erase the personal data if any of the following cases apply

> "the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing; the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2); the personal data have been unlawfully processed; the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; the personal data have been collected in relation to the offer of information society services referred to in Article 8(1)." (Regulation (EU) 2016/679, Article 17 (1))

No clear definition in the GDPR has been provided of what "erasure" means; however, within Article 4 (2) of the GDPR, it has been defined as one of the forms of data processing, stating that

> "'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction" (Regulation (EU) 2016/679, Article 4(2)).

Additionally, "erasure" describes a form of action that serves to ensure that data can no longer be used and can no longer be challenged. Erasure can take place in different ways; however, the decisive factor is that it is impossible to perceive the information previously recorded in the data to be deleted (Judgement of the court in case Case-434/16, reference 55, 20 December 2017). It is not sufficient to remove a reference to certain data in a register or to overwrite the data in a file, it is necessary that the data cannot be recovered after erasure and cannot be processed in any other.

Evaluating the technical possibilities of reconstruction after insufficient attempts at extinguishment, the requirements for erasure depend on the current state of the personal data. It must irreversibly prevent information in the data from being used further. Erasure must be performed on all data carriers of the data controller and must also cover all backup copies (Hornung & Wagner, 2020). Under the conditions of Article 17 (2) of the GDPR, the obligation to delete must also be made known to other data controllers and implemented by them. The erasure concept required for proper erasure is dealt by national or any other guidelines in regard to erasure periods for personal data that may differ case by case. Absolute security cannot be demanded for complete and irreversible rendering of data unrecognisable to anyone and for an unforeseeable period of time (Hammer, 2016). However, it must be practically impossible that the data can be restored with reasonable effort.

For erasure "destruction" of the data is not required. This form of action, in addition to erasure, is described in Article 4 (2) of the GDPR and is therefore an "alternative form of processing" to erasure (Stürmer, 2020). Destruction, in contrast to erasure, means the physical removal of the data media (Hornung & Wagner, 2020). Destruction is possible, for example, by destroying the data media if one can be sure that the data was only stored on the destroyed data media (Roßnagel, 2021).

## 3 Differences between Terms "Erasure" and "Anonymisation"

Analysis of the terms "erasure" and "anonymisation" shows similarities but above all differences between the two forms of processing. It must, therefore, be examined whether these differences allow the conclusion that anonymisation of personal data can replace erasure and that the controller is free to decide on the replacement.

Anonymisation is not defined in the GDPR but is only described in more detail in Recital 26 of the GDPR, as described above. According to it, the principles of the GDPR do not apply to anonymous data, i.e., data that do not (or no longer) relate to an identified or identifiable natural person. The wording makes it clear that anonymous data are the flip side of personal data within the meaning of Article 4(1) of the GDPR and thus do not fall within the scope of the Regulation as described in Article 1(1) of the GDPR. Therefore, the right to erasure can only apply to personal data, not to non-personal data. In addition, erasure does not require that the data in question be "destroyed". This already follows from Article 4(2) of the GDPR, according to which, the processing of personal data includes "erasure or destruction". Therefore, on the one hand, it is possible to conclude that it is sufficient to comply with Article 17 (1) of the GDPR if the information contained in the data has been rendered unrecognisable to such an extent that the data concerned cannot be restored or can only be restored by disproportionate means. From a teleological point of view, elimination of the reference to a person is close to deletion, because the data subject is no longer considered to be in need of protection (Specht, 2017). Thus, if all personal data is deleted in the event of a claim for deletion, and only anonymous data remains with the data controller, the claim for deletion is satisfied. For example, the customer of an online store demands the deletion of his personal data. In this case, the online store will nevertheless have to ensure that it retains the non-personal data that it needs to prepare its annual financial statements, to detect accounting errors in the event of a tax audit or to analyse sales over specific periods in the past for business planning purposes.

## 4 Terms "Erasure" and "Anonymisation" Compared regarding GDPR

A major shortcoming of the GDPR is that it only defines the collective term of data processing and explains it with 16 data processing examples:

> "collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction" (Regulation (EU) 2016/679, Article 2).

However, in Article 4 (2) of the GDPR, there are not defined most of the above-described data processing examples or "erasure" either, for which the most specific definition can be found in Article 17 and in Recitals 65, 66 and 81 of the GDPR. Within the scope of the term "anonymisation", the same advantage can be found in scope of the GDPR because the GDPR not only does not define the term "anonymisation" but also does not mention it in the whole regulation except in Recital 26 GDPR, where it is mentioned once.

It is undisputed that both forms of processing fall under the concept of processing. Article 4 (2) of the GDPR, however, mentions erasure as a separate form of processing

because it changes the data in a very specific manner. Since it deprives the data of their further processability, it is logical to emphasise this specificity separately. Anonymisation removes personal reference of the data and thus withdraws it from the scope of the regulation. In order to distinguish it from the usual forms of processing, anonymisation should be regarded as a separate – unnamed – form of data processing (Hornung & Wagner, 2020; Roßnagel, 2021).

It is not possible to draw any conclusions when evaluating the term "processing" defined in Article 4(2) of the GDPR that states that

> "'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction" (Regulation (EU) 2016/679, Article 4(2))

No conclusions about any of the discussed terms under investigation can be drawn from the definition of data processing alone. "Anonymisation" is used without using the term

> "where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner" (Regulation (EU) 2016/679, Article 89),

as defined in Article 89 of the GDPR as a prerequisite for further processing of data for purposes of research, statistics, and archiving. In all cases in which these purposes can also be achieved without identifying data subjects, further processing is to take place without personal data. This is only possible if the data has been anonymised before further processing (Simitis, Hornung, & Spiecker, 2019).

Likewise, erasure of personal data is regulated very specifically in Article 17 of the GDPR. Paragraph 1 and 2 of Article 17 of the GDPR regulate obligations of the controller to erase and provide information about the data subject' s right to erasure; however, paragraph 3 of Article 17 of the GDPR determines five final exceptions to the obligation to erase. These exceptions do not include general anonymisation of data. One exception is only addressed very indirectly in Article 17 (3) (d) as a requirement in Article 89 (1) of the GDPR to further processing of the data for purposes of research, statistics, and archiving. If the Union legislator had wanted to provide for anonymisation as a general substitute for data erasure beyond this specific case, which should exceptionally exclude the data subject's right to erasure of the data, he would most probably have included it in Article 17 (3) of the GDPR. They would have done so in a similar way as in Article 89 (1) of the GDPR in relation to specific further processing. In any case, there is no indication either in the wording of the GDPR or in the conceptual use of the forms of processing that anonymisation of personal data replaces erasure (Roßnagel, 2021).

Since the GDPR does not apply to anonymised data (Regulation (EU) 2016/679, Recital 26), it can be assumed that the obligation to delete data can also be met by making the data anonymous (Hornung & Hofmann, 2013). Anonymisation does not exist; however, if the link between the data and a specific person can be restored, for example, by linking it to other data, such data is merely pseudonymised (Paal & Pauly, 2021) so that the GDPR remains applicable and the obligation to erase is not met.

## 5 Principle of Storage Limitation within Scope of "Erasure" and "Anonymisation"

When comparing "erasure" and "anonymisation", it must be considered that both terms can implement the principle of storage limitation defined in Article 5 (1)(e) of the GDPR (Stürmer, 2020).

The principle requires that personal data shall be

> "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed" (Regulation (EU) 2016/679, Article 5 (1)(e)).

This goal can be achieved both by deleting data when they are no longer necessary and by making such data anonymous. However, the fact that several measures can achieve the goal of storage limitation does not mean that they are all equivalent and can replace each other. In particular, it cannot be concluded that physical elimination of the data is equivalent to further processing of the data for another purpose, even if a personal reference is no longer required for this purpose (Der Bundesbeauftragte für den Datenschutz und der Informationsreiheit, 2020).

## 6 Necessary Differentiations Depending on Data Category or Any Other Condition in Case of "Erasure" and "Anonymisation"

Even if, contrary to the previous result, a substitution of erasure by anonymisation of the data were permissible in principle, this could not apply to all conceivable cases. Rather, it would be necessary to further differentiate for which erasure reasons anonymisation would be excluded and for which it would be possible. Likewise, it would have to be differentiated for which data anonymisation is possible at all, and anonymisation could be a substitute for erasure.

On the one hand, according to the grounds for a claim for erasure pursuant to Article 17(1) of the GDPR, it would have to be differentiated. No substitution of erasure by anonymisation is possible if only

> "the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject" (Regulation (EU) 2016/679, Article 17 (1)(e)).

However, this also applies if, according to Article 17(1)(d),

> "the personal data have been unlawfully processed" (Regulation (EU) 2016/679, Article 17 (1)(d)).

Otherwise, this would invite circumvention opportunities such as unlawful acquisition of data for Artificial intelligence and Big Data that can be seen as a real objective for data controllers for developing new applications and analyses tools.

On the other hand, complete anonymisation cannot be performed at all for a large number of data categories as data categories sometimes use access control of company locations such as image data of fingerprints as well as for categories such as genomic data, biomaterial samples or voice recordings. Thus, the claim that anonymisation can replace erasure should be put into perspective and exclude a significant amount of data for which anonymisation is not possible or is particularly difficult or not possible with measurable means or at least defining for which data categories anonymisation could and in which categories it could not take place, for example, splitting "personal data" and "special categories of personal data" in different possibilities of data anonymisation.

## 7 Different Results of Both Terms, "Erasure" and "Anonymisation"

Every anonymisation must also include erasure, namely that of identifiers at least for creating the data anonymous. As long as those are still present in the data set, the data cannot be anonymous. In this respect, anonymisation is also a partial erasure of the personal data, until the personal data cannot be considered as personal data anymore. Otherwise, anonymisation only changes the data so as not to jeopardize its further processing. In this respect, it must be questioned whether the obligation to delete can already be fulfilled with partial erasure through anonymisation or erasure must be made in a "full" manner. This must be evaluated as both forms of processing pursue different goals and achieve different results.

Erasure is intended to make stored personal data completely unrecognisable so that it can no longer be processed, read or perceived. The result of erasure is the empty data set (Pohle & Hölzel, 2020); meanwhile, in anonymisation only partly empty data set.

Anonymisation, on the other hand, aims to continue processing the data without any reference to a person but using the representation of the reality of life of the person concerned. However, the data can still be processed, read and perceived (Der Bundesbeauftragte für den Datenschutz und der Informationsreiheit, 2020). The purpose of anonymisation is for the controller to leave the scope of the GDPR and free himself from the obligation to protect the fundamental rights and freedoms of the data subjects and to safeguard the data subjects' rights as anonymised data cannot be considered personal data anymore (Pohle & Hölzel, 2020). If it were allowed to replace erasure with anonymisation, the controller could copy the anonymous data and sell or pass it on

without restriction, or use it as statistical or typing statements, correlative relationships, behavioural models or decision proposals, or other Big Data and Artificial Intelligence applications.

Anonymisation and erasure thus lead to very different results. Anonymisation cannot produce the results expected from erasure. This argues against the assumption that anonymising the data could fulfil the obligation to delete it.

The fact that anonymisation and erasure are not similar and equivalent forms of data processing is also reflected in the respective different requirements for information obligations to data subjects while conducting any activity.

While the controller must inform the data subject prior to anonymisation about the purposes and legal basis of processing for which the personal data are intended pursuant to Article 13 (1) (c), Article 14 (1) (c) and Article 14 (4) of the GDPR, these information obligations do not exist in the case of erasure as further data processing does not take place.

