KAZIMIERO SIMONAVIČIAUS UNIVERSITETAS

ŠIUOLAIKINĖS TEISĖS PROBLEMOS IR IŠŠŪKIAI TARPTAUTINĖS TEISĖS KONTEKSTE

PROBLEMS AND CHALLENGES OF CONTEMPORARY LAW IN THE CONTEXT OF INTERNATIONAL LAW

Kazimiero Simonavičiaus universitetas

KAZIMIERO SIMONAVIČIAUS UNIVERSITETAS

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ĮŽANGA

Šiuolaikinis pasaulis susiduria su įvairiais pokyčiais, įskaitant pandemijos protrūkius, globalinį klimato atšilimą, spartų technologijų vystymąsi. Vykstantys pokyčiai padarė įtaką įvairių šalių ekonominei ir teisinei veiklai bei skatina ieškoti teisinių bei priemonių savo įsipareigojimams vykdyti. Kartu ši situacija lemia ir objektyvų poreikį tinkamai įvertinti globalų teisinį reguliavimą bei įvairius sprendimus tam tikrose srityse ir situacijose, kai tokių tyrimų nėra pasaulinėje praktikoje. Šiais sudėtingais laikais, vykstant dideliems geopolitiniams pokyčiams, reikia peržiūrėti teisinę konceptualios tvarkos struktūrą ir jos veikimą, ištirti galimybes, kurti naujas normas, įrankius ir paradigmas.

Konferencijos pranešimų medžiaga suteiks galimybę kritiškai ir kūrybiškai permąstyti probleminės tarptautinės teisės sritis bei galimus sprendimus ir pateiks naujoviškų požiūrių, sprendžiant kylančias problemas.

Konferencijos pranešimų medžiaga yra Kazimiero Simonavičiaus universiteto Teisės ir technologijos instituto dėstytojų bei jų Lietuvos ir užsienio kolegų iš kitų aukštųjų mokyklų tyrimų rezultatas.

INTRODUCTION

The modern world is facing various changes, including pandemic outbreaks, global warming, rapid technological development. The ongoing changes have influenced the economic and legal activities of various countries and encourage the search for legal and means to fulfill their obligations. At the same time, this situation leads to an objective need to properly evaluate global legal regulation and various solutions in certain areas and situations where such studies are not available in global practice. In these complex times, with major geopolitical changes taking place, it is necessary to review the legal structure of the conceptual order and its functioning, to explore possibilities, to create new norms, tools and paradigms.

The proceedings of the conference will provide an opportunity to critically and creatively rethink problematic areas of international law and possible solutions, and will present innovative approaches to solving emerging problems.

The conference proceedings are the result of the research of the professors of the Institute of Law and Technology of Kazimieras Simonavicius University and their Lithuanian and foreign colleagues from other higher education institutions.

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Child rights and the labor market in Mali

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Annotation

In Malian society, the child has a special place. He is the symbol of a successful marriage in the family. In society, they are seen as the guarantor of a nation's future. Aware of this major role, both national and international authorities have enshrined the fullness of their rights. However, given societal practices and the need for the survival of the child and his or her family, many children are subject to exploitation at various levels. It is especially in the workplace that this exploitation takes an underhanded and even more overt form, thereby violating their rights.

Keywords: *child, children's work, labor market.*

Introduction

In recent years, Malian legislation on human rights has devoted considerable space to the rights of women and men. This consecration appears, more than ever, as an awareness on the part of the public authorities of the injustice faced by these two social strata, but also as a clear desire to curb it BOKA, H. M. G. (2021).

Thus, the national action plan for the survival, development and protection of children was adopted in 1991. This was followed by the creation in 1997 of a Ministry for the Promotion of Women, Children and the Family. This was followed by the creation of an inter-ministerial committee for the promotion of women, children and the family. This logic was reinforced with the creation of the National Centre for Documentation and Information on Women and Children (CNDIFE) in 2004. The epilogue was reached with the adoption of the Child Protection Code in 2002. Article 58 emphasizes the notion of economic exploitation, which refers to the employment of children in the workplace or in income-generating activities by their families, Koranic masters or by private or personal employers.

However, there are many violations of children's rights in the labor market Ministère du Travail, de la Fonction Publique et de la Réforme de l'Etat (2011). Domestic work in Mali's big cities is carried out by young men who come from rural areas to help women in the cities. In our country, thousands of young girls leave their villages in search of domestic work in urban families. In most cases, they are still children without any form of protection N'Diaye, F. C. (2013). They are prone to all sorts of exploitation and abuse. Unqualified, with an average age of 10 to 16 years, migrant girls are working in private spaces and are vulnerable. Conditions vary from one employer to another. In addition, many children are entrusted by their parents to bosses working in precarious jobs (vehicle repairers, carpenters, welders, dyers, etc.). Under the guise of training or apprenticeships, these children, who receive no wages, are subject to large-scale exploitation.

Research object: the violation of children's rights in the labor market.

The aim: To analyze the manifestations of the violation of children's rights in the labor market despite the legal arsenal implemented to protect them.

Results

This problem of economic exploitation of children is much more acute not only in Mali but in all African countries.

''Exposure of a child to begging, trafficking, or work that is likely to deprive the child of schooling, or that is harmful to the child's health, development or physical or moral integrity, or its use for purposes and/or under conditions contrary to this Code, is considered "economic exploitation", requiring intervention according to article 58th of Ordonnance no 02-062/P-RM du 5 juin 2002 portant Code de protection de L'Enfant.

The irruption of children in the labor market in Mali is not a recent phenomenon. It dates back to the birth of the country on 22 September 1960, even before. There were approximately 1.4 million individuals aged between 7 and 14 years, i.e. just over 50% of this age group in the labor market (The Understanding Children's Work Programme, 2009). However, it is in the last few years that the phenomenon has reached a high level Lesclingand, M. (2011). This increase is attributable to the worsening of poverty, the problems of security and political crisis and the social constraints that make child labor a means of training and education.

The labor market, more commonly known as the job market, is a theoretical place where job offers and demands meet. Two actors are inseparable from the labor market: employers and employees. The former are the source of supply, the latter of demand. It is on this labor market that professional activity is regulated in return for payment (Guerrien, B., & Gun, O.; 2020). Labor law provides a legislative framework for the labor market.

Article 32 of the CRC: The right of the child to "protection from economic exploitation and not to be required to perform any work that is likely to be hazardous or to interfere with to his or her health or development [...]".

Economic child labor encompasses most productive activities carried out by children, whether market or non-market, paid or unpaid, for a few hours or full time, on an occasional or regular basis, in a legal or illegal form; it excludes household tasks entrusted to children in their families and school activities. To be counted as economically active in the ILO global estimates, a child must have worked for at least one hour during the reference week Dennis, M. J. (1999).

The term "child labor" is defined as all "activities that deprive children of their childhood children of their childhood, potential and dignity, and hinder their physical and mental development".111 This concept includes work that is hazardous and harmful to the physical, mental or moral mental or moral well-being of the child. For an activity to be classified as child labor, a range of a series of conditions that vary according to the country:

- The age of the child: the minimum age of access to work defined by ILO Convention 182, which has been Convention 182, ratified by Mali, is 15 years;
- The type of work in question;
- The level of interference with the exercise of other rights, such as the right to education;
- The number of hours spent;
- The conditions of work.

According to the MICS 2015, 55.8 per cent of children aged 5 to 17 are involved in child labor. In the MICS 2010, it was reported that 34 per cent of children aged 5 to 14 in school were working. In the 2010 MICS, it was reported that 34% of children aged 5-14 in school were working. Unicef's SITAN reports that one third of children aged 5-14 are working. A third source presents very different data, where the 14 years old are reported to be working. A third source presents very different data, where the percentage is more than doubled: according to the US Department of Labor, 72.6% of children aged 5-14 are reported to be working in Mali (20.5% of 7-14 year olds are also in school).

Agriculture is reported to be the sector that employs the most children (83%).116 Children aged 5-14 in school are reported to be working. Unicef's SITAN reports that one third of children aged 5-14 are working. A third source presents very different data, where the percentage is more than doubled: according to the percentage is more than doubled: according to the US Department of Labor, 72.6% of children aged 5-14 are reported to be working in Mali (20.5% of 7-14 year olds are also in school).

The rural sector is the most important sector for child labor. This is not surprising when one considers that 85% of the national population is rural and that more than 80% of children live in rural areas. According to the national statistics institute (2020) on the informal sector, there is a very high number of children under 15 years of age working in rural areas. They number 423,372, including 131,293 girls. 21,056 children under the age of 15 are engaged in secondary activities (work done during the off-season). It has also been established that the majority of school-age children are in rural areas. In the sector, 95% of the child labor force is made up of unpaid family helpers.

In the urban sector, again, there is very little information available. Nevertheless, a study of children in the streets of Sabalibougou, a neighborhood in the disadvantaged areas of Bamako, reveals that out of a total of 4,807 children observed:

- 48.98% were engaged in petty trade and similar activities;
- 41.31% were apprentices;
- 5.78% were caregivers.

The same study revealed that 4,787 children or 99.5% of the total number were actively involved in actively in improving their family's income.

The above-mentioned DNSI survey gives other indicative figures. Out of 11,148 working children observed:

- 2,991 of whom 775 girls are between 8 and 9 years old;
- 8,157 of whom 1,161 girls are aged between 10 and 14.

(INSTAT, 2021).

According to the formal sector, officially, there are no child workers in the formal sector (Administrations, large industrial and commercial enterprises, etc.). However, the INSTAT "National statistics Institute» counted 125 female children aged 8 to 9 working in the formal urban sector. They are most often used in sorting operations in some industrial units (sludge cubing factories).They are required to work at a very high rate, with wages set by the spot or piecework.

The same survey revealed that 689 boys aged 10-14 and 2,657 girls in the same age group are also employed in The same survey revealed that 689 boys aged 10-14 and 2,657 girls in the same age group are also employed in the same sector. In the structured rural sector, there are no child workers under the age of 10. However, 648 boys and 352 girls in the 10-14 age group were counted. They are used to drive oxen, to weed and sometimes to plough.

In the informal sector, a large majority of working children are found in this sector. In the rural informal sector, children are mainly engaged in learning arts and crafts (blacksmithing, shoemaking, weaving etc.). In the informal urban sector, children are mainly involved in petty trade and service activities (e.g., cleaning, washing, cleaning, etc.). In the urban informal sector, children are mainly found in the petty trade and service sector (shoeshine boys, car guards, maids, water sellers, sorters of water sellers, rubbish sorters, etc.). In addition to this category of working children, there are also those of apprentices (carpenters, mechanics, dyers, etc.), who are very numerous but for whom there are no precise statistics.

When we take the distribution by branch of activity, we make the same remark. Children under 15 years of age work in practically all branches of activity (agriculture, manufacturing, trade, transport, etc.). There are no statistics at national level. However, according to a study carried out on a sample of 9,051 children, it was found that 40.7% are in the agriculture-livestock-fishing sector; 11.6% in metallurgy 6.6% in trade; 10.6% in services. It should be noted that a high proportion of child employees hand over their entire remuneration to their parents or other members of the family. It is worth noting that a high proportion of child workers hand over their entire earnings to their parents or other family members with whom they live.

The dangers of child domestic labor are of concern Traore, I. S., & Lauwerier, T. (2020). The International Labor Office (ILO) has identified several hazards to which domestic workers are particularly exposed. This niche can be considered one of the worst forms of child labor. The most common risks faced by children include long and arduous working days, the use of toxic chemicals, carrying heavy loads, handling dangerous utensils such as knives, mincing machines, hot pots and pans, inadequate or inappropriate food and shelter, humiliating or degrading treatment, including verbal or physical abuse, and sexual abuse Amon, J. J., Buchanan, J., Cohen, J., & Kippenberg, J. (2012).

The risks are multiplied when children live in the employer's home. These dangers must be seen in the context of the deprivation of children's basic rights, such as access to education and health care, the right to rest and leisure, to play and recreational activities, to be protected and to have regular contact with parents or peers Brown, C. (2017). These factors can have an irreversible physical, moral and psychological impact on the development, health and well-being of children.

Many reasons explain the intervention of children on the labor market. In the economic point of view, poverty is the primary cause of child labor Mbebi, O. E. (2018). In many cases, child labor is seen as essential to the household economy, whether it is paid employment or a contribution to the family business. At this level, family size has a decisive impact on child labor. The larger the family the larger the family, the more children work and the lower the school attendance and completion rates. Child labor is also a consequence of poverty. Thus, strategies to reduce and eliminate poverty must take this aspect of the problem into account.

The use of child labor slows down social growth and economic development. It is a violation of fundamental human rights. The relationship between child labor and the social conditions in which the child finds himself or herself must therefore be addressed. The relationship between child labor and the social conditions in which the child finds himself must therefore be at the center of any sustainable social development policy N'Diaye, F. C. (2013).

From the socio-cultural factors, work has long been perceived as a means of socializing children, i.e. "a process that is gradually initiated by the child's parents. That is, a process which gradually introduces the child to work and imparts skills that enable them to live Hilowitz, J. (2000). Label social et lutte contre le travail des enfants: quelques réflexions. *La mondialisation: origines, développement et effets*, 239-260. It is generally accepted that children must learn to adapt to situations in their environment and to find situations in their environment and to find solutions to the problems that the environment problems. The blessing and esteem of parents and society also depend to a large extent on the child's contribution to the family's burdens. Therefore, work becomes a duty for him.

Furthermore, education, especially basic education, which is one of the main instruments for the prevention and elimination of child labor, is a prerequisite for the development of the family, is still rather poorly perceived in some quarters. School remains a place of perdition for children. This valuable tool for the prevention and elimination of child labor is thus undermined by because of subjective considerations. Other contributing factors facilitate the interference of children in the labor market. In most countries, children are in particular demand because they are cheaper and create fewer problems than adult workers.

Conclusion

The right of the child is a sacred right that must be protected both within families and by public authorities. However, this right is frequently violated because of its vulnerability and the social constraints that make children a source of income for their parents and the whole family.

While it is difficult, if not impossible, to prohibit children's access to the labor market for all the reasons mentioned (poverty, vocational training, social practices, etc.), there is an urgent need to create conditions for their involvement in the labor market.

The current legislation must redefine the nature of the activities to be carried out for children, the working conditions, the working hours as well as the conditions and modalities of payment so that no one can exploit children's work for personal gain.

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The problems in defining the limits of criminal liability in finance and business order in Lithuanian law

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Summary

The current wording of the 97th Lithuanian Criminal Law still has not solved significant problems related to a clearer definition of the limits of criminal liability in relation to administrative liability, and the intensive establishment of businesses and the huge scale of their activities naturally increase the risk of possible crime in the Particularly difficult conditions of a pandemic – all this forces a re-examination of significant legal regulation. Therefore, the object of investigation of this article is the regulation of criminal and administrative liability for violations of the law in the field of finance and business order and its application in case-law. The purpose of the article is to analyse the issue of the relationship between these responsibilities for illegal economic activity, fraudulent and negligent accounting, and for violating the procedure for submitting financial documents and data to institutions in legal regulation and case-law of the Court of Cassation. The article uses basic research methods such as document analysis, systematic analysis, comparative analysis, and generalization methods. The performed analysis substantiated the incompleteness of the Lithuanian legal regulation with the survey in question, as the problems seen in the case-law of the Court of Cassation clearly require a substantial adjustment of the criteria for delimitation of criminal and administrative liability.

Key words: *financial crimes, criminal liability, administrative liability, crimes against business.*

Introduction

Administrative liability and criminal liability often compete with each other, however, the principle of *ultima ratio* in criminal liability obliges entities to apply this liability, which provides for the most restrictive measures on human rights, with the utmost responsibility. However, the current 97th edition of the Lithuanian criminal law has not substantially resolved all the significant problems related to a clearer definition of the limits of criminal liability in relation to administrative liability during the entire twenty years of its existence. By failing to formulate clear criteria for dealing with different responsibilities, the legislature has left everything to the prerogatives of the courts, which seek solutions to these problems by applying abstract rules of law, and the solutions they propose are often complex and overly confusing, especially for lower courts. However, such a mission entrusted to the courts is a clear distortion of the constitutional purpose of the courts, i.e. to apply the law rather than finish defining it, all the more so when it comes to applying the strictest legal liability. As a result, this study seeks to reassess some of the sensitive and hitherto unresolved issues of the delimitation of administrative and criminal liability in the areas of financial and business order. These areas are significant in that the number of legal entities registered according to official data has more than halved in twenty years and continues to grow steadily [30], and in 2020-2021, although the turnover of companies decreased due to the pandemic situation, it still amounted to 99.9 billion Euros [31]. Such intensive start-ups and huge scale of activity naturally increase the risk of crime in the areas of finance and business order, especially given the difficult period of the pandemic, which has negatively affected economic indicators. It is the current situation that calls for a re-examination of the relevant legal framework in order to bring it into line. On this basis, and given the limited scope of this study, this paper aims to assess the problems identified in the case-law only in relation to three criminal offenses of illegal economic activity, fraudulent and negligent accounting, and violations of the procedure for submitting financial documents and data to public authorities. It is precisely because of these offenses

that clear criteria for the delimitation of criminal and administrative liability and a coherent system of legal liability are most lacking today.

The object of the research – regulation of criminal and administrative liability for violations of the law in the field of finance and business order and its application in case-law.

The aim of the research – to analyse the peculiarities and problems of the regulation of criminal and administrative liability for violations of the law in the fields of finance and business order and its application in case-law.

The tasks of the research:

1. to analyse the issues of regulation of criminal and administrative liability for illegal pursuit of economic, commercial, financial or professional activities and its application in case-law;
2. to examine the issues of regulation of criminal and administrative liability for fraudulent and negligent accounting and its application in case-law;
3. to analyse the issues of regulation of criminal and administrative liability for violation of the procedure for submission of financial documents and data to state institutions and its application in case-law.

Methodology of research: depending on the topic, goals and objectives of the scientific article, the following research methods are used: methods of document analysis, systematic analysis, methods of comparative analysis and generalization.

Abbreviations used in the work:

1. the CC – the Criminal Code of the Republic of Lithuania [1];
2. the CAO – the Code of Administrative Offences of the Republic of Lithuania [3];
3. the SCL – the Supreme Court of Lithuania;
4. the MSL – the amounts of minimum standard of living.

The application of criminal liability and administrative liability for unauthorised engagement in economic, commercial, financial or professional activities

Lithuanian tax laws oblige subjects to register as taxpayers, to cooperate with the tax administration institutions and to fulfil the tax obligations, so in case of ignoring of these obligations the tax administrator loses control the taxpayers and this could damage the state's financial interests. As a result, the unauthorised (illegal) economic activities are criminalized, but they may differ in their danger nature considering their possible damages to state-regulated economic, commercial, financial order, so there are criminal and administrative liabilities for that.

The illegal engagement in economic activities is criminalized under Para. 1 of Art. 202 of the CC while the administrative responsibility for that is established in Para. 1 and 5 of Art. 127 of the CAO. After analysing of dispositions of these legal norms, it can be seen that the illegal acts are formulated similarly in both norms, i.e. the illegality of engagement in commercial, economic, financial or professional activities is related with such activities without a license or in any other illegal manner. Meanwhile, the distinction between criminal liability and administrative liability for these illegal activities is formulated in a less informative way, i.e., from a linguistic point of view Art. 202 of the CC and Art. 127 of the CAO are distinguished by evaluative type and alternative features "the form of a business" and "on a large scale" provided in the CC. So, in order to have a better understanding of this distinction between different liabilities, the content of these both features need to be analysed in detail.

Because both entrepreneurial and large-scale criteria are not directly defined in criminal law, it is considered that the legislator, in view of the fact that criminal liability is perceived as an *ultima ratio* measure, has defined the criterion of "large scale" negatively, i.e. provided that this concept was to be

followed by all cases where the turnover exceeded the ceiling laid down by administrative law. A systematic comparison of the provisions of the commented norms shows that this limit is linked to 500 MSL. The other criterion of "entrepreneurship" is not defined in the criminal law, thus, the legislature left the interpretation of this concept to the case-law. In case No. 2K-148/2015 the Court of Cassation defines the term "undertook an activity" established in Article 202 of the CC as the permanence of an activity and its permanent nature, especially as additional assessment criteria are indicated: the nature of the income from these activities (must be the main or ancillary source of livelihood) and may include other indications of how to carry out the preparatory work for organizing and carrying out illegal commercial or other activities, acquiring and possessing appropriate activities, managing these activities, etc. [9] It should be noted that the case-law of the Court of Cassation does not contain an exhaustive list of circumstances, so the concept of entrepreneurship and must be reassessed each time in the case [23]. This means that the same circumstances that shape entrepreneurship in one case will not necessarily be sufficient to justify it in another. Given that the characteristic of entrepreneurship is indefinite, the case-law takes the view that this characteristic must be applied very responsibly and only if the court has an internal conviction that this characteristic actually exists in a particular case. This is perfectly illustrated in criminal case No. 2K-515/2014, where the entrepreneurship of the illegal activity was based by the lower courts on the fact that the person had carried out preparatory actions and had established a system for issuing loans, which, at first sight, was in line with the Court of Cassation's previous interpretations in criminal case No. 2K-7-58/2013, that the carrying out of certain preparatory work for an illegal commercial or other activity may constitute evidence of the entrepreneurial nature of such activity [6, 8]. However, in the present case, the Court of Cassation criticized the application of the entrepreneurial criterion, since criminal liability for illegal economic activity could only be imposed if the court was satisfied that the activity was genuinely dangerous, which the Court of Cassation did not consider in the present case. It should be noted that the subsequent case-law of the Court of Cassation has somewhat supplemented these interpretations, stating that the continuity and systematic nature of the activity alone are not sufficient, as these criteria are inherently inherent in an analogous administrative infringement and therefore do not play an identification role [13]. Such a position has made it even more difficult to define the scope of the criminal liability in question, since certain relevant assessment criteria identified in the case-law become even more conditional, which must be assessed in the light of other circumstances which are not clearly defined.

Before analysing the individual characteristics of entrepreneurship and their interpretation, the significance of the determination of a large-scale characteristic in the application of the entrepreneurial characteristic should be assessed. It should be noted that in the case law of the Court of Cassation the scope of activities is quite clearly defined and is related to the developed infrastructure of illegal business, extensive relations with suppliers, active search for users, availability of employees, high organizational effort to conduct business, etc. [14] It should be noted that in case-law, the nature of the act itself may lead to a greater scale, i.e. activities with a complex infrastructure, scope, specific management, or activities involving complex and responsible economic operations requiring time and some professionalism [11, 13]. Meanwhile, the sign of entrepreneurship, as mentioned, is an alternative and independent qualifying sign, however, some of their links can also be seen in case-law, for example, when in criminal case no. 2K-515/2014, the Court of Cassation expressly stated its opposition to the case-law of artificially criminalizing small-scale illegal economic activities on the grounds of entrepreneurship [8]. As a result, it seems at first sight that the application of the entrepreneurial criterion without the "large-scale" feature is not acceptable, however, its subsequent case-law shows a fairly clear position of the Court of Cassation that criminal liability is possible even in the absence of a large-scale feature, but in the presence of a clear entrepreneurial feature [10]. In the light of these interpretations by the Court of Cassation and a comparison with the previous practice, it can be concluded that the application of criminal liability where the scale of the activity, which is not linked solely to the scale of the law, is not sufficient to conclude that the activity is more dangerous.

Returning to the features of the concept of entrepreneurship and the disclosure of its content, it should be noted that the first feature, the duration and permanent nature of the activity, is a necessary but not sufficient feature to justify entrepreneurship. The case-law does not distinguish between the long and short duration of an activity, which testifies to the permanent nature and intensity of the

activity, for example, in one case No. 2K-303-507/2016, in the opinion of the Court of Cassation, the duration of one year is not relatively long [14]. Meanwhile in another case No. 2K-347-696/2015 - recognized a period of less than 2 years as quite a long time [12]. It is also noted that even a very long period of activity, when it is lacking in its stability and permanence, is not sufficient to justify entrepreneurship, for example, in one case No. 2K-27-689/2018 the Court of Cassation refused to apply criminal liability on the grounds that although the activity had been carried out for 8 years, it did not have sufficient intensity and stability [21]. It should also be noted that the feature of basic or additional income is equally important, which is quite logical, considering that the very idea of any activity is to receive income or other financial benefits. In view of this, the court must in all cases make sure that this feature is satisfied. Although examples can be found in the case law, in the procedural decisions of the Court of Cassation in criminal cases No. 2K-347-696/2015 and No. 2K-165-976/2018, when the income from illegal activities was the main and only source of personal income, however, in some cases the proceeds of crime are not the only source of income [12, 25]. So, the court basically assesses the percentage of the proceeds of crime, for example, in one of its case No. 2K-262-697/2016, the Court of Cassation ruled that the proceeds of crime should be classified as additional income, however, they accounted for about 58 percent of the revenue received each year, which accounted for a significant amount of revenue received [13]. This naturally leads to even more uncertainty, where is a threshold at which such additional income will no longer constitute a "significant amount of the income received". Furthermore, the conclusion that certain income constituted a person's main or additional regular income is not always reasoned by the courts, such as in case No. 2K-455-693/2016 the Court of Cassation criticized the lower courts for failing to assess what income a person could have received or received from a criminal offense, because in the absence of such data - the person's actions could not be criminalized [15]. Thus, the case-law of the Court of Cassation, as mentioned above, takes the view that the first two characteristics (continuity and permanence of activity, nature of income, main or secondary source of livelihood) must be determined on a case-by-case basis, and the characteristics of the third category do not have an exhaustive list and are generally described in the case-law as indicating a higher risk of an act. Given that only those features, in principle, make it possible to distinguish between criminal and administrative liability, the case-law takes the view that at least one such additional feature must be identified and, in the absence of such a feature, administrative rather than criminal liability should apply [13, 24].

In summary, criminal and administrative liability for illegal economic activity is limited to the criteria of "large-scale" and "entrepreneurial", which are not directly defined in the criminal law, and the interpretation of their content is left to the case-law. However, an analysis of the case-law reveals that the characteristic of entrepreneurship provided for in the Criminal Law is not informatively defined and is interpreted as a non-exhaustive list of circumstances, therefore, in order to establish that characteristic in an act on a case-by-case basis, it is necessary to establish the circumstances which indicate the seriousness of that act in comparison with the administrative offense. Unfortunately, the finding of this qualifying feature is essentially based only on the court's internal conviction that the activity is "more dangerous". In this way, relatively wide limits are formed by the courts to subjectively interpret the content of the term "more dangerous" and allow for an unjustifiably extended application of criminal liability, especially considering that the case-law of the Court of Cassation constantly needs to correct procedural decisions of lower courts. Such circumstances should not be inherent in criminal law, which, as the strictest form of legal liability, must be characterized by objectivity. Therefore, in the light of that, the complex case law, there is a sufficient basis for considering the abandonment of the characteristic "entrepreneurship" character.

Application of criminal and administrative liability for fraudulent and negligent accounting

In the following, it is appropriate to take a broader look at the issue of the application of criminal and administrative liability in the financial field, in order to delimit these liability for irregularities related to fraudulent and negligent accounting practices. Comparing the concepts of fraudulent and negligent accounting in Article 222 and Article 223 of the CC with the provisions of Article 205 of the CAO, it can be seen that these concepts do not acquire any distinctive features in comparison. Nor does the case law indicate that these acts could manifest themselves in any other way in the context

of the CAO, which would indicate their lower danger compared to the above-mentioned norms of the CC. The only delimitation of these acts is the legal consequences, i.e. all the alternative acts listed in Article 222 and Article 223 of the CC are of a material nature, therefore criminal liability on the basis of these norms arises only if it has been established that the performed acts have had certain consequences – "The size and structure of a person's activities, assets, equity or liabilities cannot be determined in whole or in Para". It should be noted that the law formulates the latter consequences as alternatives, so it is sufficient to establish at least one of them in order for a person to be prosecuted [10]. Meanwhile, Article 205 of the CAO does not provide for the same consequences and here the consequences are only related to non-payment or evasion of taxes. The Court of Cassation also emphasizes the consequences as a criterion for delimitation in criminal and administrative competition matters [17, 22]. Thus, given that the legislature defined fraudulent and negligent accounting practices in a similar way in both criminal and administrative offenses law, it is the criterion of consequences that must be regarded as a "cornerstone" in determining whether administrative or criminal liability is to be applied. The doctrine of law also states that in the law of administrative offenses, fraudulent and negligent accounting is formed exclusively as a way of tax evasion (concealment), whereas, in the meantime, Articles 222 and 223 of the CC provide for consequences of a broader content, which are not necessarily related to tax evasion (concealment) [4]. In this respect, however, it is debatable whether these "wider consequences" do not, in principle, allow courts to criminalize less dangerous acts by distorting the application of the *ultima ratio* principle.

In the case-law of the Court of Cassation, the wording "The size and structure of a person's activities, assets, equity or liabilities cannot be determined in whole or in part" means not the abstract inability to identify such information, but the total or partial inability to do so on the basis of documents provided and held by the entity [19]. Therefore, according to the Court of Cassation, in cases where this can only be done through cross-checks, pre-trial investigation, etc., the consequences mentioned in the criminal law are considered to have occurred. It should be noted that according to the above-mentioned wording of the norm, it is sufficient to conclude that at least Para. of the structure cannot be determined and no matter what indicator (assets, capital or liabilities) it is related to, which means that making at least one incorrect entry can in principle lead to criminal liability. In this context, there are examples of case law where the proportionality of criminal liability is in dispute, for example, the case-law of the Court of Cassation has considered the issue of criminalizing the one-off exclusion of income received from the accounts and concluded that, given the insufficient seriousness of such an act, the issue of administrative liability may be considered [7]. The Court of Cassation also took a similar position in another case No. 2K-245-303/2017 where the issue of failure to submit one cash receipt order to the accounts was considered, although the expert's report directly stated the consequences of the criminal act [19]. Meanwhile, in the case-law of lower courts, including the latter case, the norm provided for in Article 222 of the CC is formally observed and this offense is incriminated when the consequences provided for in this article are established. However, at present there is a clear tendency developed by the Court of Cassation to tighten the interpretation of Articles 222 and 223 of the CC, stating that in order to accuse the consequences provided for in these Articles, it is not sufficient to establish a single violation, however, "many" irregularities need to be identified, and the court explains this concept as a several or a dozen of accounting transactions [18]. This may be due to the fact that this type of act is not committed through individual acts, which are episodes of such activity, but through a system of acts [16, 19]. Although a stricter approach to these crimes is being developed as a continuing criminal offense, it makes it possible to apply criminal liability more responsibly, but at the same time this position makes it difficult to draw the line between the different types of liability. On the other hand, although the case-law developed by the courts restricts the ability of lower courts to interpret these legal consequences too broadly, such a situation is not acceptable when the boundaries of a criminal offense are substantially narrowed or widened by a court, especially when applying the strictest liability. Moreover, even the rules formed by the case-law can be interpreted very subjectively, because in one case the court may consider the same number of violations as sufficient to establish that the consequences established by the criminal law have occurred, in other cases, on the contrary, such violations cannot be classified as causing the consequences provided for in Articles 222 and 223 of the CC.

In addition, the case-law of the Court of Cassation states that the impossibility of determining the size and structure of an undertaking's activities, assets, equity or liabilities must be real. For example, in one case, the Court of Cassation ruled that the structure of assets and liabilities had been distorted because the falsification of a cash expense order had a negative effect on determining only the actual cash flow, but the transaction itself was recorded [20]. In another case, the Court of Cassation noted that all records of cancelled transactions remained in the cash register program, therefore, from the court's point of view, the main parameters of the company's activity, assets, equity or liabilities or the structure of the amount of unpaid taxes could also be calculated [16]. It is these examples of case-law that unequivocally substantiate that the current definition of the consequences of Article 222 and Article 223 of the CC is too abstract and creates preconditions for criminalizing less serious acts in comparison with an administrative offense.

Another related problem – the precise definition of the limits of criminal liability in question. It should be noted that Para. 5 and Para. 7 of Article 205 of the CAO only provides for a lower limit of administrative liability under these parts - 50 MSL, which means, in principle that all acts, even in excess of that threshold, may fall within the scope of both administrative law and criminal law. The conclusion regarding the consequences of criminal law, as mentioned above, can be made only after the court has additionally assessed whether the actions of a person cause the consequences provided for in the criminal law. In this context, it is considered appropriate to amend the existing regulation focussing on the seriousness of the offenses and the resolution of criminal and administrative liability competition issues. Given that the consequences of Para. 7 of Article 205 of the CAO are defined only by providing for a lower limit, it is appropriate to consider the question of setting an upper limit from which criminal liability could be imposed. The rates provided for in Para. 5 of Article 205 of the CAO and Articles 222 and 223 of the CC should be adjusted accordingly, instead of abstract legal consequences enshrined in the criminal law, by introducing a new criterion of criminal liability, which would be related to the amount of hidden taxes exceeding the upper limit set by the CAO. Such a position can also be found in legal literature, noting that the criterion of criminality in question should not be linked to the criterion of establishing fairness in accounting, which lacks clarity and objectivity, and since these acts are criminal offenses in the financial system, the consequences of such acts should be linked to a reduction in the tax burden [5]. Therefore, it is considered that a specific criterion defined in monetary terms would prevent an expanding interpretation of Articles 222 and 223 of the CC, and would resolve the issues of delimitation of criminal and administrative liability. Although such a solution would be quite effective, the question of the expression of a specific threshold definition, which would be related to the level of hidden taxes, remains open to discussion. In this case, it can only be pointed out that the legislature has also included specific monetary criteria in the definition of the limits of criminal liability in the case of other criminal offenses classified as criminal offenses in the financial system. The relevant provisions of Article 219 or Article 220 of the CC, which link the minimum level of criminal liability for non-payment of taxes and the submission of incorrect financial data to the avoidance of taxes in the amount exceeding 100 MSL, are relevant. Whereas, as already mentioned, it is expedient to define the boundaries of the acts defined in Article 222 and Article 223 of the CC by using a specific criterion, which would be related to the amount of hidden taxes, and the position of the legislator expressed in Article 219 or Article 220 of the CC regarding the criminalization of tax law violations would be an important basis for consideration of the transfer of such a criterion and for criminal offenses related to improper accounting. However, it is not possible to elaborate precisely on the solution to this issue, as such a final decision can only be taken by the legislator, however, what is unequivocally clear is that the issue of the delimitation of criminal and administrative liability must be addressed in a more rational way, using specific criteria, so as not to unduly extend the scope of criminal liability.

Application of criminal and administrative liability for violation of the procedure for submission of financial documents and data to state institutions

It is further appropriate to focus the analysis on the provisions of the so-called tax fraud legislation, which also show the problems that arise in practice. First of all, it should be started from the fact that for a long time the criminal liability of Article 220 of the CC for submitting incorrect data on income,

profit or property to state authorized institutions has been linked regardless of the amounts of taxes sought to be avoided, and subsequently, amendments to the criminal law introduced a criterion for the application of criminal liability for the purpose of avoiding (concealing) taxes in the amount of more than 10 MSL. Meanwhile, in Para. 1 of Article 221 of the CC, the threshold for the occurrence of criminal liability for failure to submit declarations, reports or other documents is established when the aim is to avoid (conceal) taxes in the amount of 500 MSL. Thus, despite the fact that the norms established in Article 220 and Article 221 of the CC criminalize tax evasion, however, as can be seen from the previous regulation, the disproportion of these norms in determining the threshold for the occurrence of criminal liability was obvious, thus giving these relative norms a different danger. In the current criminal law, the amendments to Articles 220 and 221 of the CC have abolished these disproportions, i.e. the provisions of Article 220 and Article 221 of the CC were last amended by the Law of Amending Articles 220 and 221 No. XIII-791 of the Criminal Code of the Republic of Lithuania adopted on November 21st, 2017, by which, the limits of criminal liability provided for in these two articles have been harmonized, linking it to the clearly defined criterion of 100 MSL [2]. Thus, criminal liability no longer depends on whether known data are entered in tax returns, certified statements or other documents in order to conceal taxes, and such data are provided to the authorities authorized by the State, or such data are not provided in order to conceal information about income, profits, assets or their use. In view of the current legal regulation, it can be stated that the amendments to the Criminal Law of 21 November 21st, 2017 were a rational step in establishing and enshrining a uniform criterion for the application of criminal liability, if the aim was to avoid taxes in the amount of more than 100 MSL. At the same time, it should be noted that the liability for the submission or failure to submit data on income, profits, assets or their use to the authorities authorized by the State is also provided for in Article 187 of the CAO, which provisions, taking into account the amendments to Article 220 and Article 221 of the CC on 21 November 21st, 2017, were also adjusted and harmonized with the Criminal Law. Thus, a comparison of the dispositions of all these three articles of the law allows to conclude that the dividing line between criminal and administrative liability for similar acts is the amounts of taxes to be avoided (concealed). However, although the existing legal framework establishes and harmonises the criterion by linking it to a specific monetary amount, which has made it possible to clearly define the limits of tax fraud and has solved the significant problem of delimiting criminal and administrative liability, however, the criterion of 100 MSL, which limits these limits of liability, remains a matter of debate, the basis for which is dictated by the needs of the actual practice of applying this liability.

In particular, it is necessary to start with the fact that the specificity of tax evasion is characterized by the fact that it is usually a continuous criminal offense, and the amounts of hidden taxes are determined and calculated for the longer period during which no taxes were paid [5]. It should be noted that the criteria for the application of criminal liability established in Articles 220 and 221 of the CC in order to avoid (conceal) taxes exceeding 100 MSL (EUR 5,000) can be established with sufficient ease in a short period of time, for example, with the current minimum wage per employee in the company, it is estimated that 2 years will be enough to prevent the company from paying more than 100 MSL per employee. Meanwhile, on November 21st, 2017, when the amendments to the criminal law currently in force were adopted, this term was 3 years. There are also other economic indicators, one of the most important being inflation, i.e. the change in consumer prices in November 2022, as compared to January 2017, increased by as much as 18.5 percent [32]. This means that almost a fifth of the increase in the general price level has naturally led to an increase in the financial performance of companies and, at the same time, in the scale of corporate tax fraud. In the recent case-law of the Court of Cassation alone, there is a clear trend in tax fraud cases that the monetary amounts involved in these offenses vary from several times to several dozen times: 1) in criminal case No. 2K-106-628/2021 persons deliberately did not declare EUR 22,553.72 and another EUR 12,984.76 VAT [29]; 2) in criminal case No. 2K-49-1073/2021 organized the entry of known incorrect data in VAT declarations and submission of these declarations to the State Tax Inspectorate, as a result of which LTL 988,943 (EUR 286,417.69) of damage was caused to the state budget of the Republic of Lithuania [28]; 3) in criminal case No. 2K-70-719/2021, in order to avoid value added tax payable by the company in the amount of EUR 189,149.52, the person entered known incorrect data in the company's value added tax return and submitted it to the State Tax Inspectorate [27]; 4) in criminal case No. 2K-272-511/2020 person did not intentionally declare and did not pay a total of EUR 264,711.73

in taxes [26] and etc. All these examples in the cases of the Court of Cassation show a clear tendency that in cases related to the application of Article 220 and Article 221 of the CC, the amounts of hidden taxes payable sometimes even exceed 50 times the minimum threshold from which criminal liability arises, which is natural given the changing economic indicators mentioned above. Therefore, it is reasonably doubtful that the criterion for the application of criminal liability established in Article 200 and Article 221 of the CC, which is related to the amount of 100 MSL, correlates with the real situation in criminal cases and the country's economic situation that has changed significantly over five years. Together with the evaluation of the tendencies and frequency of increasing the size of MSL, which was last increased by the Government of the Republic of Lithuania on August 30th, 2017 by Resolution No. 707 by only € 12.34, it is clear that the problems in question will not be resolved in principle. Unfortunately, such an inadequately low criterion in itself presupposes wider possibilities for prosecuting individuals, and criminalizing less and less serious offenses. This situation is inappropriate when it comes to the most severe criminal liability, therefore, in order to ensure a significant balance between administrative and criminal liability for similar acts, which was achieved five years ago with the introduction of clear criteria for the application of Articles 200 and 221 of the CC, and in order to update the scope of criminal liability, the qualifying feature is that these criminal offenses seek to avoid (conceal) the amount of taxes, expressed in terms of MSL, should be unambiguously increased.

Conclusions

1. The analysis of relationship between criminal liability and administrative liability for unauthorised engagement in economic, commercial, financial or professional activities has shown that "the form of a business" and "on a large scale" as alternative features set in the CC for delimiting these both responsibilities are not clearly defined in case-law that provides only the non-exhaustive list of circumstances related with that. However, analysed case-law of the SCL raises a number of difficulties related with the identification and incrimination of feature "the form of a business" and even its assessment ways identified in case-law are still conditional, leaving its assessment to the court's internal conviction, that lead to an unjustified extension of criminal liability and the artificial criminalization. Considering this and the fact that the SCL constantly has to explain to lower courts in this regard, there is a sufficient basis for consideration of the waiver of feature "the form of a business".

2. The systematic analysis of case-law on criminal liability and administrative liability for fraudulent and negligent management of accounts has revealed that the necessary legal consequences of an evaluative nature in the CC are extremely abstract and uninformative. Although in analysed case-law the SCL seeks to restrict the ability to interpret these legal consequences too broadly, but such situation is unacceptable when the limits of criminal liability are adjusted or even changed by the courts because of laconic and unclear statutory regulation. So, such uncertainty of statutory regulation must be resolved in more rational way by considering the establishment of a specific criterion defined in monetary terms in the CC and combining it with other provisions of this law.

3. Analysing the issue of the relationship between criminal and administrative liability for violation of the procedure for submission of financial documents and data to state institutions, it was established that in this case, the criterion established in the criminal law - the amount of taxes sought to be concealed (avoided), which is linked to a specific monetary expression, provides a basis for a clearer definition of the above-mentioned limits of legal liability, however, it is clear that the criterion of the current size, which is linked to the size of 100 MSL, no longer correlates with the actual situation in criminal proceedings and with the substantial change in the country's economic situation over the last five years, especially in view of the continuity inherent in these crimes. As such an inadequately low criterion presupposes the application of criminal liability to less and less serious offenses, the value of this criterion should be unambiguously increased in order to ensure a significant balance between administrative and criminal liability and to update the scope of criminal liability.

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Turkish forestry and environmental legislation and practices in the light of internatıonal environmental conventions

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Annotation

International environmental conventions are legal sources that play an important role in the protection of the environment. Article 90 of the Turkish constitution forbids bringing a lawsuit to the constitutional court on the grounds that international agreements are laws and that they are unconstitutional. Turkey has become a party to many international conventions concerning the environment, forest and wildlife. In the study, contracts concerning the forest ecosystem and the environment were chosen as examples. Information is given about the Ramsar and Bern conventions to which we are a party and the Bonn and Aarhus conventions regarding the environment that we are not a party to, and the situation of the Turkish legislation against these conventions is explained. It has been stated that it is absolutely necessary to be a party to the Bonn and Aarhus agreements, which are not parties.

Keywords: *International, agreement, Türkiye, environment, forest, wildlife*

Indroduction

International conventions/agreements, which is one of the most effective way of protecting biodiversity. Law has many effective tools and one of them is international conventions/agreements. (Ardon et al., 2014); (Barbier, 2000); (Sarma, 1999); Klaphake et al., 2001); (Pringle, 2017); (Petrakis and Xepapadeas, 1996); (Carraro and Siniscalco, 1993); (Verhaag, 2002); (Duruigbo, 2000); (McCallion and Sharma, 1999); (Sands, 1989); (Charney, 1994); (Hägerhäll, 1980); (Benedick, 1986); (Hunter, 2018); (Kueck, 1995); (Mitchell, 2003).

International conventions/agreements are usually adopted in both country's own legislation and administrative structures. In this context, the conventions/agreements are intended to protect biodiversity via the country's own legislation. It sets out many responsibilities such as development plans, limiting the use of sites, defining areas as special status, creating lists of species to be protected, creating lists of protected areas, establishing protection units, sanctions, and follow-up/monitoring mechanisms. Due to the provisions of conventions/agreements, the parties also have to organize administrative mechanisms (secretariats/monitoring unit) to monitor the implementation of the conventions/agreements in practice at both the national and international levels. Therefore, there is an important governance issue in the implementation of conventions/agreements in the protection of biodiversity. However, as it is known, solely legislation and administrative units are not sufficient tools in the implementation and governance of conventions/agreements. The effective implementation of international conventions/agreements has four pillars. These are effective legislation, strong administrative structure, independent organizations monitoring the enforceability, and judicial subjects.

To assess and improve the implementation of the convention/agreement by parties, initially, the country that is a party to an international convention/agreement must adopt the provisions of that convention/agreement into its domestic law in the form of law or secondary legislation. In this way, the effective implementation of the provisions of the convention/agreement will be ensured. Second, important point is a strong administrative structure. A strong administrative structure follows the legislation in every

aspect, implements it in practice, and at the same time, provides a healthy information flow and makes regular reports to the international secretariat. In addition, it ensures the preparation of legislation by following current developments and informing the legislators when necessary. A strong administration has important functions such as planning in accordance with the terms of the convention/agreement; protection, special status, creating lists of species and areas, informing the public, ensuring participation, raising awareness etc. A strong administration should know how to use effective tools, especially in education and reaching the society, in raising awareness and ensuring participation. A strong administrative structure should have a sufficient number of expert personnel, healthy working environments, sufficient technological infrastructure, sufficient equipment and technical personnel. If there are inadequacies of the responsible administrations in the implementation of the legislation, it is up to independent organizations (NGOs, universities, professional organizations, national or international unions or association fighting for the protection of the environment) to follow up. Independent organizations should be able to monitor the effective implementation of convention/agreement. However, to be able to monitor, they should have awareness and sufficient knowledge about international conventions/agreements. Independent organizations should know how to fight against conflicting situations in areas of very high biodiversity value subject to international conventions/agreements. In this regard, independent organizations must act within the rules of law and be able to activate the judiciary. Two issues are important at this point. First, independent organizations are to put forward international conventions/agreements and seek rights in their objections. The second is putting the international conventions/agreements into practice. It means that the judiciary has to refer to the provisions of the conventions/agreements in its final decisions related to that situation in matters concerning the areas subject to objection. Therefore, judges, prosecutors, and lawyers, who are subjects of the judiciary, should also be well-versed in international conventions. In order for the conventions/agreements to find effective application area in legal systems, it is necessary to include the relevant international conventions/agreements provisions in the court decisions. At what extent the judicial subjects, namely judges, prosecutors and lawyers are competent in international conventions/agreements is very important. Bar associations, especially the ministries of justice, should constantly train and raise awareness on international conventions/agreements, and support the development of decision makers, prosecution and advocates.

Results

In this study, a brief analysis of two international conventions to which Turkey is a party and two international conventions to which Turkey is not a party will be made. The selected conventions are those that concern the environment, forest and wildlife ecosystem. The reflection of the provisions of this contract in the Turkish legislation has been examined. In particular, the importance of agreements for the environment was emphasized which are Türkiye is not party

- Examined international conventions are; Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)- Türkiye is party.
- The Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)- Türkiye is party.
- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)-Türkiye is not party.
- The Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention)-Türkiye is not party.

Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)

In the 1982 Turkish Constitution, there is no direct provision on wetlands. Yet, its 63rd article states the protection of historical, cultural, and natural assets, while its 43rd article states that it is in the public interest to benefit from the seas, lakes, and rivers. The 168th article states that natural wealth and resources are under the rule and disposal of the state, and in the 169th article, the surveillance and protection of all forests are under the responsibility of the state. In the 90th article there is a regulation

stating that international treaties duly put into effect have the force of law and that they cannot be challenged in the Constitutional Court with the claim of unconstitutionality. (Elvan and Birben, 2020)

Turkey's participation in the Ramsar Convention was approved in law no. 3958 dated December 28, 1993 and implemented after publication on May 17, 1994 in the Official Gazette .The laws relating directly or indirectly to the wetlands in Turkey are as follows: law no. 4915Land Hunting Law (1983), no. 2872 Environmental Law (1983), no. 2873 National Parks Law (1983), no. 831 Law on Waters (1926), no. 1380 Fisheries Law, no. 167 Groundwater Law (1960), no. 5237 Turkish Penal Law (2004), and no. 6831 Forest Law (1956). Related regulations include: the Environmental Impact Regulation (2014), the Water Pollution Control Regulation (2004), and the Wetland Conservation Regulation (2014).

In terms of the relevant legislation, wetlands are defined in Article 2 of the Land Hunting Law No. 4915 as "all waters covering the depths, marshes, reeds and peatlands; natural or artificial, continuous or temporary, with stagnant or flowing waters, sweet, bitter or salty, not exceeding six meters in the withdrawal period of the tidal movements of the seas." In the 4th article of the law, the provision that "wetlands cannot be polluted or dried, and their natural structures cannot be changed" is included. However, there is no penalty for violation of this article. A wider definition of wetlands than the Land Hunting Law is included in the Environmental Law which describes them as "Natural or artificial, continuous or temporary, with stagnant or flowing waters, sweet, bitter, or salty, covering depths not exceeding six meters during the withdrawal period of the tidal movements of the seas, mainly waterfowl. All waters, marshes, reeds, and turbines, which are important as habitats of living beings, and ecologically wetlands from the shore edge line to the land side of these areas." (Elvan and Birben, 2021)

The penalty for damage to wetlands is an administrative fine in Article 9 of the Environmental Law. Another penalty is for the deliberate or negligent pollution of water as is determined in the Turkish Penal Code, which is punished with imprisonment. Sentences of imprisonment from 6 months to 2 years for deliberate pollution and from 2 months to 1 year for negligent pollution are stipulated. If the pollution is permanent or causes permanent damage to living things, the penalty is increased.

The Environmental Impact Assessment included wetlands in Annex 5 of sensitive regions. But, the fundamental regulation for wetlands in the legislation is the "Regulation on the Protection of Wetlands."The regulation has been amended three times and the current regulation is from April 4, 2014.

Wetlands in all the relevant regulation are Ramsar sites, Wetland with National Importance, or Wetland with Local Importance and the areas that have not been registered are other Wetlands. The definition of wetland has been made in accord with the definition in the Environmental Law, but the definition of water birds is not. The regulation consists of six parts: definitions, wetland qualifications, conservation, usage principles, and prohibitions; determination of protected zones and application principles; Ramsar sites and management plans; national commission, local commission, duties, working procedures and principles; various and final provisions. Chapter four is titled "Ramsar sites announcement and management plans" and consists of sub-sections: Determination of Ramsar sites; Determination and announcement of the boundaries of Ramsar sites; preparation and implementation of management plans; Compliance principles of management plans.

The National Commission, regulated in the fifth chapter, is a decisive body which makes all decisions regarding wetlands, especially Ramsar sites, and its duties are defined. Although the members of the commission are predominantly government agencies, it can be stated that the 14-person commission was formed with a partially participatory approach. Regulation on the Protection of Wetlands is carried out by the Ministry of Agriculture and Forestry.

The Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)

As one of the pioneers of national and regional environmental policies, the EU requires that its members harmonize their domestic legal systems with EU legislation including environmental legislation

as a fulfillment of the conditions to be a member of the EU. Turkey, as a candidate member, has closely followed legislation and made important changes in domestic policy especially concerning the environment. Turkey, per Law No. 244, ratified the Bern Convention on 9 January 1984 with the Council of Ministers Decision No. 84/7601, subsequently published in the Official Gazette No. 18318 dated 20 February 1984 (Arslankaya 2014).

Turkey lies at the intersection of Europe, Asia, and Africa and is bordered by the Black Sea, Mediterranean Sea, and the Aegean Sea which each have different ecological characteristics (Şekercioğlu et al. 2011). Various ecosystems provide homes to thousands of animal and plant species. Also, it should be noted that two of the four major migration routes used by birds pass through Turkey (MOE 2001). Turkey is a country rich in biodiverse flora with more than 11.000 species of Spermatophyta and Pterophyta taxa, of which 3.700 are endemic. By comparison, Europe has about 12.000 species Spermatophyta and Pterophyta of which only 2.750 are endemic to the continent which is about 15 times the size of Turkey (FAO 2016). Turkey possesses Europe-Siberia, Iran-Turan, and Mediterranean plant geography in terms of location, topographic structure, water supply, microclimate diversity, geological structure, and is a gene center location with a high endemism rate which makes it one of the most important and rich centers in the world in terms of plant resources (FAO 2018). These include European, Asian, Caucasian, Iranian, and Arabian species. There are depressed mountain forest ecosystems in the Black Sea, the Mediterranean, and Aegean zones, suitable wetlands that provide habitats for many rare water birds, and step-characterized grassland ecosystems in the central and eastern Anatolian regions (Kiziroglu et al. 2013). Owing to all these reasons, Turkey is one of the most important and unique natural resource centers of the Palearctic region in terms of biological diversity (Gross 2012). Its biological diversity is important, not only in the Western Palearctic region but around the globe. However, a substantial portion of the country's habitats and related wildlife components are experiencing significant adverse pressures due to a variety of factors, especially rapid development. Biological diversity is threatened. These instigating factors can make a sole impact, or their effects may be increased through multiple interactions (IUCN 2012). These include infractions to the wetlands and other regions by solid wastes, mining activities, wind energy, highway and road-based losses, electric transmission lines, air traffic, road construction, hydroelectric power plants, construction and urban development, illegal hunting and poaching, plant bulb collection, farm irrigation and erosion, forest destruction, and forest and brush fires (Küçük and Ertürk 2013).

Since 1984, the articles of the Bern Convention have been domestic law and are referred to in judicial decisions. According to the last paragraph of Article 90 of the 1982 Turkish Constitution, international treaties put into effect are under protection by the Turkish Constitutional Court. If the treaty is violated, the plaintiff cannot appeal to the Turkish Constitutional Court for alleged violation of the Constitution. In other words, international agreements such as the Bern Convention supersede previous domestic policies. Therefore, international agreements have a direct effect on domestic law and judicial decisions. However, it is not possible to state that the Ministry of Agriculture and Forestry, which is the responsible ministry for the administration of the Bern Convention, has been working very effectively. Every two years the Bern member states produce reports for review by the European Council. However, Turkey did not produce these reports between 2009-2018. Likewise, Turkey has yet to become a candidate for the Emerald Network. Although EU supported projects have been implemented and some areas meet the ASCI criteria, no official applications have been made. The preliminary studies carried out identified, 122 important plant areas, and these areas were combined as 9 important plant networks. These are Ergene Basin, Ömerli Basin, Uludağ, Çoruh Valley, Baba Mountain, Lara-Parakende Sand Dunes, Mount Ahır, Erciyes Mountain, and Çıldır Lake (Özhatay et al. 2008).

The purpose of the Bern Convention, to which the Member States of the Council of Europe and other signatories are parties, is to protect wild flora and fauna and their habitats, to protect endangered and potentially endangered species, especially migratory species, and to cooperate with other states on these issues. Turkey signed the Bern Convention on 9 January 1984, and it was subsequently published in the Official Gazette No. 18318 on 20 February 1984.

At the time turkey became a party to the Bern Convention, the Land Hunting Law (Law No. 3167) of 1937 was in effect. Law No. 3167 was replaced by the new Land Hunting Law of 2003. Currently, Land Hunting Law No. 4915 is in effect. (Elvan et all, 2021)

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

Although Turkey has not yet signed the Aarhus Convention, it has taken a significant step in access to information, which is one of the three fundamental rights and effected the Information Act in 2003. Public participation in decision making in environmental matters is practiced within the framework of Environmental Impact Assessment Regulation .

The legislative framework of access to justice has been defined more strictly compared to other rights. The general framework of access to justice is set out in the Constitution of Turkish Republic (2 , 5 , 10 and 36 , 37 , 138 , 141). However, it has begun to become more common in Turkish legal literature as a concept in 2000s when full EU membership nomination of Turkey has been accepted . The first solid example to this is that access of all citizens to justice has been facilitated under the title "Justice and Internal Affairs" within the National Program of 2003 and continuing development of the legal aid system has been included in the program.

In the "Judicial Reform Strategy" prepared by the Ministry of Justice in 2009, issues on simplification of access to justice has been identified. For those issues identified, taking simplifying measures and making endeavours through participative methods have been set as the objective . Issues identifies are expressed as follows.

- Effecting the legal aid procedure for judicial proceedings,
- Informing the beneficiaries on legal issues and trial course processes,
- Developing and improving websites of courthouses,
- Standardisation of translation services rendered in courts,
- Facilitating easy access for disadvantaged groups to justice.

In 2010-2014 Strategic Plan of the Ministry of Justice, the right of access to justice has been discussed. Measures to be taken has been identified as follows;

- Determining opinions and views of judicial officials and justice actors by using scientific methods (survey, interview, workshop, seminar, etc.),
- Preparing clear, comprehensible and guiding documents (brochure, handbook, etc.) the legal aid procedure association with practicians and academicians and convenient delivery of these documents to beneficiaries.
- Providing practical information explaining the legal aid procedure on websites of the Ministry and courthouses.

There is no regulation or arrangement regarding access to justice in environmental matters. The effect of not being a party to the Aarhus Convention yet is clear in this respect. However, there are direct regulations on environmental matters, despite their limited number. The first regulation which has to be considered in this contexts is Article 30 of the Environment Law. According to the referred provision, "Anyone who has sustained damage from or is aware of an action polluting or impairing the environment may apply to relevant authorities to demand necessary measures to be taken in regard to the action or to demand the action to be stopped. The right to apply to relevant authorities is granted not only to people sustaining damage, but also to people who are aware of the environmental impact in the Environment Law . Accordingly, everyone has the right to apply to administrative and legislative authorities without requiring any violation of interest or right, in environmental matters. This is a practice that can be considered comprehensive in the environmental respect and construed in favour of the environment. (Elvan and Türker, 2015).

The Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention)

Turkey has a very unique and important location for migratory birds in terms of geography. The country's 486 bird species include 416 migratory birds, and most of them are listed on an IUCN Red

List. Turkey is party to three international conventions (BERN, RAMSAR, and PARIS) related to migratory birds, but it is not party to the BONN Convention or the AEWA, ACAP, and ASEAN agreements aimed at the conservation of migratory species.

The Convention on the Conservation of Migratory Species of Wild Animals (BONN) was entered into force on June 23, 1979 (Lewis & Trouwborst, 2017; Lyster, 1989). It is the most comprehensive convention on the protection of migratory species and the ensuring of international cooperation. The convention defines migrant species and also lists the species that should be protected.

The convention also allows the parties to organize agreements in accordance with the convention provisions. An agreement is defined as an international agreement relating to the conservation of one or more migratory species as provided for in Articles IV and V of this convention. One hundred and thirty-three countries are parties to the BONN Convention. In line with the objectives of the convention, seven agreements have been opened for signature, two of which are related to migratory birds. Those are the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) and the Agreement on the Conservation of Albatrosses and Petrels (ACAP). The Association of Southeast Asian Nations (ASEAN) Agreement on the Conservation of Nature and Natural Resources (designated ASEAN in this paper) is also significant for bird species.

Turkish domestic legislation has been able to incorporate 50% of the provisions on migratory birds in the conventions and agreements to which Turkey is a party. According to the analysis, there is no effective provision in Turkish domestic law that focuses especially on international cooperation and coordination. Another shortcoming is that the list of migratory bird species entering Turkish airspace is not issued by official institutions in accordance with detailed and scientific methods and there are no regulations on how it is compiled. There are no adequate regulations regarding effective measures to meet the needs of migratory bird species during the nonhunting period. Other deficiencies in terms of legislation are the lack of planning for suitable places where migratory birds can easily find food and rest and the lack of effective provisions for creating places suitable for these purposes. Legislative regulations are adequate for the protection of areas in which migratory species stay, the protection of species in these areas, and the prohibition of the hunting of these protected species, especially during hunting seasons. (Elvan et al., 2022)

Conclusion

1. The Ramsar Convention has had a significant impact on Turkish legislation. Because of it there are direct provisions on wetlands in the Environmental Law and the Land Hunting Law. However, an important deficiency is wetlands are not included in the laws that address impacts to groundwater and drinking water. While a regulation for the protection of wetlands has been prepared on the basis of the Ramsar Convention, it is negligent in not defining "waterbirds" even though the regulation has been amended three times by legislators. Furthermore, the absence of a regulation regarding the establishment of alternate protected areas to compensate destruction or degradation of a wetland does not comply with the principle of protecting wetlands. Although a key provision in the Ramsar Convention text it cannot be effectively executed by domestic law unless a specific regulation is prescribed under Turkish legislation or regulation. There is neither a plan nor program in legislation or administration for training expert personnel for Ramsar Sites.

2. In the process of joining the European Union, the Republic of Turkey has made necessary updates in its legislation related to the environment, natural habitats, and protected species. Law No. 4915 is an example of one of the laws prepared based on EU legislation and international agreements to which Turkey is a party. In the examination carried out on the Law No. 4915, it is seen that the law largely meets the basic provisions of the Bern Convention. However, provisions on the protection of habitats need to be improved. It is also concluded that efforts should be made to ensure coordination concerning border regions, especially for migratory species. Concerning other issues, it was concluded that Law No. 4915 was sufficient to meet the provisions of the Bern Convention.

3. Despite the positive picture of access to justice in environmental issues in Turkey, suggestions can be made for the deficiencies identified. Considering that late justice is no justice, specialised courts capable of assessing situations in multiple aspects in order to prevent irreversible environmental destructions are required. Legal support must be provided to citizens and civil society organisations in environmental matters, free of charge. Lawsuits filed in environmental matters must be exempt from case fees and judiciary costs since they are for the public weal. Comprehensible and easily accessible booklets and brochures on access to justice must be prepared and published. Such documents must be available on the internet. Information on cases directly concerning the public, including cases regarding environmental matters must be provided through official channels and these information must be available on public domain. Technological assistance must be provided in respect to access of disadvantaged people including the disabled to justice and man support must be provided. The right to file a lawsuit against pollution of the environment granted to everyone and regulated by the Environmental Law must be regulated in laws concerning other natural resources with the reason of violation of public interest, including the Forestry Law and protection of the environment must be included in the constitution.

4. There are effective multilateral international conventions and agreements for the protection and sustainability of migratory birds. Turkey is a party to the BERN, RAMSAR, and Paris conventions. Turkey was able to effectively incorporate the provisions of these conventions into its domestic laws at a rate of 50%. Considering the international conventions and domestic laws on migratory birds, it is possible to make the following assessment about Turkey. Strategies for the protection of migratory birds have been set as priorities for protecting the habitats of species, but the species-based conservation approach is secondary. For this reason, one can state that the efforts of Turkey to coordinate its provisions for various bird species with those of other countries and its legislation in this regard are insufficient. Another important issue is that the listing and counting of species of migratory birds in Turkey are not performed by the administration charged with the task of protecting wildlife. Migratory bird counting in Turkey is done by members of NGOs and volunteers. As a result, there is no effective conservation strategy or planning. Turkey is a very rich country in terms of the number and diversity of the migratory birds entering it. Turkey needs conservation-oriented development strategies and policies for its bird species. This lack is especially evident in MAK decisions regarding which international conventions are subscribed to and enforced in domestic laws. Although MAK has a very important role in determining the species to be protected and hunted, the protected migratory bird species and their listing by the Ministry are not reflected in MAK decisions at the desired level. The legislation on migratory birds should be improved, because at the current time only 50% of the international conventions have been incorporated into domestic laws

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Legal psychology as a branch of psychological science

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Annotation

Psychological research in the application of the law is not something new, although its study is important, and proof of this is that, in the 90s, its study was expanded, which quickly bore fruits. Today, the development of psychological science has taken on special significance, in areas such as the use of psychological data to solve problems of economic and cultural construction and the improvement of the work of agencies and officials responsible for enforcing the law and the creation of a professional profile of the legal professions. The in-depth study of these issues requires a psychological analysis of the personality and the employees of the judicial bodies must possess a developed system of psychological knowledge, as well as skills and techniques that provide a high culture of communication that, together with legal knowledge, promotes their humanization. Through this work the following objectives are pursued: to consider legal psychology as a branch of psychological science; to reveal the subject, the methods, the tasks and the system of legal psychology as well as to present the control tests in this discipline.

Keywords: *psychology, law, objective, methods.*

Introduction

The history of psychological research in law enforcement is a few hundred years old. It began with the problems of justice under the name "Forensic Psychology". This situation persisted until the 1970s, when the science of Legal Psychology was officially registered (Vasilyev, 1991).

The name change was due to radical changes in the understanding that the psychological problems of strengthening law and order are not limited to crime investigation. The actual state of psychological research, which developed in law enforcement agencies and went far beyond traditional topics, forced a new approach: studies of psychological problems of legal education of the population, strengthening of the state of law, work with law enforcement personnel, professional training and psychological training of employees, psychological causes of crimes and their prevention, management in law enforcement agencies and operational search, correction of prisoners and social rehabilitation of prisoners in freedom. The tendency to expand legal and psychological research continued to strengthen and develop in the 1980s in relation to the growing need of society to strengthen public order and a comprehensive approach to this work.

The urgency of solving the entire complex of psychological problems of law enforcement agencies became especially acute in the 1990s, when the task of creating the rule of law was declared the task of restoring our society, and the crime increased considerably, becoming a real state problem. The investigation of the problems of legal psychology was expanded in accordance with the needs of the practice, and its results, which are of undoubted practical interest, accumulated. However, all of this was not sufficiently reflected in the literature on legal psychology, available to a wide student audience and the body of law enforcement officials (Yenikeev, 1996).

Our time is characterized by a significant development of psychological science, its penetration into all spheres of human activity, the use of psychological data in solving problems of economic and cultural construction, as well as the improvement of the work of agencies and officials responsible of enforcing the law and creating a professional profile of the legal professions. The in-depth study of these issues requires a psychological analysis of personality and legal activity, based on the study of phenomena,

processes, and basic psychological states, their characteristics in the legal field (needs, motives, goals, temperament, attitude, social orientation and other personality characteristics).

The psychological culture of a lawyer presupposes that all employees of judicial bodies have a developed system of psychological knowledge, as well as skills and techniques that provide a high culture of communication. Psychological culture increases the effectiveness of legal activity, promotes its humanization. The study of legal psychology is greatly complicated by the lack of scientific and methodological literature in this discipline (Chufarovsky, 1997).

The following objectives are established for the dissemination of this work: to consider legal psychology as a branch of psychological science; reveal the topic, methods, tasks and system of legal psychology; perform control tests in this discipline (Virtual rosin machine Psychology for lawyers, 1997).

Legal psychology as a branch of psychological science

Psychology is a science that studies the laws and mechanisms of the mental activity of people. The name of "psychological" science comes from the Greek words: "psyche" (soul), "logos" (science, knowledge), that is, the science of the soul, or rather, the subjective inner world of man 1. The term "psychology" was proposed by the German psychologist Hocklenius at the end of the 16th century (Bodnar, 2019). For a long time, psychology developed as an integral part of philosophy, and only in the middle of the 19th century did it come to the fore as an independent science.

This was possible because psychology gradually transformed from a descriptive science to an experimental science. Today, psychology is a fairly complex and extensive system of disciplines. In addition to general psychology, which studies the general laws of mental activity, there are applied private branches of psychology that are developing rapidly. Thus, a group of applied industries that study the laws and mechanisms of the psyche of people engaged in specific activities are: work psychology and its relatively independent sections: engineering, aviation and space psychology; psychology of cognition; pedagogical, military, legal psychology, etc.

Operational, investigative, prosecutorial and judicial personnel are constantly faced with many problems, the solution of which requires not only a broad perspective, legal culture, special knowledge and life experience, but also a good understanding of legal psychology. In order to correctly understand the complex relationships of people, their experiences and actions, in confusing situations that are reflected in criminal cases, it is necessary to know the laws of mental life.

Legal psychology comprises various fields of scientific knowledge, is an applied science and belongs equally to both psychology and jurisprudence. In the field of social relations governed by the rule of law, the mental activity of people acquires peculiar features, which are due to the specificities of human activity in the field of legal regulation. Therefore, psychology is the only science that can provide not only knowledge of mental activity, but also its management. With the development of society, its importance will grow (Fundamentals of general and legal psychology…, 2014).

The need to resort to psychology, its methods, achievements, etc. arises when a particular science, related to or closely related to psychology, is included in the solution of practical problems. It has a place in pedagogy, medicine and law. Practical activity, as a rule, is realized in concrete actions of concrete people, and how it happens, largely depends on its psychological characteristics. Only the need to solve practical problems has led to the fact that social, ethnic, historical and other branches of psychology arose and developed on the border with the social sciences.

However, it would underestimate the role of the natural in the life and development of the individual, appealing exclusively to the social aspects of its manifestation. Of course, the study of human biology (anatomy, physiology, anthropology) is inextricably linked to research in the field of psychophysiology, neuropsychology, psychophysics and other sciences bordering on psychology and science. The entire system of scientific knowledge feels the need to use psychological knowledge, it becomes a link between the different branches of science. Psychology connects social sciences and natural sciences,

biology and history, medicine and pedagogy, management and law, among others. This determines its place in the system of scientific knowledge.

The theoretical basis of legal psychology is general psychology, since it uses its conceptual and categorical apparatus, knowledge of general laws and laws of human mental activity. Most lawyers and psychologists working in this field agree that psychology, as the fundamental science of the human psyche, studies the most general laws of mental activity in general, so that legal psychology studies the same laws of the human psyche, different mental phenomena, but only in the field of legal relations (criminal law, civil law, etc.) or, as it is sometimes said, in the "man - law" system.

Object of legal psychology

Legal psychology is one of the branches of general psychology. The object of study of psychological science is the general laws of consciousness and human behavior as a subject of activity. Mental processes and personality traits are specifically manifested and formed in various activities, in connection with which there are applied branches of psychology that study relevant theoretical and practical problems of human behavior (pedagogy, social psychology, occupational psychology, pathophysiology, etc.). (Konovalova, 2019). Psychology as an independent scientific field of research and academic discipline is associated with special legal aspects of human activity. Man as a person is formed and exists in the system of social relationships, being a social being, characterized by determination and self-regulation. A necessary condition for the existence of any social formation, as we know, are the legal norms elaborated by people, which regulate behavior and relations between individuals, between the individual and society.

The object of legal psychology is the study of patterns of human behavior in the system of legal relations, as well as the structure and types of legal activity. Legal psychology synthesizes the foundations of psychological knowledge and the foundations of jurisprudence. Being a social being, a person organizes his activities according to certain rules and norms of behavior, mandatory for specific groups, classes or society as a whole. According to (Vasilyev, 1991), all norms of behavior can be divided into ecotechnics (regulating the use of natural resources and tools) and social norms that regulate relations between people. Social norms include customs, morals, and law. Customs (traditions) influence the organization of behavior of representatives of certain ethnic and religious groups; morality constitutes those accepted norms of moral behavior in society (for example, Christian precepts, rules of chivalrous honor, culture of behavior), which can lead the subject not to legal responsibility, but only to public condemnation. Finally, the law is the rules of conduct adopted in society, which require refraining from actions that cause individuals, groups of people or the State as a whole, various types of damage, or perform the necessary actions in certain circumstances as a duty civic (Chaldini, 2016).

If a lawyer, as a specialist in the field of law, considers the actions of people in accordance with the articles of the constitution, civil and criminal codes, the legal psychologist mainly examines the person as a defendant, witness, victim, agent of the law in mental terms, that is, the processes and characteristics of illegal behavior.

The modern development of science is characterized, on the one hand, by the differentiation of scientific knowledge, and, on the other hand, by integration, the interpenetration of some branches into others. This process leads to the creation of new branches of scientific knowledge, linking previously separate sciences.

From this point of view, the assignment of a science such as legal psychology, which is the link between psychological and legal sciences, is a natural phenomenon.

Legal psychology is an applied science that includes both psychology and jurisprudence. The mental sphere of people involved in litigation and legal activities has a number of psychological characteristics, the nature of which is due to the performance of many different social and legal functions. The details of the mental activity of people involved in the orbit of legal relations, and is designed to study legal psychology (Konovalova, 2019).

Therefore, the object of legal psychology is the study of mental phenomena, mechanisms and patterns found in the field of law.

Tasks of legal psychology

The tasks that legal psychology is designed to solve are mediated by the variety and complexity of theoretical and practical problems that fall within the scope of activities of legal professionals. The main tasks of legal psychology include the following:

- Study of the psychological mechanisms of illegal behavior; factors that contribute to the formation of motivation and criminal intent; ways to prevent them;
- Development of psychological methods to determine personality traits and states, as well as to study their impact on individual behavior in a criminogenic situation, which is necessary to understand the "human factor" in the system of legal relations and fair judicial decisions in matters of human rights and interests;
- Study (along with criminology and pathophysiology) of delinquency factors such as the state of "sanity" - "madness", pathological traits, personal immaturity (infantilism), suggestibility, low social adaptation, age appropriateness of mental development , etc. ;
- Study of the age dynamics of illegal conduct and the factors involved in juvenile delinquency;
- Study of the psychological mechanisms of the growth of crime in terms of socio-economic and political transformations in society;
- Development of effective methods of organization of correctional labor activities of inmates and provision of their readiness for resocialization;
- Development of rational methods of interaction with victims and witnesses in order to obtain objective evidence in the case;
- Study of the psychological structure of the professional activity of law enforcement officers (investigators, lawyers, judges, and prosecutors), the implementation of professional and psychographics of their activities (Zhalinsky,1997);
- Psychological training of law enforcement officers to form professionally important personality traits, including the ability to psychological analysis of subjects of illegal behavior, individual and group crimes;
- Ensure the participation of specialists in conducting forensic psychological examinations in the process of investigation and consideration of criminal cases, as well as other types of crimes;
- Provide psychological services in the law enforcement system in order to provide advice and practical assistance to the officials of this system in carrying out their procedural actions (investigative experiment, search, interrogation, identification) in compliance with the statutory freedoms and individual rights (Zhurbin, 1997);
- Development of psych diagnostic methods of professional selection and longitudinal control of the activities of officials of the law enforcement system, the formation of adequate motivation and the prevention of professional deformity;
- Organization of work with the population for the purpose of psychological education and crime prevention among the different groups of citizens (Konovalova, 2019).

Solving these problems, legal psychology contributes to the improvement of law enforcement and law enforcement activities, provides significant assistance to lawyers of various specialties in solving their professional problems.

Legal psychology as a science has certain tasks, which can be divided into general and private. The general task of legal psychology is the scientific synthesis of legal and psychological knowledge and the revelation of the psychological essence of the fundamental categories of law. The private tasks of legal psychology are related to the development of recommendations for the most effective implementation of law enforcement activities. These include:

1. investigation of psychological preconditions (conditions) of efficiency of legal norms;
2. psychological study of the identity of the offender, the disclosure of the motivation of criminal behavior, the details of the motivation of certain types of criminal behavior;
3. development of socio-psychological foundations of crime prevention;
4. study of psychological patterns of different types of law enforcement activities (investigator, prosecutor, lawyer, judge);
5. study of the psychological patterns of activity of correctional institutions in order to develop a system of measures for the correction and re-education of convicts;
6. preparation of recommendations for the improvement of the professional skills of law enforcement officers, career guidance, career selection, career counseling for candidates who wish to work in these bodies.