## 8 Risk Assessment Evaluation when Using "Erasure" or "Anonymisation"

Article 17(1) of the GDPR, provided that one of the six grounds for erasure applies, gives the data subject the right to require the controller to physically eliminate the data concerning them. The data subject, thus, has a right to have its risk that the data may be used against interests eliminated by the fact that it no longer exists. However, this claim to elimination of risk is defeated by anonymisation. On the contrary, the risk reduction to which the data subject is entitled is not inconsiderably increased by anonymisation for at least two reasons.

First, the risk of de-anonymisation is increased by further processing of the anonymised data (Hornung & Wagner, 2020). According to the relative concept of personal reference, anonymisation is already considered sufficient if, at the time of anonymisation, it can be reasonably ruled out that the controller can assign the data to the data subject with the additional knowledge available to him or foreseeably acquirable (Opinion 5/2014 on Anonymisation Techniques, 2014). If the data is no longer subject to data protection law under this condition, it can be passed on at any time to anyone who can process it further for a wide variety of purposes and use it, for example, for Big Data analyses and Artificial Intelligence applications. Due to dissemination of data to countless responsible parties and due to technical progress over time, the risk of de-anonymisation is continuously increasing. If the data is no longer available after correct erasure, this risk is eliminated (Roßnagel, 2021).

Advocates of the replacement option rightly point out that residual risks can remain with both erasure and anonymisation (Stürmer, 2020). This is correct insofar as data protection law allows the practical exclusion of risks to suffice for both terms "anonymisation" and "erasure". However, this commonality does not mean that both

forms of handling aim at the same level of risk or lead to the same or comparable risks. Rather, anonymisation targets a significantly higher level of risk than erasure, and proper anonymisation is much more difficult to achieve than proper erasure. Therefore, the risk to the data subject after erasure is significantly lower than after anonymisation. This also speaks against anonymisation being a substitute for erasure (Roßnagel, 2021).

Second, anonymisation preserves the data and their connections with other activities or characteristics. Although they can no longer be assigned to the person concerned, if done correctly, they still describe their relationships, characteristics, attributes, and history. When these data are later reapplied to the data subject as statistical or typing statements, correlative relationships, behavioural models, or decision suggestions, they apply to that person and may then be used against them (Weichert, 2013; Roßnagel, 2013). They enable behavioural control, especially of the individuals to whom they apply, even if the person responsible cannot identify those individuals (Richter, 2015).

Different risks after anonymisation or erasure have been also acknowledged by authors who consider anonymisation instead of erasure to be a suitable alternative, if they consider a data protection impact assessment defined in Article 35 of the GDPR to be necessary in the case of anonymisation of the data and its further use and to evaluate the possible consequences within the anonymisation made.

Despite data protection impact assessment not being required before the data is deleted, it could be considered as pre-condition in case anonymisation could replace data deletion for evaluating the possible risks to de-anonymise the data set after personal data anonymisation. This again leads to conclusion that anonymisation is associated with a significantly higher risk than direct data erasure.

## Conclusions

On the one hand, the requirements defined in Article 17 (1) of the GDPR within the obligation to erase personal data from the controller's perspective cannot be seen as data erasure if anonymisation of data takes place due to the reason that two data processing methods have different goals, can cause different risks to the data subject and are also differently regulated within the context of the GDPR, the question can be indicated as crucial for the controllers concerning optimisation of applications performance and other technological improvements for development that anonymised personal data may provide.

On the other hand, in legal practice from the specific normative arrangement of the provision the obligation to erase data under the GDPR can also be seen by removing the reference to a person through anonymisation as generally Article 17 of the GDPR requires processing only that personal data which is no longer possible after data erasure. According to the above discussion, anonymisation is associated with a residual risk of re-identifiability. However, such view is based on the fact that this risk, in the case of proper anonymisation, is at least theoretically no different from the risk of identifiability of data

not initially covered by the GDPR, and thus, from the point of view of the data protection regime, anonymisation falls below the threshold of the relevant risk. Anonymisation constitutes processing within the meaning of Article 4 (2) of the GDPR, which is based on Article 6 (1) (1) (c) in conjunction with Article 17 of the GDPR.

There is no clear answer provided within the GDPR whether anonymisation can replace data erasure thus leaving space for interpretation.

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# Valdes locekļa atbrīvošana no atbildības ar dalībnieka lēmumu

## Release from Liability of Member of the Board by Decision of the Shareholder

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### Abstract

The current legislation in force in the Republic of Latvia grants to any member of the board of any capital company wide powers to dispose of the company's property. The duty to act with the care and diligence of a prudent and careful manager does not allow a CEO to act contrary to the company's interest. However, if a member of the board has caused damage to the company, they may be released from liability by a lawful resolution of the shareholder.

The current study analysed the standard of an honest and careful manager in accordance to Article 169 of the Commercial Law and the obligation to follow this pattern of conduct in order to avoid potential liability for losses. However, a member of the Management Board may also be released from liability if such a decision is taken by the shareholders in accordance with Article 173 of the Commercial Code.

Although a decision may obviously release a Member of the Board, such a decision is not binding in all cases. Only if there is a belief that the board member has performed their duties in good faith, they can enjoy the immunity afforded by a decision of a shareholder.

*Keywords:* civil proceedings, commercial law, losses, responsibility of a member of the board, business judgment rule.

## Ievads

Latvijas Republikā spēkā esošie tiesību akti jebkuram kapitālsabiedrības valdes loceklim piešķir plašas pilnvaras atsavināt uzņēmuma mantu, taču pienākums darboties kā gādīgam, rūpīgam un apdomīgam saimniekam neļauj rīkoties pretēji uzņēmuma interesēm. Ja valdes loceklis ir nodarījis kaitējumu kapitālsabiedrībai, viņu var atbrīvot no atbildības ar akcionāru (sabiedrības ar ierobežotu atbildību dalībnieku) lēmumu, turpmāk īstenojot nodarītā kaitējuma piedziņas procedūru. Kādas problēmas rodas šādā situācijā? Par to – šajā pētījumā. Vispirms ilustrācijai daži piemēri no tiesu prakses.

2016. gada 16. februārī Zemgales apgabaltiesa, izskatot civillietu Nr. C31406514, apmierināja prasītāja – maksātnespējīga komersanta – prasību pret bijušo valdes locekli, kurš savā vadīšanas laikā cedēja uzņēmuma prasījuma tiesības pret pašu valdes locekli trešajai personai, nosakot atlīdzību par prasījuma cedēšanu aptuveni 5 % apmērā no parāda summas. Šā darījuma laikā valdes loceklis bija vienīgais sabiedrības dalībnieks. Savukārt vēlāk, atsavinot sev piederošās pamatkapitāla daļas trešajai personai, tā gan daļu pirkuma līgumā, gan atsevišķi pieņemtajā dalībnieka lēmumā apstiprināja prasījumu neesamību pret bijušo valdes locekli un atzina aprakstīto darījumu par saistošu sabiedrībai. Par spīti šiem apstākļiem tomēr tika nospriests piedzīt no valdes locekļa visu zaudējumu summu.

Savukārt 2022. gada 19. janvārī Rīgas rajona tiesā tika ierosināta civillieta Nr. C33284722 maksātnespējīgās kapitālsabiedrības prasībā pret bijušo valdes locekli par naudas līdzekļu piedziņu. Maksātnespējīgās kapitālsabiedrības administrators cēla prasību par nodarīto zaudējumu piedziņu, vērtējot vienīgi komersanta aktīva – nekustamā īpašuma – pārdošanu saistītajai personai zem tirgus vērtības, balstoties tikai uz paša valdes locekļa iepriekš pasūtīto nekustamā īpašuma objekta tirgus vērtības noteikšanas atzinumu. Darījuma īstenošanas brīdī sabiedrībai nebija citu kreditoru, izņemot pircēju, turklāt nekustamā īpašuma objekta funkcionēšanas uzturēšanai vajadzēja veikt ieguldījumus. Sabiedrības dalībnieks, kas bija šī uzņēmuma valdes loceklis, atbrīvoja sevi no atbildības, pieņemot attiecīgu dalībnieka lēmumu.

Gan šajos piemēros, gan arī profesionālajā praksē vairākkārt ir konstatēts, ka valdes locekļi tiek saukti pie atbildības par nodarītajiem zaudējumiem ne tikai komersanta maksātnespējas laikā, bet arī mainoties komersanta valdes vai dalībnieku sastāvam, ignorējot dalībnieka vai dalībnieku iepriekš pieņemtu lēmumu.

Latvijas Republikas Komerclikuma 1. pantā ir noteikts, ka komercdarbība ir atklāta saimnieciskā darbība, kuru savā vārdā peļņas gūšanas nolūkā veic komersants. Komerclikumā ir norādīti divi komersanta – kapitālsabiedrības – veidi, t. i., sabiedrība ar ierobežotu atbildību un akciju sabiedrība, kuru pamatkapitāls sastāv no pamatkapitāla daļu vai akciju nominālvērtību kopsummas. Sabiedrību ar ierobežotu atbildību un akciju sabiedrību (turpmāk arī – sabiedrība) dalībnieki vai akcionāri neatbild par sabiedrības saistībām, jo nedz dalībnieki, nedz akcionāri neīsteno sabiedrības saimniecisko darbību un nepārstāv sabiedrību attiecībās ar tās kontrahentiem, un viņu atbildība ir ierobežota ar

sabiedrības pamatkapitālā veikto ieguldījumu. Attiecībās ar trešajām personām sabiedrību pārstāv tās amatpersona – valdes loceklis (Komerclikums, 221. pants). Tieši valde ir katras sabiedrības neatņemama sastāvdaļa, tā vada sabiedrības lietas, rūpējas par sabiedrības finanšu rādītājiem un cenšas tās dalībniekiem (vai akcionāriem) nodrošināt peļņu, kā arī gādā par to, lai laikus tiktu kārtotas kredītsaistības.

Saskaņā ar Komerclikuma 173. panta pirmo daļu komersanta dalībnieku sapulce var atbrīvot valdes locekļus no atbildības tikai par viņu faktiski veiktu konkrētu dalībnieku sapulcē atklātu rīcību, kuras rezultātā sabiedrībai nodarīti zaudējumi. Vai praksē šāds valdes locekļa atbrīvojums no atbildības izslēdz sabiedrības tiesības vērsties pret viņu ar attiecīgo prasījumu? Viennozīmīgu atbildi uz šo jautājumu Latvijas tiesu prakse nesniedz.

Šī pētījuma mērķis ir noskaidrot, vai sabiedrības dalībnieku lēmums atbrīvo valdes locekli no pienākuma atlīdzināt zaudējumus gadījumā, ja ticis mainīts valdes vai dalībnieku sastāvs, kā arī sabiedrības maksātnespējas gadījumā.

Lai rastu atbildi uz šo jautājumu, jānoskaidro:

1) valdes locekļa kā krietna un rūpīga saimnieka izpausmes elementi;
2) vai sabiedrības dalībnieka (akcionāra) likumiski pieņemts lēmums atbrīvo valdes locekli no viņa darbības rezultātā nodarītajiem zaudējumiem;
3) tiesu prakse saistībā ar valdes locekļa atbildību gadījumā, ja ir pieņemts dalībnieka lēmums par valdes locekļa atbrīvošanu no atbildības.

Atbilstīgi konstatētajam šajā rakstā tiks sniegti arī priekšlikumi, lai situāciju uzlabotu.

Gatavojot publikāciju, tika veikts pētījums, kurā izmantota vēsturiskā, analītiskā un aprakstošā metode. Vēsturiskā metode tika lietota, lai noskaidrotu, kā bija regulēta valdes locekļa atbrīvošana no atbildības pirms Komerclikuma stāšanās spēkā. Aprakstošā metode ļāva atainot gadījumus, kuros valdes locekli var saukt pie atbildības, kaut arī likumiski ir pieņemts lēmums par viņa atbrīvošanu no atbildības. Savukārt analītiskās metodes izmantošana palīdzēja izzināt tiesu praksi un normatīvo regulējumu, lai izdarītu secinājumus.