Methods of legal psychology

In legal psychology, there is a system of methods of psychological study of personality, as well as various psychological phenomena that arise in the process of applying the law. (Konovalova, 2019). These include the following:

1. Observation method. The observation method in psychology means a specially organized, deliberate and purposeful perception of the investigator of various external manifestations of the psyche directly in life, during investigation, trial and other areas of law enforcement. The observation method excludes the use of any technique that may produce changes or disturbances in the natural course of the phenomena studied. Due to this, the observation method allows knowing the phenomenon under study in all its integrity and reliability of its qualitative characteristics. The object of observation in psychology is not direct subjective mental experiences, but their manifestations in human actions and behaviors, in their language and activities. The observation is: direct and indirect, not included and included. In direct observation, the study is carried out by the person who draws conclusions from the results of this observation. Such observation is carried out by the investigator and the judge during the investigative and judicial proceedings, the educator of the penitentiary institution. Indirect observation occurs when information is obtained about the observations made by others. This type of observation has one feature: its results are always recorded in the case file, in the interrogation protocols of others, in the conclusions of experts (forensic psychological examination, forensic psychiatric examination), etc. The non-inclusion of the observation is an observation from the side in which the researcher is a stranger to the person or group of subjects. Embedded observation is characterized by the fact that the researcher enters the social situation as a participant, without revealing the true motives for his behavior (research). So, for example, in the research of the institute of people's advisers the method of the included supervision was used. The investigator received a detailed questionnaire developed by scientists, related to the course of the process and the meeting of judges, which he filled out after each case. The questionnaire was anonymous. Official permission to perform the observation was obtained, but the judges were not informed of the study. The advantage of the observation included is the direct contact with the object of study, recording of events that, if the observation is not turned on, could be hidden from the eyes of the researcher. All this applies to the method of objective observation. In addition, psychological research also uses the method of subjective observation - introspection (self-observation). It consists both in observing your outwardly expressed activities, psychologically significant facts of life, and in observing your inner life, your state of mind.

2. Conversation method. The purpose of psychological research is the deepest possible knowledge of the individual, his inner world, beliefs, aspirations, interests, attitudes towards various phenomena of social life. In such cases, the simple observation method is not suitable. In such cases, the conversation method is successfully used. The essence of this method is an informal conversation with people on topics of interest to the researcher (the conversation should not turn into a questionnaire). The conversation method is very similar to the interrogation method, so it is subject to certain similar requirements. In particular, the prerequisite for your success is the creation of an

atmosphere of calm, which allows you to naturally combine a free story with answers to specific questions that clarify, complement and control the presentation.

3. Questionnaire method. This is a survey of a large number of people in a strictly established form - a questionnaire. The method is based on the anonymity of the questionnaire, which allows obtaining the most objective data on the processes, facts and phenomena studied. The material obtained is subjected to processing and statistical analysis. In the field of legal psychology, the questionnaire method is widely used - from the spheres of forensic and correctional activity to the field of law enforcement. Parallel to the survey, a "public opinion machine" (telephone survey) is used. Its main advantage is complete anonymity. Because of this, subjects automatically give different answers to a series of "critical" questions than in quizzes.

4. One type of survey is the interview method. During the interview, a person expresses her opinion about certain phenomena, circumstances and actions. Interviews should be conducted according to a clearly defined schedule. With the help of it, you can get a variety of information about the peculiarities of law enforcement. Interviewing investigators and operatives reveals their professionalism, the difficulties they face, their opinion on the causes of crime and ways to reduce it, etc.

5. According to the psychological characteristics of the individual, he has a certain biographical method. The essence of this method is to collect and analyze biographical materials that shed light on human characteristics and their development. These include: setting specific biographical data, analyzing journals, collecting and comparing the memories of others, and more. In essence, the biographical method is close to the method of generalization of independent characteristics, the purpose of which is to collect personal data from different independent sources. This method provides rich material that allows you to get the most complete picture of the personality through the analysis of the opinions expressed by people with whom the subject had a relationship.

6. Experimental method - the leading method in psychological science. Its goal is to study mental phenomena in specially created conditions, and by its nature and types it is divided into laboratory and natural experiments. There is also another type of experimental method that can be used in legal psychology: it is a formative (educational) experiment. It is aimed at studying mental phenomena in the process of learning and training through the introduction of the most active teaching methods, including problem-based ones, which are used to form important professional qualities of the future lawyer.

7. Finally, we can observe another type of experimental method: the associative experiment, first proposed by the English psychologist F. Galton and developed by the Austrian scientist K. Jung. Its essence is that the subject is asked to respond to each word with the first word that comes to mind. In all cases, the reaction time is taken into account, that is, the interval between the word and the response (determination of the suspect's involvement in the crime). A variant of the experimental method used in a narrower range is the test method. Psychological testing, called testing, has long been used to address various problems: to test the level of intellectual development, to determine the degree of giftedness, professional suitability, to identify personal parameters.

8. Method of analysis of products of human activity. The products of human activity are valuable objective material that reveals many features of the human psyche. The analysis of the products of the activity allows characterizing traits of abilities and skills, receptions and forms of work, personality traits that are expressed in relation to work, etc.

The legal psychology system

Legal psychology has its own system of categories, a certain structural organization. It can be specified in the following sections: (Konovalova, 2019)

1. Methodological section, which includes the subject, objectives, system, methods and history of legal psychology.

2. Legal psychology: a branch of legal psychology that studies the psychological aspects of the application of the law, the psychological patterns of legal socialization of the individual, as well as the psychological defects that lead to defects in legal socialization.
3. Criminal psychology: section that studies the psychological characteristics of the offender, the motivation of criminal behavior in general and certain types of criminal behavior (violent crime, mercenary crime, juvenile delinquency), as well as the psychology of criminal groups.
4. Investigative and operational psychology: branch of legal psychology that studies the psychological aspects of crime detection and investigation.
5. Forensic psychology: a section that studies the psychological aspects of litigation, the problems of forensic psychological examination.
6. Psychology of correctional activity - a section of legal psychology, which studies the psychological aspects of the effectiveness of the criminal sanction, the psychological problems of the execution of the criminal sanction, the psychology of the convicted and the psychological foundations of their resocialization and rehabilitation after serving a sentence.

Conclusions

The current state of psychological science can be assessed as a period of significant increase in its development. In recent decades, the front of psychological research has expanded, new directions and scientific disciplines have appeared. The range of problems developed in psychology is growing, its conceptual apparatus is changing. Research methodology and methods are being improved.

Psychology is constantly enriched with interesting new data, hypotheses, and concepts that relate to all of its major problem areas. Psychological science is increasingly involved in solving various problems that arise in various spheres of social practice.

A complex and multifaceted course in legal psychology is designed to provide lawyers with an understanding of the socio-psychological nature of legal regulation, the psychological characteristics of human behavior in the field of relationships governed by law. Legal regulation is objectively determined by social and socio-psychological laws. Only by synthesizing legal knowledge with knowledge of the psychology of human behavior can a lawyer become a competent specialist.

Studying legal psychology, the lawyer learns the laws of human interaction with the environment, the features and conditions of formation of socially adapted and deviant behavior of the individual, the psychological factors of the criminalization of the individual. Legal psychology equips the lawyer with a systematic analysis of criminal behavior, a structural approach to the organization of judicial and investigative activities.

Emerging as an independent branch of knowledge at the end of the 19th century, legal psychology is now becoming part of legal education, integrating all branches of law on its one basis: on the basis of the "human factor".

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Dirbtinio intelekto taikymas teismo procese

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Santrauka

Dirbtinis intelektas (toliau – DI) yra matematikos ir logikos junginys, galintis kopijuoti žmogaus intelektą ir vykdyti tokias užduotis, kaip sprendimų priėmimas, vaizdų ir garso atpažinimas. DI šiuolaikiniame pasaulyje yra naudojamas itin plačiai, ne išimtis – teisinėje sistemoje. 2018 m. Estija paskelbė apie roboto – teisėjo projekto kūrimą, kuris iš esmės galėtų palengvinti teisėjų darbo krūvį, apdorojant paprastas bylas bei kompleksinę informaciją. Tačiau, analizuojant DI veikimo principus bei teisingo teismo kriterijus, kyla klausimas – ar DI sistema robotas – teisėjas gali pažeisti žmogaus teisę į nešališką teismą?

Raktiniai žodžiai: *dirbtinis intelektas, dirbtinis intelektas teisėje, robotas-teisėjas, teismo procesas, nešališkas teismas*

Įvadas

Kiekvienas asmuo turi teisę į teisinga teismą ir objektyviai priimtą sprendimą. Tai yra vienas esminių vakarietiškosios demokratijos principų, o pati idėja yra kildinama iš anglosaksų. Nuo 1215 metų Anglijos karaliaus Džono išleistame teisės akte „Magna Carta" yra deklaruojama teisė kiekvienam asmeniui gauti teisingą teismo procesą. Būtent ši teisė yra laikoma kertiniu pamatu žmogaus teisių doktrinoje, o jos egzistavimas įtvirtinta kitų fundamentaliųjų teisių prigimtį. Šios teisės įvirtinimą ir svarbą įtvirtina Europos Žmogaus Teisių Teismo jurisprudencija, kuri remiasi Konvensijos 6 str. 1d ., kai 1978 m. byloje Tyrer v. the Unite Kingdom, Teismas konstatavo, jog Konvesija yra „gyvas instrumentas" (angl. living instrument) ir turi būti aiškinama pagal besikeičiančias aplinkybes. Konvensijos 6 str. 1 d. teigiama, jog: „kai yra sprendžiamas tam tikro asmens civilinio pobūdžio teisių ir pareigų ar jam pareikšto kokio nors baudžiamojo kaltinimo klausimas, toks asmuo turi teisę, kad bylą per įmanomai trumpiausią laiką viešumo sąlygomis teisingai išnagrinėtų pagal įstatymą įsteigtas nepriklausomas ir bešališkas teismas.".

Tyrimo objektas. DI sistemų algoritmų veikimo principo keliama gresmė žmogaus teisei į teisingą teismą.

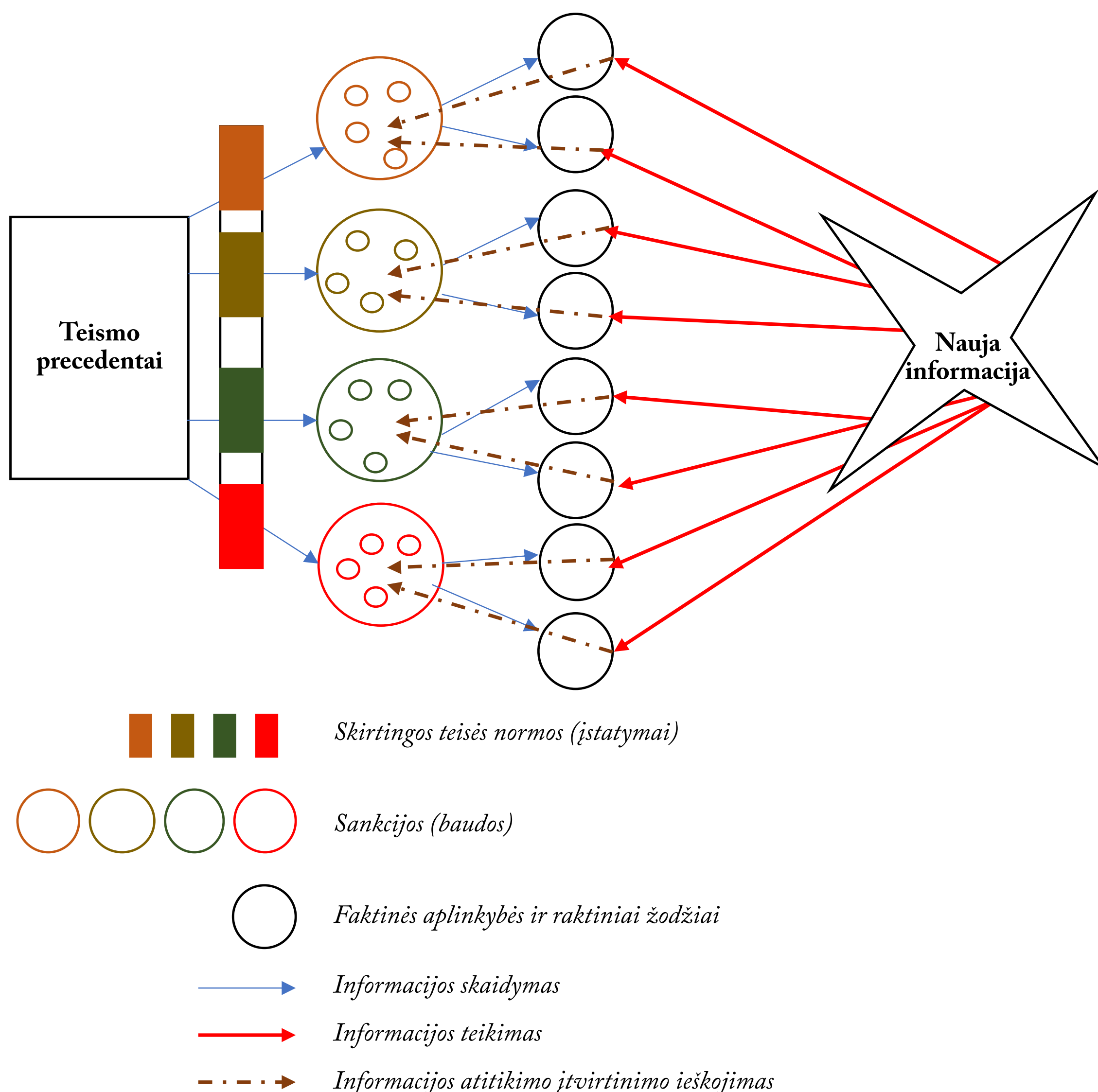
Tyrimo tikslas. Vadovaujantis DI sistemų algoritmo veikimo mechanizmu ir principais išanalizuoti roboto - teisėjo taikymo teismo procese grėsmę žmogaus teisei į nešališką teismą.

Tyrimo metodai. Sisteminės analizės, dokumentų analizės, lyginamosios analizės, loginis - analitinis bei metaanalizės metodai.

Dirbtinio intelekto veikimo principas

Antrojo pasaulinio karto metais DI sistemų įgyvendinime buvo žengtas vienas didžiausių žingsnių – kopijuojant žmogaus neuronų veikimą, buvo sukurti kompiuteriniai neuroniniai tinklai. Neorininiai tinklai iš esmės veikia taip, jog matematinių algoritmų seka suprogramuota pradinė informacija „mokosi" vienu iš mokymosi būdų ir kaupia informaciją sistemoje, o vėliau ją skaido į tam tikras schemas iš kurių „išmoksta" dar daugiau informacijos (Bernotas, 2009). Pavyzdžiui, DI sistemai yra pateikiami 5 dokumentai su skirtingais tekstais: pirmoje mokymosi fazėje, DI sistema fiksuoja informacija (raktiniai žodžiai, paveikslai esantys dokumente), o antroje – šią informaciją grupuoja. Toks dvifazis

rėžimas yra taikomas tol, kol DI sistema išmoksta pagrindinius „raktus“ (raktinius žodžius, paveikslus dokumente ir pan.) ir geba pati atlikti sprendimą ar prognozę. DI sistemos rezultatas yra šabloninis, ne unikalus. DI sistema kaupimo ir skaidymo metodu idealiai išmoksta „raktus“, tačiau negeba kurti naujų. Pavyzdžiui, DI sistemą taikant bylos nagrinėjimo procese, DI fiksuotų raktinius žodžius, kuriuos yra sukaupęs duomenų bazėje (savo neuronų tinkle), tačiau naujos informacijos gavimas į sistemą sutrikdytų jau nusistovėjusį duomenų tinklą, todėl galutinę išvadą būtų galima traktuoti tik kaip prognozę, tačiau ne sprendimą. DI sistemai pateikta informacija yra skenuojama ir joje yra ieškoma jau „išmoktų“ scenarijų pagal raktinius žodžius, todėl visa pateikta medžiaga pereina per visą neuronų tinklą ir taip yra gaunamas atsakymas, remiantis praeities veiksmais (Bartholomew, 2014). Panašiu principu veikia ir ateities prognozavimas – DI sistema iš praeityje įvykusių įvykių ir jų pakartojimų, kuriuos išmoko, spėja ateities prognozę. Pavyzdžiui, DI sistemai pateikiant administracinės teisės normas, asmens, padarusio nusižengimus, faktines aplinkybes bei paskutinius, skirtingus 5 sprendimus greičio viršijimo bylose, DI sistema gali sukonfigūruoti sprendimą. Tačiau, tokie DI sistemų veikimai yra galimi tik paprastose bylose, kurios nereikalauja kompleksinės informacijos vertinimo ir individualaus sprendimo (Nilsson, 2010).



1 paveikslas
Dirbtinio intelekto neuronų tinklo veikimo principas
Šaltinis: sudaryta straipsnio autorių

Straipsnio 1 paveikslas vaizduoja DI sistemų neuronų darbo veiklą. Pradinė stadija yra DI sistemos mokymasis, todėl naudojant prižiūrimojo mokymosi metoda, kai duomenys yra teikiami ir sistema iš to mokosi, į DI algoritmus yra įvedami teismo precedentai – pavyzdinės bylos, kurių šablonais galima naudotis. Pateiktos bylos yra išdalinamos į blokus, kurie atspindi tam tikrą teisės normą. Sekantis žingsnis – perskaidymas į bylas pagal sankcijas – nuo švelniausių iki griežčiausių ir paskutinis veiksmas – jau iš esamo padalijimo, išryškinami faktai, raktiniai žodžiai, kurie asocijuojasi su praejusių veiksmų skaidymo schemos elementais. Taigi, būtent tokiu metodu, DI sistemų algoritmai informacija išdalija į tam tikrus blokus, kurie sudaro neuronų tinklą, kurio deka DI sistema geba atlikti šabloninį veiksmą vėliau. Atvirkštiniu variantu, jau išmokusiai sistemai, pateikiama nauja informacija, kuri, pirmiausia, turi būti paskirstyta pagal tam tikrus raktinius žodžius. Įvykus „raktų" identifikavimui, duomenys keliauja į paskirtos sankcijos pagal tas aplinkybes bloką, iš kurio – į teisės normą. Išskirsčius informaciją į reikiamus blokus ir sutikrinus su įvestu sistemos pagrindu – teisės norma, DI algoritmai, atsižvelgami į teismo precedentus, pateikia savo sprendimą. Algoritmams pateikus savo išvadą, atliktas analizavimas yra išsaugojamas kaip šablonas, kuriuo bus pasinaudota ateityje. Taigi, galima teigti, jog DI sistemų algoritmų neuronų tinklas turi panašų veikimo principą kaip ir žmogaus. Algoritmų pranašumas prieš žmogų – tobula ir ideali atmintis, kuri geba apdoroti itin didelį informacijos kiekį vienu metu, todėl vertinant operatyvumo kriterijų prieš žmogų, DI sistemų algoritmai tai įgyvendina efektyviau.

Roboto - teisėjo keliama grėsmė žmogaus teisei į nešališką teismą

Žmogaus teisė į nepriklausomą teismą yra viena pagrindinių teisių, užtikrinančių objektyvų ir nešališką teismo procesą bei teismo sprendimą. Siekiant suvokti kuriamo DI roboto - teisėjo veikimo principą ir jo naudojimo galimybes teismo procese, reikia bylas suskirstyti į lengvas ir sunkias. Sunkių bylų esminis skirtumas nuo lengvų yra tas, kad sunkiais ginčų atvejais, teisėjas turi įvertinti daugiau aplinkybių, o tai reiškia, apdoroti unikalų ir didelį kiekį informacijos bei atsižvelgti į individualias aplinkybes. 2018 m. Estijai paskelbus, jog yra kuriamas roboto – teisėjo projektas, esminis šios DI sistemos veikimo kriterijus buvo nurodytas kaip „lengvos" bylos ir ginčai, kurių materialinė išraiška yra iki 7000 eurų (Strikaitė, Latušinskaja, 2021). Analizuojant teismų praktika, akivaizdu, jog materialinė išraiška nelemia ginčo sudėtingumo. Kompleksinės informacijos kiekis bei individualumas yra sietinas su ginčais, vykstančiais tarp dviejų šalių: dviejų fizinių asmenų, fizinio asmens su juridiniu asmeniu ar dviejų juridinių asmenų. Tokiais atvejais, kiekviena šalis pateikia savo medžiagą, kuri niekada nesutaps net ir su praeityje vykusiomis panašiomis bylomis. Tačiau, tokiais atvejais, kai pavyzdžiui, asmuo viršijo greitį, roboto-teisėjo veikimas galėtų būti įgyvendintas. Administracinėse bylose vyrauja teisės normos ir asmens, padariusio nusižengimą būtinybė, o papildomų faktinių aplinkybių analizavimas yra taikomas retai. Todėl būtent administracinė teisė galėtų ateityje pasitelkti DI sistemų algoritmus. Tačiau, analizuojant civilinės ir baudžiamosios teisės teismų praktiką, akivaizdu, jog roboto – teisėjo naudojimas galimai pažeistų žmogaus teisę į teisingą teismą.

Nepriklausomas teismas

DI algoritmų sistemoss, įskaitant ir robotą – teisėją mokosi prižiūrimuoju metodu. Tai reiškia, kad jų mąstymas yra paveikiamas programuotojų ir kitų asmenų, kurie pradinėje programavimo stadijoje teikia duomenis ir informaciją. Jeigu pareigūnas, kuris kelia informaciją į sistemą arba programuotojas, atliekantis pirminius algoritmų sekos veiksmus, pažeis formuojamą neuronų tinklo svorį vienoje iš pozicijų, yra galimas roboto – teisėjo nešališkų išvadų teikimas. Neuronų tinklo svorį galima suvokti, kaip tam tikros informacijos perteklių arba stygių. Pavyzdžiui, jeigu pateikta informacija apie nusikalstamų asmenų rasę yra nelygiavertė – iš 100 asmenų, įvykdžiusių vagystę, 62 asmenys bus pateikti kaip juodaodžiai, o likę – baltaodžiai, DI sistema yra suprogramuojama taip, jog juodaodžiai yra labiau linkę vykdyti tokias veikas, todėl esant dviems įtariamiesiems – juodaodžiui ir baltaodžiui, sistema apkaltins juodaodį. Objektyvumo pažeidimo rizika yra ne dėl pačios sistemos klaidų, tačiau dėl asmenų, teikiančių informaciją į DI sistemas, žmogiškųjų faktorių. Kadangi, kaip ir minėta prieš tai, DI sistemų algoritmai kopijuoja žmogaus intelektą, šių programų veikimas ir darbo procesai yra neįmanomi be žmogaus įsikišimo. Lyginat žmogaus ir DI sistemų algoritmų intelekto vystimą, galima teigti, jog tai yra ganėtinai panašu, nes žmogaus požiūris priklauso nuo kitų asmenų bei aplinkos, kuri

įdiegė tam tikras vertybės, lygiai tokių pačiu principu mokosi ir DI algoritmų sistema. Taigi, pirmasis galimas nešališkumo principo pažeidimas taikant robotą-teisėją teismo procesuose yra nulemtas dėl privalomojo žmogaus įsikišimo (Nilsson, 2010).

Analizuojant roboto – teisėjo veikimo principą plačiuoju požiūriu, galima teigti, jog nešališkumo principo efektyvesnį įgyvendinimą teismo procese galėtų padėti įtvirtinti jausmų ir empatijos nebuvimo aspektas. Žvelgiant į tai, jog žmogus, atliekantis teisėjo darbą, yra veikiamas žmogiškųjų faktorių, išlieka nemaža tikimybė, jog vien dėl savo požiūrio, nuovargio, įsitikinimų ar kitų veiksnių, gali priimti teismo sprendimą, kuris nors ir atitiks teisės normose numatytus kriterijus, tačiau bus paveiktas emocinės ir jausminės teisėjo būklės. Analizuojant DI sistemų veikimo principą, kaip ir minėta anksčiau, nešališkumas gali būti pažeidžiamas vykdant bazinę sistemos programavimo stadiją, kai yra formuojamas pagrindas tolimesniam DI sistemos mokymuisi – pateikiama informacinė medžiaga, kuri dėl neuronų formavimo netinkamo ir nelygiaverčio svorio, tolimesnį schemos braižymą atlieka neobjektyviai. Tačiau, jeigu DI sistemos, šiuo atveju roboto – teisėjo, programavimo pagrindas yra atliekamas teigiamai, objektuvumo kriterijus lenkia žmogaus teisėjo galimybes. Vadovaujantis Hovardo Earlo Gardnerio (Howard Earl Gardner daugialypio intelekto teorija) daugialypio intelekto teorija, galima teigti, jog DI sistemos yra kuriamos pagal loginį ir matematinį asmens intelektą, kopijuojant žmogaus linijinį ir analitinį mastymą, kuriame nėra empatijos išraiškų, todėl būtent šis kriterijus lemią tai, jog DI sistema, šiuo atveju robotas – teisėjas, išvengia kalbinio intelekto, kuris dirba pagal jausmų ir emocijų išreiškimą, galimai keliamų šališkumo bėdų, kaip pavyzdžiui – teismo sprendimo priėmimas, kuriame būtų įžvelgiamas empatijos ir jausmų naudojimas. Analizuojant DI sistemų veikimo principą ir galimą roboto – teisėjo pritaikymą teismo procese iš teigiamos pusės, kai programojamoje pagrindinėje bazėje yra įvesti lygiaverčiai neuronų svoriai, akivaizdu, jog nešališkumo kriterijus yra įgyvendinimas efektyviau už žmogaus teisėjo darbo procesus nagrinėjant bylą. Žmogui, atliekančiam teisėjo darbo funkcijas, nešališkumo kriterijus yra vienas pagrindinių, tačiau žvelgiant į ilgametę teismų praktiką, akivaizdu, jog žmogiškojo faktoriaus kalbinis intelektas dažnai paveikia teismų sprendimus, o kadangi, is intelekto tipas yra daugiau ar mažiau būdingas visiems asmenims, jo išvengti yra neįmanoma. Analizuojant DI sistemos roboto – teisėjo praitaikomumą ir nešališkumo principo įgyvendinimą, svarbu yra ir tai, jog vadovaujantis DI sistemų veikimo principu, yra įžvelgiamas ir tarpasmeninio intelekto kopijavimas nuo žmogaus. Tarpasmeninis intelektas yra sietinas ir su loginiu – matematiniu intelektu, kurio veikimas yra grindžiamas žmonių elegesio analizavimu ir ateities ketinimu prognozavimu. Žvelgiant į loginio – matematinio intelekto linijinį analitinį gebėjimą „šaltai" įvertinti situaciją bei į pagalbą pasitelkiant tarpasmeninį intelektą bei išvengiant kalbinio intelekto, programinė įrangą, jeigu neuronų tinklo svoriai yra suprogramuoti lygiavertiškai, galima teigti, jog DI sistemos robotas – teisėjas gali visiškai pilnai efektyvinti objektyvumo ir nešališkumo kriterijų įgyvendinimą teismo procese, išvengiant žmogiškojo faktoriaus ir kalbinio intelekto keliamų problemų. Tačiau, svarbiausias aspektas yra tai, jog kaip ir minėta ankščiau, pagrindinę bazę DI sistemų neuronų tinklui programuotoja žmogus, kuris turi bent minimaliai išvystytą kalbinį intelektą, kuris gali turėti įtakos neuronų paskirstymo svoriui, o tai yra lemiamas kriterijus, pažeidžiantis nešališkumo principą, todėl ypač svarbu priversti DI sistemų pradinę bazę formuoti atliekant matematinius skaičiavimus lygiavertiškai (Casstells, 2000; Alhelt, 2017).

Taigi, vadovaujantis DI sistemų veikimo esminiu mechanizmu, galima teigti, jog DI sistemos roboto – teisėjo naudojimo įvedimas į teismo procesą iš esmės gali padidinti galimybę pažeisti nešališkumo principą bylos nagrinėjime. Pirmiausia, tai prižiūrimojo mokymosi metodas yra taikomas mokant DI sistemą iš bazinės medžiagos, kuri yra pateikiama programuotojo, o būtent šis aspektas vertinant kritiškai, gali išbalansuoti lygiavertį DI sistemos neuronų tinklą (Negnevitsky, 2005). Nors vienas netikslumas programuojant ir sistema toliau plėtos neobjektyvią ir šališką duomenų bazę, sprendimus bei prognozes (Fraser and Dutta, 2010). Akivaizdu, jog žvelgiant į tai, jog programuotojas yra žmogus, kurį veikia žmogiškieji faktoriai bei kalbinis intelektas, rizika, kad bazinė duomenų bazė, nuo kuriuos prasideda DI sistemos mokymasis, greičiausiai bus suformuota vienu ar kitu atžvilgiu neobjektyviai. Taigi, galima daryti išvadą, jog DI sistemos roboto – teisėjo įvedimas į teismo procesą yra rizikingas žingsnis, žvelgiant į nešališkumo principo įgyvendinimą, tačiau pašalinus žmogaus įsikišimo į sistemą veikimą, robotas – teisėjas būtų puiki priemonė efektyvinant objektyvumo principą teismo procese, nes kaip ir minėta ankščiau, DI sistemos kopijuoja žmogaus loginį – matematinį bei tarpasmeninį intelektą, neveikdamas pagal kalbinį intelektą, o tai yra esminis kriterijus nešališkume.

Išvados

1. DI sistemų algoritmai veikia pagal išmoktą šabloną. DI sistemų algoritmai pradinio mokymosi metu surenka duomenų bazę, kurią skaido pagal blokus. Vėliau, ši duomenų bazė yra pildoma šablonais, pagal kuriuos DI sistemų algoritmai operatyviai gali teikti sprendimus, išvadas arba prognozes.

2. DI sistemų algoritmai negeba suteikti visiškai tikslių rezultatų, jeigu teikiama informacija neatitinka nei vieno išmokto šablono. DI pagal raktinius žodžius ar kitą medžiagą gali pateikti sprendimą ar prognozę, tačiau nebus atsižvelgta į individualius faktus.

3. DI sistemų algoritmai gali būti naudingi administracinėje teisenoje, sprendžiant bylas, kurioms užtenkta teisės normos ir asmens, padariusio nusikalstama veiką fakto, tačiau negali dirbti su civilinės ar baudžiamosios teisės bylomis, nes jose individualios faktinės aplinkybės niekada nebūna idetiškai tapačios byloms, kurios yra panašios ir vyko praeityje.

4. Robotas – teisėjas, kaip naujausias teisei skirtas DI sistemų algoritmų kūrinys, gali pažeisti nešališkumo principą. Atsižvelgiant į tai, jog DI sistema kopijuoja žmogaus intelektą, o žmogus mokosi iš visuomenės ir kitų žmonių, DI gali tai, ką suprogramuoja ir kokią medžiagą pateikia žmogus. Todėl veikiant žmogiškąjam faktoriui ar norui pakenketi dėl tam tikrų priežasčių, yra galimas nešališkas roboto – teisėjo programavimas.

5. Koreguojant DI sistemų mokymosi metoda ir įgyvendinant DI algoritmų savarankiškumą ir veikimą be žmogaus įsikišimo, tai būtų puikus ir garantuotas būdas efektyvinti nešališkumo principo užtikrinimą teismo procese.

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Įvaikinimo instituto teisinio reguliavimo ypatumai

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Santrauka

Tarptautiniu mastu įvaikinimo institutas šiuolaikinėje visuomenėje pripažįstamas svarbus teisinės demokratinės valstybės elementas. Įvaikinimo statistikos augimas nurodo, kad įvaikinimui skiriamas didelis dėmesys tiek nacionaliniu tiek tarptautiniu lygiu. Įvaikinimo instituto konfidencialumas suteikia intenciją ieškoti teisiname reguliavime ypatumų, suvokti jo specifikas. Įvaikinimas negrįžtamas procesas. Įstatymų leidėjas neįtvirtino civiliniame kodekse tikslios įvaikinimo sampratos. Lietuvos Respublikos civiliniame kodekse nurodytos įvardytos sąlygos taikomos įvaikinamam vaikui ir įtėviams yra imperatyvaus pobūdžio, tačiau esančios išlygos skatina atlikti teisės aktų analizę siekiant suvokti tikslesnį teisinį reguliavimą. Teismų praktika įvaikinimo instituto teisiniame reguliavime yra konfidenciali tai nurodo šio instituto specifiškumą ir įvaikinamų vaikų interesų užtikrinimą.

Raktiniai žodžiai: *įvaikinimas, įvaikinamas vaikas, vaiko interesai.*

Įvadas

Visame pasaulyje susiduriama su vaikų interesų, teisių pažeidimais. Kiekviena valstybė esanti Europos Sąjungos nare ir ratifikavusi tarptautinius dokumentus, kurie saugo ir gina vaiko interesus, siekia savo šalyje suteikti tinkamas sąlygas vaikui vystytis, augti, ugdytis. Lietuvos Respublika 1993 metais pasirašė Hagos Konvenciją „Dėl vaikų apsaugos ir bendradarbiavimo tarptautinio įvaikinimo srityje"(Konvencija Dėl vaikų apsaugos ir bendradarbiavimo tarptautinio įvaikinimo srityje…, 1993). Šis žingsnis Lietuvai buvo pradžia įsteigti pirmąją instituciją, kuri reguliavo įvaikinimo procesą - Įvaikinimo tarnybą prie Socialinės apsaugos ir darbo ministerijos (Valstybinės vaiko teisių ir apsaugos įvaikinimo tarnyba…,2022). Šios tarnybos paskirtis rūpintis vaiko interesais, užtikrinti jo prigimtinių teisių saugumą.

Lietuvos Respublikos Konstitucijoje, kuri yra aukščiausią galią turintis teisės aktas, įtvirtinta, kad „šeima yra visuomenės ir valstybės pagrindas. Valstybė saugo ir globoja šeimą, motinystę, tėvystę ir vaikystę" (Lietuvos Respublikos Konstitucija…, 1992).Siekiant geriau atskleisti įvaikinimo instituto reikšmę, būtina paaiškinti šeimos sampratą. Lietuvos Respublikos Konstitucinis teismas 2011 metų rugsėjo 28 dienos nutarime yra pasisakęs, kad šeimos samprata ne tik siejama su santuokos sudarymu, kuri yra neatsiejama šeimos dalis, tačiau šeima suvokiama platesne prasme (Lietuvos Respublikos Konstitucinio Teismo 2011 m. rugsėjo 28 d. nutartis byloje Nr. 21/2008). Mūsų valstybė yra suinteresuota saugoti ir globoti šeimas, užtikrinti jose augančių vaikų interesų apsaugą. Tačiau nevisada pavyksta užtikrinti vaikams sąlygas gyventi savo biologinėse šeimose. Tam gali trukdyti įvairios priežastys - turtiniai sunkumai, ekonominės priežastys, socialinės ar psichologinės priežastys, smurtas šeimoje, asociali aplinka. Visa tai sukelia grėsmę vaikui, kuris pats negali savimi pasirupinti dėl savo bejėgiškumo ir kurio interesus turi ginti valstybė.

Lietuvoje šiuo metu mažai nagrinėjama įvaikinimo teisinio reguliavimo tematika, nes įvaikinimo institutas yra specifinis ir konfidencialus. Pastebėta, kad mokslininkai daugiau dėmesio skiria šiam institutui socialiniu aspektu. Pavyzdžiui, Vida Gudžinskienė ir Gediminas Navaitis bei R. Baranauskienė atliko tyrimus, susijusius su įvaikinimo socialiniu kontekstu. Todėl šiame straipsnyje siekiama pagilinti su įvaikinimo teisiniais klausimais susijusią informaciją ir atskleisti teisinio reguliavimo problematiką ir įvaikinimo instituto teisinio reguliavimo ypatumus.

Tyrimo objektas: įvaikinimo instituto teisinis reguliavimas siekiant vaiko interesų užtikrinimo.

Tyrimo tikslas: išanalizuoti įvaikinimo instituto teisinio reguliavimo aspektus užtikrinant vaiko interesus.

Darbo uždaviniai:

1. Apibrėžti įvaikinimo sampratą.
2. Ištirti nacionalinius ir tarptautinius teisės aktus susijusius su įvaikinimu.
3. Identifikuoti teismų praktiką, susijusią su įvaikinimo teisiniu reguliavimu.

Tyrimo metodai: darbe taikoma mokslinės literatūros analizė, kuri padeda įsigilinti į šio instituto specifiką, analizuojami teisės aktai, reguliuojantys įvaikinimo institutą, analizuojama teismų praktika, susijusi su įvaikinimo institutu, taikomas apibendrinimo metodas.

Įvaikinimo instituto samprata

Remiantis 2019 m. vaiko teisių apsaugos tarnybos veiklos atsakaita pastebėta, kad tarptautiniu mastu, LR piliečius dažniausiai įsivaikina italų pilietybės asmenys. Autorės nuomone, remiantis šiais duomenimis, svarbu apžvelgti ir reikalavimus, taikomus Italijos Respublikoje. Statistikos duomenimis, Lietuvos piliečiai 2019 metais įsivaikino 74 vaikus, kurie augo institucinėje globoje. 2017 metais įsivaikinti 92 vaikai - ši duomenų diferencijacija parodo, kad įvaikinamų vaikų skaičius sumažėjo ir tai lėmė įvaikinamų vaikų amžius - dauguma buvo iki 3 metų. Lietuvos Respublikoje asmenys ketinantys įsivaikinti, dažniausiai siekia įsivaikinti sveikus vaikus, neturinčius sveikatos sutrikimų. 2019 metais Lietuvos piliečiai įsivaikino 43 tokį reikalavimą atitikusius vaikus. Tuo tarpu Italijos piliečiai, remiantis 2019 metų statistiniais duomenimis, įsivaikino 17 vaikų, turinčių rimtų sveikatos problemų (2019 m. veiklos atasakaita…, 2019).

Konstatuotina, kad Italijos piliečiai sutinka vaikus įsivaikinti su sveikatos sutrikimais, o Lietuvos piliečiai pirmenybę teikia tik sveikiems vaikams. Lietuvoje nuo 2018 metų pradėta vykdyti vaikų globos namų visoje Lietuvoje pertvarka. Jos tikslas - nuo 2018 metų iki 2020 metų pereiti nuo institucinės globos, prie vaikų, likusių be tėvų globos gyvenimo šeimynose, tačiau šis projektas dar vis vykdomas (2021 m. globos pertvarka…, 2021).