## 1. Valdes locekļa kā krietna un rūpīga saimnieka uzvedības elementi

Pēc Latvijas Republikas neatkarības atjaunošanas bija nepieciešams regulēt privāto saimniecisko darbību, kas iepriekš bija vāji attīstīta. Mērķis bija jebkurai personai neatkarīgi no pilsonības, izglītības un iepriekšējas pieredzes piešķirt iespēju iesaistīties uzņēmējdarbībā. Ar 1991. gada 23. janvāra Latvijas Republikas Augstākās Padomes lēmumu tika noteikts, ka Latvijas Republikas likums "Par sabiedrībām ar ierobežotu atbildību" stājas spēkā ar 1991. gada 1. februāri.

Stājoties spēkā likumam "Par sabiedrībām ar ierobežotu atbildību", no juridiskās apgrozības tika izņemts termins "orgāns", kuru aizvietoja ar mūsdienās lietojamo terminu "izpildinstitūcija".

> "Ar jēdzienu "orgāns" plašākā nozīmē apzīmē veidojumu, kurš nav patstāvīgs, bet kalpo kādam patstāvīgam veselumam, pildot savas noteiktās funkcijas. Šaurākā juridiskā nozīmē ar juridiskās personas orgānu saprot noteiktā kārtībā izvēlētu fizisko personu vai to grupu, kam kā vienotam kopumam ir uzticētas noteiktas funkcijas, parasti – vadīt kādu tiesību subjektu un rīkoties tā vārdā. Tai pašā laikā pats orgāns nekādā ziņā nav tiesību subjekts, tas ir tikai tiesību subjekta daļa ar tam stingri noteiktām funkcijām. Valdi var dēvēt par SIA orgānu, jo (1) tās sastāvā ietilpst viena vai vairākas fiziskās personas, (2) tā nav tiesību subjekts (tai skaitā juridiska persona); (3) tai ir likumā noteiktas funkcijas – vadīt un pārstāvēt sabiedrību" (Strupišs, 221. panta komentārs).

Jēdzienu maiņa no "orgāns" vai "organizācija" uz "izpildinstitūcija" ir valodnieciska korekcija, kas neietekmēja sabiedrības likumisko pārstāvju funkcijas vadīt sabiedrības saimniecisko darbību un to pārstāvēt attiecībās ar trešajām personām. Lai gan valdes locekļiem bija liels potenciālās darbības apjoms un plašas tiesības pārstāvēt sabiedrību, tomēr likumā "Par sabiedrībām ar ierobežotu atbildību" valdes pilnvaras regulēja vien 44. un 56. pants, kurā bija noteikts: ja sabiedrības izpildinstitūcijas locekļi rīkojas nelikumīgi, pārkāpj savu pilnvaru ietvarus vai neievēro likumu un statūtu noteikumus vai dalībnieku sapulču lēmumus un instrukcijas vai darbojas nolaidīgi, viņi ir solidāri atbildīgi ar visu savu īpašumu par zaudējumiem, kas tādējādi radušies sabiedrībai, atsevišķiem tās dalībniekiem vai trešajām personām. Taču šis normatīvais akts, atšķirībā no Komerclikuma, nenodrošināja īpašu kārtību prasības celšanai un pierādījuma sloga sadalīšanai. Par zaudējumiem, kuri nodarīti valdes darbības vai bezdarbības rezultātā, sabiedrībai, ievērojot likuma "Par sabiedrībām ar ierobežotu atbildību" 59. pantā norādītos priekšnoteikumus, bija jāceļ prasība saskaņā ar vispārīgiem Latvijas Republikas Civillikuma noteikumiem par zaudējumu piedziņu ar pienākumu prasītājam pierādīt ne tikai precīzo zaudējuma apmēru, bet arī izpildinstitūciju locekļu vainu un cēlonisko sakaru starp zaudējumiem un pārstāvju rīcību.

Civillikuma 1646. pantā paredzēts, ka par vieglu neuzmanību atzīstams tās rūpības un čaklības trūkums, kāda vispār jāievēro krietnam un rūpīgam saimniekam. Savukārt Civillikuma 2250. pantā noteikts, ka katram biedram, izpildot uzliktos pienākumus, jādarbojas sabiedrības lietās ar tādu rūpību un čaklību, kādu var sagaidīt no krietna un rūpīga saimnieka.

Civillikuma 1646. pants satur ģenerālklauzulu "krietns un rūpīgs saimnieks", kas ir kritērijs vieglas neuzmanības noskaidrošanai. Latviešu valodas skaidrojošajā vārdnīcā *Tēzaurs.lv* termins "krietns" definēts šādi: tāds, kas labi, apzinīgi veic savu darbu, izpilda savu pienākumu, arī godīgs. Savukārt rūpīgs ir tāds, kas ir kārtīgs, precīzs; tāds, kam ir apzinīga attieksme pret darbu, pienākumiem.

Valodnieciski interpretējot 1646. pantu, var secināt, ka vieglas neuzmanības konstatēšanai ir jānoskaidro, vai personas rīcība atbilst apzinīga, godīga un precīza subjekta uzvedībai. Savukārt vieglas neuzmanības konstatēšana pierāda personas uzvedības neatbilstību krietna un rūpīga saimnieka mērauklai.

Ievērojot Civillikuma 2241. pantu, prasības, kas iekļautas Civillikuma 2250. pantā, ir piemērojamas visa veida sabiedrībām, izņemot gadījumus, ja par sabiedrībām speciālajā likumā ir paredzētas citādas normas. Tādējādi, pat nekonstatējot likumā "Par sabiedrībām ar ierobežotu atbildību" pienākumu valdes loceklim darboties ar atbilstošu krietna un rūpīga saimnieka uzmanības pakāpi, šāda prasība tomēr izriet no Civillikuma 2250. pantā ietvertā regulējuma.

Stājoties spēkā Latvijas Republikas Komerclikumam, likumdevējs ieviesa skaidrību šajā jautājumā, koncentrējot valdes locekļa rīcības pienākumu Komerclikuma 169. panta pirmajā daļā un tādējādi acīmredzami norādot uz aizsardzību no ļaunprātīgiem izpildinstitūciju locekļiem, uzliekot tiem pienākumu darboties vienīgi sabiedrības interesēs un paredzot, ka tikai lojāliem, labticīgiem un rūpīgiem sabiedrības pārstāvjiem ir iespēja tikt atbrīvotiem no atbildības par zaudējumiem, kuri iestājas viņu vainas dēļ.

Spēkā esošā Komerclikuma 169. panta pirmajā daļā paredzēts, ka valdes un padomes loceklim savi pienākumi jāpilda kā krietnam un rūpīgam saimniekam. Krietns un rūpīgs saimnieks ir atklātie (nenoteiktie juridiskie) jēdzieni jeb ģenerālklauzulas, kuru satura konkretizācija ir atstāta tiesību piemērotāja ziņā. Tiesību normas atvērtība ļauj meklēt individuālas lietas taisnīgāko risinājumu, tādējādi situācijā, kurā ir piemērojami šādi jēdzieni, tiesas uzdevums ir piepildīt tos ar juridiski nozīmīgu saturu un spriedumā atspoguļot izdarīto secinājumu pamatojumu (Strupišs, 2003). Šā panta elastīgais formulējums ļauj pielāgot prasības valdei atkarībā no laika gara, sabiedrības saimnieciskās darbības nozares un paražām, kā arī citiem apstākļiem, kuri pēc tiesas ieskata ir svarīgi.

Lai gan valdes locekļa amats pēc savas būtības var būt līdzīgs darba tiesiskajām attiecībām, tomēr valdes iecelšanu regulē Komerclikuma 224. pants, kas paredz no Darba likuma atšķirīgu kārtību. Uz valdes locekli ir attiecināms arī pilnvarojuma institūta tiesiskais regulējums, ciktāl Komerclikumā nav paredzēts speciāls regulējums (Novicāne, 2021, *19*). Civillikuma 2301. pantā tiek regulēta pilnvarnieka rīcība, t. i., tiek uzdots pilnvarniekam rīkoties nevis vienīgi pēc savas iegribas, bet tā, kā attiecīgā gadījumā, domājams, rīkotos pats pilnvarotājs, lai lietu visizdevīgāk pabeigtu.

Sistēmiski tulkojot Komerclikuma 169. pantā norādīto, var secināt, ka, rodoties zaudējumiem, valdes vaina *a priori* ir konstatēta, jo zaudējumu esamība liecina vai nu par pārstāvja neuzmanību, vai par ļaunticīgu rīcību, vai par tādu rīcību, kas nav izdevīga pašai sabiedrībai. Tomēr zaudējumu esamības fakts tajā gadījumā, ja valde pieņem komerciālu lēmumu, balstoties uz informāciju, godprātīgi un godīgi ticot, ka veiktā darbība ir uzņēmuma interesēs, nevar būt pamatā tam, lai sodītu šādu uzņēmuma pārstāvi ar pienākumu atlīdzināt zaudējumus (*Bruner*, 2006). Secīgi valdes locekļa rīcība ir atbilstoša krietna un rūpīga saimnieka standartam, ja, to izpildot, valdes loceklis ir darbojies labticīgi un lojāli pret sabiedrību, rīkojies precīzi, nepieļaujot pat vieglu neuzmanību.

Labticīgam valdes loceklim ir iespēja rīkoties ar lielāku brīvību, mazāk uztraucoties par to, ka dalībnieks vai kreditors, kurš, iespējams, ir mazāk kompetents nekā valdes loceklis attiecīgajā uzņēmējdarbībās jomā, pieņems biznesa lēmumus no savas

perspektīvas, ignorējot faktiskus uzņēmējdarbības apstākļus. Pārzinot cilvēka īpašības un motīvus, lojalitātes pienākums no valdes locekļa prasa visprecīzāko pienākumu izpildi ne vien nolūkā aizsargāt sabiedrības intereses, bet arī tādēļ, lai atturētos no rīcības, kuras rezultātā sabiedrībai tiktu nodarīti zaudējumi vai samazinātos peļņas daļa, tāpēc lojalitātes pienākums prasa nesavtīgu uzticību sabiedrībai, nodrošinot, lai nepastāvētu konflikts starp pienākuma izpildīšanu un paša valdes locekļa interesēm (*McMillan*, 2013, *12*). Savukārt rūpības pienākums prasa, lai valdes loceklis pieņemtu lēmumus sabiedrības vārdā, izmantojot tādu atbildības un rūpības pakāpi, kādu atbildīgie un apzinīgie cilvēki izmantotu līdzīgos apstākļos, ņemot vērā visu pieejamo informāciju lēmuma pieņemšanai (*Gold*, 2007, *12*).

Atsevišķos gadījumos valdes locekļa labticīguma pienākums var tikt vērtēts izolēti no lojalitātes pienākuma, piemēram, situācijā, kurā valdes loceklis rīkojas nolaidīgi vai rupji pārkāpj sabiedrības iekšējos dokumentos ietverto vai sabiedrības paražas, taču darbojas sabiedrības, nevis trešās personas interesēs. Piemēram, ja valdes loceklis sniedz dalībniekiem nepārbaudītu informāciju, nepastāvot interešu konfliktam, viņš nepārkāpj lojalitātes pienākumu, tomēr viņš pārkāpj savu labas ticības pienākumu (*Gold*, 2007, *12*). Izpildinstitūcijas locekļa rīcībai jābūt orientētai uz pilnvaras devēja – sabiedrības – labklājības uzlabošanu, upurējot savu privāto labumu. Valdes locekļa subjektīvās vēlmes, kuras apdraud sabiedrības reputāciju un labklājību, nav savienojamas ar valdes locekļa amatu.

Ņemot vērā, ka ikviena saimnieciskā darbība ir saistīta ar risku, zaudējumu varbūtība pastāv vienmēr, neatkarīgi no valdes locekļa motīviem, tāpēc ir pamatoti no valdes locekļa prasīt atbilstošu rūpību un zināšanas, vadot sabiedrību. Tomēr, apstiprinot savu piekrišanu ieņemt valdes locekļa amatu, neviens valdes loceklis, būdams pat sabiedrības saimnieciskās darbības sfēras eksperts, nespēj zināt un paredzēt visus riskus, tāpēc rūpībai, atšķirībā no lojalitātes, nav jābūt absolūtai, bet tai jābūt adekvātai, proti, valdes loceklim jādarbojas ar tādu rūpības pakāpi, kāda ir raksturīga vidēja līmeņa nozares speciālistam, nevis pieredzējušam ekspertam. Pretējā gadījumā valdes loceklim, kuram ir zināms par pienākumu rīkoties ar krietna un rūpīga saimnieka uzmanību, rodas dilemma, vai nodibināt darījuma attiecības ar sabiedrības jauno partneri, tādējādi attīstot sabiedrības uzņēmējdarbību, vai tomēr atteikties no saistību uzņemšanās, jo pastāv zaudējumu nodarīšanas risks. Valdes locekļa pārliecināšanai par potenciālo prasījumu neesamību var kalpot dalībnieka (akcionāra) lēmums par valdes locekļa atbrīvošanu no atbildības, ievērojot Komerclikuma 173. pantā noteikto kārtību. Taču arī šajā gadījumā pastāv varbūtība, ka valdes loceklis tomēr būs atbildīgs par nodarītajiem zaudējumiem.

## 2. Sabiedrības dalībnieka lēmuma par atbrīvošanu no atbildības spēks

Komerclikuma 173. pantā paredzēta dalībnieka tiesība patstāvīgi izvērtēt darījumu un atbrīvot valdes locekli no atbildības, pat ja šī darījuma rezultātā komersants cieš zaudējumus.

Turpmāk tiks noskaidrots, vai šāda likumīgi pieņemta lēmuma pastāvēšana ir absolūts šķērslis valdes locekļa saukšanai pie atbildības par sabiedrībai nodarītajiem zaudējumiem gadījumā, ja:

1) tiek mainīts sabiedrības valdes sastāvs vai dalībnieku (akcionāru) sastāvs;
2) sabiedrība ir pasludināta par maksātnespējīgu.

Atbrīvošanu no atbildības regulē Komerclikuma 173. pants, kura pirmajā daļā noteikts, ka dalībnieku sapulce var atbrīvot valdes vai padomes locekļus no atbildības vai pieņemt lēmumu par izlīguma slēgšanu tikai par viņu faktiski veiktu konkrētu dalībnieku sapulcē atklātu rīcību, kuras rezultātā sabiedrībai nodarīti zaudējumi. Šī norma ir imperatīva, jo tajā paredzētās tiesiskās sekas (atbrīvošana no atbildības vai izlīguma slēgšana) var iestāties tikai tad, ja izpildās visas trīs tiesību normas sastāva pazīmes kumulatīvi:

1) vainīgās personas rīcība faktiski ir notikusi;
2) ar šo rīcību ir nodarīti zaudējumi, kuru apmērs ir konkrēti noteikts;
3) rīcība un tās sekas darītas zināmas sapulcei (Augstākās tiesas spriedums, SKC- 30/2019; Vidzemes apgabaltiesas spriedums, C71408619).

Komersanta valdes vai dalībnieku sastāva maiņas gadījumā, pastāvot lēmumam, kas pieņemts Komerclikuma 173. pantā noteiktajā kārtībā, nav pieļaujama valdes locekļa atbrīvošana no atbildības par krietna un rūpīga saimnieka standarta neievērošanu. Tikai darbojoties labticīgi un lojāli, valdes loceklis ir tiesīgs baudīt aizsardzību no sankcijām, kas var iestāties nākotnē sakarā ar valdes locekļa nodarītajiem zaudējumiem.

Krievijas Federācijas Augstākās arbitrāžas tiesas plēnuma 2013. gada 30. jūlija rezolūcijas Nr. 62 "Par atsevišķiem jautājumiem, kas saistīti ar zaudējumu atlīdzināšanu no personām, kas ietilpst juridiskās personas orgānu sastāvā" 2. punktā paredzēts, ka valdes locekļa ļaunprātīga darbība (bezdarbība) tiek uzskatīta par pierādītu, ja viņš ir:

1) rīkojies tā, ka radījis konfliktu starp viņa personīgajām interesēm (direktora radniecīgo sabiedrību interesēm) un juridiskās personas interesēm;
2) slēpis informāciju no juridiskās personas dalībniekiem par veikto darījumu;
3) veicis darījumu bez likumā vai statūtos noteiktā juridisko personu attiecīgo institūciju apstiprinājuma;
4) pēc pilnvaru izbeigšanās aizturējis un izvairījies no dokumentu nodošanas juridiskajai personai par apstākļiem, kas radījuši nelabvēlīgas sekas juridiskajai personai;
5) zinājis vai viņam vajadzējis zināt, ka viņa darbība (bezdarbība), tajā laikā, kad viņš attiecīgi rīkojies, neatbilst juridiskās personas interesēm.

Kaut arī atšķirībā no Krievijas Federācijas pieredzes Latvijas Republikā nepastāv vienots Augstākās tiesas rekomendāciju kopums attiecībā uz valdes locekļa vadības atbilstību komersanta interesēm, tiesu prakse tomēr sniedz atbildi, norādot, ka ļaunprātīgu rīcību nevar attaisnot ar dalībnieku (akcionāru) lēmumu. Pilnvaras izmantošana pretēji sabiedrības interesēm ir analizēta vairākos Latvijas Republikas Augstākas tiesas spriedumos, piemēram, Augstākās tiesas spriedumā lietā Nr. SKC-7/2016 un Augstākās tiesas spriedumā lietā Nr. SKC-207/2015, bet atsevišķi šis jautājums izskatīts 2019. gada 24. aprīļa

spriedumā lietā Nr. SKC-46/2019. Senāts paplašinātā sastāvā izskatīja AS "Reverta" prasību pret diviem bijušajiem mažoritārajiem akcionāriem un izpildinstitūciju locekļiem par zaudējumu solidāru piedziņu. Spriedumā cita starpā norādīts, ka "[..] tiesa balstījusies uz Civillikuma 1643. pantā ietverto principu, kuram atbilstoši noteikts imperatīvs aizliegums iepriekš vienoties par atbrīvošanu no atbildības par darbību, kas izdarīta ļaunā nolūkā. Par pamatotu atzīts, ka aizdevuma līgumu noslēgšanā likumā tieši noteiktu prasību neievērošana Civillikuma 1645. panta pirmās daļas izpratnē ir kvalificējama kā rupja neuzmanība, kas atbilstoši šā panta otrajai daļai pielīdzināma ļaunam nolūkam. Līdz ar to vienošanās, ka ar ļaunā nolūkā izdarītu darbību nodarīts zaudējums nav jāatlīdzina, ir spēkā neesoša no tās noslēgšanas brīža. [..] Tādējādi akcionāru sapulces lēmums par iepriekšēju atbrīvošanu no atbildības nerada juridiskas sekas, ja zaudējumi nodarīti ļaunā nolūkā. Pretējs secinājums neatbilstu valdes locekļa atbildības institūta mērķim." (Augstākās tiesas Senāta spriedums lietā Nr. SKC-46/2019).

Latvijas tiesību doktrīnā ir izteikta šāda atziņa: ja valdes locekļa rīcība ir pretēja saprātīgai komerciālās apgrozības praksei un tiek pierādīts, ka sabiedrībai ir nodarīti zaudējumi, konstatēta amatpersonas rīcība un pastāv cēloņsakarība starp amatpersonas rīcību un nodarītajiem zaudējumiem, tad apstāklim, ka valdes locekļa rīcība neietver ļaunprātīgu tiesību aizskārumu, nav tiesiskas nozīmes, jo viņš ir atbildīgs par katru, tostarp vieglu, neuzmanību (Strupišs, 2003, 143). Tomēr zaudējumu esamība vēl nepierāda valdes locekļa prettiesisku rīcību, bet tikai apšauba valdes locekļa kompetenci. Svarīgi, ka kompetences trūkums nav priekšnosacījums sabiedrības dalībnieka (akcionāra) lēmuma atzīšanai par spēkā neesošu, jo kompetences neesamība vēl neizslēdz valdes locekļa rīcības atbilstību labticīga un lojāla pārstāvja standartam. Proti, ja sabiedrības valdes loceklis ir nodarījis komersantam zaudējumus, par to informējot dalībniekus (akcionārus), un ir bijis atbrīvots no atbildības Komerclikuma 173. panta pirmās daļas kārtībā, pat nākotnē mainoties valdes vai dalībnieku (akcionāru) sastāvam, iepriekšējais komersanta valdes loceklis saglabā imunitāti, jo viņa rīcība, par spīti vēlāk konstatētajiem zaudējumiem, ir atbilstoša krietna un rūpīga saimnieka mērauklai un ir atbalstīta no tā sabiedrības dalībnieka puses, kas bija dalībnieks tajā laikā, kad informācija tika sniegta, tātad pirms dalībnieku sastāva maiņas. Tādējādi nozīme ir tam, ka zaudējumu pastāvēšana nav valdes locekļa ļaunprātīgas rīcības rezultāts, jo neuzmanību vai nezināšanu dalībnieki var attaisnot, nevis nozīme ir apstāklim, ka tika izmainīts valdes vai dalībnieku sastāvs. Iepriekšējā dalībnieka (vai padomes locekļu) pieņemts lēmums, kas piešķir valdes loceklim imunitāti, ir saistošs arī jaunam sabiedrības dalībnieku, padomes vai valdes sastāvam.

Turpretī pat likumiski pieņemts sabiedrības dalībnieka lēmums nenodrošina imunitāti valdes loceklim komersanta maksātnespējas gadījumā. Finansiālo grūtību gadījumā valdei ir pienākums veikt adekvātus un atbilstošus pasākumus sabiedrības maksātnespējas novēršanai, tostarp sabiedrības vadības fokusa maiņai no tās dalībnieku (akcionāru) ekonomisko interešu īstenošanas uz iespējamo zaudējumu samazināšanu tās kreditoriem (*Legislative Guide on Insolvency Law*, 2013).

No maksātnespējas pasludināšanas brīža komersanta pārvaldes institūciju darbība tiek apturēta, un komersanta pārvaldīšanu veic administrators (Maksātnespējas likums, 63. panta pirmās daļas 2. punkts). Administrators veic pasākumu kopumu, kas nepieciešams kreditoru interešu maksimālai apmierināšanai, proti, administrators apkopo un pārdod parādnieka (maksātnespējīgā komersanta) mantu, saņemtos naudas līdzekļus novirzot kreditoru prasījumu apmierināšanai.

No Maksātnespējas likuma 1. pantā definētajiem maksātnespējas procesa mērķiem un 6. pantā noteiktajiem šā procesa principiem izriet, ka, sākoties sabiedrības finansiālajām grūtībām, valdes locekļu pienākums ir nodrošināt parādnieka mantas saglabāšanu un nepieļaut objektīvi nepamatotu saistību pieaugumu, lai būtu iespējams maksimāli apmierināt kreditoru prasījumus. Viens no instrumentiem, kā atgūt līdzekļus kreditoru prasījumu segšanai maksātnespējas procesā, ir zaudējumu piedziņa no maksātnespējīgās komercsabiedrības valdes locekļiem (Augstākās tiesas spriedums lietā Nr. SKC 7/2016 (C39072411)).