Analizuojant šio projekto rengimo paskirtį suvokiama, kad valstybės prioritetas - jog vaikas augtų šeimoje. Lietuvos Respublikos Konstitucijoje įtvirtinta, kad šeima yra valstybės pamatas (Lietuvos Respublikos Konstitucija…,1992). Lietuvos Respublikos vaiko teisių apsaugos pagrindų įstatymo 7 straipsnyje įtvirtinta, kad vaikas turi turėti galimybę turėti tėvus. Šio įstatymo 33 straipsnyje nurodoma, kad vaikas pilnavertiškai augti ir tobulėti gali tik šeimoje (Lietuvos Respublikos vaiko teisių pagrindų įstatymas…, 1996). Šis įstatymas nurodo aplinkybes, kurioms atsiradus vaikas paimamas iš šeimos - tikras pavojus vaiko saugumui ir gyvybei. Įstatymų leidėjas teikia pirmenybę vaiko augimui biologinėje šeimoje, jeigu tai nepažeidžia vaiko interesų (Lietuvos Respublikos vaiko teisių pagrindų įstatymas…, 1996).

Lietuvoje įvaikinimo institutas brendo sąlyginai ilgai - tam neigiamos įtakos turėjo istoriniai laikotarpiai, kurie sukėlė permainų visame pasaulyje. Pavyzdžiui – priimti Lietuvos Statutai, kurie draudė įvaikinimą, pirmojo pasaulinio karo laikotarpis, kuriam būdingas draudimas įsivaikinti, jeigu sutuoktinis turi savo biologinių vaikų.(Mikelėnas, V., 2009). Analizuojant įvairius norminius teisės aktus nerasime konkretaus įvaikinimo sąvokos apibūdinimo, tačiau priimtiniausias apibūdinimas, kuris atskleidžia biologinių tėvų, įtėvių ir vaiko tarpusavio ryšį būtų šis: „ įvaikinimas – procesas, kurio metu be tėvų globos likusiam vaikui panaikinamos tarpusavio asmeninės ir turtinės teisės ir pareigos su tėvais ir giminaičiais pagal kilmę ir sukuriamos tarpusavio asmeninės ir turtinės teisės ir pareigos su įtėviais bei jų giminaičiais kaip giminaičiams pagal kilmę“ (Lietuvos Respublikos vaiko teisių apsaugos ir įvaikinimo tarnyba…, 2022).

Įvaikinamui vaikui ir jo įtėviams įvaikinimo procesas iškelia sudėtingą užduotį vienas kitą pamilti nesant kraujo ryšio t.y sukurti ryšį tarsi tėvų ir vaikų nesant biologinio aspekto “.(Gustaitienė, A., 2014). Tarptautiniu mastu pastebima, kad ne visose valstybėse yra įmanoma įsivaikinti vaiką, nes Islamo teisė

draudžia įsivaikinti vaiką esant jo biologiniams tėvams gyviems, šioje valstybėje leidžiama rūpintis tik našlaičiu vaiku tokio instituto, kaip įvaikinimas Islamo teisė nereguliuoja. Rusija buvo nustačiusi imperatyvą įsivaikinti rusijos piliečius Jungtinių amerikos valstijų pilietybės asmenims, Kinijoje taikomos griežtos taisyklės siekiant įsivaikinti vaikus. Nustatyta, kad pasaulyje vis dar egzistuoja valstybių, kuriose įvaikinimo institutas nėra taikomas ši teisinė spraga atima iš vaikų galimybę turėti tėvus (Perkumienė, D., Beriozovas, O., Escudeiro ,M,J., 2021).

Įvaikinimo instituto teisinio reguliavimo sąlygos

Lietuvoje, siekiant įsivaikinti vaiką, būtina laikytis visų sąlygų, nurodomų CK tryliktame skyriuje. Pirmiausia, įvaikinimas turi atitikti vaiko interesus (Lietuvos Respublikos civilinis kodeksas…, 2020). Lietuvos Respublikos vaiko teisių pagrindų įstatymo ketvirtame straipsnyje nurodoma, kad visada reikia atsižvelgti į įvaikinamo vaiko interesus ir jie turi būti teisėti Tarptautiniu mastu geriausio vaiko interesų principas išanalizuotas Europos Žmogaus Teisių Teismo. Europos Žmogaus Teisių Teismas sieja vaiko interesus su dvejomis galimybėmis- vaiko užtikrinimas augti sveikai ir vaiko ryšių palaikymas su tėvais, jeigu tai nepažeidžia jo interesų. Lietuvos teismai vaiko interesų teisėtą užtikrinimą sieja su tinkamos aplinkos suteikimu vaikui, kurioje jis galėtų užsiimti veikla, kuri padėtų jam tobulėti, augti. Klaipėdos apygardos teismo nagrinėjamoje byloje apeliacinės instancijos teismas vadovavosi Europos Žmogaus Teisių Teismo praktikos suformuluota taisykle, kad svarstant dėl geriausių vaiko interesų reikia garantuoti, kad vaikas augs sveikoje aplinkoje ir tėvai nepakenks vaiko sveikatai ir kitas aspektas turi būti užtikrintas vaikosu šeima palaikymas su išimtimi, jeigu tas ryšių palaikymas kenks vaiko interesams (Klaipėdos apygardos teismo nutartis 2021 m. sausio 14 d. nutartis civilinėje byloje Nr. E2S-10666-165/2021).

CK 3.209 straipsnio trečioje dalyje nurodoma : „ įvaikinti leidžiama ne jaunesnius, kaip trijų mėnesių nepilnamečius vaikus“ (Lietuvos Respublikos civilinis kodeksas…,2020). Siekiant įvertinti įstatymo leidėjo reikalavimą, pirmiausia svarbu sovokti, kas yra vaikas. Lietuvos Respublikos vaiko teisių apsaugos pagrindų įstatyme apibrėžiama, kad vaikas - fizinis asmuo iki aštuoniolikos metų (Lietuvos Respublikos vaiko teisių pagrindų įstatymas…,2017).

Amžiaus nuostata suponuoja, kad iki aštuoniolikos metų vaikas nėra visiškai subrendusi ir savarankiška asmenybė, nes vadovaujantis CK nuostatomis, fizinis asmuo visišką veiksnumą įgyja sulaukęs pilnametystės (Lietuvos Respublikos civilinis kodeksas…,2020). Įstatymo leidėjo imperatyvus nurodymas nustatytas turint tikslą ginti vaiko interesus. Lietuvoje susiklosto situacijų, kai moterys pagimdžiusios vaiką jį palieka dėl įvairių priežasčių. Tokiems poelgiams daro įtaką pogimdyvinė depresija, ekonominės priežastys, socialinių įgudžių stoka, psichologinės priežastys.

Susiduriama su atvejais, kai biologinė vaiko motina pradeda gailėtis savo poelgių ir pradeda ieškoti savo vaiko"(Mikelėnas, V., 2009). Lietuvos Respublikos vaiko teisių apsaugos tarnybos duomenimis 2020 metais „Gyvybės langeliuose“ buvo palikta dešimt kūdikių (Lietuvos Respublikos vaiko teisių apsaugos ir įvaikinimo tarnyba…, 2022). Įstatymų leidėjas nurodydamas trijų mėnesių amžiaus ribą įvertino pagimdžiusios moters savijautos ypatumus remdamasis medicininiais tyrimais ir nusprendė, kad toks laiko tarpas pakankamas moterims nuspręsti ar vaiką susigražinti, ar duoti sutikimą, kad jį įvaikintų kita šeima “. (Mikelėnas, V., 2009).

Apibendrinant galima teigti, kad įstatymų leidėjas skiria prioritetą vaiko pareikiams, tačiau suteikia laiko ir motinoms, kurios dėl anksčiau minėtų priežasčių po gimdymo atsižada vaiko. Tai suponuoja, kad įstatymų leidėjas pirmenybę teikia vaiko išsaugojimui jo biologinėje šeimoje.

CK 3.209 straipsnio antroje dalyje įtvirtintas reikalavimas, jog siekiant įvaikinti vaiką, jis būtų įrašytas į ivaikinamų vaikų sąrašą. (Lietuvos Respublikos civilinis kodeksas…,2020). Įvaikinamų vaikų apskaita vykdoma vadovaujantis Lietuvos Respublikos nutarimu „ Dėl Asmenų, norinčių įvaikinti vaikus, ir galimų įvaikinti vaikų apskaitos Lietuvos Respublikoje tvarkos aprašu“(Dėl Asmenų, norinčių įvaikinti vaikus, ir galimų įvaikinti vaikų apskaitos Lietuvos Respublikoje tvarkos aprašas …,2002). Vaikas įtraukiamas į šią apskaitą, kai atitinka nors vieną iš nutarime nustatytų sąlygų: vaiko biologiniai tėvai yra mirę, vaiko tėvai teismo sprendimu paskelbti mirusiais, vaiko biologiniai tėvai nėra žinomi,

vaiko tėvams teismo sprendimu neterminuotai apribotos teisės vaiko atžvilgiu, vaiko tėvai duoda sutikimą, kad vaikas būtų įvaikintas - tai susiję tiek su veiksniais, ribotai arba neveiksniais biologiniais tėvais“ (Dėl Asmenų, norinčių įvaikinti vaikus, ir galimų įvaikinti vaikų apskaitos Lietuvos Respublikoje tvarkos aprašas …, 2002).

Įvaikinamų vaikų apskaitos nutarime yra įstatymo nustatytų išimčių. Vaikas neįrašomas į apskaitą, jeigu gyvena su vienu iš tėvų ar įtėvių, arba vaiką nori įsivaikinti jo biologinio tėvo (įtėvio) sutuoktinė ar biologinės motinos (įmotės) sutuoktinis.“(Dėl Asmenų, norinčių įvaikinti vaikus, ir galimų įvaikinti vaikų apskaitos Lietuvos Respublikoje tvarkos aprašas …, 2002). Analizuojant nutarimą, susijusį su vaikų apskaita nustatoma, kad vaiko giminaičių atsisakymai sutikti, kad vaikas būtų įvaikinamas, prailgina vaiko patekimo į vaikų apskaitos sąrašą ir užvilkinamas įvaikinimo procesas. Įstatymų leidėjas nustatė imperatyvą įsivaikinti savo biologinius vaikus, seseris ir brolius. CK 3.209 str. 4 d. įtvirtinta nuostata, jog neleidžiama įvaikinti savo vaikų, seserų ir brolių (Lietuvos Respublikos civilinis kodeksas…,2020). Analizuojant šią įstatymo normą akivaizdu, kad šis draudimas yra pagrįstas, nes šiuos asmenis sieja kraujo ir giminystės ryšiai, o įvaikinimo institutu siekiama sukurti ryšius su svetimais žmonėmis.

Priimant sprendimą dėl brolių ir seseru išskyrimo, teismas išklauso vaikų nuomones. CK 3.215 straipsnio pirmoje dalyje nurodoma, kad vaikas, kuris turi dešimt metų ir kurį siekiama įvaikinti, turi pateikti teismui savo sutikimą dėl įvaikinimo. Taip pat nurodoma, kad vaikas, jaunesnis, nei dešimt metų amžiaus, gali būti išklausomas teismo posėdžio metu. Kauno apylinkės teismo 2020 m. gegužės 14 d. nutartyje, dėl vaiko globėjo atleidimo nuo pareigų ir kito globėjo paskyrimo, buvo akcentuojamas brolių ir seserų neišskyrimo principo svarbumas. Vadovaujantis Konvencijos nuostatomis vaiko raida pilnavertiška gali būti tik augant šeimoje (Kauno apylinkės teismo nutartis 2020 m. gegužės 14 d. nutartis civilinėje byloje Nr. E2YT-10666-217/2022).Remiantis 2019 metų Valstybės vaiko teisių apsaugos ir įvaikinimo tarnybos veiklos atsakaita pastebima, kad tarptautiniu mastu sumažėjo kartu įvaikinamų brolių ir seserų (2019 m. veiklos atasakaita…, 2019). Pažymima, kad daugiausia brolius ir seseris drauge įsivaikina Italijos piliečiai. Darbo autorė daro išvadą, kad Italijoje šeima yra svarbi vertybė ir brolių ir seserų ryšių išsaugojimas yra prioritetinis klausimas.

Įvaikinimo instituto teisinės pasekmės

CK 3.227-3.228 straipsniuose reglamentuojami įvaikinimo teisiniai padariniai. Pirmiausia, įvaikinimu tarp vaiko ir jo biologinių tėvų bei giminaičių panaikinamos asmeninės teisės ir pareigos turtiniu atžvilgiu. Panaikinus siejusį ryšį su biologiniais tėvais, sukuriamas naujas ryšys su įtėviais, kaip giminaičiais pagal kilmę, įvaikinamojo įtėviai įgauna asmenines tarpusavio turtines teises ir pareigas. Priėmus teismo sprendimą, vaikui pakeičiama pavardė ir vardas. Įvaikinamo vaiko įtėviai gali kreiptis dėl teikiamų socialinių lengvatų (Mikelėnas, V., 2009). Lietuvoje, įvaikintų vaikų tėvams suteikiamos įvairios lengvatos pagal išmokų vaikams įstatymą- vaiko pinigai, vienkartinė išmoka, bei išmoka, kuri mokama įsivaikinus 24 mėnesius.

2015 m. LAT išnagrinėjo bylą, kurioje pirmos instancijos teismas pareiškėjams leido įsivaikinti nepilnamečius berniukus. Praėjus ketveriems metams po įvaikinimo, pareiškėjų teigimu, atsirado naujų aplinkybių, kurios įtakojo juos pakeisti savo sprendimą dėl įvaikinimo. Pareiškėjai rėmėsi 2019 m. birželio 4 dienos specialisto išvada dėl įvaikintų vaikų sveikatos būklės ir nustatytų naujų diagnozių jų atžvilgiu. Vilniaus apygardos teismui pareiškėjai pateikė prašymą atnaujinti bylos nagrinėjimą dėl naujai paaiškėjusių aplinkybių, tačiau teismas nepatekino pareiškėjų tokio prašymo (Lietuvos Aukščiausio Teismo Civilinių bylų skyriaus teisėjų kolegijos nutartis 2020 m. baladžio 01 d. nutartis civilinėje byloje Nr. E3K-3-167-969/2020)

Lietuvos Respublikos įstatymai nereglamentuoja įvaikinimo panaikinimo, nes nėra galimybės panaikinti tėvystės ir motinystės ryšių. Pažymėtina, kad įstatymų leidėjo nuomonė dėl įvaikinimo panaikinimo istoriškai kito. Lietuvoje pagal galiojusį Santuokos ir šeimos kodekso 128 str. įvaikinimas galėjo būti panaikinimas su išlyga, jeigu dėl įvaikinamojo biologiniai tėvai nebuvo pateikę sutikimo jį įvaikinti.2001 metai atnaujinus Lietuvos civilinį kodeksą išnyko nuostatos, leidžiančios panaikinti įvaikinimą ar jį pripažinti negaliojančiu. Lietuvos teisinėje sistemoje tiesiogiai nėra nurodoma, kad

negalima atnaujinti bylų dėl įvaikinimo proceso CPK 366 str. 3 dalyje, tačiau taikant CPK 366 str 1 dalyje nustatytus proceso atnaujinimo galimybes būtina atsižvelgti į įvaikinamo vaiko interesus (Lietuvos Aukščiausias Teismas. Teismų praktika. Biuletenis NR 53 2020 m). Apibendrinant galima konstatuoti, kad įvaikinimo atšaukti negalima, tačiau įtėviams netinkamai atliekant savo pareigas ir pažeidžiant vaiko interesus galima apriboti įtėvių valdžią (Mikelėnas, V., 2009). Tėvų valdžios apribojimo atvejai įtvirtinti Lietuvos Respublikos civilinio kodekso 3.180 straipsnyje. Tėvai neatlieka savo pareigų t.y neauklėja vaikų, piknaudžiauja savo teisėmis įgyvendinant valdžią, žiauriai elgiasi su vaikais t.y naudoja fizinį ar psichinį smurtą, netikamą pavyzdį rodo savo vaikams elgiasi amoraliai, neprižiūri vaikų t.y nesirūpina jais (Vilniaus regiono apylinkės teismo 2019 m. spalio 28 d. nutartis civilinėje byloje Nr. E2-7999-675/2019)

Išvados

1. Lietuvos Respublikos Konstitucijoje šeima yra valstybės pagrindas. Įvaikinimo samprata nėra konkrečiai apibrėžta teisės aktuose, tačiau tiksliausia būtų teigti, kad įvaikinimas yra procesas, kurio metu tarp vaiko ir teisę auginti vaiką praradusių biologinių tėvų panaikinamos tarpusavio asmeninės ir turtinės teisės bei pareigos, siejusios juos ir jų giminaičius, ir sukuriamas naujas ryšys tarp vaiko ir įtėvių.

2. Atlikus nacionalinių Lietuvos teisės aktų analizę nustatyta, kad siekiant Lietuvoje įsivaikinti vaiką būtina laikytis visų civilio kodekso trylikto skyriaus sąlygų. Įstatymų leidėjas tam tikrais atvejai leidžia taikyti išimtinius atvejus, kurie susiję su brolių ir seserų neišskyrimo principu ir įtėvių amžiumi, įtėvių šeimynine padėtimi. Europos Žmogaus Teisių Teismo praktikoje nagrinėjant geriausio vaiko interesų pricipą nustatyta, kad vaiko interesai siejami su dvejomis sąlygomis – vaiko užtikrinimas augti sveikai ir vaiko ryšių palaikymas su tėvais.

3. Atlikus bylų analizę įvaikinimo srityje nustatyta, kad įvaikinimo teisinis reguliavimas retais atvejais pažeidžia vaiko interesus, remiantis atlikto tyrimo rezultatais nustatyta, kad įvaikinimo instituto teisinis reguliavimas teikia pirmenybę vaiko interesų apsaugai ir vaiko atžvilgiu galimybės suteikimo augti šeimoje. Nacionaliniais ir tarptautiniai teisės aktai prioritetą teikia vaikui, kaip silpnesnei asmenybei nesugebančiai savarankiškai apsiginti. Įvertinus teismų praktiką įvaikinimo srityje pastebėta, kad įvaikinimo teisinis reguliavimas turi keletą spragų konkrečiai vaiko interesų apsaugos srityje. Lietuvos Aukščiausio Teismo nagrinėjamoje 2020 m. balandžio 1 dieną byloje nustatytas dviejų mažamečių vaikų interesų pažeidimas siekinat atnaujinti bylos nagrinėjimą dėl įvaikinimo turint tikslą panaikinti įvaikinimą.

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Laws and Regulations of Advertising in Malaysia

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Annotation

Advertisement is a form of communication that is easy to be absorbed by consumers. Businesses use various marketing strategies to capture the attention of the prospective consumers to promote, to introduce and to attract consumers to buy their products. Conventional advertisement through print media, television and radio which the sources of advertisement mainly come from news, journalism and entertainment content has significant change due to the growing of online advertising. Despite various laws and regulations governing advertising in Malaysia, the challenges on online advertising remain problematic. Malaysia Advertisers Association raises their concern on digital advertising fraud and it is expected to remains an issue globally in the foreseeable future.

Keywords: *advertisement, communication, legal regulation, consumers, products.*

Introduction

Advertisement is one of the most effective marketing strategies employs by businesses to communicate to their audience. Advertising market is a huge market worldwide with vast expenditure spends on advertising strategies. According to Guttmann from Statista (Guttmann, 2021), despite the challenges on Covid-19 pandemic which affected many industries, advertisement spending worldwide has been increasing steadily. It is expected to surpass 630 billion U.S. dollars in 2024. The forms of advertisement include television and radio, print media, digital and mobile advertising. In Malaysia, the total investment in advertising expenditure in 2019 was approximately 4.4 billion Malaysian ringgit (Hirschmann, 2021).

Conventional advertisement through print media, television and radio which the sources of advertisement mainly come from news, journalism and entertainment content has significant change due to the growing of online advertising. The growth of online advertising because of changes in consumer behaviour. Nowadays, consumer spends more time online and moving from conventional bricks to mortal retails to e-commerce. In order to reach wider audience without geographical constraints, blooming of online advertisement has create new advertising strategies, in particular, through target advertisement using artificial intelligent and advertising by social media influencer. The involvement of artificial intelligent in target marketing and unregulated social media influencer advertisement based on words of mouth have posed new challenges on advertising laws and regulations. This article aims to provide a basic understanding of advertising laws in Malaysia in discussing the challenges posed by the new trends of online advertisement to Malaysian consumers.

The Consumer Protection Act 1999 (hereinafter 'CPA 1999') of Malaysia defines 'advertisement' as every form of advertisement, whether or not accompanied by or in association with spoken or written words or other writing or sounds and whether or not contained or issued in a publication, and includes advertisement: a) by the display of notices; b) by means of catalogues, price lists, circulars, labels, cards or other documents or materials; c) by the exhibition of films or of pictures or photographs; or d) by means of radio, television, telecommunication or any other similar means (Section 3(1) of the Consumer Protection Act 1999). Besides, CPA 1999, the Multimedia Content Forum of Malaysia Content Code (2020) (hereinafter 'Content Code') provides that 'advertisement' means an announcement of a public nature whether for the sale or purchase or provision of goods or services or constituting of an invitation to participate in an activity and conveyed by or through any signage, image or sound disseminated through electronic medium for advertising purposes. The Content Code of Malaysia is a commitment toward self-regulation by the communications and multimedia industry in

compliance with the Communications and Multimedia Act 1998. The purpose of the Content Code is to provide guidelines and procedures for good practice and standards of content disseminated to audiences by service providers in the communications and multimedia industry in Malaysia.

The object of the research is the analysis of laws and regulations of advertising. *The purpose of the research* is to analyse laws and regulations of advertising in Malaysia.

Results

Laws and Regulations governing Advertisement in Malaysia

Advertising law is a wide spectrum with different perspectives, hence there is no single statute that governing advertisement industry in Malaysia (Asuhaimi et al., 2017). Malaysia approaches advertising law in both common law and statutes. Apart from the general contract law and tort law of defamation, there are many laws and regulations government advertisement in Malaysia. Among others, the statues that affect and relevant to contents of advertisement include:

- Consumer Protection Act 1999;
- Communications and Multimedia Act 1998;
- Trade Description Act 2011;
- Indecent Advertisements Act 1953;
- Penal Code;
- Food Act 1983 and Food Regulations 1985;
- Sale of Drugs Act1952 (Revised 1989) and the Control of Drugs and Cosmetics Regulations 1984 (amendment 2009);
- Medicines (Advertisement and Sale) Act 1956;
- Traditional and Complementary Medicine Act 2016;
- Direct Sales and Anti-Pyramid Scheme Act 1993; and many others.

Besides, the main statutes, there are also rules, regulations and guidelines issued by various Ministries and industries related to advertisement in Malaysia. This article focuses on main statutes related to advertising in food industry, cosmetics and related issues on online advertising. According to Rahmah & Sakina (Rahmah, & Sakina Shaik, 2017), Trade Description Act 2011, Medicines (Advertisement and Sale) Act 1956, Direct Sales and Anti-Pyramid Scheme Act 1993 and Consumer Protection Act 1999 covers online advertising in the cyber sphere.

The Malaysian Communications and Multimedia Content Code

Multimedia and communication industry in Malaysia is governing by two major legislations which are the Communications and Multimedia Act 1998 (hereinafter 'CMA 1998') and Malaysian Communications and Multimedia Commission Act 1998 (hereinafter 'MCMC 1998'). CMA 1998 set out a new regulatory licensing framework for the industry and MCMC 1998 established Malaysian Communications and Multimedia Commission with powers to supervise and regulate the communications and multimedia activities in Malaysia, and to enforce the communications and multimedia laws of Malaysia, and for related matters. For online activities include online advertisement, Malaysian Communication and Multimedia Commission promote a self-regulatory framework with the establishment of Malaysian Communications and Multimedia Content Code (hereinafter 'Content Code, 2020) after appropriate consultations with the multimedia and communication industry.

The Content Code sets out the guidelines and procedures for good practice and standards of content disseminated to audiences by service providers in the communications and multimedia industry. The Content Code identify the content that is indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person which is prohibited under the Section 211

of the CMA 1998. The Content Code is merely providing the guidelines and procedures. The compliance of such guidelines and procedures are on a voluntary basis, hence no sanctions for breach of such guidelines and procedures. The general principles governing the Content Code includes:

1. All advertisements must conform with this part and to the general guidelines on Content.
2. All advertisements should be legal, decent, honest and truthful.
3. All advertisements should be prepared with a sense of responsibility to consumers and to society.
4. All advertisements should respect the principles of fair competition generally accepted in business.

The Content Code is to be observed voluntarily by the advertiser. The responsibility to observe the Content Code voluntarily lies with the advertiser as to be in accordance with the objective of self-regulations. However, lack of compliance and observation of the Content Code caused many unethical online advertisers breach the Content Code and there is no recourse for consumers.

Prior to the Content Code, there are various independent bodies formed by the industry players to observed ethical advertising in Malaysia. Among others, the Malaysian Advertisers Association (MAA, 2022) which was established in 1964 representing the interest of advertisers in all areas of commercial communications. MAA objectives are to promote self-regulation and work with government, media owners and advertising agencies in ensuring an environment conducive to the growth of the industry. Advertising Standards Malaysia (ASA, 2022) was established in 1977 as an independent body to provide scrutiny of the self-regulating advertising industry, to ensure that all advertisements are prepared with a sense of responsibility to the consumer. ASA main tasks are to promote and enforce ethical standards in advertisements, to investigate complaints from the industry and consumers, and to ensure that the self-regulatory system operates in the public interest. MAA and ASA often raise various issues on advertisements and work closely with the relevant ministries to ensuring a health and conducive environment for advertiser and at the same time protecting consumer interests.

Besides the Content Code, Malaysian Communications and Multimedia Commission also set up the General Consumer Code of Practice for the Communications and Multimedia Industry (hereinafter 'Consumer Code') in Malaysia. The Consumer Code mainly provides the guidelines and complaints channel for services in in the communications and multimedia industry.

Food Act 1983 and Food Regulations 1985

Food Act 1983 (Food Act 1983 of Malaysia…, 2022) and Food Regulations (Food Regulations 1985 of Malaysia…, 2022) 1985 are the principal statutes that governing various aspects of food safety in Malaysia including food advertising. Food Safety and Quality Division of the Ministry of Health is responsible for implementing and enforcing the law. Section 15 of the Food Act 1983 prohibits any person from advertising any food that does not comply with the standard prescribed, that it is likely to be mistaken for food of the prescribed standard. It is an offence for any person who prepares, packages, labels or advertises any food which does not comply with that standard (Food Act 1983 of Malaysia…, 2022). The person found be liable on conviction to imprisonment for a term not exceeding three years or to fine or to both (Food Act 1983 of Malaysia…, 2022). In regards to false labelling etc. section 16 of the Food Act 1983 provides that Any person who prepares, packages, labels or sells any food in a manner that is false, misleading or deceptive as regards its character, nature, value, substance, quality, composition, merit or safety, strength, purity, weight, origin, age or proportion or in contravention of any regulation made under the Act commits an offence and is liable on conviction to imprisonment for a term not exceeding three years or to fine or to both (Food Act 1983 of Malaysia…, 2022; 16 section). On the other hand, Food Regulations 1985 mainly provides for general requirements for labelling of food in Regulation (Food Regulations 1985 of Malaysia…, 2022).

Medicines (Advertisement and Sale) Act 1956

The Medicines (Advertisement and Sale) Act 1956 is an Act that to prohibit certain advertisements

relating to medical matters and to regulate the sale of substances recommended as a medicine. Section 4B of the Act requires any publication of an advertisement for medicine "for the purpose of treatment or prevention of diseases or conditions of human" to be approved by the Medicine Advertisements Board (MAB) (The Medicines Advertisement and Sale Act 1956, Section 4B). MAB is an agency of the Pharmaceutical Services Division of the Ministry of Health chaired by the Director-General of Health. The MAB has issued the Guideline on Advertising of Medicines and Medicinal Products to General Public 2015 (2015 Guidelines), which governs the advertising practices of medicines and medicinal products aimed at the general public. The 2015 guidelines are intended to complement the provisions of the Act and the MAB Regulation 1976.

In Malaysia, certain treatment or prevention of certain diseases is prohibited, among others, the diseases include diseases or defects of the kidney, diseases or defects of the heart, diabetes, epilepsy or fits, paralysis, tuberculosis, asthma, leprosy, cancer, deafness, drug addiction, hernia or rupture, diseases of the eye, hypertension, mental disorder, infertility, frigidity, impairment of the sexual function or impotency, venereal disease and nervous debility, or other complaint or infirmity, arising from or relating to sexual intercourse (The Medicines Advertisement and Sale Act 1956, Section 3). Besides that, advertising in relation to abortion is also prohibited (The Medicines Advertisement and Sale Act 1956, Section 4). Section 4A further prohibited advertisements relating to skill or service relating to the treatment, prevention or diagnosis of any ailment, disease, injury, infirmity or condition affecting the human body unless it is approved by the Minister of Health, or by any professional body related to the medical profession or to any other allied profession which is established by any professional body related to the medical profession or to any other allied profession which is established by or registered under any written law (The Medicines Advertisement and Sale Act 1956, Section 4A).

Rising Issues of Targeted Advertisement and Advertising by Influencer

Despite various laws and regulations governing advertising in Malaysia, the challenges on online advertising remain problematic. Malaysia Advertisers Association raises their concern on digital advertising fraud and it is expected to remains an issue globally in the foreseeable future. The situation makes worst by the targeted advertisement employed by using AI. These targeted advertisements are tailored to individual with the information learn from one online behaviours or activities. Targeted advertisements are often individualised and personal, for example, when you search a particular item online, your personal e-mail, social media page and others online e-commerce Apps that you used, will show you what you search previously. This strategy often very efficient and effective, however, it is more destructive than any other advertising. Targeted advertising often led to proliferation of fake news and clickbait. It facilitates data-mining and compromise personal data protection. Vulnerability of consumers increase with the challenges of targeted advertising. However, the laws and regulations always a step behind the advance technology. As for today, there is no laws and regulations governing targeted advertising in Malaysia despite raising concerns on the advertising strategy.

On the other hand, another raising issue to both the regulators and advertisers is the advertising by influencer. The trends that influencer is employed to promote or advertise certain products or services are commons. More often or not these online influencers attracted certain targeted individuals as friends and followers which sparked the effect of trusting despite many are violated the advertising rules and regulations. For the advertisers, the influencers whose are not professional in advertising often undermine the ethical standards and quality of the advertisers. For example, inappropriate languages were used, often offensive pictures shown, some event advertised by exploiting young children to gain sympathy of the viewers.

Conclusions

It is a summary offence contravenes any of the provisions of sections 3, 4, 4A and 4B of the Act. For first conviction, a fine not exceeding RM3, 000 or to imprisonment for any term not exceeding one year or to both may be imposed. In the case of a subsequent conviction, a fine not exceeding RM5, 000, or to imprisonment for a term not exceeding two years, or to both may be imposed.

The involvement of artificial intelligent in target marketing and unregulated social media influencer advertisement based on words of mouth have posed new challenges on advertising laws and regulations.

Advertising by influencers often escape the advertising rules and code of practices by indicating that they are not advertising but merely sharing personal experience to their followers. Moreover, there are also social issues associated with advertising by influencer, such as cyber bully, fraud, defamation and many others.

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Problems of regulating the procedural definition of legal persons as subjects of administrative responsibility

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Summary

Although undifferentiated regulation has been in place in criminal justice for almost a few decades to guarantee procedural rights to legal persons, however, in administrative law, this issue is still left to the discretion of the various agencies, with the risk of not guaranteeing the procedural rights of all legal entities held liable. Consequently, the object of the research of this article is the procedural definition of the status of legal persons in special laws providing for the administrative liability of these persons, and the article seeks to analyze the specificities and issues of this differentiated regulation in comparison with the standards set for natural persons to define their procedural position. The article uses basic research methods such as document analysis, systematic analysis, comparative analysis, and generalization methods. The analysis substantiated inconsistent regulation of the procedural rights of defense of legal persons and related procedural terms in special laws providing for administrative liability of these persons, which significantly exceed the standards set for administrative liability of natural persons without ensuring the implementation of the principle of equality in administrative proceedings.

Keywords: *legal person, administrative liability, procedural time limits, right of defense.*

Introduction

With the new Criminal Code and the new Code on Criminal Procedure in Lithuania a consolidated institute of criminal liability of legal persons was established in both substantive law and procedural law, establishing and ensuring undifferentiated guarantees of procedural rights for these legal entities. Unfortunately, no such step has been taken in administrative justice when it comes to the administrative liability of legal persons and its regulation, which is left differentiated and enshrined in the legislation governing the activities of the various agencies. It should be noted that most of the legal acts regulating economic activities issued by the state are nothing more than administrative laws, which also provide for administrative liability for legal persons. Over time, the legislator has adopted an increasing number of administrative legal acts regulating various types of economic activities, in the context of which the institute of administrative responsibility of legal persons as advanced and equal market participants has been established. There are more than 30 such special laws in Lithuania today and their number is constantly changing. However, the main problem is that in Lithuania the legal acts regulating the administrative liability of legal persons in a differentiated manner do not establish or detail the rules for the implementation of general administrative liability, which should ensure effective protection of the procedural rights of persons to be prosecuted. In this context, it is also necessary to note that Lithuanian legal doctrine and jurisprudence unequivocally agree that the application of legal liability to a person must ensure all procedural rights of the persons to be prosecuted. Based on this, the research of this article is differentiated into several levels. At one level, the aim is to assess the consistency of the enforcement of procedural rights for legal persons in different specific laws providing for the administrative liability of these persons. At the next level of analysis, the aim is to assess the compliance of these regulations on procedural rights provided for in special laws for legal persons with the standards provided by the legislator for the administrative liability of natural persons. In this way, the aim is to assess the possible difficulties in ensuring the principle of equality of

persons in the existing regulations defining the procedural status of legal persons. However, given the limited scope of this research, the analysis of the work is limited to three specific laws providing for the administrative liability of these persons, and the procedural status of a legal person as an entity of administrative responsibility is analyzed only in a few aspects related to ensuring the procedural rights of defense of these persons, as well as the regulation of procedural terms.

The object of the research – the procedural definition of administrative liability of legal persons in the sense of special laws providing for the administrative liability of these persons.

The aim of the research – to analyze the peculiarities of the definition of the procedural situation of legal persons as a subject of administrative responsibility and the issue of regulation in special laws providing for the administrative liability of these persons.

The tasks of the research:

1. To reveal the problems of the definition of the status of a legal person in administrative proceedings;
2. To examine the issue of ensuring the procedural rights of defense of legal persons in special laws providing for the administrative liability of these persons and comparing them with the standards established by the Code of Administrative Offenses of the Republic of Lithuania;
3. To analyze the issues of regulation of procedural terms related to the administrative liability of legal entities in special laws and to compare them with the standards established by the Code of Administrative Offenses of the Republic of Lithuania.

Methodology of the research: depending on the topic, goals and objectives of the scientific article, the following research methods are used: document analysis, systematic analysis, comparative analysis, and generalization methods.

Abbreviations used in the article:

1. The Convention – the European Convention for the Protection of Human Rights and Fundamental Freedoms [1];
2. The CAO – the Code of Administrative Offenses of the Republic of Lithuania [2];
3. The LB – the Law on Banks of the Republic of Lithuania [4];
4. The LA – the Law on Advertising of the Republic of Lithuania [3];
5. The LC – the Law on Competition of the Republic of Lithuania [5];
6. The SAC – the Supreme Administrative Court of Lithuania.

The problem of defining the status of a legal person in administrative law

In Lithuania, the main law regulating liability for administrative offenses is the CAO, in accordance with Section 1 of Article 2, only a natural person shall be considered an entity. However, there are over 30 special laws in Lithuania under which administrative liability applies not only to natural persons but also to legal persons, which is also substantiated by the SAC, which has already stated ten years ago that legal persons are special subjects of administrative responsibility in the context of the Law on tobacco control and other laws providing for administrative liability [12]. The administrative subjectivity of legal persons is also justified by the nature of the sanctions imposed on them, i.e. when imposing liability on legal persons for violations of special legal acts, unlike the CAO, public administration entities do not impose administrative penalties, but economic sanctions, which by their nature are identical in several respects. In the first aspect, it should be noted that economic sanctions and administrative penalties belong to the same legal institution, which was confirmed by the Constitutional Court of The Republic of Lithuania, noting that there is no such separate type of legal liability and separate institute of law as "economic responsibility" at all, and the so-called economic sanctions belong to the same institute of law as administrative penalties [10]. Similarly, legal doctrine agrees that economic sanctions fall within the sphere of administrative responsibility and should therefore

be referred to as administrative sanctions [8]. In the second aspect, legal doctrine points to the identification of economic sanctions and administrative penalties because of the identity of the objectives pursued by those fines [9]. On that basis, it must be held that legal persons are subject to administrative liability within the meaning of the economic sanctions imposed on them. Although it should be noted here that some other legal scholars did not rush to accept such statements, which unanimously stated that only a natural person can be subject to administrative liability due to the above-mentioned subjective characteristics of a natural person established by the CAO [6, 7]. Today, however, the situation has changed, with the legal entity already being treated as an entity with administrative liability.

Analyzing in detail the regulation of over 30 special laws, which provide for the application of administrative liability to legal persons, it appears that, in contrast to the CAO, most cases regulate the same procedural issues differently, such as the procedure for imposing time limits, imposing sanctions or the procedure for sending the protocol, etc. However, in the absence of a separate unified legal instrument on the administrative liability of legal persons, each such special law independently regulates the application of economic sanctions to legal persons. As a result, there are natural problems with the fact that in most of these laws the rules on the application of general administrative liability are regulated occasionally or incompletely, therefore, the regulation establishing the administrative liability of legal persons is differentiated and, possibly, not ensuring uniform and consistent application of liability.