Pārstāvot maksātnespējīgu komersantu prasībā pret valdes locekli, administrators rīkojas nevis parādnieka dalībnieku, bet kreditoru kopuma interesēs. Atbilstoši Komerclikuma 170. panta otrās daļas 3. punktam sabiedrības kreditoriem ir tiesības celt prasību, un šīs tiesības nav ierobežotas arī gadījumos, ja zaudējumi nodarīti, pildot dalībnieku sapulces vai padomes lēmumu. Proti, administratoru, kamēr viņš rīkojas kreditoru interesēs, nesaista sabiedrības maksātspējas laikā pieņemtie dalībnieku (akcionāru) lēmumi par valdes locekļa atbrīvošanu no atbildības par sabiedrībai nodarīto zaudējumu pat tādā gadījumā, ja valdes loceklis bija atbrīvots no atbildības ar likumīgu dalībnieku lēmumu Komerclikuma 173. panta pirmajā daļā noteiktajā kārtībā.

Līdz ar to valdes loceklis nevar baudīt imunitāti pat gadījumā, ja viņš, iespējams, rīkojoties labticīgi, bet, neapzinoties savas rīcības sekas, nodarījis zaudējumus komersantam. Zaudējumi tiek pakļauti piedziņai no valdes locekļa, ignorējot dalībnieku lēmumu, it kā šāds lēmums nekad nebūtu bijis.

Atbalstāma ir kārtība, ka dalībnieku lēmums nav saistošs maksātnespējas procesa administratoram, bet tikai gadījumā, ja zaudējumus nesošs darījums tiek vērtēts kopsakarā ar komersanta saimnieciskās darbības finanšu rādītājiem, proti, darījuma rezultātā ir pasliktinājies komersanta mantiskais stāvoklis, negatīvi ietekmēta komersanta saimnieciskā darbība nākotnē vai pat tā rezultējusies ar maksātnespējas stāvokli. Savukārt, ja prasība par zaudējumu piedziņu celta, ņemot vērā tikai vienu darījumu, kura rezultātā sabiedrības finanšu stāvoklis netika negatīvi ietekmēts vai pat darījums pozitīvi ietekmēja uz saimniecisko darbību, pat neskatoties uz zaudējumu esamību, tas nav pietiekošs priekšnosacījums valdes locekļa saukšanai pie atbildības. Ja valdes loceklis ir spējīgs pierādīt savas rīcības labticīgumu, ir nepamatoti pēc ilga laika perioda vērtēt viņa rīcību situācijā, par kuru iepriekš bija paziņots sabiedrības dalībniekiem, turklāt viņi to atbalstīja, pieņemot attiecīgu lēmumu.

Tādējādi Komerclikuma 173. pantu ir jāpapildina ar 2.[1] daļu šādā redakcijā: "Iestājoties sabiedrības maksātnespējai, sabiedrības administrators, pārstāvot kreditorus,

ir tiesīgs celt prasību pret valdes locekli, bet šīs tiesības ir ierobežotas gadījumos, ja zaudējumi ir nodarīti, labticīgi pildot dalībnieku sapulces vai padomes lēmumu."

Tiesai, izskatot strīdu par valdes locekļa saukšanu pie atbildības par sabiedrībai nodarītajiem zaudējumiem, nevajadzētu *post factum* mēģināt novērtēt valdes locekļa veiktās transakcijas komerciālu pamatotību, pretējā gadījumā tiesa uzņemsies tai neraksturīgu uzņēmējdarbības riska vērtēšanas funkciju, savukārt komersanti zaudēs motivāciju veikt uzņēmējdarbību, jo nevēlēsies pieņemt saimnieciskus lēmumus, baidoties, ka nākotnē kāds tiesnesis norādīs uz to, ka valdes locekļa veiktā komerciālā darbība nebija saprātīga (*Stepanov & Mihal'chuk*, 2018, 14).

Pašreizējā Latvijas Republikas tiesu prakse nesniedz precīzu atbildi uz jautājumu, kuros gadījumos valdes loceklis tiek atbrīvots no atbildības ar dalībnieka lēmumu un kuros šis lēmums ir saistošs tikai pašam dalībniekam. Ignorējot valdes locekļa atbrīvošanas tiesības, mēģinot kādā veidā piespriest zaudējumu piedziņu, uzņēmējdarbību nejauši var padarīt par stagnējošu, jo katrs adekvāts valdes loceklis negatīvi vērtēs jebkādu riska faktoru, tādējādi bremzējot sava uzņēmuma iespējamo attīstību.

## Secinājumi

Sabiedrības valdes loceklis neatkarīgi no zaudējumu apmēra un iestāšanās apstākļiem var tikt atbrīvots no atbildības par sabiedrības zaudējumiem, ja viņa rīcība atbilst krietna un rūpīga saimnieka standartam.

Mainoties sabiedrības valdes vai dalībnieku sastāvam, jaunajam dalībniekam ir saistoši iepriekšējā dalībnieka pieņemtie lēmumi, kamēr valdes loceklis var pierādīt, ka viņš labticīgi izpildījis savus pienākumus. Vieglas neuzmanības konstatēšana vai valdes locekļa kompetences trūkums nav pietiekošs pamats dalībnieka lēmuma par valdes locekļa atbrīvošanu no atbildības ignorēšanai vai atcelšanai.

Sabiedrības maksātnespējas administratoru nesaista dalībnieku lēmums par valdes locekļa atbrīvošanu no atbildības, ja administrators, ceļot prasību par zaudējumiem pret valdes locekli, pārstāv sabiedrības kreditorus.

Nepamatoti ir saukt valdes locekli pie atbildības sabiedrības maksātnespējas gadījumā, ja valdes loceklis labticīgi ir rīkojies sabiedrības dalībnieku lēmuma ietvaros. Tādējādi Komerclikuma 173. pants jāpapildina ar 2.[1] daļu šādā redakcijā: "Iestājoties sabiedrības maksātnespējai, sabiedrības administrators, pārstāvot kreditorus, ir tiesīgs celt prasību pret valdes locekli, bet šīs tiesības ir ierobežotas gadījumos, ja zaudējumi ir nodarīti, labticīgi pildot dalībnieku sapulces vai padomes lēmumu."

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# Mūsdienu reiderisma tiesiskais konteksts

## Legal Context of Modern Raiderism

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### Abstract

Raiderism typology is the classification of objects or phenomena according to certain common (type) features. The typology, as a method of cognition, helped the author to perform the analysis, revealing the quintessence or set of transactions of the respective raider as a transaction between legal entities, aimed at implementation of suspicious and illegal transactions with the intention of gaining self-interest.

Within the essence of the raiderism typology, the author focused on the main features of that, which allows summarising the obtained research results, achieved and revealed the type of raiders found in Latvian conditions and which should be taken into account in the field of raiderism.

The typology of modern raiders includes the possibility of the existence of several types, where there are 4 main types with mainly typological features.

*Keywords:* court judgment, elements of typology, methods, raiderism.

### Ievads

Raksta mērķis bija identificēt reiderisma gadījumus, analizēt tā biežākās izpausmes, pētīt tiesību aktu ietekmi uz reiderismu, noteikt labākās iespējamās komersantu darbības, lai izvairītos no reideru uzbrukumiem, un izpētīt gan Latvijas, gan arī atsevišķu Eiropas Savienības valstu reālo pieredzi reiderismā.

Reiderisma pastāvēšanas fenomens vispirms ir jāsaista ar civiltiesisku darījumu izcelsmi, kas skar dažādu komercsabiedrību dibināšanu un to darbības funkcionālu nodrošinājumu. Lai gan reiderisma pastāvēšana ir tiešā veidā saistīta ar šo subjektu komerciālo labklājību, tam ne vienmēr var būt iznīcinošas īstermiņa sekas. Atsevišķos gadījumos reideri izvēlas ilgtermiņa komercdarbības politiku, būdami pārliecināti par iespēju noturēt savas pozīcijas ieņemtajos uzņēmumos vai īpašumos.

## 1. Reiderisma tipoloģijas elementi

Pirmais reideru tips: cilvēki ar augstāko izglītību un labām zināšanām praktiskajā ikdienā, psiholoģijas un, protams, mūsdienu tiesību aktu jomā. Šo reiderisko grupējumu vadītāji var būt uzņēmēji, kuriem ir pietiekami daudz līdzekļu, lai realizētu reideru uzbrukuma mēģinājumu. Viņu galvenā funkcija ir pareizi izvēlēties uzbrukuma objektu, bet vēlams, lai īpašnieki nebūtu labi sagatavoti vai finansiāli spējīgi aizstāvēties reideru uzbrukuma sākotnējā stadijā.

Otrais reideru tips: krāpnieki, kuri savas iekrātās bagātības slēpj, meklē "noieta" vietas pie saviem tuvākajiem radiem un arī izmanto sociāli maznodrošinātus cilvēkus, kuru vārdā tiek veiktas reideriskas darbības, uz kuru vārda tiek reģistrēti reiderisma rezultātā iegūtie īpašumi utt.

Trešais reideru tips: kriminogēni subjekti ar ietekmi pār valsts varas elementiem, kuri neatklāj sevi un necenšas būt publiski. Šāda veida reideri ietekmē tiesu varu un izpildvaru, kā arī tiesībaizsardzības iestādes. Šajā reideru grupā var būt gan prokuratūras pārstāvji, kuri spēj operatīvi un efektīvi ierosināt vai arī novērst iespējamos reideru uzbrukumus, gan arī izmeklētāji, kuri ātri izmeklē uzsākto lietu un nonāk pie konglomerātam nepieciešamā secinājuma. Šīs grupas sabiedrotie var būt arī atsevišķi tiesneši un tiesu izpildītāji, kuri īstajā laikā pieņems "vienīgo pareizo" lēmumu par īpašnieka aizturēšanu vai pat sodīšanu.

Ceturtais reideru tips: valsts un pašvaldību amatpersonas. Ar šīs shēmas dalībniekiem pieejamo labticīgo attieksmi un ietekmi pār dažādām valsts pārvaldes institūcijām un amatpersonām potenciāli apsūdzētajai pusei ir savas priekšrocības, jo institūcijas pret abām iesaistītajām pusēm nav izteikti neitrālas un līdz ar to nav iespējama objektīva tiesību aizskāruma izvērtēšana.

Visu minēto reideru tipu pārstāvji un galvenie izpildītāji ir sava "aroda" profesionāļi, kas labi apzinās, kā pasniegt nelikumīgas darbības kvazitiesiskā formā (Svešvārdu vārdnīca, 2004). Šajā grupā lielu īpatsvaru var veidot ieinteresēto ministriju un pašvaldību darbinieki, kuri īsteno visu procesu kopumā, ietverot arī tiesu izpildītāju darbu.

Visiem minētajiem reideru tipiem ir raksturīgas noteiktas īpatnības, kurām viņi, sagatavojot realizēšanai savas ieceres, pievērš uzmanību:

1) izraudzītā objekta juridiskā nodrošinājuma un atbalsta nopietnība. Piemēram, kompetences trūkums juridiskajos jautājumos var novest pie tā, ka uzņēmuma vadītājs spriedumu savā lietā parakstīs ar savu roku un reideri bez problēmām varēs pārņemt biznesu;
2) uzņēmuma morāli psiholoģiskais klimats, jo tieši konfliktu skartie objekti ir iecienītākie reideru uzbrukumu upuri – arī attiecību līdzsvara neesamības dēļ. Turklāt konflikts var būt gan starp uzņēmumu īpašniekiem, gan starp darbiniekiem un vadību;
3) riski biznesa atvērtības jomā, jo reideri labprātāk izvēlas uzņēmumus, kas nav atvērti sabiedrībai, nesadarbojas ar presi un neveic ierakstus sociālajos tīklos;

4) uzņēmuma kredītportfeļa stāvoklis un tā nodrošinājums ar pušu līgumsaistībām;
5) reideru iekārotā īpašuma drošība;
6) uzņēmuma pastāvīgo darījumu partneru tiesiski ekonomisko aspektu funkcionēšanas drošība;
7) īstais labuma guvējs – vai tas ir noskaidrojams?

Minētie reiderisma tipoloģijas elementi ir radījuši īpaša reideru izvērtējuma vērtu parādību, kas ir kvalificējama kā reiderisma ideoloģijas rašanās fakts un kam ir ievērojama vieta reiderisma fenomena pastāvēšanā vispār. Vispārzināms, ka ikviena sabiedrības fenomena pastāvēšana ir balstīta uz noteiktu ideoloģiju, kas raksturo to kā tiesiski filozofisku, politisku un ētisku uzskatu un ideju sistēmu. Arī reiderisms kā parādība attiecībā uz saimnieciskiem subjektiem, tostarp uzņēmumiem un komercsabiedrībām, atspoguļo kādas grupas intereses un tajās darbojas ar nolūku prettiesiski iegūt materiālus un intelektuālus labumus. Respektīvi, reiderisma ideoloģija ir balstīta uz negodīgām afērām, apšaubāmiem darījumiem, diktatorisku un pēc iespējas diletantiskāku uzņēmējdarbības pārvaldīšanu, tādēļ reideri ir uzskatāmi par agresoriem, kas var traucēt un būtiski iespaidot normālu valsts tautsaimniecisko attīstību.

## 2. Reiderisma ideoloģijas konteksts

Reiderisma ideoloģijas kontekstā reideru pārstāvji ignorē un pārkāpj ikvienu tiesiskuma pazīmi un tiesisko regulējumu tam, ka jebkuram tiesiskam darījumam ir jārespektē pastāvošās tiesību normas, pirmkārt, to obligātumā (lat. *officium*). To apstiprina tiesību normas, kas uzliek pienākumu atturēties no prettiesiskām darbībām, – reideru darbības vai bezdarbības rezultātā radušies zaudējumi ir jāatlīdzina saskaņā ar Civillikuma 1779. pantu.

Otrkārt, reideru ideoloģijas kontekstā viņiem būtu jāizvairās no tiesībaizliedzošo (lat. *veto*) normu pieļaušanas savās prettiesiskajās darbībās, kas nozīmē aizliegumu atņemt īpašumus, aktīvus un pat īpašnieka tiesību ierobežojumus vai atņemšanu, tostarp viņa mantiniekiem, atbilstoši Civillikuma 1036., 1641. un 1652. pantam.

Jēdziens "reiderisms" ikdienā ir dzirdams aizvien biežāk, tomēr kas tas vispār ir? Šis termins ir radies Amerikas Savienotajās Valstīs jau pagājušā gadsimta 70. gados, kur šādi tika apzīmēta formāli likumīga uzņēmuma akciju vai kapitāla daļu iegūšana un turpmāka balsstiesību izmantošana ar nolūku gūt īstermiņa ienākumus. Vēlāk postpadomju valstīs ar šo "importa" apzīmējumu sāka apzīmēt uzņēmuma vai tā aktīvu sagrābšanu ar pretlikumīgām metodēm. Mūsdienās šis apzīmējums tiek piemērots abos gadījumos. Latvijas normatīvajos aktos vēl aizvien nav konkrētas definīcijas, taču to varētu definēt kā uz svešas mantas vai tiesību uz šādu mantu iegūšanu vērstu darbību kopumu. Starp jēdzieniem "reiderisms" un "krāpšana" vienādības zīmi likt nevar, jo reiderisms ir saistāms ne tikai ar klaji pretlikumīgām darbībām, bet arī ar neētisku rīcību, spiedienu, sabiedrības noskaņošanu u. c. gadījumiem, kuri ir grūti nosakāmi un strīdīgi interpretējami.

## 3. Reiderisma darbības metodes

Reiderismā tiek izmantotas gan ikdienišķas, gan arī nestandarta darbības metodes un paņēmieni.

1. **Parādu uzkrāšana un uzpirkšana ar mērķi panākt uzņēmuma maksātnespēju un bankrotu** (Civillikuma 1779. pants). Šajos gadījumos par mērķi tiek izvēlēta komercsabiedrība, kas nekontrolē parādsaistības vai pieļauj to ilgstošu nemaksāšanu. Uzkrājot pietiekami lielu parādu, tiesā vienlaikus tiek iesniegti visi prasījumi, lai apdraudētu komercsabiedrības darbību. Nereti, lai prasības summa būtu apjomīga, tiek viltoti dokumenti vai uzpirktas komercsabiedrības amatpersonas, kas uzņemas neizpildāmas saistības, un tiek paredzēta īpaša strīdu izšķiršanas kārtība. Šo darbību nolūks – panākt, lai komercsabiedrība kļūst maksātnespējīga, un tās mantu bankrota procedūras laikā iegūt par pazeminātu vērtību. Šajā gadījumā tiek izmantotas korumpētas tiesas, tiesu izpildītāji un citas amatpersonas. Ja reiders apzinās, ka mērķa sasniegšana var tikt būtiski apgrūtināta, upurim tiek piedāvāta iespēja noslēgt izlīgumu, samaksājot "kompensāciju" reideram, un tad procesi tiek izbeigti.

2. **Mazākuma dalībnieka vai akcionāra tiesību izmantošana.** Tas notiek gadījumos, ja reideram pieder mazākuma akcijas vai daļas kapitālsabiedrībā vai viņš ir apvienojies ar šādu mazākuma dalībnieku vai akcionāru kopīga mērķa sasniegšanai. Tiek izmantotas tiesības celt prasības pret citiem dalībniekiem (arī vairākumu), pret pašu sabiedrību, notiek sabiedrības izpildinstitūciju amatpersonu nomaiņa ar reidera pārstāvjiem. Vēlamo mērķu sasniegšanai var tikt izmantoti dažādi līdzekļi, piemēram:

1) tiek celtas prasības tiesā, piemērojot prasības nodrošinājumus pret pārējiem dalībniekiem;
2) tiek viltoti dalībnieku vai akcionāru sapulču protokoli, akcionāru reģistri;
3) tiek likti šķēršļi pārējo dalībnieku un akcionāru fiziskai dalībai sapulcēs;
4) tiek ierosināti kriminālprocesi pret galvenajiem dalībniekiem vai akcionāriem;
5) masu medijos tiek grauta komercsabiedrības reputācija.

Šo darbību rezultātā tiek iegūta vara komercsabiedrībā – parasti sākot ar valdi, vēlāk iegūstot arī daļas vai akcijas. Reideru radītais spiediens un izteiktās prasības ir pietiekami lieli, lai mazākuma akcionāri vai dalībnieki pieņemtu lēmumu atbrīvoties no problēmām un riska palikt ar nevērtīgām komercsabiedrības akcijām vai daļām.

3. **Banku izmantošana.** Tas ir reiderisma veids, kas tiek piekopts ekonomiskās krīzes apstākļos un ir balstīts uz bankas un reidera sadarbību. Komercsabiedrībām lielākoties ir saistības kredītiestādēs, tādēļ kredītiestādēm ir apjomīga informācija par komercsabiedrību (tostarp saistībām, aktīviem, pasīviem, mērķiem, tehnoloģijām, sadarbības partneriem u. tml.), kā arī ir iespēja ietekmēt komercsabiedrību, izmantojot izsniegto kredītu.

Ja starp banku un reideru tiek panākta vienošanās, tad var tikt izmantoti šādi līdzekļi:

1) apjomīgas soda sankcijas par niecīgiem kredītlīguma noteikumu pārkāpumiem;
2) atteikums samazināt procentu likmes;

3) kredīta atmaksas termiņu pagarināšana vai mainīšana;
4) pie jebkuras iespējas – kredīta procentu likmju paaugstināšana;
5) papildu kredīta nodrošinājuma pieprasījums, balstoties uz esošā nodrošinājuma tirgus vērtības mazināšanos.

Rezultātā komercsabiedrība nonāk pilnīgā atkarībā no bankas godaprāta. Tālāk var notikt tās īpašumu un mantas pārdošana (parasti banku līgumos paredzēta vienkāršota mantas pārdošana un parāda piedziņa, kas ļauj bankai šo procesu kontrolēt un pārdot komercsabiedrības mantu – arī bez izsoles un par brīvu cenu) un komercsabiedrības dalībnieki vai akcionāri tiek piespiesti atsavināt savas daļas vai akcijas konkrētiem investoriem (to nav grūti panākt, jo liela daļa komersantu par savu sabiedrību saistībām galvo arī ar savu personīgo mantu).

4. **Valsts institūciju, tiesībsargājošo iestāžu un to amatpersonu izmantošana.** Šo metodi reideri plaši izmanto Latvijā un arī valstīs, kur ir īpaši augsts korupcijas līmenis. Tā tiek bāzēta uz valsts institūciju amatpersonu korupciju, kā arī amatpersonu iesaistīšanu reiderismā. Parasti tiek izmantotas valsts institūcijas, kas var kontrolēt komercsabiedrību darbību, – nodokļu administrācija, muitas iestādes, finanšu policija, valsts amatpersonas, pat deputāti u. c. Tā, piemēram, 2015. gadā kāda nu jau bijusī notāre tika apsūdzēta un saukta pie krimināltiesiskās atbildības par izvairīšanos no nodokļu un tiem pielīdzināto maksājumu nomaksas, savukārt viņas vīrs tika apsūdzēts par tādu noziedzīgu nodarījumu atbalstīšanu, kas saistīti ar izvairīšanos no nodokļu un tiem pielīdzināto maksājumu nomaksas. Izrādījās, ka notāre ilgstoši un apzināti atradusies reāla interešu konflikta situācijā, pārkāpusi finansiālo darbību noteikumus un ētikas normas. Abas radnieciskās personas bija izstrādājušas reideru shēmu un ilgstoši veica krimināltiesiski nozīmīgas darbības.

Komercsabiedrība nonāk valsts institūciju interešu lokā – tiek veiktas daudzas pārbaudes, kuru laikā tiek konstatēti dažādi administratīvie pārkāpumi, nodokļu parādu un soda naudu uzrēķini, pārkāpumi muitas noteikumos u. c. Tā rezultātā tiek ierosināti krimināltiesiskie procesi, komercsabiedrību amatpersonas tiek apcietinātas un uzsākti dažādi piedziņas procesi, kas vērsti gan pret komercsabiedrību, gan pret tās dalībniekiem vai akcionāriem, – sākas masveida represijas pret "atslēgas" personām. Ja upuri neizpilda reideru prasības, komercsabiedrība īsā laikā tiek paralizēta un iznīcināta, tās manta pārdota vai arī to pārņem kāda trešā persona. Lai ietekmētu uzņēmuma un tā amatpersonu veiktspēju, nav pat nepieciešamas uz nepatiesiem faktiem balstītas apsūdzības – likums nekādā veidā neierobežo procesuālo darbību veicējus, un arī Satversmes 92. pantā minētais, ka "ikviens uzskatāms par nevainīgu, iekams viņa vaina nav atzīta saskaņā ar likumu", dzīvē drīzāk ir folklorizēts teiciens, nevis svētas pamattiesības.

Reiderismā iesaistītās amatpersonas, slēpjoties aiz izmeklēšanas pienākuma, var uzņēmuma amatpersonas saukt uz paskaidrojumu sniegšanu un/vai uzlikt pienākumu iesniegt dokumentus, turklāt tas var notikt nepārtraukti.