The "need" for uniform and consistent application of administrative liability to legal persons is justified by legal doctrine, which analyzes the case law of the Court of Cassation and notes that the application of administrative liability for violations of management legislation must comply with all the requirements established for the regulation of such liability [9]. Such requirements are considered to be the procedural norms established in the general part of the CAO, which are intended to regulate the application of administrative liability to natural persons. This is also confirmed by the SAC, which establishes the rule that when a gap in the legal regulation is found in the legal act regulating the administrative liability of legal persons, the CAO is still applicable, which, as mentioned, is not intended to regulate the administrative liability of legal persons [15]. Consequently, all general procedural rules for the application of liability as in the CAO should be laid down in law, however, the real situation is different, as the above-mentioned legal regulation of legal entities still does not contain the same rules as the CAO for regulating identical procedural issues. Moreover, there may be situations in which there may be no regulatory loopholes in a specific special law defining a legal person as an entity with administrative liability, which means that legal persons are subject to different rules governing the issue of identity in the context of individual laws. In this case, legal entities may find themselves in an unequal legal position. Although, the prevailing protective principle, which prohibits the application of the analogy of the law when it complicates or restricts a person's legal position, should not be forgotten here. In other cases, when the protection of the mentioned principle is not provided, the norms of the general part of the CAO shall be applied to fill the gaps in the legal regulation. This leads to a confusing perception of the rules applicable to legal persons. There are cases in the case law where, due to the different regulation of identical issues, it is completely unclear to legal persons which legal norms should be applicable to them, as a result of which legal disputes arise [11]. It is considered that the main factor that may influence the above-mentioned differentiated application of administrative liability to legal entities is the dynamism of the laws and their inadequate improvement, i.e. four further examined special laws, which define a legal entity as being subject to administrative liability has been amended more than 145 times, however, the most sensitive regulatory gaps in the application of administrative liability and in particular in the issues analyzed in this paper for legal entities are left out.

The problem of ensuring the procedural rights of defense of legal persons in administrative law

The legal doctrine and jurisprudence of the Republic of Lithuania recognize that all procedural rights of persons subject to liability must be ensured when applying legal liability to a person, among other things, the individual's right to a defense, which, according to the Constitutional Court of The Republic of Lithuania, is "absolute, [and] it cannot be denied or constrained on any grounds and under any circumstances" [14]. This right (rights) of a person to a defense is defined and enshrined in Section 3 of Article 6 of the Convention, which lays down minimum and mandatory requirements guaranteeing

the specific procedural rights of a person charged with a criminal offense. This importance of ensuring the procedural rights of the defense of a person to be prosecuted enshrined in the Convention is also emphasized by the above-mentioned resolution of the Constitutional Court, noting that the accused's rights of defense ensure that the innocent person is not prosecuted, it also presupposes that the accused must be guaranteed sufficient procedural means to defend himself against the accusation and that it must be available to him. Although the scope of Article 6 of the Convention is criminal liability, the guarantees of this Convention must also be extended to persons prosecuted for the criminal nature of the administrative offense and the nature and severity of the sanction threatened. In this case, it should be noted that the aforementioned rights of the defense of the person to be held administratively liable under Section 3 of Article 6 of the Convention are, in principle, governed by Article 577 of the CAO, which also enshrines other rights ensuring the defense of a person brought to administrative responsibility, i.e., the right to inspect the case file, to give explanations, to give evidence, to make requests, to appeal against the decision in the case and to take part in the proceedings. Thus, the CAO regulates in detail the rights ensuring the defense of a natural person who is brought to administrative responsibility. Unfortunately, this cannot be said of the legislation governing the administrative liability of legal persons, most of which do not enshrine the basic provisions of Section 3 of Article 6 of the Convention and other procedural rights provided for in the ATPK, ensuring the defense of the person.

In particular, the analysis begins with an analysis of the LA, Article 24 of which governs administrative sanctions against legal persons, such as warnings and fines, which are also provided for natural persons in Articles 23 and 27 of the CAO. Meanwhile, when analyzing in detail the norms of this law regulating the procedural rights of a legal person subject to administrative liability, it should be noted that most of them enshrine the rights ensuring the defense of the individual enshrined in Section 3 of Article 6 of the Convention and Article 577 of the CAO, but some of these rights are still not regulated. It should be noted that the legal regulation of the LA establishes the right of a person to be prosecuted to submit reasoned explanations and evidence (Sections 12, 13 of Article 25), to have access to the case file (Section 13, 15 of Article 25), to be represented (Section 11 of Article 25), within 21 calendar days to prepare for the defense (Section 15 of Article 25), to appeal against the ruling (Section 1 of Article 27), to participate in the proceedings of the administrative law violation case (Section 10 of Article 25). However, some of the above provisions raise certain doubts, such as a provision of Section 15 of Article 25 of this law, indirectly establishing the right to prepare a defense within 21 calendar days. This raises a number of interrelated issues, i.e., first, what time is sufficient to prepare the defense as required by Section 3 of Article 6 of the Convention, and second, whether that time-limit complies with that requirement laid down by the Convention. Unfortunately, the answer to these questions remains unclear, as the legislator has not established a sufficient definition of the term either in the CAO or in any other legal act regulating the law of administrative offenses. For this reason, the establishment of a person's right to a defense provided for in Section 15 of Article 25 of the LA is questionable. In addition, there are much more serious regulatory problems in this law, i.e., there is no article in this legal act establishing other rights provided for in the legal regulation of the CAO: to make requests, to speak in the mother tongue or in a language spoken by the person prosecuted (in this case the representative of the legal person), as well as the right to use the services of an interpreter. In addition, it should be noted that the LA also does not contain legal norms regulating these rights to be granted in Section 3 of Article 6 of the Convention and procedural rights ensuring the defense of a person brought to administrative liability – receive free counsel or an interpreter (if required) and the right to question witnesses. Thus, this is a problem of legal regulation of the LA, which causes violations of procedural rights ensuring the protection of legal persons.

Meanwhile, in the analysis of the LB, Article 72 of which, like Article 23 and Article 27 of the CAO, provides for various sanctions, e.g. warning, fine, revocation of the intended license, etc., It should be noted that this law shows a much more flawed tendency to regulate the rights provided for in Section 3 of Article 6 of the Convention and Article 577 of the CAO than in the LA under consideration. This justifies Article 67 of the LB, which regulates only the rights and obligations of public administration entities, but does not provide for the rights of legal persons to be held administratively liable. This is confirmed by the particularly deeper provision of Point 6 of Section 2 of Article 67 of this law, which provides for the right of the supervisory authority to give written instructions to the CAO

under administrative responsibility "for the banks managers to come to the supervisory authority and give explanations". Although at first sight it would seem that this legal norm establishes the right to provide explanations ensuring the defense of a legal person (banks), this is not the case, whereas this statutory provision imposes a prohibited obligation and not the right to give explanations to the person prosecuted. Even more problems are seen when this provision is read in conjunction with the provision of Section 2 of Article 73 of the LB, which provides for the real right of the accused person to be heard, i.e., it remains unclear how the dispute should be resolved if the legal entity legally refuses to exercise the right of Section 2 of Article 73 of the LB and at the same time unlawfully fails to comply with the obligation to provide explanations provided for in Point 6 of Section 2 of Article 67 of the LB. There is only one thing that is clear, the regulation of these legal norms is incompatible with each other and must be considered flawed. Continuing the establishment of other procedural rights of a person guaranteeing the protection of a person to be granted in Article 3 of the Convention and Article 577 of the CAO in the legal regulation of the LB, it should be noted that the provisions of Sections 2 and 8 of Article 73 of this Law duly regulate a number of such rights of the person being prosecuted, however, a number of rights ensuring the protection of a legal person subject to administrative liability, as provided for in Article 577 of the CAO, are not provided for, i.e., the procedural rights to make requests, to give evidence, to speak the mother tongue or the language of the person charged (in this case a bank representative), to be represented by a lawyer, to have the services of an interpreter free of charge and to question witnesses. Undoubtedly, this is considered to be a problem in the regulation of this law. In addition, another sensitive issue is Section 2 of Article 73 of the LB, which provides for the possibility for the supervisory authority to decide on the application of sanctions in certain urgent cases, notwithstanding the requirements set out in this Article, i.e., without the participation of a legal person, acquaintance with the case file, etc. It is clear that in the exceptional cases provided for in this provision, the application of sanctions does not ensure the protection of the procedural rights guaranteeing the defense of the person brought to administrative liability. Thus, the regulation of the LB is considered problematic and does not ensure the implementation of procedural rights guaranteeing the protection of legal entities subject to administrative liability.

The last legal act to be analyzed is the LC. Although, at first sight, it would appear that this law should provide for the strongest possible protection of the procedural rights of legal persons subject to administrative liability, considering that, in accordance with Article 36 of this Law, enormous administrative sanctions imposed on legal persons, the amount of which, often, measured in terms of MGL, far exceeds the amounts established by criminal law, but this is not the case. In the legal norms of the LC, as well as in the special laws examined above, only partial regulation of the procedural rights guaranteeing the defense of a legal person to be held administratively liable, provided for in Article 577 of the CAO and to be granted in Section 3 of Article 6 of the Convention, is noticeable. This is evident from the fact that the legal regulation of the LC in principle correctly establishes only three rights of a legal person subject to administrative liability – access to the case-file (Section 2 of Article 29), to appeal against a decision made in respect of that person to a court (Section 1 of Article 33) and the indirectly established right of a person to participate in the proceedings decided by the Competition Council (Section 3 and 4 of Article 29). Meanwhile, the right of a legal person to provide explanations in this law, as in the LB, is regulated ambiguously. This is confirmed by the provisions of Point 5 of Section 1 of Article 25 and Sections 1 and 3 of Article 29 of the LC regarding the rights and obligations of legal persons to be held administratively liable to provide explanations to the Competition Council, which are regulated in a manner analogous to the LB. At this point, there is a conflict of legal norms, which hinders the guarantee of the right to provide explanations, which guarantees the defense of the legal person being prosecuted administratively. In addition, the right to submit requests ensuring the defense of a person enshrined in separate norms of the LC, such as Section 4 of Article 29 or Section 2 of Article 22, is noteworthy. This regulation is considered to be flawed, as it provides for only a few possible variants of applications and thus restricts the right of a legal person to be administratively held to choose and submit the most effective applications for its defense. Concluding the analysis of the legal regulation of the LC, it should be noted that most of the other rights guaranteeing the defense of a legal person to be held administratively liable under Section 3 of Article 6 of the Convention and Article 577 of the CAO – to give evidence, to speak the mother tongue or the language he speaks, to use the services of an interpreter, a lawyer, at the same time guarantee a free lawyer or interpreter (if necessary) and the right to question witnesses, are not regulated by this law.

Thus, these rights become vague in the context of the regulation of the LC and this is a problem to be considered. In summary, it must be stated that all these regulatory problems of the LC illustrate the flawed establishment of the procedural rights of legal persons to be held administratively liable, which causes restrictions and violations of the rights ensuring the defense of these persons.

Problems of regulation of procedural terms related to the administrative liability of legal entities

Further examining the problems of the legal regulation establishing the administrative liability of legal persons in Lithuania, it is expedient to analyze in detail the procedural and limitation periods established in the above-mentioned special laws, which establish the norms of fundamental rights, and to assess their problems. As a result, the above-mentioned legal norms regulating the main procedural and limitation periods of the LA, the LB and the LC applicable to legal entities will be examined in comparison with the CAO applicable to natural persons, which regulates these terms uniformly. The SAC, forming a uniform case law in administrative cases, has already stated in 2012 that legal persons should be subject to the same rules as those established by the SAC (currently valid CAO) when applying administrative liability [15]. Thus, according to the SAC, it can be concluded that the laws regulating the administrative liability of legal entities should theoretically establish the same procedural and limitation terms as the terms provided by the CAO, however, the real situation in legal regulation is different.

Before examining in detail, the procedural and limitation periods laid down in the laws governing the administrative liability of legal persons, it is appropriate to first review those that are enshrined in the norms of the CAO. As the CAO has a number of procedural time limits for the examination of a case, therefore, the procedural term for the examination of administrative offense cases regulated by Section 4 of Article 616 of the CAO was selected, which provides for the requirement to investigate cases of administrative offenses out of court, usually within 20 working days from the date of service of the report on the administrative offense or the expiry of the term for execution of the administrative order. Meanwhile, the second procedural term that was assessed during the analysis, – the term for imposing an administrative penalty provided for in Article 39 of the CAO, which provides that an administrative penalty may be imposed no later than 2 years from the date of the administrative offense. After reviewing these legal norms, we can notice that the legal norms established by the CAO regulate in detail the general rules of terms applicable to natural persons. Unfortunately, this cannot be said of the special laws governing the administrative liability of legal persons.

Assessing the regulation of the LA in the first aspect previously identified, i.e. analyzing the procedural time limit for a legal person, it appears that such a time-limit is laid down in Section 19 of Article 25) of that law, which lays down a time-limit of 6 months, which may be extended to a further 6 months, which means that the maximum time allowed for an administrative case before an institution can be 12 months. Consequently, Section 19 of Article 25 of the said LA sets a time limit that is more than 12 times longer than the time limit set by the CAO for proceedings before an institution. It is considered that this term is considered inappropriate, as it violates the principle of expediency guaranteed by the terms of administrative law and is inadequate for the term of administrative proceedings established by the CAO. The same, but opposite, issue is observed in the analysis of the second procedural term - the limitation period for the imposition of sanctions. Section 9 of Article 24 of the LA provides that a fine may be imposed no later than within 1 year from the last day of the dissemination of advertising or from the moment of occurrence of other legal facts of this Law. Again, the time-limit for imposing penalties is half that of the time-limit laid down in Article 39 of the CAO, which justifies stricter requirements for the administrative liability of legal persons on this basis than for the natural liability of natural persons. Such a fundamentally different treatment of the status of legal and natural persons is not based on any rational arguments and must therefore be regarded as a breach of the principle of equality. Moreover, such a rule forces the responsible authorities to rush to impose fines on legal persons, which can lead to errors by the authorities and the imposition of insufficiently justified penalties. Thus, the current regulation of the examined legal norms of the LA is flawed, on the one hand, due to the establishment of procedural terms that do not ensure the principle of expediency, on the other hand, the irrational and strict introduction of a limitation period for administrative liability in comparison with the regulation of the CAO.

Meanwhile, when analyzing the regulation of the LB, it has been noticed that it does not contain any article that directly determines the term for the examination of an administrative case, as defined in Section 4 of Article 616 of the CAO for natural persons. So, the problem is obvious – unregulated time limit for administrative proceedings. It is considered that this problem is possibly affected by the fact that this law confers a number of rights on the infringement body, and the discretion to set certain procedural time limits independently, but does not, in principle, impose obligations. As an example, Section 11 of Article 72 of the LB can be cited, the analysis of which shows that the time limits for the application of provisional sanctions are set by the institution itself. It is believed that the regulation of the LB, granting a considerable amount of such discretion, may presuppose the abuse of the rights of legal entities by institutions and violations of the principles of equality and expediency of proceedings. Continuing the analysis of the legal norms of the LB, it should be noted that the limitation period for imposing sanctions is nevertheless regulated in Section 3 of Article 73 of this Law, where a time limit of up to 5 years, from the date of the infringement, is provided for the supervisory authorities to decide on the sanction. Looking more closely at this legal norm, it should be noted that such a term established in it is also 2.5 times different from the term established in Article 39 of the CAO for imposing an administrative penalty on natural persons. Thus, it is considered to be a problem of legal regulation, possibly leading to violations of the principles of efficiency of administrative procedure and equality of persons before the law.

Finally, when analyzing the legal norms establishing the procedural and limitation terms of the LC, it should be noted that none of them directly regulates the procedural time limit for an administrative hearing before an institution. At the same time, it should be noted that these legal norms do not regulate and name the process of administrative proceedings before the institution as such. After a conceptual examination of the norms of the LC, it should be noted that this is due to the fact that the examination of an administrative case in the context of this law is to be treated simply as an investigation. The term of such an investigation is regulated by Section 5 of Article 23 of the LC, which provides for the obligation of the Competition Council to complete the investigation no later than within 5 months from the date of the decision to initiate an investigation, with the possibility to extend it for another 3 months. Linguistically analyzing this legal norm, it is not difficult to notice that such procedural time limit for hearing a case (in this case investigation) is significantly more than 5 times longer than the time limit set out in Section 4 of Article 616 of the CAO for natural persons subject to administrative liability. As in the previous case of regulation of the LA, such term of investigation is inadequate to the term established by CAO, does not ensure observance of the principles of equality of persons and efficiency of proceedings. Further analysis of the regulation of the LC in the aspect of the limitation period for the imposition of procedural sanctions, it is noted that it is enshrined in Section 3 of Article 35 of this Law, where it is possible to impose sanctions for violations of this Law no later than within 5 years from the date of the violation or from the date of the last action or termination. From the content of the mentioned legal norm, again, the same problem of legal regulation can be seen – an unequal and more than twice as long limitation period for the imposition of an administrative penalty as compared to Article 39 of the CAO. In summary, the analysis of the main statute of limitations and procedural terms regulated by the LC states that this regulation is problematic and presupposes violations of the principles of equality of legal persons and the efficiency of administrative proceedings.

Having examined the legal provisions governing the administrative liability of legal persons under the said special laws and providing for the main procedural and limitation periods and after identifying their problems, it should be noted that in practice these problems are not usually solved. The main reason for this is the fact that the legislator is prohibited from applying the analogy of the law in the above-mentioned laws, albeit inappropriately, if the legal regulation of terms is substantially established – in this case, the legal norms regulating the terms of the CAO, which could solve the problems of regulation of terms established by the said special laws. Among other things, according to the SAC, the application of the analogy of the law is not possible also in the cases when the existing flawed legal regulation of legal terms may violate the principle of expediency of the proceedings [13]. In addition, it should be noted that without solving the problems of regulation of terms provided for in the above-mentioned special laws, another possible violation of the principle of equality of legal persons in relation to natural persons is left aside.

Conclusions

1. The analysis substantiated the complex definition of the status of a legal person as an entity of administrative responsibility, the problem of which mainly consists of differentiated legal regulation, often leading to a somewhat different definition of such entity in administrative procedural terms in different areas of administrative law regulation. And the requirement to apply different legal norms to legal persons in the context of separate laws regulating the same issue leads to a confusing perception of the norms applicable to legal persons.

2. Examination of the procedural rights of the individual provided for in Section 3 of Article 6 of the Convention and of the CAO, and the analysis of their different establishment for legal entities as an entity of administrative responsibility in the context of the LA, the LB and the LC has established that only a small part of the above procedural rights are properly regulated in these special laws. As this existing differentiated special regulation is not able to ensure the protection of all the rights ensuring the defense of a legal person, a systematic and constructive harmonization of the administrative liability of legal persons with the rights of the defense of the individual guaranteed by the Convention and the CAO would change the situation.

3. After analyzing the regulation of all three of the above-mentioned special laws establishing the administrative liability of legal persons, which defines the limitation periods for the examination of an administrative case in the institutions and the imposition of an administrative penalty, several times more significant discrepancies have been identified from the analogous standards established by the CAO for the administrative liability of natural persons, which does not objectively ensure the observance of the principles of equality of persons and expediency of the process. Of all the special laws examined, the regulation of the LB is even more flawed, given that it gives the institution investigating infringements the discretion to set certain procedural deadlines independently.

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14. the Constitutional Court of The Republic of Lithuania 15th November 2013 decision in case No. 12/2010-3/2013-4/2013-5/2013.
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Migracijos priežastys ir ją reglamentuojantys teisės aktai

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Santrauka

Migracija visuomenėje kaip reiškinys egzistuoja nuo seniausių laikų. Migracijos sąvoka yra plati, nevienareikšmiška. Migracija tai sudėtingas, sunkiai pamatuojamas ar apibūdinamas procesas. Tai įtakoja vieningo apibrėžimo nebuvimą, tačiau išskirtinos kelios apibrėžtys bei pagrindiniai aspektai. Literatūroje galima aptikti įvairiausiu migracijos sąvokų apibrėžimų, kuriuos skirtingi autoriai pateikia skirtingai. Migracijos ir žmonijos istorijos sutampa. Tačiau kaip socialiai reikšmingas, nuolatinis, individualiai motyvuotas ir laisvas reiškinys migracija išryškėjo tik industrializacijos ir urbanizacijos periodu. Šiandieniniame mūsų moderniame pasaulyje migraciją skatiną įvairūs veiksniai – ekonominiai, kultūriniai, socialiniai ar psichologiniai. Veiksniai, skatinantys migruoti, gali būti skirstomi į keturias pagrindines grupes – paklausos (traukos), pasiūlos (stūmimo), grandininės migracijos veiksniai ir psichologiniai veiksniai

Raktiniai žodžiai: *migracija, pabėgėliai, migracijos priežastys.*

Įvadas

Migracijos procesai visuomenėje egzistuoja nuo seniausių laikų, tai yra sudėtingas, sunkiai pamatuojamas procesas. 2021 metais Lietuvoje prasidėjęs masinis nelegalių imigrantų antplūdis iš Baltarusijos patraukė visos Europos ir pasaulio dėmesį, bei sukėlė sumaištį Lietuvoje, dėl itin didelio, nelegaliai kertančių valstybės sieną pabėgėlių skaičiaus, jų sulaikymo ir fizinio apgyvendinimo. Lietuvos statistikos departamento duomenimis laikotarpyje nuo 2021 m. sausio 1 iki 2022 m. sausio 23 d. dienos jau yra registruoti 4333 neteisėtai Lietuvos Respublikos sieną kirtę migrantai[1], kai palyginimui 2020 metais atveju, kuomet iš Baltarusijos buvo bandoma nelegaliai patekti į Lietuvos Respubliką buvo vos 103[2].

2022 metų vasario mėnesį prasidėjęs karas Ukrainoje sukėlė kitą didžiulę, tik šį kartą karo pabėgėlių bangą. Lietuva dėl to vėl susidūrė su sunkumais, kadangi karo pabėgėliai imigravo ir į Lietuvą. Migracijos departamento duomenimis 2022 m. kovo 22 dieną Lietuvoje yra registruoti jau 26986 karo pabėgėliai iš Ukrainos[3].

Tyrimo objektas. Migracijos priežastys ir ją reguliuojantys teisės aktai.

Tyrimo tikslas. Išanalizuoti migracijos priežastis ir ją reguliuojančius teisės aktus.

Tyrimo metodai: dokumentų analizės, sisteminės analizės, lyginamosios analizės, loginis - analitinis bei metaanalizės metodai.

1 Lietuvos Respublikos statistikos departamentas (2022). *Neteisėtos migracijos stebėsena.* https://ls-osp-sdg.maps.arcgis.com/apps/dashboards/9b0a008b1fff41a88c5efcc61a876be2

2 Valstybės sienos apsaugos tarnyba prie Lietuvos Respublikos vidaus reikalų ministerijos (2022). *Lietuvos pasienyje sulaikyti valstybės sienos pažeidėjai.* http://www.pasienis.lt/lit/Lietuvos-pasienyje-sulaikyti-valstybes-sienos-pazeidejai

3 Lietuvos Respublikos Migracijos departamentas prie LR VRM. (2022). Užregistruotų karo pabėgėlių iš Ukrainos skaičius.

Migracijos samprata

Tarptautinių žodžių žodyne terminas *migracija* (lot. migratio) pateikiamas kaip kėlimasis, kraustymasis, perėjimas iš vienos vietos į kitą. Šis terminas apima bet kokį žmonių judėjimą – tiek kėlimąsi gyventi į kitą vietą toje pačioje šalyje laikinai arba ilgam laikui, tiek persikėlimą į kitą šalį. Šiame žodyne taip pat pateikiamos ir migracijos rūšys, kurios nusako migracijos kryptį – tai gali būti *emigracija* (lot. emigratio) – išsikėlimas, žmonių persikėlimas iš tėvynės į kitas šalis, dėl tam tikrų priežasčių, tokių kaip valstybės ekonominė padėtis, siekiant susikurti geresnę ekonominę padėtį, dėl politinių, religinių pažiūrų. Emigracija gali būti laikina arba nuolatinė, taip pat legali arba nelegali. *Imigracija* (lot. immigro) gyventojų atsikėlimas gyventi iš kitų šalių, o *reemigracija* (lot. reemigratio) – grįžimas atgal į tėvynę iš emigracijos.

Migracija tai sudėtingas, sunkiai pamatuojamas ar apibūdinamas procesas. Tai įtakoja vieningo apibrėžimo nebuvimą, tačiau išskirtinos kelios apibrėžtys bei pagrindiniai aspektai. Literatūroje galima aptikti įvairiausiu migracijos sąvokų apibrėžimų, kuriuos skirtingi autoriai pateikia skirtingai. Migracija – tai vienos valstybės gyventojų persikėlimas ilgam laikui į kitą valstybę, laikantis šį procesą reglamentuojančių teisės aktų. (G. Babachinaitė), migracija – tai asmenų persikėlimas santykinai ilgam laikui, gan dideliu atstumu; gyvenamosios vietos keitimas visam arba tam tikram laiko tarpui kertant šalies teritorines ribas (A.Maslauskienė), migracija – tai individų ar grupių persikėlimas iš vienos gyvenamosios vietos į kitą, turint tikslą naujoje vietovėje pasilikti pakankamai ilgą laiką (V. Stankūnienė). Šios sąvokos turinys didele dalimi priklauso nuo to, kokiame kontekste bus pateiktas – politiniame, socialiniame ar ekonominiame. Plačiąja prasme migracijos procesai gali būti suprantami, kaip asmenų ar grupių judėjimas trumpuoju ar ilguoju laikotarpiu, kertant valstybės teritorines ribas arba ne. Politiniu statistiniu lygmeniu yra priimtas migracijos tipų apibūdinimas pagal Jungtinių Tautų siūlomą tarptautinės migracijos apibrėžimą. JTO tarptautinę migraciją pabrėžia, kad „ilgalaikis migrantas yra asmuo, kuris pakeitė gyvenamąją vietą ne trumpesniam kaip 12 mėnesių laikotarpiui“, tai reiškia, kai pasirinkta šalis tampa gyvenamąją vieta.[4] Nuo migracijos sąvokos neatskiriama yra migranto samprata. Jungtinių Tautų organizacija migrantą apibūdina kaip „asmens ar asmenų grupės judėjimas iš vieno geografinio vieneto į kitą, kertant administracines ir politines valstybės sienas, ir siekiant laikinai ar visam laikui įsikurti kitoje šalyje, nei jų kilmės vieta..“[5] Lietuvos ekonominės migracijos reguliavimo strategijoje ekonominės migracijos sąvoka apibūdinama kaip išvykimas iš Lietuvos įsikurti užsienio valstybėje ar atvykimas iš užsienio valstybės įsikurti Lietuvoje (ekonominė imigracija), siekiant geresnės gyvenimo kokybės, didesnio darbo užmokesčio, geresnių darbo ir gyvenimo sąlygų, ar dėl kitų ekonominių priežasčių, o ekonominis migrantas suprantamas kaip asmuo, išvykęs iš Lietuvos į užsienio valstybę arba atvykęs į Lietuvą iš užsienio valstybės (ekonominis imigrantas) dėl ekonominių priežasčių[6].

Tarptautinė migracija gali būti skirstoma į ilgalaikę ir trumpalaikę. Ilgalaikė migracija yra tada, kai buvimo užsienyje laikotarpis yra bent vieneri metai, o trumpalaikė tarptautinė migracija apibūdinama kaip laikinas buvimas užsienio šalyje, trunkantis nuo trijų mėnesių iki vienerių metų. Ilgalaikė migracija yra daug žalingesnė nei trumpalaikė emigracija, nes didžioji dalis išvykusių nebegrįžta į gimtinę, todėl yra prarandamos lėšos, kurios buvo investuojamos į žmogaus išsilavinimą ir tuo pačiu prarandamas specialistas. O trumpalaikę emigraciją galima vertinti kaip išsigelbėjimą sunkiu ekonominiu laikotarpiu[7].

Migracijos raida

Migracija viso pasaulio šalyse yra pakankamai senas ir suprantamas procesas. Šis reiškinys turėjo didelę įtaką visai žmonijos istorijos raidai, tautų apsigyvendinimui, jų formavimuisi. Pastarąjį laikotar-

4 Solnyškinienė, & Adamonienė, R. (2017). Migracijos procesus formuojančių veiksnių Lietuvoje vertinimas. Visuomenės saugumas ir viešoji tvarka (18) : mokslinių straipsnių rinkinys, p. 471

5 United nations. Migrants. [žiūrėta 2022-02-01]. Prieiga per internetą: https://www.un.org/en/fight-racism/vulnerable-groups/migrants

6 Lietuvos Respublikos Vyriausybės nutarimas Dėl ekonominės migracijos reguliavimo strategijos ir jos įgyvendinimo priemonių 2007–2008 metų plano patvirtinimo. *Valstybės žinios.* 2009, Nr. 77-3177.

7 Siniavskaite, & Andriusaitiene, D. (2015). Lietuvos jaunimo migracinių nuostatų tyrimas., p. 213.

pį sparčiai besiplečianti globalizacija ypač įtakojo migracijos sąvoką, o technologijų ir komunikacijų pažanga išplėtė žmonių migracijos galimybes, kadangi migruoti pasidarė daug paprasčiau ir pigiau. Pasak I. Naulickaitės ir B. Melniko, tarptautinė migracija tapo itin ryškia tendencija globalizuotame pasaulyje – XXI a. net vadinamas „migracijos amžiumi". Ekonomikos globalizacija pakeitė pasaulinės migracijos pobūdį bei apimtis[8].

Migracijos ir žmonijos istorijos sutampa. Tačiau kaip socialiai reikšmingas, nuolatinis, individualiai motyvuotas ir laisvas reiškinys migracija išryškėjo tik industrializacijos ir urbanizacijos periodu. Tarptautinė darbo jėgos migracija atsirado prieš keletą šimtmečių, vieni pirmųjų ją aiškino klasikai. Jų teigimu, žmonės, kaip bet kurie darbo ištekliai, juda iš išteklių pertekliaus regionų į regionus, kur jaučiamas darbo jėgos trūkumas. Išsamiau teoriškai problemą aiškinti imta XX a. 6-ojo dešimtmečio pabaigoje. Teoriniai modeliai rėmėsi tuo, kad tarptautinis darbo jėgos judėjimas, kaip vienas iš gamybos veiksnių, veikia ekonomikos augimo tempus. Pagrindine migracijos priežastimi laikytas darbo užmokesčio lygio skirtumas šalyse. Neoklasikinio požiūrio šalininkai teigė, kad kiekvienas žmogus gauna ir sunaudoja ribinį savo darbo produktą, tad jie manė, jog emigracija didina darbo jėgą priimančios šalies gerovę, tuo tarpu šalies, iš kurios darbo jėga išvyksta, ekonominis vystymasis bent jau neprastėja[9].

Šiandieniniame mūsų moderniame pasaulyje migraciją skatiną įvairūs veiksniai – ekonominiai, kultūriniai, socialiniai ar psichologiniai. Veiksniai, skatinantys migruoti, gali būti skirstomi į keturias pagrindines grupes – paklausos (traukos), pasiūlos (stūmimo), grandininės migracijos veiksniai ir psichologiniai veiksniai[10]. Paklausos veiksniai yra susiję su tikslo šalimis. Migrantus traukia geresnės, nei jų gimtinėje esančios ekonominės, socialinės ar kitokio pobūdžio sąlygos. Prie šių veiksnių priskiriamos didesnės pajamos, mažesni mokesčiai, geresnės darbo sąlygos, politinis stabilumas, geresnės socialinės paslaugos (mokymosi, gydymo), religinė tolerancija. Pasiūlos veiksniai susiję su vidine gimtosios šalies situacija. Prie šių veiksnių yra priskiriama karas ar kitokie ginkluoti konfliktai, žemas gyvenimo lygis, bloga šalies politinė situacija, aukštas nedarbo lygis, mažas užimtumas, maži atlyginimai, sunkios ir sudėtingos socialinės gyvenimo sąlygos. Grandininės migracijos veiksniai yra susiję tuo, jog seniau atvykę emigrantai papasakoja apie tai ir informuoja gimtinėje likusius šeimos narius, draugus ar pažystamus apie darbo, ekonomines sąlygas, būstą, socialines garantijas ir net pakviečia atvykti į šalį gyventi, kurioje yra įsikūrę. Taigi migracija sukelia papildomą emigracijos arba imigracijos srautą, kuris priklauso nuo to, kurios valstybės atžvilgiu yra vertinama. Psichologiniai veiksniai svarbūs tuo, kad jie nulemia norą ir sprendimą emigruoti. Psichologiniai veiksniai susiję su motyvacija, prisirišimu prie šeimos, baime ir nežinomybe dėl prisitaikymo naujoje šalyje, kalbos barjeru ir pan[11].

Migraciją ir pabėgėlių teises reglamentuojantys teisės aktai

Visuotinė žmogaus teisių deklaracija 1948 metais pripažino asmens teisę ieškoti prieglobsčio nuo persekiojimo. Tačiau teisė gauti prieglobstį iki šiol nėra visuotinai pripažinta. Tarptautinėje teisėje galioja taisyklė, kad užsieniečių atvykimo ir buvimo valstybės teritorijoje kontrolė priklauso pačios valstybės kompetencijai.[12] Lietuvoje užsieniečių atvykimo ir buvimo valstybės teritorijoje kontrolę užtikrina Migracijos departamentas. Migracijos departamentas buvo įkurtas 1992 metais, sujungus du tuometinius Vidaus reikalų ministerijos padalinius – Emigracijos ir imigracijos tarnybą ir Pasų valdybą. Šiuo metu Migracijos departamentas yra centrinė institucija, kuri įgyvendina valstybės politiką migracijos srityje bei aptarnauja šios politikos formavimą ir įgyvendinimą. Pagrindinis Migracijos departamento veiklos tikslas yra pagal kompetenciją užtikrinti vizų, imigracijos, prieglobsčio, grąžinimo, asmenų perkėlimo į Lietuvos Respubliką, Lietuvos Respublikos pilietybės procedūrų vykdymą, asmens tapatybę ir pilietybę patvirtinančių dokumentų Lietuvos Respublikos piliečiams, kelionės dokumentų, leidimų gyventi

8 Naulickaitė, & Melnikas, B. (2015). Emigracijos iš Lietuvos procesai ekonomikos globalizacijos sąlygomis. p. 221.

9 Karaša, & Čiegis, R. (2021). Migracijos priežastys, tendencijos ir pasekmės. Regional Formation and Development Studies, 31–40., p. 32.

10 Rudžinskienė, R., & Paulauskaitė, L. (2014). Lietuvos gyventojų emigracijos priežastys ir padariniai šalies ekonomikai, p. 65

11 *Ibid,* p. 66.

12 Vysockienė L., (2005). Pabėgėlių teisė : monografija., p. 11.

Lietuvos Respublikoje ir kitų dokumentų užsieniečiams išdavimą, laisvo asmenų judėjimo Europos Sąjungoje principo įgyvendinimą. Pagal kompetenciją Migracijos departamentas kontroliuoja užsieniečių buvimą ir gyvenimą Lietuvos Respublikoje, analizuoja migracijos srautų pokyčius.[13] Lietuvos Respublikoje užsieniečių atvykimo ir išvykimo, buvimo ir gyvenimo, prieglobsčio ir laikinosios apsaugos Lietuvos Respublikoje suteikimo, integracijos ir sprendimų dėl užsieniečių teisinės padėties apskundimo tvarką ir kitus užsieniečių teisinės padėties Lietuvos Respublikoje klausimus užtikrina 2004 m. Seimo priimtas įstatymas „Dėl užsieniečių teisinės padėties".[14] Tai yra vienas iš pagrindinių įstatymų Lietuvos Respublikoje, kurio nuostatos yra suderintos su Europos Sąjungos teisės aktai, ir kuriuo vadovaujantis Migracijos departamentas užtikrina atvykusių užsieniečių teises. Be abejo įstatyme yra numatytos ir užsieniečių, atvykusių į Lietuvos Respubliką pareigos. Įstatymo 6 straipsnis (pareiga turėti galiojantį kelionės dokumentą) nurodo, jog atvykimui į Lietuvos Respubliką ir buvimui jos teritorijoje užsienietis privalo turėti galiojantį kelionės dokumentą, jeigu Lietuvos Respublikos tarptautinės sutartys, Europos Sąjungos teisės aktai arba Lietuvos Respublikos Vyriausybė nenustato kitaip. Taip pat įstatyme numatyta užsieniečių teisė kreiptis dėl prieglobsčio suteikimo. Įstatymo 65 straipsnis (Užsieniečio teisė kreiptis ir gauti prieglobstį Lietuvos Respublikoje) numato, kad užsienietis turi teisę kreiptis ir gauti prieglobstį Lietuvos Respublikoje šio Įstatymo nustatyta tvarka. Jeigu yra požymių, kad sulaikymo vietoje, pasienio kontrolės punkte ar tranzito zonoje esantis užsienietis gali pageidauti kreiptis dėl prieglobsčio, tokiam užsieniečiui jam suprantama kalba pateikiama informacija apie šią teisę ir taikytinas procedūras. Įstatyme taip pat įtvirtintos ir užsieniečių integracijos sąlygos, užsieniečių judėjimo laisvė, užsieniečių teisinės padėties apskundimo teismui sąlygos ir pan.

Lietuva taip pat vadovaujasi ir tarptautiniais teisės aktais. Vienas iš jų, svarbus žmonių prigimtinėms teisėms ir laisvėms, Lietuvoje 1997 metų sausio 21 dieną ratifikuota, Generalinės Asamblėjos 1948 metais priimta visuotinė žmogaus teisių deklaracija. Deklaracija numato, jog kiekvienas žmogus turi teisę į gyvybę, laisvę, negali būti vergijoje, kankinami ir pan. Deklaracijos 13 straipsnyje yra įtvirtinta, kad kiekvienas turi teisę laisvai judėti ir teisę pasirinkti gyvenamąją vietą kiekvienos valstybės teritorijoje, o 14 straipsnis įtvirtina teisę kitose šalyse ieškoti prieglobsčio nuo persekiojimo ir juo naudotis.