5. **Politiskās ietekmes izmantošana.** Reideri izmanto sakarus augstākajā politiskajā līmenī un pašvaldībās. Nereti par reideru mērķi kļūst komercsabiedrības, kas pieder valstij vai pašvaldībai, vai arī komercsabiedrībā ir valstij vai pašvaldībām piederošas

kapitāldaļas. Metode ir balstīta uz iespēju ietekmēt (arī korupcijas ceļā) politiski saimnieciskos lēmumus. Mērķis ir panākt, lai tiek pieņemts lēmumus par investīciju nepieciešamību (efektivitātes paaugstināšanai, jaunu iekārtu iegādei, jaunu tirgu apguvei, efektīvākai darbībai u. c.), kā rezultātā tiek piesaistīts privātais investors, kuram piešķir daļas vai akcijas komercsabiedrībā pret investīcijām. Pēc daļu iegūšanas komercsabiedrībā reiders risina jautājumus par savu daļu vai akciju skaita palielināšanu (papildu investīcijas, mākslīgu parādu radīšana, neefektīva vadīšana) – rada apstākļus, kas ļauj politiskā līmenī pieņemt lēmumu pat par valstij vai pašvaldībai piederošo daļu atsavināšanu vai arī reidera daļu pieaugumu (piemēram, kapitalizējot reidera prasījumus pret kapitālsabiedrību). Metode ir efektīva, jo balstās uz iepriekš norunātām shēmām, turklāt reidera izvēlētā komercsabiedrība pārņemšanai pretojas tikai formāli. Publiskajā telpā pieejamā informācija ir minimāla un ierobežota, tādēļ īpaši iebildumi pret komercsabiedrības pārņemšanu nevar rasties.

6. **Upura izvēle un sākotnējā izpēte.** Par reideru upuriem kļūst komercsabiedrības, kurām ir mantiskā vērtība: pieder dārgi nekustamie īpašumi, ražošanas iekārtas, ir apjomīgs apgrozījums un finanšu līdzekļi, komercsabiedrība piedalās apjomīgu valsts un pašvaldību pasūtījumu izpildē, ir iekarojusi nozīmīgu tirgus daļu – šīs pazīmes interesē reideru no iespējamā labuma gūšanas viedokļa. Tomēr ir saprotams, ka reideri neizvēlēsies jebkuru komercsabiedrību – tiks izvēlēta tā, kura ir ekonomiski spēcīga, tomēr arī ar kādu vājo pusi.

Reideru redzeslokā nonāk komercsabiedrības ar šādām pazīmēm:

1) ir būtiskas parādsaistības pret kreditoriem;
2) ir būtiskas domstarpības starp dalībniekiem vai akcionāriem;
3) komercsabiedrības vadība vāji kontrolē savus darbiniekus (tā ir iespēja uzpirkt darbiniekus, dažkārt arī amatpersonas);
4) komercsabiedrībai ir "melnā kase" (lieli skaidrās naudas līdzekļi, noguldījumi ārvalstīs);
5) visi komercsabiedrības aktīvi koncentrēti pašā sabiedrībā;
6) nesakārtota dokumentācija (piemēram, zemesgrāmatās nereģistrēti īpašumi, nepabeigta privatizācija u. tml.);
7) paredzama nespēja piesaistīt būtiskus līdzekļus no malas (ja reidera uzbrukuma laikā tiek apķīlāti līdzekļi un manta, komercsabiedrība nespēj pat īslaicīgi risināt problēmu);
8) nespēja nošķirt īpašnieka un amatpersonas statusu komercsabiedrībā (Latvijā ir raksturīgi, ka vairums dalībnieku un akcionāru ar komercsabiedrības mantu un līdzekļiem rīkojas kā vienīgie īpašnieki, kā rezultātā rodas domstarpības ar pārējiem dalībniekiem vai akcionāriem).

Nav būtiski, vai ir tikai viens kreditors vai vairāki ar mazākām summām, svarīgi, lai reideram būtu iespēja šos parādus iegūt, piemēram, uz cesijas pamata (Ņemenova, 2015). Reidera mērķis ir uzkrāt apjomīgus prasījumus, kuru izpilde tiek pieprasīta vienlaikus. Normālos apstākļos tas komercsabiedrībai nekādas grūtības nerada, bet to kopējais

apjoms ir pārāk liels, un vienlaicīga prasījumu izvirzīšana rada būtiskas problēmas, kā arī var kalpot par pamatu prasību nodrošināšanai vai maksātnespējas ierosināšanai. Šādu komercsabiedrību ir viegli ietekmēt, ceļot dažādas prasības tiesā un traucējot vai pat bloķējot parādu atmaksu, kredītu atmaksu bankām (piemēram, tiek apķīlāti uzņēmuma līdzekļi un/vai manta).

7. **Informācijas avoti, kas nodrošina sekmīgu reiderisma funkcionēšanu.** Sākotnēji reideri apkopo publiskajos reģistros pieejamo informāciju par potenciālo upuri, dalībniekiem un "atslēgas" akcionāriem.

Pamatā reideri izmanto pieejamo informāciju no:

1) zemesgrāmatas – par piederošajiem nekustamajiem īpašumiem un reģistrētajiem apgrūtinājumiem (hipotēkām, pirmpirkuma tiesībām utt.);
2) Uzņēmumu reģistra – par dalībnieku un amatpersonu sastāvu, reģistrētajiem aizliegumiem, komercķīlām, komercsabiedrības lietu;
3) Ceļu satiksmes drošības direkcijas – dati par transportlīdzekļiem un tehniku;
4) citiem publiskajiem reģistriem, kuros iespējams uzzināt par komercsabiedrības mantas stāvokli;
5) valsts institūcijām – Valsts ieņēmumu dienesta, Finanšu policijas, muitas, Valsts policijas, Konkurences padomes u. tml.;
6) komercsabiedrības iekšienes – darbinieku, amatpersonu slepus sniegtas ziņas, dokumentācija.

Jāatzīmē, ka dažādu rangu amatpersonu līdzdarbošanās reiderisma jomā ir kvalificējama kā īpaši nelabvēlīga tendence. Viņu saukšana pie kriminālatbildības būtu realizējama saskaņā ar Krimināllikuma 317. un 318. pantu, taču ikdienā tas ir liels "dabas retums".

Pēc informācijas apkopošanas reiders var izstrādāt uzbrukuma shēmu, kā arī izvērtēt komercsabiedrības vājos punktus; parasti uzbrukums notiek negaidīti un vienlaikus vairākos virzienos:

1) prasību celšana pret pašu komercsabiedrību;
2) prasību celšana pret dalībniekiem;
3) kriminālprocesu ierosināšana pret komercsabiedrības amatpersonām;
4) dažādu valsts institūciju pārbaudes;
5) negaidīti auditi;
6) masu mediju uzmanība.

Šo darbību rezultātā komercsabiedrība un tās dalībnieki izjūt būtisku spiedienu un tiek traucēts komercsabiedrības darbs. Rodas domstarpības starp akciju vai daļu īpašniekiem un iekšējas nesaskaņas, kuras savā labā izmanto reideri. Tādēļ ir svarīgi, lai komercsabiedrības īpašnieki un amatpersonas sekotu līdzi notikumiem savā komercsabiedrībā un laikus pamanītu iespējamo reideru uzbrukumu.

Par to, ka komercsabiedrība ir nonākusi reideru redzeslokā, var liecināt arī šādi apstākļi:

1) reiderisma gadījumi ar citu "radniecīgo" komercsabiedrību;
2) atkārtoti piedāvājumi iegādāties komercsabiedrības daļas vai akcijas;

3) negaidīts mazākuma akciju pārdošanas gadījumu pieaugums;
4) negaidīts investīciju piedāvājums ar atvieglotiem noteikumiem;
5) atsevišķu dalībnieku vai akcionāru pieaugoša interese par komercsabiedrības ikdienas darbību, dokumentāciju u. tml., kas agrāk nebija novērota;
6) valsts institūciju pārbaudes, kurās tiek pieprasīti dokumentu oriģināli, informācija, kas atspoguļo komercsabiedrības mantisko stāvokli un darījumu partnerus;
7) aizdomīgu un apšaubāmu prasību parādīšanās pret komercsabiedrību tiesās;
8) dalībnieku vai akcionāru domstarpības jautājumos, kas agrāk nebūtu radījuši problēmas.

Komersantam ir svarīgi pareizi novērtēt situāciju – ne jau katra tiesvedība vai strīds liecina par iespējamo reideru uzbrukumu. Tomēr, ja vienlaikus vai ar nelielu starpposmu parādās vairākas no iepriekš nosauktajām pazīmēm, ir pamats kļūt uzmanīgiem un sākt domāt par iespējama reideru uzbrukuma atvairīšanu.

Reiderismam labvēlīgu vidi veido dažādi valsts ekonomiskie faktori, piemēram, kopējā ekonomiskā situācija valstī ir smaga, daudzas komercsabiedrības strādā ar zaudējumiem vai arī ar minimālu peļņu, relatīvi lielai daļai ir parādsaistības kredītiestādēs, problēmas ar savu debitoru parādu atgūšanu, nav iespējas piesaistīt kapitālu un investīcijas. Tādējādi komercsabiedrības var tikt pakļautas reiderisma izpausmēm un izredzes pretoties ir ierobežotas. Tādēļ komercsabiedrībām ir jāpārvērtē sava darbība un jāveic preventīvas darbības, lai padarītu tās mazāk pievilcīgas reideriem, kā arī komercsabiedrību pārņemšana jāpadara būtiski apgrūtināta (Vilks, 2013). To var panākt ar juridiski pareizu komercsabiedrības strukturēšanu, iekšējo kontroli, īpašu nosacījumu paredzēšanu komercsabiedrības statūtos, ierakstiem zemesgrāmatās un citiem līdzekļiem. Katrai komercsabiedrībai ir individuāli preventīvie pasākumi, un tie ir atkarīgi gan no komercsabiedrības formas (SIA vai AS), gan arī no komercsabiedrības individuālajām iezīmēm (dalībnieku skaita, sadalījuma, darbības virziena, aktīvu sastāva u. c.). Ņemot vērā iepriekš norādīto, ir jāizvērtē reiderisma draudu iespējamība, kā arī jāizstrādā savs aizsardzības mehānisms pret šādiem uzbrukumiem. Zināšanu trūkumam par reideru darbību un nespējai laikus pamanīt iespējamo apdraudējumu ir smagas sekas, kas var beigties pat ar komercsabiedrības zaudēšanu.

Tiek uzskatīts, ka reiderisms ir prettiesiska dažādu komercsabiedrību un uzņēmumu pārņemšana, to mantas izsaimniekošana un novešana līdz maksātnespējai, tomēr jāsaprot, ka reiderisma izpausmes ir biežākas un daudz plašākas. Šajos gadījumos iecerēto labumu gūšanai (pat veicot prettiesiskas darbības) tiek izmantota ietekme, kura tiek gūta valsts vai pašvaldību institūcijās, sabiedriskajās vai bezpeļņas organizācijās u. tml. Šī ietekme izpaužas, iesaistot darbiniekus, ierēdņus vai pat to grupas aizdomīgos un riskantos pasākumos, safabricējot informāciju par komercsabiedrību dalībnieku vai vienkārši "vajadzīgā indivīda" pārkāpumiem un organizējot tiesu procesus vispārējās jurisdikcijas vai administratīvajās tiesās, veicot psiholoģiski iespaidojošas, pat prettiesiskas darbības, izdarot reiderismam raksturīgo ekonomisku un organizatorisku spiedienu utt.