Kitas svarbus tarptautinis teisės aktas yra 1951 m. liepos 28 dieną Jungtinių Tautų Organizacijos priimta konvencija dėl pabėgėlių statuso. Šiame dokumente įtvirtinamas pabėgėlio apibrėžimas, pagrindiniai pabėgėlių apsaugos reikalavimai bei elgesio su pabėgėliais valstybių įsipareigojimas.

Pabėgėlių teisių reguliavimas tarptautinėje teisėje

Pabėgėlių problema pasaulyje egzistuoja nuo senų laikų, tačiau po Antrojo pasaulinio karo ji tapo ypatingai aktuali, kadangi Europoje po karo buvo apie 1 milijonas pabėgėlių ir šią problemą reikėjo spręsti ir ieškoti išeities. Iki 1951 m. nebuvo jokių tarptautinių sutarčių, dokumentų, kurie numatytų visų pabėgėlių, nepriklausomai nuo jų tautybės, apsaugą. Tautų sąjungos (tarpvyriausybinė organizacija veikusi 1919 – 1939 m., Jungtinių Tautų pirmtake) laikais buvo sudaryta nemažai susitarimų, dėl pabėgėlių, tačiau šiems susitarimams buvo būdingas vienas bruožas – jie visi buvo skirti tam tikros konkrečios pabėgėlių grupės apsaugai, pavyzdžiui 1938 m. konvencija dėl pabėgėlių iš Vokietijos statuso arba 1926 m. susitarimas dėl Rusijos ir Armėnijos pabėgėlių[15]. 1948 metais Generalinės Asamblėjos priimta ir paskelbta „visuotinė žmogaus teisių deklaracija" numatė, jog kiekvienas turi teisę kitose šalyse ieškoti prieglobsčio nuo persekiojimo ir juo naudotis[16]. Tačiau ši deklaracija nereglamentavo pabėgėlių teisinio reguliavimo, jų apsaugos, nenumatė procedūrų, dėl pabėgėlių statuso suteikimo ir pan. 1951 m. Jungtinių Tautų Organizacijos priimta konvencija „dėl pabėgėlių statuso" padėjo pabėgėlių teisės pagrindą. Ši konvencija įtvirtino bendrą pabėgėlio apibrėžimą ir

13 Lietuvos Respublikos Migracijos departamentas. (2022) *Apie migracijos departamentą.* https://migracija.lrv.lt/lt/administracine-informacija/apie-migracijos-departamenta.

14 Lietuvos Respublikos įstatymas „Dėl užsieniečių teisinės padėties", Žin. (2004, Nr. 73-2539; TAR identifikacinis kodas 1041010ISTA0IX-2206), 1 str. 1 d.

15 Vysockienė, L. *supra note* 12, p. 21.

16 Generalinės asamblėjos 1948 m. gruodžio 10 d. rezoliucija Nr. 217 A (III) „Visuotinė žmogaus teisių deklaracija", *supra note* 53, 14 str.

nustatė pagrindinius pabėgėlių apsaugos reikalavimus bei elgesio su pabėgėliais valstybių įsipareigojimus[17]. Konvencija įsigaliojo 1954 metais balandžio 22 d., tačiau joje taip pat buvo nustatyti tam tikri taikymo ribojimai, kadangi valstybės tuo metu siekė išspręsti tik tuomet egzistuojančią problemą susijusią su pabėgėliais dėl Antrojo pasaulinio karo, ir nenorėjo prisiimti įsipareigojimų ateičiai. Pirmasis apribojimas buvo geografinis, tai reiškia, jog konvencija buvo taikoma tik pabėgėliams atvykstantiems iš Europos regiono. Valstybė pasirašant konvenciją galėjo pasirinkti, ar taikyti konvenciją ir pabėgėliams iš kitų regionų. Antrasis apribojimas nustatė, jog konvencija taikoma tik asmenims, tapusiems pabėgėliais iki 1951 m. sausio 1 d., t. y. dėl Antrojo pasaulinio karo atsiradusiems pabėgėliams. Šis apribojimas dar buvo vadinamas laiko apribojimu. Konvencijos 1 straipsnis nurodė, jog pabėgėlis tai asmuo, kuris dėl įvykių, buvusių iki 1951 m. sausio 1 d., arba dėl visiškai pagrįstos baimės būti persekiojamam dėl rasės, religijos, pilietybės, priklausymo tam tikrai socialinei grupei ar politinių įsitikinimų yra už šalies, kurios pilietis jis yra, ribų ir negali arba bijo naudotis tos šalies gynyba; arba neturėdamas atitinkamos pilietybės ir būdamas už šalies, kurioje anksčiau buvo jo nuolatinė gyvenamoji vieta, ribų dėl tokių įvykių negali ar bijo į ją grįžti[18]. Laikui bėgant praktika parodė, jog pabėgėlių problema nesibaigė Antrojo pasaulinio karo pabėgėlių problemos išsprendimu. Pabėgėlių srautai atsirado ir iš kitų regionų, todėl buvo aišku, kad konvencija nėra tinkama esant tokiai padėčiai. Atsižvelgus į esamas pabėgėlių problemas ir konvencijos taikomus ribojimus 1965 m. balandžio mėnesį Italijoje buvo surengtas koliokviumas dėl pabėgėlių problemų teisinių aspektų[19]. Susitikimo metu buvo nuspręsta, jog tinkamiausias būdas išspręsti pabėgėlių problemas yra priimti protokolą, kuriuo būtų panaikinamas konvencijos laiko apribojimas. Susitikime parengus protokolo projektą 1967 m. protokolas „dėl pabėgėlių statuso" buvo priimtas ir įsigaliojo 1967 m. spalio 4 d., kuriuo buvo panaikintas konvencijoje įtvirtintas laiko ribojimas, o geografinis apribojimas galėjo būti išlaikytas tik tada, jei valstybė taikė šį apribojimą prisijungdama prie konvencijos. 1967 m. priimtame protokole pabėgėlis yra apibrėžiamas kaip kiekvienas asmuo, kuris atitinka Konvencijos 1 straipsnio apibrėžimą be žodžių „dėl įvykių, buvusiu iki 1951 m. sausio 1 d." ir žodžių „dėl tokių įvykių", esančių 1 straipsnio A skirsnio 2 punkte[20]. Pabėgėlio statuso pripažinimas yra iš esmės deklaratyvaus pobūdžio, tai reiškia, jog ne pripažinimas daro asmenį pabėgėliu, o jo išvykimas iš šalies, dėl konvencijoje numatytų priežasčių lemia jo tapimą pabėgėliu, tačiau kad asmuo galėtų pasinaudoti 1951 m. konvencijos pabėgėliams suteikiamomis teisėmis, jo, kaip pabėgėlio statusas turi būti nustatytas remiantis pabėgėlio sąvokoje išvardytomis sąlygomis. Toks nustatymas vadinamas pabėgėlio statuso nustatymo procedūra[21].

Pabėgėlių teisės esmė yra siekis užtikrinti žmogaus teises pabėgėliams, o Europos Sąjunga yra lyderė, tarp prisiimtų tarptautinių įsipareigojimų ginti ir saugoti žmogaus teises, tai yra vienas iš Europos Sąjungos prioritetų. Europos Vadovu Taryba deklaruoja, jog sudarė keturias prioritetines sritis, ateinantiems keliems metams iš kurių viena svarbiausių yra ginti piliečius ir laisves, užtikrinti veiksmingą ES išorės sienų kontrolę ir toliau plėtoti visapusę migracijos politiką, kova su terorizmu ir tarpvalstybiniu nusikalstamumu, didinant ES atsparumą tiek stichinėms, tiek žmogaus sukeltoms nelaimėms[22].

Kalbant apie žmogaus teisių užtikrinimą pabėgėliams būtina aptarti tarptautines organizacijas, kurios ir sprendžia pabėgėlių problemas. Pabėgėlių problema, kaip viena iš prioritetinių sričių, buvo įtraukta į JT Generalinės asamblėjos sesijos darbotvarkę dar 1946 m., kai buvo iškeltas klausimas įsteigti tarptautinę instituciją, kuri būtų atsakinga už visų pabėgėlių, nepriklausomai nuo tautybės, problemų sprendimą ir paramos jiems tiekimą[23]. Taigi 1946 m. buvo įkurta Tarptautinė pabėgėlių organizacija (*International Refugee Organization*), įsteigta Jungtinių Tautų kaip laikinoji agentūra, kurios tikslas

17 *Ibid.*

18 Jungtinių Tautų Organizacijos 1951 m. liepos 28 d. konvencija „dėl pabėgėlių statuso", 1 str.

19 Vysockienė, *supra note* 12, p. 22

20 Generalinės asamblėjos 1966 m. gruodžio 16 d. rezoliucija Nr. 2198 (XXI) „Protokolas dėl pabėgėlių statuso". *Valstybės žinios*, 1997-02-07, Nr. 12-227, 1 str. 2 d.

21 Vysockienė, L. *op cit* 12*,* p. 83

22 An official website of the European Union (2022). *European Union priorities 2019 – 2024.* Prieiga per internetą: https://european-union.europa.eu/priorities-and-actions/eu-priorities_en

23 Vysockienė, L. *op cit* 12, p. 43.

buvo organizuoti europiečių, kurie tapo benamiais dėl Antrojo pasaulinio karo priežiūrą, repatriaciją ar persikėlimą. Organizacija nutraukė savo veiklą 1952 m., perkėlusi apie 1 mln. žmonių.[24] Tarptautinę pabėgėlių organizaciją 1950 m. gruodžio 14 dieną pakeitė Generalinės asamblėjos rezoliucijos patvirtintas Jungtinių Tautų Pabėgėlių vyriausiojo komisaro biuras (*United Nations High Commissioner for Refugees*). Organizacija turėjo veikti trejus metus ir buvo įsteigta kaip pagalbinė JT Generalinės asamblėjos institucija. Jos funkcijos buvo ieškoti nuolatinių pabėgėlių problemų sprendimo būdų, teikti pabėgėliams tarptautinę apsaugą, koordinuoti savanoriškų agentūrų veiklą, padėti labiausiai nepasiturinčioms pabėgėlių grupėms.[25] Nepaisant to, jog Jungtinių Tautų Pabėgėlių vyriausiojo komisaro biuras buvo įkurtas kaip laikina organizacija, jos veikla pratęsiama iki šiol, kas penkerius metus. Vyriausiąjį komisarą renka Generalinė asamblėja ir skiria generalinis sekretorius[26].

Vienas pagrindinių ir svarbiausių valstybių tarptautinių įsipareigojimų prieglobsčio suteikimo srityje yra „asmens negrąžinimo principas". Tai yra kertinis Konvencijos principas, numatytas 33 straipsnyje. Konvencijoje nurodoma, jog nė viena Susitariančioji valstybė jokiu būdu neišsiunčia ir negrąžina pabėgėlio į šalį, kur jo gyvybei ar laisvei grėstų pavojus dėl rasės, religijos, pilietybės, priklausymo tam tikrai socialinei grupei ar dėl politinių pažiūrų[27]. Tačiau šis principas ir valstybių įsipareigojimas nėra visiškai absoliutus, nes konvencija numato ir išimčių. Joje nurodyta, jog ši nuostata negali būti taikoma pabėgėliams, dėl svarbių priežasčių laikomiems pavojingais šalies, kurioje jie yra, saugumui arba nuteistiems įsigaliojusiu nuosprendžiu už ypač sunkų nusikaltimą ir keliantiems pavojų šiai šaliai.[28] Praktiškai prieglobsčio prašytojo išsiuntimas iš valstybės gali būti problematiškas, jei yra svarių ir pagrįstų įrodymų, kad prieglobsčio prašytojui gresia realus pavojus valstybėje, į kurią jis išsiunčiamas. Šį principą įtvirtina ne tik 1951 m. konvencija, tačiau ir kitos konvencijos ir taip pat Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencija, kurioje bene labiausiai išplėtota šio principo taikymo praktika. Konvencijos 3 straipsnyje numatyta, jog niekas negali būti kankinamas, su niekuo neturi būti žiauriai, nežmoniškai ar žeminant jo orumą elgiamasi, ar jis baudžiamas[29]. Europos žmogaus teisių komisijos nuomone, „jei sąlygos vienoje ar kitoje valstybėje yra tokios, kurios patenka į 3 straipsnio taikymo apimtį, sprendimas dėl asmens išsiuntimo, išdavimo arba grąžinimo tokiomis sąlygomis sukelia tokį sprendimą priimančios susitariančios valstybės atsakomybę[30].

Išvados

Migracijos procesai pasaulyje vyksta nuo seniausių laikų, ir kaip rodo dabartiniai pasaulio įvykiai šie procesai niekada nesustos, todėl šalyse ir tarptautiniu mastu būtina turėti įstatymus ir įsipareigojimus tarp šalių kuriais būtų sukurta efektyvi sistema skirta padėti užsieniečiams bėgantiems nuo gręsiančio pavojaus.

Visuotinė žmogaus teisių deklaracija 1948 metais pripažino asmens teisę ieškoti prieglobsčio nuo persekiojimo. Tačiau teisė gauti prieglobstį iki šiol nėra visuotinai pripažinta. Tarptautinėje teisėje galioja taisyklė, kad užsieniečių atvykimo ir buvimo valstybės teritorijoje kontrolė priklauso pačios valstybės kompetencijai.

Analizuojant Lietuvos migracijos istoriją, neabejotinai galima teigti, jog per visą Lietuvos nepriklausomybės laikotarpį šalis su didžiausiu nelegalių migrantų srautu susidūrė 2021 m. prasidėjus Baltarusijos migracijos krizei, tai sukėlė sumaištį Lietuvos migracijos institucijoms ir pareigūnams, kurie susidūrė su dideliais kiekiais pabėgėlių, todėl Seimas neeilinėje sesijoje ypatingos skubos tvarka priėmė įstatymo „Dėl užsieniečių teisinės padėties" įstatymo pataisas, kuriomis numatė paspartinti prieglobs-

24 International Refugee Organization. (2021). Columbia Electronic Encyclopedia, 6th Edition, 1.

25 International Refugee Organization. (2021). Columbia Electronic Encyclopedia, 6th Edition, 1.

26 Vysockienė, L. *supra note* 12, p. 43

27 Jungtinių Tautų Organizacijos 1951 m. liepos 28 d. konvencija „dėl pabėgėlių statuso", *supra note* 49, 33 str. 1 d.

28 *Ibid,* 33 str. 2 d.

29 Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencija. Valstybės žinios, 1995-05-16, Nr. 40-987., 3 str.

30 Vysockienė, L. *op cit* 12, p. 48

čio prašymų nagrinėjimą ir apriboti kai kurias prieglobsčio prašytojų teises tais atvejais, kai valstybė jų negali užtikrinti dėl valstybėje paskelbtos ekstremaliosios situacijos.

1951 m. Jungtinių Tautų Organizacijos priimta konvencija „Dėl pabėgėlių statuso" padėjo pabėgėlių teisės pagrindą. Šį konvencija įtvirtino bendrą pabėgėlio apibrėžimą ir nustatė pagrindinius pabėgėlių apsaugos reikalavimus bei elgesio su pabėgėliais valstybių įsipareigojimus. Šį konvencija yra pagrindinė Tarptautiniu mastu reglamentuojanti pabėgėlių teises.

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The Importance and Role of the Political Minority of the Municipal Council in Ensuring the Democratic Implementation of the Right to Local Self-Government Guaranteed by the Lithuanian Constitution in Territorial Administrative Units Designated by the State

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Annotation

Recognition of the parliamentary opposition and the obligation to defend it in order to ensure pluralist democracy is notable as one of the key elements of pluralist democracy. The fact that ensuring the protection of the rights of the minority (opposition) in the municipal council is a necessary element of a pluralistic democracy has been emphasized by the Constitutional Court of the Republic of Lithuania. The term pluralist democracy in the current jurisprudence of the Constitutional Court of the Republic of Lithuania is related not only to the diversity of opinions, but also to a broader analysis: in the political, ideological and cultural context.

Keywords: *Local Self-Government, Political Minority, Municipal Council, Democracy.*

Introduction

The relevance and scientific novelty of the research is based on the fact that the significance of the realization of the minority (opposition) rights of municipal councils in the management of the municipality is examined from a systematic point of view: at the beginning, a general analysis of the place of local self-government in the State structure is performed, and its modern understanding is based on the synergy of philosophy, politics and law, the interaction between state and municipal institutions is examined later, which allows for a holistic transition to the assessment of the internal legal situation of the local government itself, that is, public decision-making and implementation processes at the lowest level of municipal governance. The need to realize the rights of the minority (opposition) in municipal councils should be focused on creating a system of democratic governance at the local public level that would effectively help citizens to exercise their rights and legitimate interests in any organization with an institutionalized structure.

The aim of the research is to develop the protection of the minority (opposition) rights of municipal councils as a complementary mechanism of local self-government (regulation) by ensuring the balanced functioning of the system of "checks and balances" between the majority and the minority of municipal councils in municipalities.

The research formulates a problematic situation when the insufficient guarantee of the minority (opposition) rights of the municipal council causes violations of the rule of law and the development of autocratic governance tendencies in the local government system of the Republic of Lithuania. Although democratic institutions of local self-government are formally enshrined in Lithuanian legislation, however, different demographic situation, different emerging municipal management traditions, different work regulations of municipal councils, poor control of decisions and administrative actions of municipal councils, incorrect treatment and application of statutory legal norms creates conditions for the formation of situations where democratic values, the principles of law declared by international organizations and the protection of civil rights and freedoms in the fields of activity of municipalities are endangered.

The place of local self-government in the State structure

This research part examines the place of self-government in the Republic of Lithuania, the relationship of local self-government with the central government and the interaction between self-government institutions. Extensive practical and legislative analysis shows that in self-government, powers interactions are specific because they interact not only with each other but also with central government, however the fact about government interactions presupposes that leverage mechanisms also exist in self-government. In this subchapter trying to reveal the essential features of operation of the Checks and balances system in the local - government.

According to the theory of the Checks and Balances system, each branch of government is separate and has its own area of governmental responsibilities. The goal is that none of the branches would be able to become powerful enough to dominate the other two branches. Checks and balances give each branch of government the ability to change or cancel acts of another branch, preventing any one branch from becoming too powerful.

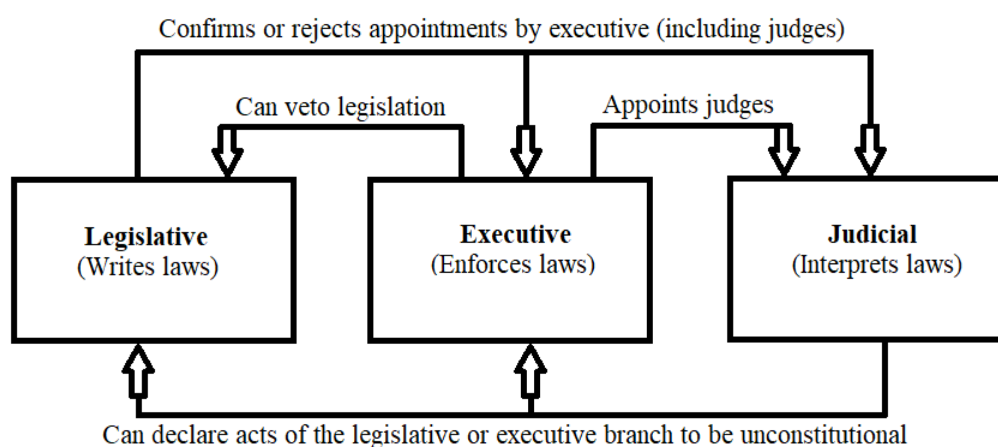

Figure 1[31]. Checks and Balances system (State level model)

The state governance model is usually established by Constitution. In the Constitution of the Republic of Lithuania, a separate section dedicated to local self-governance and its management, which shows not only that the state recognizes local self-government, but the principles of local self-government mentioned in the Constitution of the Republic of Lithuania, also acquire constitutional protection.

The separation of powers (Checks and balances system) is one of the most important constitutional principles of a democratic state, which influences the organization of state power, its functioning and guarantees human rights and freedoms. The separation of powers can be divided into two interrelated parts:

1. Interaction of authorities - is usually associated with the relationship between individual authorities, which is understood as cooperation between authorities, coordination, operation of a system of "checks and balances", which ensures control and balance between authorities.
2. Separation of powers - is not only the division of powers into branches of state power, but also the determination of their own internal formation procedure, legal status, powers and competencies, and ensuring independence.

J. Madison, one of the main founders of the doctrine of the division of powers, also held the position that the constitutional framework defining the powers of each individual government was insufficient. He argued that a mechanism was needed to guarantee self-regulatory control over the government. "J.

31 The figure is compiled by the author.

Madison's aim was to protect freedom and the interests of the minority by creating a system in which the central authorities remain independent but at the same time control and counterbalance each other. Based on the experience of the United States, J. Madison saw the greatest danger (to democracy) in the power of the legislature."

The system of **Checks and Balances** is usually associated with the management of the State rather than municipalities and the institutional structure of their government differs. Moreover some researchers generally take the view that *local authorities are not State structures, so the principle of separation of powers does not apply to the organization of local government*. However, it must be acknowledged that in both: local government and central government, the analogy of the framework for decision-making is very similar.

At the State level: the Seimas of the Republic of Lithuania passes laws, the Government of the Republic of Lithuania is the executive power, the Courts control the legality of legislation and its application. In the municipality: The municipal council makes decisions, the administration is the executive power, the representative of the Government of the Republic of Lithuania exercises administrative supervision, that is, Supervises whether municipalities comply with the Constitution and laws, or implement the resolutions of the Government of the Republic of Lithuania.

According to the Constitution of the Republic of Lithuania, the right of self-government is guaranteed only to municipalities - the lowest territorial administrative units, therefore Lithuania is classified as a state with one-tier self-government. The wording of Part 1 of Article 3 of the Charter on the right of self-government to conduct its public affairs under its full responsibility is enshrined in Article 120 of the Constitution of the Republic of Lithuania, which establishes, that "*Municipalities shall act freely and independently within the limits of the competence defined by the Constitution and laws*". This provision is also enshrined in Part 2 of Article 4 of the Law on Local Self-Government. Together with Article 3 of the Charter, which stipulates that the local government shall have the right and ability to handle and manage the major part of public affairs represented by freely elected councils, Article 120 of the Constitution provides for the election of local government decision-making bodies and the right to vote for citizens and other permanent residents of the administrative unit. The limits within which self-government operates are established only by a law at the State level.

The Constitution of the Republic of Lithuania does not directly define the powers and duties of local self-government bodies, thus leaving them to be established by law. The law defines in detail what functions each level of government should perform. Article 6 of the Law on Local Self-Government lists autonomous functions of municipalities, such as: preparation and approval of the municipal budget; setting local tolls; management, use and disposal of land and other property owned by the municipality; maintenance, repair and construction of municipal roads and streets of local importance; the organization of road safety and many others (45 points in total).It should be noted that the list is not exhaustive, as Part 46 of Article 6 of the Law on Local Self-Government provides that other functions of autonomous municipalities may also be included other functions not attributed to public authorities.

Article 7 of the Law on Local Self-Government specifies the functions delegated by the State to municipalities, such as: registration of acts of civil status; fire safety; involvement in managing state parks; setting up social benefits and compensation; providing free meals to students, and many others (38 items in total). It should also be noted that the list is not exhaustive, as Part 39 of Article 7 of the Law on Local Self-Government provides that functions delegated by the State may include other functions delegated by law.

The constitutional principle of a state under the rule of law involves many different interrelated imperatives, including the requirement of a hierarchy of legislation, from whence arises the rule of law over the secondary legislation. It means that the constitutional principle does not allow sub-statutory legal acts to establish such legal regulation that would compete with the one provided by the law. Sub-statutory legal acts may not change the law or create new general legal norms that compete with one another, as this would violate the supremacy of the laws enshrined in the Constitution of

the Republic of Lithuania over sub-statutory legal acts[32]. A sub-statutory legal act must implement the norms of the law, therefore it must be adopted on the basis of law. A sub-statutory act is an act of application of the rules of the law, whether it is of one-time application or of permanent validity.[33]

The principle of municipal autonomy is not absolute and it does not relieve public administration entity (municipal councils) from the obligation to comply with all the principles of public law, including the principle of legality. Municipal councils, implementing the functions entrusted to them, has no discretion to establish legal regulation that does not comply with the provisions of higher-ranking legal acts.[34]

Under Part 1 of Article 123 of the Constitution of the Republic of Lithuania: "*In higher administrative units, the government shall organize the management in accordance with the procedure established by law.*" In accordance with the provisions of the second and third paragraphs of Article 123 of the Constitution of the Republic of Lithuania and Municipal Administrative Supervision law - administrative supervision of municipalities is performed by state officials appointed by the Government - representatives of the Government. They supervise the compliance of municipalities with the Constitution and laws of the Republic of Lithuania or the implementation of Government decisions.

This way the control of the legality of administrative acts adopted by municipal administration entities is within the competence of the Government representative[35]. Government representative oversees the municipalities' compliance with the Constitution and laws, or enforces government decisions, proposes (must propose) to repeal or amend unlawful legal acts of municipal administrative entities, and when the entities of municipal administration do not agree to repeal or amend the disputed legal act, refuse to implement the law or execute the decision of the Government, apply (must apply) to the court.

Article 4 of the new version of the Law on Administrative Supervision of Local Governments of the Republic of Lithuania, which came into force on 01.07.2011, provides that representatives of the Government of the Republic of Lithuania shall be appointed on the recommendation of the Prime Minister of the Republic of Lithuania. In this way, the tender procedure established for the position of the representative of the Government of the Republic of Lithuania was waived. The representative of the Government of the Republic of Lithuania has become a state of political trust, subordinate and accountable to the Government of the Republic of Lithuania. Because the Government itself is a political entity in which political parties play a major role - there is a clear risk that decisions related to administrative control in individual municipalities will be taken selectively, not by law-based arguments, but by political agreements. After the Seimas of the Republic of Lithuania adopted amendments to the Law on Administrative Supervision of Municipalities of the Republic of Lithuania, also in the public space there are many fears that administrative supervision will be carried out in accordance with political decisions, which could undoubtedly complicate the democratic process in the future.

Local authorities shall have the right to use judicial means to safeguard the right to exercise their powers unrestrictedly and to ensure respect for the principles of local self-government enshrined in the Constitution and in domestic law. Accordingly, Article 122 of the Constitution provides that municipal councils shall have the right to apply to the courts for violation of their rights, which is also enshrined in Article 11 of the European Charter of Local Self-Government.

32 21th of August, (2002) Ruling of the Constitutional Court of the Republic of Lithuania, in case no. 43/01; 12th of December, (2005) Ruling of the Constitutional Court of the Republic of Lithuania, in case no. 20/02; 19th of January, (2005) Ruling of the Constitutional Court of the Republic of Lithuania, in case no. 23/2003.

33 06th of September, (2007) Ruling of the Constitutional Court of the Republic of Lithuania, in case no. 44/04-10/06; 31th of March, (2010) Ruling of the Constitutional Court of the Republic of Lithuania, in case no. Nr. 30/07; 18th of April, (2012) Ruling of the Constitutional Court of the Republic of Lithuania, in case no. 37/2008-11/2009-7/2010-22/2010-34/2010-56/2010-116/2010-126/2010-10/2011-12/2011-13/2011-24/2011; 20th of February, (2013) Ruling of the Constitutional Court of the Republic of Lithuania, in case no. 41/2009.

34 19th of October, (2015) Ruling of the Supreme Administrative Court of Lithuania, in case no. A-737-552/2015.

35 06th of December, (2010) Ruling of the Supreme Administrative Court of Lithuania, in case no. A662-1429/2010.

The place of self-government in the State structure could be depicted like in Figure 2.

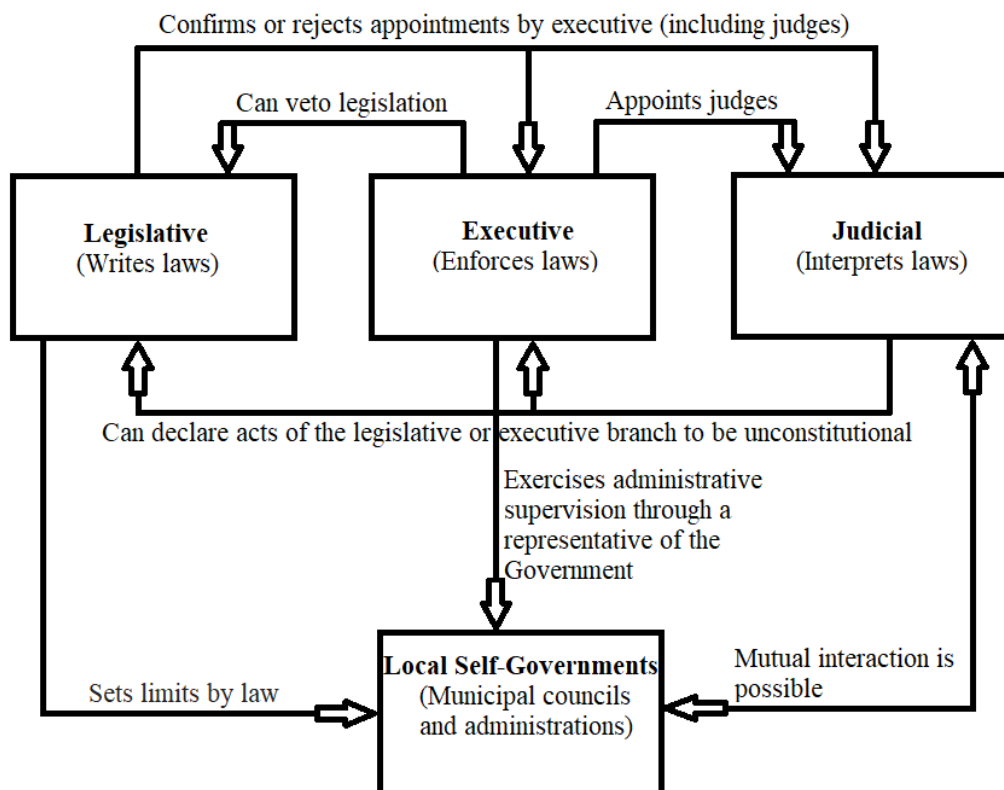

Figure 2[36]. The State Structure

Undoubtedly, the municipal council has the greatest influence on the management of self-government, therefore in each municipality council, the presence of an opposition (minority) is not only a normative phenomenon, but also a necessary expression of democracy. In essence, the opposition has two main functions: One, it does not allow one party to come entrench and curtails government selfishness, it helps to maintain the Constitutional model of Local - Government. Secondly, because the political decisions are not perfect, the opposition points out the mistakes and shortcomings of the government. Opposition works like instrument to restrict government and cultivate social peace.

A brief summary of the research part should highlight a number of points:

1. In self-government, powers interactions are specific because they interact not only with each other but also with central government, however the fact about government interactions presupposes that leverage mechanisms are also exist in self-government.
2. Considering that the municipal council has the greatest influence on the decisions made in the municipality, and in order to maintain democratic governance at the municipal level (Checks and Balances mechanism), it is necessary to strengthen the capacity of the opposition and ensure proper implementation of laws in the local government.
3. Municipal administrative supervision must be carried out - not on political, but on legal arguments, so reform is needed in this area.

National legal acts review in the context of ensuring political minority rights (opposition) of the municipal council

The council of each municipality approves the regulations of the activities of the municipal council -

36 The figure is compiled by the author.

the main internal legal act of the municipal council, for the term of office, which, in accordance with the valid Law on Local Self-Government of the Republic of Lithuania, establishes the procedure and forms of activities of the municipal council, the mayor, the deputy mayor, council committees, commissions and individual council members. The procedure for the accountability of the mayor, the director of the municipal administration, the municipal ombudsman to the council and the population, as well as the council and the individual members of the council to the population and the main forms and methods of communication with the population are also established.

In order to guarantee political democracy - the freedom of the opposition, Articles 14 and 15 of the Law on Local Self-Government of the Republic of Lithuania provide for exclusive minority (opposition) rights. The municipal council shall form an Ethics Commission, an Anti-Corruption Commission and a Control Committee for the term of office, the chairpersons of which shall be nominated by the legislature on the proposal of the minority (opposition) of the municipal council in accordance with the regulation.

Part 19 of Article 3 of the Law on Local Self - Government of the Republic of Lithuania defines the minority (opposition) of the municipal council as "A faction of the members of the municipal council and/or a group of members of the municipal council, at the first or next meeting of the municipal council, by a public statement served on the chairman of the meeting, declaring that they are not nominating their candidate for the formation of the municipal executive body, have not delegated their candidates for the position of Deputy Mayor and have submitted their activities." Wording provided for in the Law on Local Self-Government of the Republic of Lithuania, under certain circumstances (having an absolute majority in the council), provides a practical opportunity for the majority of the municipal council to eliminate unfavourable members of the opposition from the statutory minority (opposition) chairpersons of the council (Ethics, Anti-Corruption Committees and Control Committee), creating a self-loyal "majority opposition" that is identical both ideologically and in decision-making for the majority.

Contrary to the Statute of the Seimas of the Republic of Lithuania[37], The Law on Local Self-Government of the Republic of Lithuania does not impose any more requirements for declaring a minority of the council (opposition) than provided for in Part 19 of Article 3 of the Law on Local Self-Government of the Republic of Lithuania. It follows that any group or faction of the members of the council (i.e. at least three members of the council) may declare itself an opposition group at any time. An example could be the extraordinary situation in Druskininkai municipality[38], when all positions guaranteed by law to the opposition are held by the representatives of the majority.

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37 More specifically: Part 1 of Article 41 of the Statute of the Seimas of the Republic of Lithuania provides: "*Factions of members of the Seimas or their coalitions <u>that do not agree with the Government's program</u> may declare themselves in opposition*"; Part 2 of Article 41 of the Statute of the Seimas of Republic of Lithuania provides: "*Opposition factions are those factions or their coalitions whose political declarations issued in the Seimas <u>set out the provisions that distinguish them from the Seimas majority</u>."*; Part 3 of Article 41 of the Statute of the Seimas of the Republic of Lithuania provides: *"<u>Opposition factions or coalitions announce alternative government programs.</u>"*.

38 After March 1st, 2015municipal elections, for the 2015 – 2019 term of office of Druskininkai Municipal Council, 25 members of the council were elected, divided according to the number of votes received in the municipal elections into three political parties: Representatives of the list of the Lithuanian Social Democratic Party - 18 seats, Liberal Movement of the Republic of Lithuania - 4 mandates, Homeland Union-Lithuanian Christian Democrats - 3 seats. However, as many as five factions were formed, three of which declared themselves opposition. With the list of the ruling majority (Social Democrats) on the municipal council, the council members formed as many as three separate factions, one of which declared itself in opposition. In this way, members of the minority who are unfavorable to the majority are eliminated, and all the statutory posts for the opposition (chairmen of the Ethics, Anti-Corruption Committees and the Control Committee) are *de facto* granted to the majority. Moreover, the establishment of five factions circumvents the principle of proportional representation of the Control Committee provided for in Part 2 of Article 14 of the Law on Local Self-Government of the Republic of Lithuania. A similar situation occurred after the elections on March 3rd, 2019, when at the first meeting of the newly elected municipal council with the list of the majority (mayoral) candidates in the municipal council, the politicians declared themselves to be in opposition and occupied all positions guaranteed to the opposition in the Law on Local Self-Government of the Republic of Lithuania, thus eliminating real opposition to full margins.

It is clear that in situations where the majority of the municipal council *de facto* holds both managerial positions (decision-making and implementation) and opposition positions (control and supervision) – there is a real threat to the democratic order in such municipalities. The imperfection of legal acts creates preconditions for political groups to abuse the right of self-government guaranteed by the Constitution of the Republic of Lithuania.

In this case, the intervention of a higher authority, i.e. the entity performing the administrative supervision of municipalities (representative of the Government of the Republic of Lithuania) is necessary.

The Law on Administrative Supervision of Municipalities of the Republic of Lithuania establishes the powers of the representatives of the Government of the Republic of Lithuania performing the administrative supervision of the activities of municipalities provided for in the Constitution of the Republic of Lithuania. There are three forms of implementation of the activities of a representative of the Government:

1. Reasoned submission;
2. Written request;
3. Going to court.

A reasoned submission is written when municipal institutions adopt legal acts that are in conflict with the Constitution, laws or decisions of the Government; a written request is written when the requirements of the adopted law or the decision of the Government are not implemented; going to court when laws are not implemented, normative legal acts that are in conflict with the Constitution, laws or decisions of the Government are not repealed or the public interest is violated.

In view of the relevant legislation listed above and the circumstances discussed, the totality of national legal acts is significantly affect the protection of the rights of local government political minorities (oppositions) in Lithuania, and specifically:

1. Control Committee: its importance in ensuring the rights of the opposition of the municipal council and the peculiarities of its formation;
2. Ethics Commission and Anti-Corruption Commission: their importance in ensuring the rights of the opposition of the municipal council and the peculiarities of its formation;
3. The role of the representative of the Government of the Republic of Lithuania in the aspect of ensuring the minority rights of the municipal council.

It is noted that only a systematically concentrated holistic approach to the entire Institute of Local Self-Government of the Republic of Lithuania would allow solving the problems identified in the research, and would allow to offer the most optimal model of local self-government of the Republic of Lithuania, which would ensure democracy by creating a mechanism of checks and balances in the decision-making processes of municipal councils.

Conclusions and recommendations

As there are sixty separate administrative units (municipalities) of the territory in Lithuania with different demographic, economic and political situation, different work regulations of municipal councils, composition of municipal councils, therefore, they have different traditions of local governance and decision-making. The insufficient definition of the rights of the minority (opposition) in the municipal council, which ensures the opportunities for the participation of the minority (opposition) in the management of municipal public affairs, creates an environment for the formation of autocratic tendencies in municipal governance. Poor control over the decisions taken by municipal councils and the actions of the administration, as well as a flawed legal framework, create conditions for the formation of situations where there is a real threat to democratic values and the protection of individual rights and freedoms.