Lai iezīmētu tiesu sistēmas nepilnības no koruptīvo risku aspekta, jāatzīmē, ka Korupcijas novēršanas un apkarošanas birojs (KNAB) 15 gadu pastāvēšanas laikā kriminālvajāšanas sākšanai nodevis lietu materiālus pret sešiem tiesnešiem par noziedzīgiem nodarījumiem valsts institūciju dienestā. KNAB ieskatā, lai veicinātu tiesnešu godprātīgu rīcību un mazinātu koruptīvu darbību iespējamību, nepieciešams pārskatīt Tiesnešu ētikas kodeksu, uzlabot tieslietu sistēmā notiekošās mācības korupcijas novēršanas, ētikas un godprātīguma jomā, tostarp veidot īpašu, nepārtrauktu apmācību tiesu priekšsēdētājiem, lai tie būtu labāk sagatavoti nodrošināt ētikas, interešu konfliktu, godprātīguma un pretkorupcijas normu izpratni un ievērošanu tiesās (KNAB, 2015–2020).

Līdzīgi kā pelēkais reiderisms, arī baltais reiderisms ir raksturojams kā iedzīvošanās paņēmiens, kura mērķus nodrošina ar it kā tiesisku līdzekļu lietojumu, bet izmantojot neētiskus paņēmienus. Tas var notikt, iesaistot un izmantojot komercsabiedrību dalībniekus, tostarp vairākuma vai mazākuma dalībnieku klātbūtni, provocējot, piemēram, domstarpības par komercsabiedrību attīstību, arī parādu radīšanu, tādēļ nākotnē komercsabiedrību var pasludināt par maksātnespējīgu vai tā var pat bankrotēt.

Rezumējot var secināt, ka reideru kā tiesību subjektu loks var būt visdažādākais – gan fiziskās, gan arī juridiskās personas. Šajā ziņā īpaši ir jāuzsver fakts, ka reideru vidū visai bieži ir daudzas valsts amatpersonas, kā arī ierēdņi, kas ir kvalificējams kā ļoti bīstams precedents.

Jau izsenis zināms, ka ikviens darījums ar īpašumiem un mantu vispār rada piedāvājumus noslēgto darījumu izpildes rezultātu nodrošinājumam. Taču vispirms jānoskaidro, vai šie darījumi ir tiesiski pamatoti un vai tie tiek organizēti atbilstoši tiesību normu regulējumam. Turklāt jāņem vērā, ka reideru darījumu shēmās notiek komercsabiedrību padomes un valdes locekļu prettiesiska nomaiņa, dažādu civiltiesisku strīdu konstruēšana, tiek izmantoti viltoti pilnvarojumi, negodīgums un apmāns darījumu sagatavošanas un noslēgšanas gadījumos.

Tas nozīmē, ka iespējamie reiderismam atbilstošie darījumi vispirms ir analizējami no cita tiesiskā skatpunkta, jo šādu darījumu sagatavošana un realizēšana parasti tiek balstīta uz vienas vai vairāku darījuma pušu apmānu, kas nozīmē tiesisku nihilismu šajos darījumos. Tāpēc ir svarīgi zināt, kādi riski tiek piemēroti no reideru piedāvājumiem un nav mazsvarīgi jebkurai darījuma pusei, lai nākotnē kāda no pusēm netiktu ievilināta noziedzīgās pasaules shēmu apritē.

Šeit der atgādināt, ka ikvienam juridiskam faktam un darījumam vienmēr līdzās atrodas divi teorētiska rakstura tiesiski jēdzieni – cēlonis un sekas. Abi šie jēdzieni ir organiski savienoti, veicot jebkādus tiesiskus darījumus, un šo darījumu laukumos tie ir visnopietnākie spēlētāji. Turklāt šie jēdzieni skar ne tikai komerciāla rakstura darbības, kurās ir ieraugāmas arī reideru pēdas, bet tiem ir arī dažādu veidu atbildības un sodīšanas funkcijas, kuras dominē attiecīgajās tiesību nozarēs, tostarp krimināltiesību, civiltiesību, komerctiesību un citās tiesību apakšnozaru normās.

Runājot par cēloņiem, jāatzīmē, ka vispirms ir jārespektē riski, kas ir iespējami slēdzamā vai arī jau noslēgtā darījuma oferenta piedāvājumā. Tas var nozīmēt arī to, ka šis ofertes piedāvājums var izrādīties nākamā reidera ofertes piedāvājums. Visticamāk, šādos gadījumos tas vienmēr izpaudīsies kā iespējamā reiderisma noziedzīgā nodarījuma pazīme, kuru skaits vienā darījumā var būt ļoti dažāds un daudzveidīgs nākamo pušu saistību saturā.

Savukārt darījuma risku daudzveidībā no šo darījumu akceptantu puses un, iespējams, arī prettiesisku un kļūdainu darījumu noslēgšanas gadījumos būtu jārespektē svarīgākie reiderisma virzieni, piemēram, kad Valsts ieņēmumu dienestam vai attiecīgajām tiesībsargājošajām institūcijām rodas aizdomas par iespējamām prettiesiskām reideru darbībām (krāpšanu, dokumentu viltošanu u. c.). Reiderisma izpausmes uzskatāmi ir redzamas lietā par dokumentu viltošanu, kas vēl joprojām atrodas tiesvedībā un ko veikuši Valsts darba inspekcijas atbildīgie darbinieki. Turklāt runa nav par kāda atsevišķa noziedzīga nodarījuma pastrādāšanu, bet gan par sistemātisku un ilgstošu noziedzīgas shēmas realizēšanu personiskā labuma gūšanai. Šis fakts raksturo reiderismu, kas skar ilgstošu prettiesisku darbību veikšanu, izmantojot robus valsts un komercsabiedrību normatīvajā bāzē, to resursus, padoto un arī vadītāju apzinātu vai neapzinātu prettiesiska rakstura darījumu realizēšanu utt. Pēdējā laikā publiskajā telpā izskanējušie gadījumi ir ļoti spilgts piemērs šādai praksei.

## Secinājumi

Iepriekš aplūkotajā kontekstā tika analizēti vairāki aktuāli un visās tiesu instancēs pabijuši tiesu spriedumi. Pieņemtais un spēkā esošais Komerclikums komercsabiedrību izveidošanā un lēmumu pieņemšanas jomā uzsāka jaunu ēru. To apstiprina Komerclikuma 222. pants, kurš reglamentē arī komercsabiedrību pārvaldīšanas tiesisko kārtību. Komerclikuma 222. panta norma ir tulkojama kopsakarā ar Komerclikuma 213. un 214. pantu, kā arī respektējot apstākli, ka jebkuras sabiedrības statūtos visbiežāk ir ieraugāms, ka valdes priekšsēdētājs ir tā sabiedrības amatpersona, kura organizē valdes darbu.

Taču prakse un tiesu spriedumi liecina, ka tieši komercsabiedrību pārvaldīšanas elementi ļauj aktīvi iejaukties komercsabiedrību darbībā un komercsabiedrību darbības efektivitāte bieži ir atkarīga no tā, kas nokļūst sabiedrību valdēs, padomēs, revīzijas institūcijās utt. Kas pārstāv valsts vai pašvaldību komercsabiedrību vadošajās institūcijās? Vai tie paši politiskā reiderisma vai politiskā karteļa pārstāvji, tostarp deputāti, to palīgi, ministriju parlamentārie sekretāri, koalīcijas ieceltie cilvēki? Kāpēc daudzie Saeimas opozicionāri pandēmijas laikmetā sūrojās par to, ka vakcinēšanās procesu aktivizēšanai esot vajadzīgi propogandisti, kas deputātu opozicionāru vēlētājiem nepieciešamību vakcinēties prastu izskaidrot viņiem saprotamā valodā? Bet kas cits aizstāvēs opozicionāru deputātus ievēlējušā elektorāta intereses, ja to nedara paši ievēlētie deputāti, kuri lūdz kādu citu skaidrot un pārliecināt par vakcinēšanos?

Šie jautājumi ir kļuvuši par atslēgvārdiem daudzajos tiesu spriedumos, kur reiderisma pazīmes tiesās nonākušo komercsabiedrību strīdos ir saistītas ar komersantu, komercsabiedrību dibinātāju un dalībnieku nepamatotiem tiesību aizskārumiem, kuri ir pārsātināti ar reiderisma elementu klātbūtni. To apliecina tas, ka tiesu spriedumu motīvu vai arī rezolutīvajā daļā parādās šādas standartfrāzes: inkriminējams jeb konstatējams reiderisma fakts, īpašumu un aktīvu pārņemšana ar reideru metodēm, reiderisma pastāvēšana, reiderisma neesamības fakti, reiderisma nepieļaušana vai tā novēršana utt.

Diemžēl Latvijā šo normu, kuras reglamentē reideru nodarītā morālā kaitējuma izvērtēšanu un tiesvedību, gandrīz nav, kas nozīmē, ka netiek novērtētas reiderisma rezultātā radušās morālā kaitējuma nodarīšanas un kompensācijas problēmas, ar kurām vienlīdz svarīgs ir personu materiālais zaudējums, veselības apdraudējums un citas noziedzīgo nodarījumu sekas, kā arī morālo jeb personisko nemantisko tiesību aizskārums. Nenoliedzami, ka svarīgākais faktors ir personas drošība, tostarp dzīvība, īpašuma neaizskaramība un citi morālie, materiālie un fiziskie pārinodarījumi. Taču ir jāaizsargā arī personiskās tiesības – gods, cieņa un personas brīvība. Jāsecina, ka Latvijas tiesību aktos personu tiesību aizsardzība ir pietiekami reglamentēta, un vispirms šeit jāmin Latvijas Republikas Satversmes 8. nodaļa "Cilvēka pamattiesības".

Arī Satversmes 92. pants reglamentē, ka "nepamatota tiesību aizskāruma gadījumā ikvienam ir tiesības uz atbilstīgu atlīdzinājumu". Savukārt Civillikuma 1635. pants nosaka: "Katrs tiesību aizskārums, tas ir, katra pati par sevi neatļauta darbība, kuras rezultātā nodarīts kaitējums (arī morālais kaitējums), dod tiesību cietušajam prasīt apmierinājumu no aizskārēja, ciktāl viņu par šo darbību var vainot." Arī Administratīvā procesa likuma 92. pantā ir noteikts: "Ikviens ir tiesīgs prasīt atbilstīgu atlīdzinājumu par mantiskajiem zaudējumiem vai personisko kaitējumu, arī morālo kaitējumu, kas viņam nodarīts ar administratīvo aktu vai iestādes faktisko rīcību." Savukārt vairāki Krimināllikuma panti paredz krimināltbildības iestāšanos gan par neslavas celšanu, gan par goda aizskaršanu un citiem līdzīgiem pārkāpumiem. Tas nozīmē, ka Latvijas valsts atzīst un ar visu attiecīgo institūciju (tiesas, policijas, prokuratūras u. c.) palīdzību aizsargā Satversmē, likumos un Latvijai starptautiskajos līgumos noteiktās cilvēka pamattiesības un pamatbrīvības. Šeit jāpiebilst – ja Latvijas likumdošanas aktos noteiktais cilvēktiesību aizsardzības apjoms ir zemāks par Latvijas starptautiskajās saistībās noteikto, tad valstij ir jānodrošina šo starptautisko normu izpilde, kas daudzos gadījumos jau tiek praktizēts.

Cilvēka pamattiesības un pamatbrīvības darbojas tieši, un to realizēšanai nav vajadzīgs kādu citu tiesību normu lietojums. Respektīvi, Satversmē reglamentētās pamattiesības un pamatbrīvības var būt tikai konkretizētas vai arī precizētas, bet ne ierobežotas. Taču, metodoloģiski virzoties uz izskatāmās problēmas uz optimālāku risinājumu, rodas virkne pagaidām līdz galam tiesiski nenoformulētu neskaidrību – arī tas, kā izvērtējams reideru "ieguldījums" personu goda un cieņas aizskārumos, kas arī var būt reideru darbības rezultāts ar ļoti izteiktām tiesiskām sekām.

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