Taking into account the conclusions of the research, it is recommended to improve the regulation of legal relations of the municipalities comprising the Lithuanian Institute of Local Self-Government:

1. Ensuring the effective implementation of the protection of the rights of the minority (opposition) of the municipal council provided for in the Law on Local Self-Government of the Republic of Lithuania;
2. Streamlining administrative oversight of municipal activities based on the principles of the rule of law, legality and proportionality, rather than on the basis of agreements between political parties and individual interests.

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Human rights analysis from the constitutional perspective in Lithuanian national law context

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Annotation

In every legal state, the main focus is on guaranteeing human rights. One of the main goals of civil society is to protect and guarantee human rights. It is not uncommon for members of society to pursue collective goals - real national security, national welfare, growth of the gross national product. In certain cases, priority should not be given to the collective, but rather to the personal interest - the right of the individual. Regardless of the collective dimension of all human rights and the fact that individuals are part of a certain group, human rights must be understood as a counterbalance to the state and the group. The social dimension always marks human rights. Human rights require a certain basis - a legal system. Human theses are widely held opinions, functioning norms and international order. All rights arise in certain historical circumstances. Rights are people's demands that have the characteristics of historical and social formation. They are personally approved by the will of men, or accepted and recognized by certain traditions, institutions, and means, or by historically determined theories of human needs and human aspirations, or by human conceptions of divine plan and purposes.

Keywords: *human rights, legal system, institutions protecting human rights.*

Introduction

Relevance of the topic. The relevance is determined by the fact that, today, the activities of various organizations or state institutions are evaluated taking into account human rights. There is no doubt that a democratic social order necessarily unconditionally respects human rights and helps to implement them. Humanistic theories of recent times are generally based on the fact that a person has basic and immutable rights and freedoms that are inseparable from his person from birth. Human nature is the primary source of natural rights and freedoms. This means that human rights and freedoms do not arise by the will of the state, but a person acquires them at birth. These rights are not separated from the individual; they are not connected to the territory or the nation. A person has natural rights regardless of whether they are enshrined in state legislation or not (Anciuvienė, 2002).

A democratic state must not only declare universally recognized and cherished human rights, but must also create conditions and guarantees to implement and ensure them. In this way, the state gives every member of society the opportunity to realize their natural rights, while also creating a legal apparatus that protects these rights. The state becomes a mechanism of means and institutions, which is intended to act in the interests of individuals.

The object of the research - human rights from the constitutional perspective.

The aim of the work - is to analyze human rights from the constitutional perspective in Lithuanian national law.

Research methods. Systematic, analytical, logical, teleological, summarizing and document analysis.

Analysis of scientific literature

Concept and development of human rights History had a decisive influence on the development of the

Lithuanian doctrine of human rights. Only after regaining its independence after the occupation of the Russian Empire, Lithuania was again able to create law independently. The works of M. Romeris, who tried to bring Lithuania back to the fold of the constitutional tradition of European states, had a great impact on the influence of constitutional law (Jarašiūnas, 2011). As Lithuania was unable to participate in the process of human rights development for many decades, immediately after regaining its independence, it had to integrate many provisions of international law into various areas of constitutional law. In 1992, the Constitution of the Republic of Lithuania created based on the documents of the United Nations Organization and the Council of Europe (Birmontienė, et. al. 2001; Björgvinsson, 2016).

The International Catalog of Human Rights, which includes civil, political and social, economic, cultural rights, was first published in the Society's Declaration of Human Rights. This declaration defines the fundamental rights of every human being: the right to life, the right to the protection of personal liberty and personal integrity, protection from torture, equality before the law, protection from discrimination, judicial protection of rights, public and fair trial, protection of personal and family life, correspondence confidentiality, the right to choose a place of residence, the right to freedom of thought, conscience and religion, etc. (Boyle, 2018). A person has not only rights, but also responsibilities in society: exercising his rights. and in the exercise of his liberties, every person shall not be subject to any other restrictions than those prescribed by law, designed only to secure due recognition and respect for the rights and liberties of others, in order to meet the just needs of morality, public order, and the general welfare. in a democratic society. One of the main features of rights is their commonality, universality, indivisibility, they condition each other. Human rights can be understood in various ways as individual freedoms in society and opportunities to realize them. These rights are regulated by laws and other social norms. As already mentioned, one of the main features of human rights is their universality, indivisibility, they are mutually conditioning for everyone, regardless of their individual characteristics (race, nationality, gender, age, etc.). Human rights can also be defined. as social values, moral norms, the purpose of which is to protect human dignity. Human rights can be defined as societal values - the freedoms and privileges that a person can claim "as their right" in every society in which they live. The concept of human rights is closely related to the concept of human dignity. The doctrine of human rights is based on the assumption that the dignity of all people is equal, the purpose of human rights is to protect human dignity. In court practice, there are discussions about the difference between the concepts of law and freedom. From the point of view of law, there is no big difference between human rights and freedom, because freedom is also a right, only in another sphere of human activity, in which the state cannot interfere. The current system of human rights reflects the philosophical and legal ideas of several centuries (Anciuvienė, 2002). Throughout the development of human rights, the three most important aspects of human rights have been developed - human integrity, freedom and equality, and respect for the dignity of every human being. During this process, idealistic aspirations became not only a part of some legal acts, a component of individual state legal systems, but turned into an international human rights protection system.

Human rights are very diverse, in order to get to know them, to analyze their features, they are usually divided into certain groups according to various criteria. Human rights can be divided according to the nature of the establishment of rights, according to their content, according to the groups of subjects for whom they are intended, according to the possibilities of limiting rights, according to the historical conditions of their formation and other criteria.

1. According to the nature of the legal establishment of human rights, they can be divided into basic, constitutional, established in constitutions, and formed in other legal acts. Special attention is paid to the protection of constitutional rights; their protection is also guaranteed by constitutional supervision institutions (Kūris, 2006).

2. According to the possibilities of limiting rights, they can be classified as absolute, i.e. i.e. unrestricted and rights that may be restricted under certain conditions, such as freedom, property, right to information, etc.

3. Rights can also be divided according to the special entities for which they are intended, for example: children, disabled persons, etc. (Kūris, 2006).

4. Generally, human rights are intended for individuals, but in some cases collective rights can also be discussed, for example: the rights of national minorities, etc. i.e. However, human rights remain individual, only sometimes they can be used together with others (Social state in constitutional law…, 2006).

In constitutional Europe, the prevailing opinion was that the state should not interfere in the implementation of basic human rights, and that the state should give guarantees to the individual and implement certain measures to enable the individual to use the rights.

More than twenty years after the restoration of Lithuania's independence is enough time to evaluate the reform process, its trends and results in the state of Lithuania. The Seimas of the Republic of Lithuania adopted the most important laws and other legal acts that ensure the implementation of individual rights and freedoms, laid the foundations for the training of new specialists, the activities of reformed and newly established legal institutions, etc. Human rights are enshrined in the Constitution in accordance with the provisions of international law in force. Paradoxically, the application of the same laws and even the provisions of the Constitution guaranteeing human rights and freedoms determined by the attitude towards the place of individuals in society (property status, education, positions in the government hierarchy). Therefore, it is understandable that the further, the more important the profession becomes, the profession of a lawyer, which helps a person in the confusing labyrinth of laws, to guarantee the protection or defense of his rights.

The principle of the rule of law enshrined in the basic laws of modern democratic countries states that the actions of government and people are defined by the law and all subjects of legal relations must obey it. It is asserted that the mission of the modern rule of law is not only to serve by ensuring the rule of law, but also, based on the law, to take active actions that ensure long-term social progress: to solidarize society, to organize the assistance of its members to each other. It is known that each member of society has certain characteristics and performs certain functions. Therefore, it is not surprising that certain characteristics of a person determine his status in the social system, and certain activities determine his role.

It is asserted that the mission of the modern legal state is not only to serve to ensure the rule of law, but also, based on the law, to take active actions that ensure long-term social progress: to solidarize society, to organize the assistance of its members to each other. It is known that each member of society has certain characteristics and performs certain functions. Therefore, it is not surprising that certain characteristics of a person determine his status in the social system, and certain activities determine his role. A person's place in society is defined only by his status and role. It is also obvious that every member of society operates in a certain social and economic context of society, which consists of the main social institutions - the constitution, the economic regime, the legal order and its definition, the nature of property, etc.

The protection of human rights and their implementation is the most fundamental and permanent problem of human existence, which encompasses all others. Therefore, everything that man has done in history and continues to do is just the same, never-ending effort to guarantee the protection and development of his rights in ever-new historical conditions. Today, the state of human rights in Lithuania is discussed as a legal issue, i.e. i.e. what laws and what legal mechanism protects and defends human rights. It can be asserted that the real problems do not start when human rights were enshrined in the Constitution, but when they are tried to be implemented and defended in the event of a violation. Even now, the state of human rights in Lithuania today is determined not so much by the legal protection mechanism, but rather by the increasing economic disability of the majority of the nation, unemployment, crime, arbitrariness of officials, corruption and the known powerlessness of the government in fighting these factors (Human rights in Lithuania…, 2018).

Institutions protecting human rights

The main guarantor of human rights in the legal system of the Republic of Lithuania is the regulation of human rights in the Constitution of the Republic of Lithuania. It provides an extensive catalog of

civil and political, social, economic and cultural rights and freedoms (Constitution of the Republic of Lithuania…, 1992). It is the duty of every democratic state to respect human rights and ensure their protection. Both the constitutions of democratic states and international treaties establish that human rights and freedoms are natural. Therefore, when regulating them, determining the circumstances of their limitation, and providing for the procedure for their implementation, it is necessary to maintain respect for human rights and in no way establish such regulation that would deny the natural nature of human rights or make their implementation dependent on the legal decisions of state institutions, officials or others. It should be noted that all human rights and freedoms enshrined in the Constitution form a common, harmonious system. This principle states that all human rights and freedoms are equally important. Therefore, it cannot be said that political rights are more important or should be protected more than social rights. States and their institutions must ensure the protection of all human rights (Spruogis, 2004).

Human rights are quite widely regulated by the Constitution of the Republic of Lithuania, laws and international treaties, although the system of their implementation is particularly important - a real opportunity to use human rights and defend them. The Constitutional Court of the Republic of Lithuania stated that "in the Constitution, the state obliges to respect human rights and freedoms, to ensure their protection against illegal encroachment or limitation with rights, material and organizational means." The state is constitutionally obliged to ensure the protection of human rights and freedoms from illegal encroachment or restriction by means of rights, material and organizational means, and to establish sufficient measures for the protection and defense of human rights and freedoms. Thus, respect for human rights, their recognition, as a public value and the state's commitment to them are one of the most important features of modern democratic states (Widhaber, 2004).

There are many state institutions operating in the Republic of Lithuania, whose activities must contribute to ensuring the human rights enshrined in the Constitution. The functions performed by some of them contribute to the protection of most constitutional human rights and freedoms, while the activities of others are only related to the protection of some rights. However, it is necessary to emphasize that the abundance of institutions and the establishment of new institutions do not yet indicate that various human rights are less violated in Lithuania, and their protection has become more effective. Thus, it is necessary to create such a human rights protection system that would be effective and ensure the protection of human rights and freedoms enshrined in the Constitution. Institutions protecting human rights can be divided into national and international (). It can be concluded that those institutions differ from each other in their competence and legal decision-making. Thus, if it is believed that the fundamental rights have been violated, it is possible to seek help from various institutions or bodies of the member states, or, in certain cases, from the EU institutions. This section provides information on the authorities to contact in the event of a violation of fundamental rights (Jočienė, 2010).

The following are named: 1. National human rights institution - occupies a special place in the system of human rights protection institutions. The status, competence, formation procedures and term of authority of the members of the institution should be established in the highest legal act, thus not violating the principle of independence of this institution. Consolidation of human rights monitoring as the main function of national human rights institutions ensures the effectiveness of these institutions in the protection of human rights (Alston, et. al., 2013). 2. Ombudsman institution - is an institution provided for in the Constitution or the law, led by an independent, highly qualified official accountable to the parliament, who investigates citizens' complaints about inappropriate actions of officials of state institutions or initiates an investigation on his own initiative, and has the authority to conduct an investigation, to make recommendations indicating how to restore citizens' rights have been violated or to prevent their violation, and prepare reports. 3. Institution of Seimas inspectors - Seimas inspectors investigate complaints of applicants regarding abuse of officials, bureaucracy or other violations of human rights and freedoms in the field of public administration. Auditors of the Seimas do not investigate the activities of the President of the Republic, members of the Seimas, the Prime Minister, the Government, the state auditor and judges of the Constitutional Court and other courts and municipal councils. Seimas inspectors do not investigate complaints about labor legal relations, nor do they check the validity and legality of decisions, judgments and rulings made by courts. 4. Office of the

Equal Opportunities Controller in Lithuania - investigates complaints about direct or indirect discrimination, harassment and sexual harassment and provides related objective and impartial consultations.5. The institution of the child rights protection controller in Lithuania - one of the main rights and duties and functions of the child rights protection controller is to monitor the implementation of children's rights in accordance with the UN Convention on the Protection of Children's Rights, as well as to submit proposals to the President, the Government, the Seimas regarding valid legal acts related to the protection of children's rights protection, amendment and preparation or adoption of new legislation. 6. Controller institutions in Lithuania - investigate complaints of applicants regarding abuse of officials, bureaucracy or otherwise violating human rights and freedoms in the field of public administration. The applicant is a natural or legal person who applies to the Seimas controller with complaints about abuse of officials or bureaucracy. 7. Equal Opportunities Controller - investigates complaints and conducts investigations on his own initiative and provides advice on enquiries, conducts independent investigations related to cases of discrimination and independent reviews of the state of discrimination, publishes independent reports, provides conclusions and recommendations on any issues related to discrimination in relation to this Act implementation, as well as proposals to the state and municipal institutions and institutions of the Republic of Lithuania regarding the improvement of legal acts and policy priorities for the implementation of equal rights, carries out preventive activities and educational dissemination of equal opportunities. 8. The court is an institutional guarantee of human rights - state power in Lithuania is exercised by the Seimas, the President of the Republic and the Government, and the courts. The judiciary is one of the powers enshrined in the Constitution, which is entrusted with the administration of justice. "The execution of justice is the exclusive function of the court, which determines the place of this authority in the system of state authorities, its relationship with other authorities".

Research result and their discussion

In order to properly implement and protect human rights, both the legal framework of the state and practical measures to ensure the protection of rights are important. However, the responsibility of the citizen and every member of society and respect for human rights is no less important (Diver, et. al., 2016).

Equal opportunities are human rights. Implementation without discrimination based on gender, age, sexual orientation, disability, race or ethnicity, religion, beliefs, social status, origin, language and other grounds provided for in the treaties or laws of the Republic of Lithuania.

Thus, legal perspectives of human rights are usually researched in Lithuania, more concentrated on their realization, and much less, attention is paid to political research of human rights aspects, which leads to the assumption that there is a scientific research vacuum in this field. Lithuania cannot boast of a long-standing practice of independent human rights monitoring. There is no established and functioning National Human Rights Institution in Lithuania that would monitor the overall human rights situation. Lithuania is interested in strengthening the United Nations as a center of collective security and international law, capable of responding more flexibly to the changing threats of the modern world (Cassel, 2001).

The protection of human rights is one of the main objectives of the Council of Europe. The Council of Europe develops and improves European standards for the protection of human rights, as well as analyzes threats to human rights and seeks ways to avoid or prevent them. Lithuania supports the application of the highest standards of human rights and freedoms in EU law, the activities of institutions and the policy of external relations. It is carried out by the Controller of the Seimas of the Republic of Lithuania

Conclusions

1. Human rights theory recognizes the fact that how respect for human rights is observed is influenced by an ever-changing, dynamic social environment. Therefore, it is necessary to constantly

monitor the implementation of human rights in society, in order to create effective mechanisms for human rights monitoring and prevention of violations.

2. New international human rights conventions and other international documents are adopted, which increasingly strengthen the protection of persons from vulnerable groups. There are various mechanisms applied both nationally and internationally, thanks to which the general situation of the implementation of human rights and the situation of the rights of individual social groups are monitored.

3. Analyzing the jurisprudence of the ECtHR, it can be observed that it develops dual negative and positive obligations of states in guaranteeing the rights enshrined in the Convention. In the most general sense, negative obligations are understood as the state's obligation to refrain from arbitrary actions that violate the rights protected by the Convention, while positive obligations provide for the obligation to take active actions aimed at protecting the rights of the Convention.

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Between the legal issues of the protection of cultural heritage regulation as a tourism object and right to travel

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Annotation

When discussing the right to travel, it is stated that international legal efforts to protect cultural heritage are currently facing more and more challenges. Cases of destruction and looting of objects of cultural heritage protection, which in most cases are closely related to the right of a person to travel and ensuring the free movement of persons, are worrying. There are many different definitions of cultural heritage in the scientific literature. In the broadest sense, cultural heritage is understood as material, consisting of movable and immovable values, and intangible heritage - traditions, knowledge, abilities, cultural and historical landscape that are reflected from generation to generation and human relationship with the environment. The problems could be solved in order to develop the goals of sustainable tourism, protecting cultural heritage sites and thus balancing the equality between the right to travel and the rights of the population. The presented analysis shows that in order to discuss the right to travel of cultural heritage as a tourism object in a deeper context of today, further research is needed.

Keywords: *right to travel, cultural heritage, sustainable tourism.*

Introduction

For cultural heritage protection regulation as a tourism object, a debate about the right of the individual to travel is necessary, because especially at the present time, cultural heritage protection, as well as tourism, is experiencing many challenges and problems with the principles of sustainability. Discussions about the right to travel are increasingly associated with other legal aspects, such as a clean and safe environment, the rights of local residents, and with cultural heritage protection regulation. Benner (2019) debates that the so-called "overturism" has received increasing public attention. This phenomenon can be said has a tendency to become particularly active in the post-pandemic period, when people, who had not had the opportunity to travel for a long time, began to use this right in masse. Such mass travel or overturism poses great challenges to cultural heritage protection regulation too. According to Williams and Lawson (2001), "the impact of tourism on host country governments and populations has been an increasingly researched area, as it is widely recognized that planners and entrepreneurs need to consider the views of the host country. According to Milano, 2018; Martín, et. al. 2018 overtourism is not a new problem. It can be understood as destinations or places where people (locals, visitors, hosts or guests) feel that there are too many visitors and therefore they feel a lower quality of experience and, at the same time, the quality of life in the region and protection of cultural heritage (Postma, Schmuecker, 2017, Muler Gonzalez et al., 2018, Oklevik et al., 2019, Perkumienė, Pranskūnienė, 2019; Kim, 2018).

Cultural heritage protection regulation as a tourism object is a public interest. This obliges both state institutions and society to be active in order to preserve and integrate cultural heritage protected objects in contemporary world. Protecting immovable cultural heritage is not easy because there are involved many different interest groups in this process. The article analyzes what problems and issues are faced in order to properly protect and administer the cultural heritage, but at the same time ensuring the individual's right to travel.

Research object. Legal issues of the protection of cultural heritage regulation as a tourism object and right to travel.

The aim. To identify legal issues of the protection of cultural heritage regulation as a tourism object related with the right to travel.

Results

The right to travel

The right to travel is recognized in international legal human rights instruments. It may appear that the right to travel is an absolute right of every citizen. This right includes the right of individuals to travel from place to place (Bonnie, 2018, cited in Perkumienė and Pranskūnienė, 2019), and to leave the country and return to it. The right to travel includes more aspects, such as the right to use any mode of travel, the right to enter one country and leave another, taxes, becoming permanent residents, conditions of immunities, etc. The right to travel includes not only visiting different places, protected cultural sites, but also changing a person's place of residence or work (Bonnie, 2018). Travelers face various restrictions when traveling, such as visas, residence permits, work, education or etc. This right can also affect religious, cultural, economic and political aspects.

The legal and scientific literature presents various conceptions of the right to travel. The most of the concept of the right to travel is associated with the free movement of persons. Juss (2004) point out; the right of free movement cannot be interpreted as an automatic right of access to other countries. The right to free movement and the right to travel across the country is an essential aspect of our emancipated society, which is retained by citizens (Scott, 2018).

Everyone is also guaranteed the right to leave any country, and to return to his country (Universal Declaration of Human Rights…, 1948).

The right of individuals to move is also emphasized in Article 12 of the ICCPR, which states that every citizen has the right to freedom of movement (ICCPR, 1976). The right to free movement and travel is also affirmed in the Convention on the Rights of the Disabled and the Convention on the Rights of the Child. Article 18 of the Convention on the Rights of Persons with Disabilities declares that States Parties to this Convention recognize the rights of persons with disabilities to freely choose their place of residence and citizenship (Convention on the Rights of Persons with Disabilities, 2006). According to Article 10 of the Convention on the Rights of the Child, a child whose parents live in different countries has the right to maintain and communicate directly with them (Convention on the Rights of the Child, 1990; Canestrelli, 1991).

Legal regulation of cultural heritage protection

For thousands of years, the development of nations has been based on tradition - the most reliable sociocultural tool for establishing, protecting and continuing the identity of groups (Markevičienė, 2016). Nations supported the vitality of their heritage, and decayed things were naturally replaced with similar ones, knowledge (how and what to do) was considered extremely important, and it had to be passed down from generation to generation. For several centuries, individual monuments and objects of architecture, art or history were considered cultural heritage. However, with the formation of the modern industrial and post-industrial society, with the strengthening of globalization, traditions began to disappear faster and only from the 20th century. In the second half, the cultural heritage was considered the totality of the cultural and natural environment (Wall, 2019; Universal Lithuanian encyclopedia, 2022).

The conceptual focus of cultural heritage has shifted along three interrelated and complementary directions: 1) from objects to functions; 2) from monuments to people; and 3) from conservation per se to targeted conservation, sustainable use and development (Loulanski, 2006).

It should be noted that according to the existence of cultural heritage and its function in society is determined historically. Preservation of the old heritage was also a matter of tradition for the society.

Regulations and legal norms specifying what constitutes heritage are defined by concepts such as "masterpieces", "intrinsic value" and "authenticity (Avrami, 2000).

The Supreme Court of Lithuania has stated that "cultural heritage objects that can be registered as immovable cultural values<...>can be recognized as such, cultural heritage structures (buildings, their parts, engineering structures and other immovable objects) and cultural heritage areas, but not cultural territories of the heritage object; the presence of an engineering structure (or other object) in the territory of a cultural heritage object per se (by itself) does not mean that such an engineering structure is a cultural heritage object <...>. The recognition and registration of the status of an engineering structure as a cultural heritage object and its effects are regulated by special legal acts regulating the legal relations of cultural heritage protection. In contrast to the recognition of a structure as an engineering structure, when deciding on the qualification of a structure as an object of cultural heritage, it is necessary to take into account the data of the Register of Cultural Values" (Ruling of the Supreme Administrative Court of Lithuania, 2018).

The main role in cultural heritage law is given to universality both in terms of the rhetoric used by UNESCO and other actors, as well as in international legal acts created to protect heritage (UNESCO/Culture…, 2022).

The practice of the European Court of Human Rights on the protection of cultural values states that "the protection and sustainable use of cultural heritage is important for maintaining the quality of life and maintaining the historical, cultural and artistic roots of the region and its inhabitants. These are values whose protection and promotion binds public administration institutions" (Ruling of the Supreme Administrative Court of Lithuania, 2018). Thus, in order to preserve the state cultural heritage, each state provides legal measures for the protection of cultural heritage, obliging people to act according to certain rules and norms. So, in a general sense, there are various methods of heritage protection, and it all depends on the national heritage protection policy, financial possibilities, condition of the heritage object, type, etc. The most common are the following: accounting, announcement as protected, storage, when institutions authorized by law check compliance with legal norms and protection requirements, as well as knowledge, its dissemination and the extremely important process - restoration/revival of disappearing or decayed objects (Bagočius, 2011). And cultural heritage itself is understood in a broad sense as material - it consists of movable and immovable values, as well as immaterial - its essence is the traditions, knowledge and abilities passed down from generation to generation, the cultural and historical landscape, which reflects the relationship between man and the environment (Republic of Lithuania Resolution of the Seimas, 2010). Movable cultural values and immovable cultural heritage are legally regulated in Lithuania. Movable cultural values - according to their purpose and nature, they are movable material works of human activity and other movable objects that have cultural value and are included in the state accounting of movable cultural values (Law on Protection of Movable Cultural Assets of the Republic of Lithuania, 2008). Also referred to as antiques - all immovable material works of human activity and other movable objects or their parts created 50 years ago or earlier, regardless of their cultural value. Immovable cultural heritage - "a part of cultural heritage that consists of preserved or non-preserved material cultural values built, equipped, created by past generations or emphasized by historical events, directly related to the occupied territory and required for their use." Thus, in this work, all attention is paid to immovable cultural heritage, its regulation and administration.

The courts strictly check the laws in all cases especially related with government restricts of the free movement right. In the case of *Kent v. Dulles* the Supreme Court of the USA stated that the right of free movement is a part of "liberty", and that this right may not be restricted or eliminated (USA Supreme court case Kent v. Dulles, 1958). In another similar case *Loubna El Ghar v. Socialist People's Libyan Arab Jamahiriya* case, a resident of Morocco with Libyan nationality had applied for a Libyan passport at the Libyan Consulate (Loubna El Ghar v. Socialist People's Libyan Arab Jamahiriya, 2002). It should be noted that that the judgment in this case was incorrect with a "laissez-passer" and misinterpreting the instructions of the Human Rights Committee. In another analogous case Samuel Lichtensztejn v. Uruguay related to restrictions of a person's right to travel the applicant was a Uruguayan citizen residing in Mexico at the time of the application (Samuel Lichtensztejn v. Uru-

guay, 1980). A similar problematic situation is analyzed in another Lauri Peltonen v. Finland case. Under the circumstances of this case Finland violated Lauri Peltonen's rights to free movement and right to leave by refusing to issue a passport, because he did not complete compulsory military service (Case Lauri Peltonen v. Finland, 1992). The right to travel may also be violated in the case of forced deportation. For example, on November 27 2012, the Strasbourg Court ruled on Stamose v. Bulgaria (Case Stamose v. Bulgaria, 2012). In 2003, a Bulgarian citizen, Stamose, was sent from the USA to Bulgaria. Due to a forced return to Bulgaria, the Bulgarian authorities imposed a double travel ban on him, inter alia in the letter from the US Embassy (Case Stamose v. Bulgaria, 2012). In this way he lost the right to free movement. Analyzed cases confirms existing problems related with the restrictions and violations persons' rights to free movement. At the same time raises questions how and or this situation can be improved? As free movement is closely related with different persons' rights the right to live where you please will be discussed more deeply in the next section as the possible second dimension of overtourism.

The international practice of cultural heritage protection shows that in order to achieve sustainable development, economic and social well-being, and improving the quality of life, the protection of cultural heritage must be integrated into broad state social and economic programs that strategically and systematically unite broad areas of modern society's life, and this can be achieved by integrating the protection of intangible, movable and immovable cultural heritage, natural heritage and landscape into programs jointly implemented by the Government and various ministries (Law on the Protection of Immovable Cultural Heritage of the Republic of Lithuania, 2004). The Law on Protection of Immovable Cultural Heritage of the Republic of Lithuania states that the state administration in the field of protection of immovable cultural heritage is organized and responsible for it only by the Minister of Culture. Normative legal acts in the field of immovable cultural heritage protection are adopted by the Government, the Minister of Culture, the Director of the Department of Cultural Heritage under the Ministry of Culture and municipal councils. The government is obliged to declare cultural heritage objects and areas of national significance as cultural monuments, and is also responsible for the implementation of heritage protection obligations assumed by international agreements, and performs other functions established by law. Normative legal acts of the Government, ministries, other Government bodies related to the protection of immovable cultural heritage must be submitted to the Ministry of Culture for coordination in accordance with the procedure established by legal acts before their adoption. Thus, cultural heritage interests are represented at the level of the Minister of Culture.

According to the Law on the Protection of Immovable Cultural Heritage, the conditions for the design of the cultural heritage structure for administrative construction works (temporary protection regulations) and the permits to carry them out are issued in accordance with the procedure established by the Law on Construction. Prior to issuing the permit, no later than one month from the date of project submission, the heritage protection (special) expertise of these works and the structural project expertise must be carried out in accordance with the procedure approved by the Minister of Culture - in cases and procedures approved by the Ministers of Environment and Culture (Law on the Protection of Immovable Cultural Heritage of the Republic of Lithuania, 2004).

For example, the Supreme Administrative Court of Lithuania examined a case (Decision of the Supreme Administrative Court of Lithuania, 2018) in which the applicants sought to form a parcel of land in the territory of the city of Palanga, following the procedures for the restoration of property rights. Palanga city municipality refused to form a plot of land, because the desired location of the plot of land was in the territory of cultural values, which cannot be divided into parcels. In this regard, the court stated that the plot of land requested by the applicants to be formed falls within the territory whose status is immovable cultural value (preserved for public knowledge and use), accordingly it came to the conclusion that the Administration legally and reasonably refused to form a plot of land for the restoration of property rights in kind, having established that this plot is land redeemable by the state in accordance with Article 12, paragraph 1, item 3 of the Restoration Law, which, among other things, stipulates that the land is redeemable by the state if it is occupied by the territory of cultural property protection.

In the practice of the Supreme Administrative Court of Lithuania, a case was examined (decision of the Supreme Administrative Court of Lithuania, 2018), where a dispute arose regarding the decision of the Vilnius branch of the Department to refuse to approve the capital repair project of a residential building (located in the old town of Vilnius). The department argued its refusal to approve the project by the fact that the installation of two rows of skylights is not typical in the context of the old town of Vilnius. The applicant, presenting photos of several houses to the court, argued that there are buildings in the Old Town of Vilnius that have several rows of skylights and there is no scope of legislation prohibiting the design of such skylights. Considering the abundance and dynamism of legal issues that arise in real life, it is impossible for the legislator to regulate in detail all possible situations, therefore in certain cases it is limited to more abstract legal norms". The case also established that the applicant, apart from the photographs, did not provide any other evidence (expert conclusions, etc.) that would establish that two-row skylights are typical of the old town of Vilnius.

It should be emphasized that the court must assess in each case, "<...>which of the values - the correct planning and use of the protected area or the stability of the relations for the implementation of the right to construction - is more important in a specific case of public interest protection." Thus, in the aforementioned case, the court found that the public interest in the relationship between the planning and use of the protected area outweighs the implementation of the builder's right to construction.

It is important to note that all legal regulation related to the protection of the cultural heritage must be evaluated precisely for this purpose - to ensure the protection of cultural heritage and valuable properties by creating proportional restrictions for the travelers and owners of the objects.

Conclusions

The cultural heritage protection is a special tool developed in our times, designed to preserve the testimonies of the past.

It seems paradoxical, but when discussing this right to travel in the context of the protection of cultural heritage sites, we need to hear the local population. It should be noted that the analysis of various legal acts related to these rights revealed that the right to travel can be discussed through different lenses. This is the situation to delve into the concept of sustainable tourism as a holistic principle of democracy, and at the same time to think about new sanctions and restrictions in order to preserve the cultural heritage for future generations. In order to achieve the goals of more sustainable tourism, the right of individuals to travel and the protection of cultural heritage objects should be combined. Further research should be aimed at improving the legal mechanism for the protection of cultural heritage objects.

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Alternative Dispute Resolution Benefits in Turkish Labour Law

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Abstract

In every aspect of our daily life, we are always likely to disagree over the existence, scope or consequences of a right. These disagreements mean legal disagreement. The resolution of conflicts is absolute for the continuation of daily relations. Because, in order to establish and maintain healthy relations in society, agreements are required instead of conflicts. The resolution of these conflicts, which are frequently encountered in daily life, is mainly resolved by the agreement of the parties. However, the parties may not always be able to resolve this dispute themselves. In this case, the main solution foreseen for the settlement of the dispute is the trial and therefore the courts. However, it is not always in the interests of the parties to go to the long and costly judicial process for every dispute in daily life. For this reason, alternative dispute resolution methods have been developed. Alternative dispute resolution can be defined as the dispute resolution methods that aim to resolve the existing dispute, where an impartial third party brings the parties together to help and contribute, as well as the litigation method that aims to resolve disputes in state courts.

Keywords: *Conflicts, Alternative dispute, Labour law, Benefits.*

Introduction

In Turkish positive law, three ways are envisaged in the laws as alternative dispute resolution in the resolution of legal disputes. These alternative solutions are envisaged as mediation, in which the parties aim to resolve the dispute through an impartial and independent third party, conciliation aimed at the resolution of the dispute through the attorneys of the parties, and arbitration, which aims to leave the settlement of a dispute that has arisen or may arise between the parties to one or more people and the dispute to be resolved by them. In this study, we will try to focus on mediation especially in terms of labour law.

The main purpose of alternative dispute resolution methods is to resolve the dispute between the parties without going to long and troublesome proceedings by preventing the relations of the parties from being adversely affected. For this reason , efforts are being made to expand it in positive law regulations . Alternative dispute resolution has become an institution that is tried to be applied in every field of positive law. Reducing the workload of the courts, which have a heavy workload in the Turkish legal system, and preventing the relations of the parties from being adversely affected will be sufficient to emphasize the importance of introducing an alternative dispute resolution system.

1. Benefits of Alternative Dispute Resolution

The parties can only resort to alternative dispute resolution methods in private law relations that they can freely dispose of. Therefore, it will not be possible to resort to alternative dispute resolution in cases of divorce, separation, validity of marriage, custody, guardianship, personality, denial of recognition of the child, abolition of adoption, determination of marital status, alimony, uncontested jurisdiction, and bankruptcy cases, which are considered to be of public order. Disputes concerning such public order can only be resolved through court proceedings (Kalpsüz, 1996).

In private law relations, on which the parties that do not concern public order can freely dispose of, the parties will be able to try alternative dispute resolution methods as an alternative to civil proceedings (Bickin, 2006). So, why should the parties choose the aforementioned alternative dispute resolution (ADR) instead of trial? We will try to give the main answers, which are related to each other, under the headings below.

1.1. ADR Costs Less

One of the most criticized points of the trial, which is the most important mechanism for ensuring justice and resolving disputes, is the high cost of litigation. Therefore , it is a justified criticism of the judicial system , where only the rich and the very poor can reach justice if there is a good legal aid system.

Fees paid in advance at the beginning of the trial, advances in evidence and notification stand out as obstacles to justice and the freedom to seek justice. As a matter of fact, even if these expenses are paid, the trial process and the new expenses that will arise in this process can intimidate the parties. In addition, the provision that the replacement of evidence will be deemed to have been abandoned as a result of not paying the advances for evidence (law of civil procedureart. 324/2) appears as a major obstacle in front of reaching justice. The fact that the litigation expenses are loaded on the losing party is also one of the obstacles to resorting to litigation.

ADR appear as alternative ways to resolve the dispute instead of litigation. ADR does not require large costs such as litigation. First of all, at the beginning of the process, there are no expense items such as expert, witness, notification expenses, fees that bring great burden. Therefore, the advances on expenses incurred by the plaintiff at the beginning of the proceedings for the settlement of the dispute are not included in the ADR. If there is no agreement contrary to the fee to be paid to the mediator, the parties do not bear great burdens due to the principle of equal payment by the parties (Ildir, 2003).

In addition, the dissemination of ADR is a very beneficial situation in terms of procedural economy. Because, reducing the workload of the courts will save the expenses to be made for the settlement of that dispute and thus save time and money. In the United States of America, which Özbek also mentioned in his book, there are concrete and strong examples of saving as a result of the use of ADR.

In accordance with the Minimum Fee for Mediation, published by the Ministry of Justice at the end of the ADR process and updated every year, a fee that is often more reasonable compared to the litigation expenses is paid by the parties. Unless there is an agreement to the contrary, the fact that the mediation fee is paid equally by the parties ensures that this amount becomes more reasonable and also ensures that the "trial expenses" are eliminated at the end of the process (Kekec, 2011).

1.2. ADR Takes Shorter

The litigation process manifests itself as a very long and troublesome process, especially in the Turkish positive legal system. The high workload of the courts, the negligence of the experts and witnesses, the difficulty of submitting the evidence, the failure of state institutions to respond to the written warrants or their late response are among the reasons that prolong this process. The long judicial process leads to delayed justice, decreased trust in the judiciary, fear of citizens to seek their rights, and grievances. Therefore, when a dispute arises, citizens are afraid to seek their rights by being involved in the trial process, which can take years.

Although it is stated in the Constitution (art. 141/4) that the proceedings should be concluded quickly, due to the reasons we have mentioned above and for other reasons, the proceedings in today's Turkish legal system appear as long processes. When the appeal process is added to the lengthy processes in local courts, trials that last for years emerge. Although the processes have been tried to be shortened by measures such as shortening the appeal process and bringing an appeal to reduce the workload of the Court of Cassation, and the obligation to go to the Consumer Arbitration Committee to reduce the workload of consumer courts, the desired success has not been achieved yet.

We have mentioned above that the main reason for the prolongation of the judicial process is the excessive workload of the courts. Even in the smallest disagreements, if they are able to cover the costs without reaching an agreement with each other, they prefer to apply directly to the judiciary. Since ADR means the settlement of the dispute with the agreement of the parties before going to the trial or at the trial stage; It will prevent intimidation of the parties with long trial processes and the heavy workload of the courts (Tanriver, 2006).

In case of going to the ADR before the trial, the court will not be busy at all, and the parties will have resolved the dispute with their own means in a much shorter time. Even if the parties cannot agree during ADR; If he resorts to trial later, the disputes may become more concrete and some of them may even be resolved, and the parties will be able to know each other's demands better and understand each other better.

In case of going to the ADR with the agreement of the parties during the trial, the court will make an issue that will delay this situation, and the court will not go to a review on the merits during the ADR. If the parties agree at the end of the process, the court will not be required to make a decision on the dispute. If the parties cannot agree at the end of the ADR process, the court will then conduct an examination and make a decision. However, even in this case, the parties may have resolved some disputes or agreed on some facts. This will ensure that the court does not need to examine that case and can significantly shorten the process (Taşpınar, 2001).

1.3. ADR Allows Parties to Participate More

The trial process is a process in which the parties do not directly participate and can be communicated through the judge or the lawyer. The parties cannot directly ask questions of each other; however , they can ask questions they have forwarded to their lawyers beforehand or through the judge as the judge deems appropriate during the trial . This is a situation that limits the participation of the parties in the trial process. Sometimes, the parties are not able to present their evidence freely, even in a predetermined trial order.

Since ADR involves the voluntary participation of the parties, the parties have more control over every stage of the process than the trial. ADR is a process that allows the direct participation of the parties and ensures that communication is unmediated, direct and easier. The parties can freely bring their evidence and dispose of it. Since there is the opportunity to directly ask questions and address each other, the hostility between the parties does not become a chasm, and a reasonable solution is tried to be produced through mutual communication. Relationships, which often come to a breaking point at the end of the litigation process, can be provided to continue in a more reasonable way with ADR (Ozturk, 2006).

Since the conflict is resolved by mutual agreement of the parties in ADR, the parties directly dominate the resolution process. It is more satisfying to reach the solutions they have determined instead of encountering a provision they do not want. Therefore, the hostility between the parties will be resolved more peacefully, the trust in the judiciary will be unshakable for both sides and the relations will have the chance to continue without breaking.

1.4. ADR Allows Experts to Examine

Another important deficiency of the judicial system is the issue of specialization. Even the judges, who are in the leading position of the trial, are often insufficient in matters that require expertise. Even the judges or boards of the specialized courts, which are the decision makers in disputes requiring expertise such as business, trade, consumer, intellectual and industrial rights, are composed of judges who do not have expertise in the subject and have not done any work before (Edwards, 1986).

Although the obligation to apply to an expert in matters that require expertise and technical knowledge (law of civil procedure art. 266) is an institution introduced to remedy this deficiency, it has

become an institution that is described as a bleeding wound of the judiciary due to reasons such as negligence in practice, wrong expert selection, and going to an expert in legal matters. Therefore, many plaintiffs and defendants fear that the issues that constitute the main problem in the dispute are not seen and therefore they lose their rights and that judgments incompatible with the demand are given.

In ADRs, experts or people who have good knowledge of the subject of the dispute usually conduct the examination. This is one of the most important benefits of ADR. Because the parties have the opportunity to have an examination and advice made by an impartial third party, whose knowledge they can trust, about the subject of the dispute. Again, direct examination by the expert will prevent the time to be lost in applying to the expert, choosing the expert, participating in the discovery and hearing the witness, and will reduce the costs. In addition, although the expert does not have the opportunity to give advice, in ADR, the expert will be able to give advice on the resolution of the dispute, and the parties will have the opportunity to get an impartial and expert point of view on the dispute.

1.5.ADR Protects Parties' Relationships and Prevents Hostility

Legal disputes arise from the daily relations of the parties and must be resolved in good faith. The continuation of the relations is also very important for the parties to the dispute. Especially in commercial relations, the resolution of disputes without damaging the communication and relations of the parties is an absolute necessity for the benefit of the parties.

In most cases, it is not possible to find a middle ground that protects the interests of both parties in the trial process. Usually, because of a competitive environment, one side loses and the other side wins, and one side is happy while the other is unhappy. The time lost in the trial process and heavy trial expenses also create a great burden for the losing party; At the end of the trial, the losing party may harbor hostility to the other because he has brought the dispute to the court.

ADR creates a less challenging environment than the judicial system in any case. Since ADR is based on the agreement of the parties, it is more possible to produce solutions that protect the common interests of the parties than the trial. Basically, there is no losing party in ADR. If the parties think that their interests are not protected, there will be no such thing as a loss because they will not accept the solution and agree to a solution. If the parties come to an agreement, relations will continue unharmed and hostility will not arise (Alpagut, 2012).

ADR shows its importance especially in corporate and labour disputes where relationships are vital. Since the continuation of the commercial relations of the companies is important for the continuation of the company; Resolution of the conflict before it turns into hostility is also of vital importance for companies (Batur, 2010). The continuation of the employment relationship is also very important for both the employee and the employer. If the employment relationship turns into hostility and it is not possible to continue, the worker will look for a new job; the employer will be deprived of the worker who knows the job he has trained and will search for new workers. Therefore, the resolution of disputes in legal disputes without turning into hostility is a great necessity for social relations and the economy of the country.

Extending and increasing the agreement environment offered by ADR is important for the continuation of social peace, for the economy not to be harmed and for the continuation of the peace environment. Compared to the one-sided winning structure of the trial process, the ADR's mutually beneficial structure is more suitable for maintaining relations and preventing hostility.

1.6 ADR is Based on Volunteering

Alternative dispute resolution is basically voluntary. The parties cannot be compelled to resort to or participate in alternative dispute resolution methods. Since the ADR process is based on the agreement of the parties, if the parties cannot agree on the solution, they will not be forced to accept any solution (Bickin, 2006).

In the case of an application by one party in the proceedings, the other party must participate in the process unwillingly in order to protect their rights. Although there are exceptions in ADR, the participation of both parties in the process depends on their wishes. Arbitration, consumer arbitration committee, and compulsory mediation practice in labour disputes that are currently drafted can be given as examples to the exceptions of this rule. However, even these institutions and practices do not constitute a violation of the agreement of the parties and it is not possible to make binding decisions in case of disagreement. The special cases regarding compulsory arbitration in collective labour disputes that constitute an exception to this issue will be discussed in detail below.

Even if the application process for alternative dispute resolution is made compulsory, it does not constitute an obstacle to the freedom of seeking rights. For example, even the TKHK, which obliges the application to the consumer arbitration committee for disputes below a certain value, gave the parties the right to object to the decisions of the arbitral tribunal within 15 days at the Consumer Courts. As a matter of fact , the Constitutional Court rejected the request for annulment of the fifth and last paragraphs of Article 22 of the said law on the grounds that it could not be perceived as an obstacle to the right to seek justice and the transfer of jurisdiction . Likewise, even the obligatory ADR does not abolish the freedom of seeking rights and the principle of agreement, which is the basis of ADR. Even if the parties cannot find a middle way at the end of ADR, they will be able to freely seek their rights through the judiciary.

1.7. ADR Provides Confidentiality

One of the most basic features of ADR is confidentiality. One of the most important reasons for preferring ADR is that the process is carried out in secrecy. Constitution article 141 and law of civil procedure Article 28, it is stated that the proceedings should be public. This may cause the parties to hesitate. Especially in commercial relations and business relations of large companies, it is undesirable to reveal confidential matters in the trial. The fear of damage to the reputation of large companies may cause people not to resort to litigation due to the fear of being offended by their environment or to be hesitant to reveal important issues in the trial.

It is one of the basic principles of law that the trial is fair without any doubt, that it is held publicly in order to ensure compliance with the law, to increase trust in the judiciary and to prevent arbitrariness (Caniklioglu, 2013). The fact that the hearings are open to the public and that the parties can attend the hearing and make a statement during the examination of the evidence (law of civil procedure article197/3) means that the matters that they do not want to be known by the parties. These documents are learned by the judge, the clerk, the bailiff, the parties, their lawyers and the audience, which sometimes means that the reputation of the parties is damaged (Canbolat, 2013).

In ADR, the process is carried out with the participation of the parties, if any, their lawyers and an impartial and independent third party. It is essential that the process is confidential. Therefore, the matters that should remain confidential will be known only by the parties and the third party conducting the process and cannot be used outside of ADR. For this reason, the parties will be able to act more comfortably in ADR, not be afraid of the secrets being learned and used against them later, and they will be able to express the issues they want (Caniklioglu, 2012).

ADR provides freedom to the parties as a result of confidentiality. In order to protect their rights, the parties will be able to explain the issues that they are afraid of being learned by third parties in the ADR and use these issues to make an agreement that will protect their interests. The parties can participate more sincerely with the assurance of confidentiality, and as a result, they can make agreements that keep relations alive and satisfy all parties (Celik, 2013).

2. Opinions Against Alternative Dispute Resolution

In fact, it can be said that seeking alternative ways to resolve disputes in labour law is based on two main reasons. The first is the workload of the labour judiciary and the Supreme Court, which is mostly

aimed at eliminating a problem experienced in practice. The second is to develop a more appropriate solution to justice and equity in the settlement of both individual and collective labour disputes. On the other hand, it is stated that the judiciary is the most ideal solution in terms of establishing justice in labour disputes. According to this; In labour law, the perspective of "protection of the worker" should always be maintained, and therefore, a solution should be insisted on under the supervision of the judicial organs so that the worker, who is in a weak position compared to the employer, is not victimized and does not experience loss of rights. The most important basis of this proposal is the idea that the application of alternative solutions attracts attention in order to reduce the workload of the judiciary, but in this case the principle of "rule of law" is ignored (Demir, 2011).

Another point frequently emphasized by this idea, which cautiously approaches alternative solutions; In alternative means, the authority holding the decision-making mechanism cannot penetrate the event in dispute, and most importantly, the solution accepted by the worker, who is "weak" in all respects according to the employer, at the end of this process, may be cheap but legally inadequate. Also, another problematic aspect of the system is that such solutions try to resolve the conflict by ignoring the inequality between the powers of the parties to the conflict. The final result of all these concerns is that the values that come to life within the social rule of law may be damaged at the end of this process, in which the economically strong segments dominate.

Mnookin, who expresses a concern similar to Edwards's view, does not reject the effectiveness of alternative solutions, but states that they need to be examined from a legal and economic point of view, compares the judicial process and mediation and lists three main differences that he thinks are important. Accordingly, the first difference is that although the judge of the court is determined independently of the will of the parties, the mediator can be chosen to the parties. In such a choice, it is clear that the weak worker will be completely at a disadvantage in this election (Mnookin, 1998).

Mnookin, who does not deny the fact that the mediator may be more knowledgeable about the event in dispute than the judge, as the second difference; This shows that the mediation process, which is more flexible in terms of procedural rules, will provide a faster solution than the judicial process, which includes stricter procedural rules. The last difference is that the mediation decisions are final, although the court decisions are reviewed by a higher judicial authority and allow possible errors to be eliminated.

Ideas similar to the above views are also emphasized in Turkish doctrine, and similar concerns are expressed. Considering that the procedural provisions that constitute the methods and rules of the trial are an effective legal guarantee, especially for the worker in a weak position, in the application of the principle of "equality before the law", the protection of rights and the principle of fair trial are ignored, and this is an inappropriate situation in terms of the principles that dominate the labour law. condition is stated. Similar to the above view, the absence of the possibility of appeal by the judicial activity in peaceful solutions is considered as another disadvantage. The idea that non-judicial methods weaken the interests of the worker, which should be protected in the social state of law, is another source of concern, especially in individual labour disputes, which are in the nature of rights disputes (Karacabey, 2016).

Alternative solutions, on the other hand, essentially refer to a method based on party sovereignty. For example, in mediation, which is one of the alternative solutions; Rather than resolving the conflict within the framework of legal rules, there is a reconciliation of interests on a common plane, and in this sense, alternative resolution methods are not suitable for the interventionist social state structure.

Even the part of the Labour Law, which is actually a branch of private law, regarding the employment contract, has gained a social aspect with the legal interventions made for the protection of the worker. It can be said that this idea is the basis of the approaches that care about the role of the judiciary in the resolution of labour disputes (Koç, 2012).

The reason why the difference between the economic competencies of the parties is seen as an obstacle to the peaceful resolution of disputes is that the financially weak party may be forced to submit to the demands of the other party in this long process, which sometimes takes quite a long time (Kutal, 1987).

Conclusion

It is essential for the peace and order of the society and the continuation of relations that the parties resolve their conflicting rights or interests by mutual agreement. It is not possible to resolve disputes by agreement between the parties in all cases. The reason for this is that the parties consider their own rights or interests to be superior to the rights or interests of the other party, their demands are not realistic or unwilling to be met by the other party.

It is possible to divide these emerging disputes in two ways, especially in the field of labour law, either as conflict of rights and conflict of interest or collective dispute and individual dispute. If the dispute arises from the use of a right gained from the law, collective agreement or employment contract, it is considered as a conflict of rights. Conflict of interest, which has not yet been acquired as a right, but arises from the conflict of interests and demands at the stage of signing the employment contract or collective agreement, is also considered as a conflict of interest.

The distinction of the dispute as a collective dispute or an individual dispute is basically related to the positions of the parties. It is possible for individual or collective disputes to arise in the form of conflicts of rights and interests. A dispute that concerns workers or employers as a whole is generally referred to as a collective labour dispute in disputes involving unions. However, disputes arising between one or more workers and the employer will be classified as individual labour disputes.

After classifying the disputes in question, these discrepancies need to be resolved. Otherwise, the continuation of the relations cannot be ensured and the social structure may suffer great damage. Although this study mainly focuses on labour disputes, the resolution of all disputes is essential for the preservation of the social structure and social peace.

The main way of settlement of disputes is the agreement of the parties before bringing them before a third party or authority. and the right to a fair trial with defense" and in Article 9, "Judiciary power is exercised by independent courts on behalf of the Turkish Nation" and independent courts are indicated.

However, there are some dispute resolution methods as an alternative to litigation. These alternative dispute resolution methods are based on the resolution of the dispute by the parties instead of the court or by impartial third parties or authorities outside the court. Conciliation, mediation and arbitration are the main alternative dispute resolution methods.

Alternative dispute resolution methods have not found enough application area in the Turkish legal system and have not become widespread. The main reasons for this are that people have doubts about alternative dispute resolution methods, that alternative dispute resolution methods are not well known, and that we are not a society prone to reconciliation.

There are some regulations in our legal system for the dissemination of alternative solutions. Foremost among these are the compulsory mediation institution in collective labour law and the compulsory mediation institutions planned to be introduced for the resolution of individual labour disputes.

The spread and development of alternative dispute resolution methods has many benefits both for the state and for individuals. It is possible to count some benefits of the widespread use of alternative dispute resolution methods for the state, such as reducing the workload of the courts, reducing the budget spent on trial, ensuring social peace and increasing confidence in the judiciary. In terms of individuals, there are many benefits such as ensuring the continuation of economic and social relations, reaching a solution in a shorter time, spending less, having more opportunities to participate in the solution, gaining the benefit of both parties, ensuring confidentiality, and examining the dispute by experts.

It is essential that the mediation institution envisaged in legal disputes is an institution to be applied voluntarily. Even during the application, it has a structure that provides for mutual agreement of the parties. The parties, by applying to mediation and agreeing on a mediator name, determine the medi-

ator and start negotiations. As a matter of fact, the selection of the person who will manage the mediation process and help the parties maintain their good relations will ensure a healthier functioning of the process.

It is not always easy for the parties to come to an agreement on the dispute and resolve the dispute. At this point, it is a necessary authority for the parties to find a middle ground, for the mediator to offer solutions without judgment, for the process to work properly and for more efficient results to be obtained.

It is also very important that the mediators comply with the obligations stipulated in the law and the ethical rules. Compliance with obligations and ethical rules is very critical for the success of the process and therefore for the benefits expected from alternative dispute resolution methods. The control of compliance with these obligations and ethical rules is another sensitive issue for the success of the process. Audits can also be carried out in a more reliable way by means of the subsequent feed-back meetings with the parties participating in the mediation process and the control of the minutes. By paying attention to these issues, ensuring the control of the mediation process and emphasizing the importance of the sensitivity of the process will increase the functioning of the system.

Sanctions against mediators who act in breach of their obligations as a result of inspections should also be closely monitored. The fact that the sanctions remain only on paper may mean that the mediators are given complete freedom and that the success of the process will decrease. Therefore, mediators who do not comply with their obligations should be aware that they have disciplinary responsibilities at the beginning, then legal and criminal responsibilities, and that they will endure some sanctions as a result.

For the resolution of collective interest disputes, every strike and lockout will have some harm to the society, more or less, since it is a combative solution. The slowdown or stoppage of production during the strike will cause the employer and the state to weaken economically, and the workers will not be able to get paid due to the fact that they do not work during the strike and lockout, and they may have economic difficulties.

Resolution of collective interest disputes with peaceful solutions instead of strikes or lockouts will prevent the occurrence of these damages in terms of both society, state and individuals. With this in mind, the legislator has placed the compulsory mediation system in our legal system in the resolution of collective labour disputes, even though it has some negative aspects.

Ordinary and extraordinary mediation institutions envisaged for collective labour disputes are exceptional institutions, but institutions that can only be applied in certain situations. However, in the resolution of collective labour disputes, it is an appropriate arrangement for the peaceful resolution of the dispute that the parties can always bring the dispute before a special arbitrator by agreement.

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Problems of legal regulation of an employment contract concluding

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Annotation

The relevance of the chosen topic is reflected in modern society. People enter into various types of employment contracts every day, as a result of which labor relations arise between the parties to the employment contract - the employer and the employee. Subject of work, terms of termination of employment contract. The aim of the work is to examine the theoretical aspects of the terms of termination of the employment contract and the mistakes made in practice, which later lead to legal disputes. The Labor Code of the Republic of Lithuania regarding the termination of an employment contract contains the main theoretical institutes of labor law and the circumstances based on which the employment contract is terminated at the initiative of the employer, and notes what guarantees must or may occur when the employment relationship is legally terminated. The article presents an analysis of practical problems related to the termination of the employment contract, based on the practice of the courts of the Republic of Lithuania.

Keywords: *employment contracts, employment relationships, employer, employee.*

Introduction

Work is one of the most important economic and social guarantees. It is objectively not only a source of livelihood but also the meaning of human life. It can also be said to be the economic basis for the existence of a civil, democratic society. It is only by working that people become citizens of society in the full sense of the word. It is therefore necessary to regulate the organisation of work at national level, to observe labour laws that protect the interests of the employee and the employer. The worker and the employer must also abide by the employment contract, which is drawn up and signed by both parties before they start work.

For an employment relationship to exist, there must be two parties, the employee and the employer. Each of the parties has certain rights and obligations under the law. The main duty of an employee is to perform a specific job for which the employer pays a monetary remuneration. The employer's right is to require that the work specified be carried out in a good and timely manner.

Relevance of the topic

The termination of an employment contract is a topic that is, and should be, of great relevance in modern society. Every day, people enter into various types of employment contracts, which give rise to certain employment relationships between the parties to the employment contract, the employer and the employee. It is useful for every citizen to know his or her rights and obligations, and what actions or external factors could affect the termination of an employment contract without notice (Mačiulaitis, 2010; Mačernytė-Panomariovienė, 2015; Davulis, 2014; 2017; 2018).

Subject of work. Legal regulation problems of employment contract.

The aim of the paper is to examine the theoretical aspects of the conditions of termination of employment contract and the mistakes made in practice, which subsequently give rise to court disputes.

Results

The nature of contract

Employer: the person for whose benefit and under whose authority a natural person has undertaken to perform a work function for remuneration under an employment contract. An employer may be: a natural person, provided that he or she has reached the age of majority and that his or her rights as regards legal capacity are not restricted by law; a legal person with legal capacity to work, as well as a division (branch, representative office) of a legal person or other organisation under the jurisdiction of a foreign state registered in the territory of the Republic of Lithuania, or a legal person or other organisation under the jurisdiction of a foreign state, or a legal person or other organisation or a division (branch, representative office) of a legal person or other organisation, or group of such persons. The legal personality and legal capacity of an employer-legal person shall arise from the moment of its establishment, unless the legal acts governing its activities provide for a later moment of establishment (Razgūnienė, 2015).

An employee may be: a natural person who undertakes to perform a work function for remuneration under an employment contract with an employer. A natural person who has legal capacity (the capacity to have employment rights and obligations) and legal capacity (the capacity to acquire employment rights and create employment obligations by his/her actions) may be an employee. A worker acquires legal capacity when he or she reaches the age of 16 years, subject to exceptions provided for by law. The peculiarities of employment of persons under the age of eighteen are regulated by the Resolution of the Government of the Republic of Lithuania No. 518 of 28 June 2017 "On the Approval of the Description of the Conditions of Employment of Persons under the Age of Eighteen, the Procedure for the Organisation of Work and Vocational Training, and the Conditions for the Employment of Children".

The Labour Code provides for the possibility for the employer and the employee to agree on a probationary period of up to 3 months. However, even in this case, the person must be given a contract of employment the day before the start of work and the new employee must be notified to Sodra. The probationary arrangement shall be set out in the employment contract.

Otherwise, such work is considered illegal and carries both an administrative penalty for the natural person responsible - a fine of between €1,000 and €5,000 - and a financial penalty for the legal person - a fine of between €868 and €2,896 for each person working illegally.

If the employer finds that the results of the probationary period are unsatisfactory, it may decide to terminate the employment contract before the end of the probationary period by giving the employee 3 working days' written notice before the end of the contract without paying any severance pay.

Normal working hours (full-time): 40 hours per week.

1. Part-time: 36-38 hours per week. This working time is set for employees whose nature of work is related to greater mental and emotional stress or when the levels of factors harmful to health are exceeded - the norms of reduced working time and the procedure for payment are laid down in the Resolution of the Government of the Republic of Lithuania No 496 of 21 June 2017 on the implementation of the Labour Code of the Republic of Lithuania. The reduction of working time for persons under 18 years of age is laid down in Article 36 of the Law on Occupational Safety and Health of the Republic of Lithuania (Macijauskienė, 2003; 2014).

Part-time working time: shall be determined by reducing the number of working hours per day, by reducing the number of working days per working week or working month, or by doing both.

Working time regime: the distribution of the working time standard over a working day (shift), week, month or other accounting period, which may not exceed 3 consecutive months (Labour Code of the Republic of Lithuania, 2017).

The employer shall determine one of these types of working time arrangements for one or more employees (group of employees) or for all employees in the workplace:

(1) a fixed duration of the working day (shift) and the number of working days per week;

(2) aggregate working time accounting, whereby the working time standard for the entire accounting period is met within the accounting period, the employee's working time standard remains at 40 hours per week (unless part-time working is not specified), but may be organised up to 12 hours per day and up to 52 hours per week;

(3) a flexible working pattern, whereby the worker is required to be present at the workplace during fixed hours of the working day/shift and may work before or after the other hours of that day/shift;

(4) a split-time working pattern, where the same day/shift is worked with a rest and refreshment break of a duration longer than the maximum duration of the rest and refreshment break;

5. individual working time arrangements.

The working time arrangements may not infringe these maximum working time requirements:

(1) the average working time, including overtime but not including work under an arrangement for additional work, shall not exceed 48 hours in any 7-day period;

(2) the average working time, including overtime and supplementary working arrangements, may not exceed 12 hours per working day/shift, excluding the lunch break, and 60 hours per 7-day period;

3) not more than 6 days of work in any period of 7 consecutive days (Labour Code of the Republic of Lithuania, 2017).

In transport, postal, agricultural, energy undertakings, medical and social care establishments, as well as in maritime and river navigation and other economic activities, the maximum working time requirements and minimum rest time requirements, the rules on working time and the rules on working time and working time records may differ from the standards laid down by the Labour Code. The description of the peculiarities of working time and rest time in the fields of economic activities is approved by the Resolution of the Government of the Republic of Lithuania No 496 of 21 June 2017 "On the implementation of the Labour Code of the Republic of Lithuania" (Razgūnienė, 2015).

The employer must record the performance of the employee's specified job functions until the end of the next working day at the workplace, except where the employee works temporarily, but for no more than 5 working days, at a place other than the workplace. In that case, the performance of the work function must be accounted for no later than the day following the end of the performance of the work function at the other location. If the employee works for more than 5 working days at another place of work, the obligation to account for the performance of the employee's job function shall be fulfilled at the latest one week after the performance of the job function (Dambrauskienė, 2016).

Failure to record overtime, working time on public holidays, rest days (if not scheduled), at night, additional work in the timesheet, or the entry of knowingly incorrect data in the timesheet, shall be punishable by a fine of between EUR 150 and EUR 1450 for the natural person responsible and between EUR 200 and EUR 600 for a legal person.

What should be the rest periods for employees?

1) During the working day/shift, the worker shall be given physiological breaks according to the worker's needs and special breaks in the case of outdoor work (outdoors or in unheated rooms), work under occupational risk conditions, and work that is physically demanding or involves high mental stress;

2. workers must be given a lunch break for rest and refreshment after at least 5 hours of work. The

duration of this break shall not be less than 30 minutes and not more than 2 hours, unless the parties agree on a split working time regime. The worker may leave the workplace during the lunch break;

(3) the duration of daily uninterrupted rest between working days (shifts) shall not be less than 11 hours and the worker shall be entitled to at least 35 hours of uninterrupted rest within a period of 7 consecutive days. If the worker's working day/shift is more than 12 hours but not more than 24 hours, the period of uninterrupted rest between working days/shifts shall not be less than 24 hours;

(4) if the period of on-call duty is 24 hours, the period of rest shall not be less than 24 hours. The duration, start, end and other conditions of breaks shall be determined by labour law and the daily/ shift schedules. Workers carrying out work during which production conditions preclude a break for rest and refreshment shall be given the opportunity to eat during working hours (Bagdanskis, et. al., 2018).

3. The minimum annual leave entitlement is a minimum of 20 working days (for a 5-working day week) or 24 working days (for a 6-working day week). If the number of working days per week is less or different, the employee must be granted a minimum of 4 weeks' leave. Annual leave must be taken at least once during the working year. At least one part of the annual leave may not be less than 10 working days (this part may not be less than 2 weeks). For the first year of employment, full annual leave shall normally be granted after at least half the number of working days for the working year. For the second and subsequent years of employment, annual leave shall be granted at any time during the working year, in accordance with the order in which annual leave is granted by the employer. (Macijauskienė, 2003; 2014).

Obligations for employers to provide information to the State Labour Inspectorate:

1. Temporary employment undertakings must provide information on the commencement of recruitment through temporary employment undertakings and the number of temporary workers;
2. An employer subject to the jurisdiction of a foreign state must provide information on the number of workers on secondment (as from The information on posted workers will also have to be provided by a Lithuanian company that receives posted workers from third countries from 1 September);
3. The chairman of the works council must provide information on the formation of the works council, its governing bodies and the name of the employer;
4. The employer must provide information where a new works council has not been established within six months of the expiry of the term of office of the former works council or where there are fewer than three remaining members of the works council and the list of reserve members of the works council does not include any candidate who was eligible to become a member of the works council.

Obligations for employers to draw up internal regulations:

1. An employer with an average number of employees of more than 50 must adopt and publish in the usual manner in the workplace:
    - Measures for the implementation and enforcement of the principles of equal opportunities policy (Law on Equal Opportunities for Women and Men of the Republic of Lithuania, 2016);
    - the policy on the retention of employees' personal data and the measures for its implementation.
2. In workplaces with an average number of employees of 20, a remuneration system must be adopted.
3. The employer must confirm in a governing document the procedure for training and instructing employees in occupational safety and health matters (Law on Occupational Safety and Health of the Republic of Lithuania, 2003).

The concept and content of an employment contract

An employment contract is deemed to be concluded when the parties agree on the necessary terms and conditions of the employment contract (Labour Code of the Republic of Lithuania 2017). An employment contract is the part of labour law that regulates the relationship between an employee and an employer. The fact of drawing up an employment contract guarantees that the interests and rights of both parties to the contract will be protected by the laws of the Republic of Lithuania. The employment contract is very important not only in legal terms but also in practical terms. A person who works under an employment contract is covered by state social insurance and has a length of service. Also, every employee has certain guarantees in case he or she is injured at work (Law on the Civil Service, 2016).

An employment contract ends when it is terminated on the grounds set out in the Labour Code and other laws, as well as upon the liquidation of the employer without a successor in title or upon the death of the employee. It follows that the social significance of the employment contract is very high. It is the main form of legalisation of a person's right to work. Its termination is one of the most detailed issues in labour law that has been examined and regulated by law.

An employment contract is an agreement between an employee and an employer under which the employee undertakes to perform a work function under the authority of and for the benefit of the employer, and the employer undertakes to pay remuneration (Labour Code of the Republic of Lithuania 2017).

The content requirements of an employment contract are laid down in Article 33 of the Labour Code. The content of an employment contract is the rights and obligations of the employee and the employer as agreed between them. The content of an employment contract consists of the rights and obligations of the parties as set out in the employment contract. The terms and conditions or agreements agreed by the parties by which those rights and obligations are defined. The parties may not impose terms and conditions of employment which disadvantage the worker in relation to the position of the worker as compared with that laid down by the Labour Code (Dambrauskienė, 2018).

The terms and conditions of the employment contract are set out in Article 33 of the LC

1. Conditions of employment are essential and supplementary.

2. Necessary terms of an employment contract are the terms (job function, remuneration conditions and place of work) on which, if agreed, an employment contract is deemed to have been concluded.

3. Supplementary terms and conditions of employment - terms and conditions of employment agreed by the parties to the contract of employment which specify labour law provisions or establish an agreement on the work that is not contrary to them. These terms do not have to be agreed in the contract of employment, but they become binding on the parties to the contract of employment when they are agreed.

4. In an employment contract in which the monthly wage is set at not less than two times the gross average monthly wage of the national economy as published by the Lithuanian Statistics Department, it is possible to derogate from the mandatory rules laid down in this Code or in other provisions of labour law, except for the rules relating to maximum working hours and minimum rest periods, the conclusion and termination of the employment contract, minimum wages, occupational safety and health, gender equality and non-discrimination on other grounds, provided that the employment contract achieves a balance between the interests of the employer and the employee. Disputes concerning the legality of such agreements shall be dealt with in accordance with the procedure for labour disputes. If it is established that a clause in an employment contract is contrary to a mandatory rule laid down in this Code or in other rules of labour law or that the employment contract does not achieve a balance between the interests of the employer and the employee, the clause in the employment contract may not be applied, but the rule in this Code or in the rule of labour law shall apply. In any event, a clause in an employment contract may improve the position of the worker compared with that laid down in this Code or in other rules of labour law.

5. The Parties may not enter into agreements of a civil nature for the purpose of exercising the rights and obligations set out in this Code. Such agreements shall be governed by the rules of labour law.

6. Disputes arising out of the validity of the terms and conditions of the contract of employment, their performance or improper performance, or the compensation of damages shall be dealt with in the procedure for labour disputes of law provided for in this Code (Bagdanskis, et. al., 2018).

All terms and conditions of the employment contract agreed by the parties shall be equally binding on the parties to the employment contract, unless prohibited by labour laws, other normative legal acts or a collective agreement. A party to an employment contract may not unilaterally modify the terms and conditions of employment lawfully agreed in the employment contract. Downtime and remuneration for downtime are not included in the terms of the employment contract (Resolution of the Panel of Judges of the Civil..., 2015).

In labour law theory, the terms and conditions of the employment contract are classified according to the method of determination into those determined by the agreement between the parties and those determined by a normative act (law, collective agreement, etc.). Terms and conditions established by agreement between the parties are divided into necessary and supplementary terms. Necessary conditions are those on which, in the absence of an agreement between the parties, the contract is deemed not to have been concluded. Necessary conditions are twofold: mandatory for all contracts of employment, i.e. to be understood in the literal (real) sense, because without them every contract of employment is void; and mandatory for the validity of a particular contract of employment, because otherwise it will be a regular contract of employment. Additional terms are any other terms that are discussed by the parties in the employment contract but are not binding on it (the contract). They may or may not be agreed - the employment contract will stand. It should be noted that the agreed additional terms become binding on the parties (as well as the necessary ones) and individualise the employment contract (Resolution of the Chamber of Judges of the Civil Cases Division of the Supreme Court of Lithuania, 2008).

Article 34 of the Labour Code specifies which contractual conditions are necessary and which are not. In every employment contract, the parties must agree on the essential terms of the contract, namely the employee's place of work (the undertaking, its unit, etc.); the functions of the work, i.e. the work of a particular profession, specialty, qualification or the performance of certain duties; and the terms of remuneration.

According to Article 33 of the Labour Code, an employment contract is deemed to have been concluded when the parties have agreed on the necessary conditions (Labour Code of the Republic of Lithuania 2017). The Labour Code requires that the employment contract be concluded in writing. Work performed in breach of this requirement is considered illegal. Moreover, a model form of employment contract has been approved. The employer or his/her authorised representative will only allow the worker to start work if the employment contract is formalised, i.e. drawn up in duplicate and signed by the employer and the worker. One signed copy of the employment contract shall be handed to the employee and the other shall remain with the employer. The employment contract shall be registered on the same day in the register of employment contracts. The employer or his/her authorised person shall be responsible for the conclusion of the employment contract, its registration and the issue of a document identifying the worker (Bubilaitytė, 2018). When concluding an employment contract, the employer must inform the person to be hired, in writing, of the conditions of his or her future employment, the collective labour regulations and any other regulatory acts governing his or her working conditions.

Conslusions

1. An employment contract is the legal basis for formalising the employment relationship between an employer and an employee. It is an important document that establishes and defines the rights and obligations of the employer and, of course, the employee. Although it would seem that, in the event of termination of an employment contract under Article 136 of the Labour Code, it is the

employee who should suffer the most, which is not the case. It would be a mistake to think so, as the law provides for a number of restrictions in order to protect the interests of the employee in the first place. In all cases, the contract of employment must and may be terminated only in accordance with the law and the procedures laid down in the law. Failure to comply with these conditions inevitably entails legal consequences and liability for non-compliance with this rule of law.

2. For many of us, it still seems very easy and straightforward to terminate an employment contract without giving notice to the employee. Unfortunately, this is certainly not the case. One of the main reasons for this is that the case law has not been fully developed and, as a consequence, there are still many gaps in the application and interpretation of this legal norm. It would be useful for the legislator to review and propose what could and should facilitate the application of this provision.

3. In all cases, the employer must strictly comply with the grounds, time limits and procedural procedures for dismissal provided for in laws and regulations, in order to avoid negative consequences later. It should be noted that in all cases of termination without notice, the employer has a strong basis, which gives it a dominant position. This creates the conditions for another of the problems that such an employer's omnipotence could cause.

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Kalėjimo departamento statutinių pareigūnų rengimo sisteminiai pokyčiai Lietuvoje

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Anotacija

Straipsnio tikslas – įvertinti Kalėjimo departamento statutinių pareigūnų kvalifikacijos kėlimą bei asmeninį tobulėjimą, kuris turėtų būti vienas iš pagrindinių uždavinių šios profesijos atstovui, būti naudingu, profesionaliu ir pažangiu darbuotoju savo profesinėje srityje. Žinių tobulinimas, kvalifikacijos kėlimas – turėtų būti neatsiejamas kasdieninis dalykas darbo srityje. Daugelyje statutinių įstaigų rengiami kvalifikacijos kėlimo kursai ar specialūs mokymai, kurie naudingi darbo organizavimui, žinių atnaujinimui ir kvalifikacijos kėlimui.

Statutiniai valstybės tarnautojai užtikrina visuomenės saugumą, viešąją tvarką, gesina gaisrus, atlieka gelbėjimo darbus, vykdo ikiteisminį tyrimą, saugo valstybės sieną, prižiūri bausmę atliekančius asmenis, vykdo prekių (krovinių) muitinį patikrinimą ir t. t. Įvertinus specifinį Kalėjimo departamento statutinių valstybės tarnautojų vykdomų funkcijų svarbą ir siekiant užtikrinti kvalifikuotą jų vykdymą, turėtų būti skiriamas ypatingas dėmesys tinkamam pareigūnų parengimui, nuolatiniam jų mokymui, kvalifikacijos kėlimui ir karjeros galimybėms.

Raktiniai žodžiai: *statutinė tarnyba, pareigūnai, pareigūnų rengimas, praktiniai mokymai.*

Įvadas

Pagal Lietuvos Respublikos vidaus tarnybos statutą (toliau – Statutas) statutinės įstaigos yra Lietuvos Respublikos vidaus reikalų, teisingumo ir finansų ministrų valdymo sričių viešieji juridiniai asmenys, kurių vidaus tarnybos sistemos pareigūnų (toliau – pareigūnai) tarnyba organizuojama statutiniais pagrindais. Prie statutinių įstaigų priskiriamos ir vidaus reikalų bei teisingumo ministrų valdymo srityse veikiančios statutinės profesinio mokymo įstaigos.

Vidaus reikalų ministro valdymo srities statutines įstaigas sudaro šios centrinės statutinės įstaigos:

- Policijos departamentas prie Vidaus reikalų ministerijos (toliau – Policijos departamentas, PD);
- Valstybės sienos apsaugos tarnyba prie Vidaus reikalų ministerijos (toliau – Valstybės sienos apsaugos tarnyba, VSAT);
- Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos (toliau – Priešgaisrinės apsaugos ir gelbėjimo departamentas, PAGD);
- Finansinių nusikaltimų tyrimo tarnyba prie Vidaus reikalų ministerijos (toliau – Finansinių nusikaltimų tyrimo tarnyba, FNTT);
- Viešojo saugumo tarnyba prie Vidaus reikalų ministerijos (toliau – Viešojo saugumo tarnyba, VST) (Vidaus reikalų ministerija, 2022).

Prie kitų statutinių įstaigų yra priskiriamos centrinėms statutinėms įstaigoms pavaldžios statutinės įstaigos, taip pat statutinės profesinio mokymo įstaigos – vidaus reikalų profesinio mokymo įstaigos.

Teisingumo ministro valdymo srities statutinės įstaigos yra centrinė statutinė įstaiga – Kalėjimų departamentas prie Lietuvos Respublikos teisingumo ministerijos (Kalėjimų departamentas..., 2022).

Kitoms šios valdymo srities statutinėms įstaigoms priskiriamos Kalėjimų departamentui pavaldžios probacijos tarnybos, pataisos įstaigos, tardymo izoliatoriai, o taip pat statutinė profesinio mokymo įstaiga – pataisos pareigūnų profesinio mokymo įstaiga (Lietuvos Respublikos vidaus tarnybos statutas..., 2022).

Pareigūnai yra Statute nustatyta tvarka į pareigūno pareigas vidaus reikalų ministro valdymo srities statutinėse įstaigose, teisingumo ministro valdymo srities statutinėse įstaigose, finansų ministro valdymo srities statutinėse įstaigose priimti statutiniai valstybės tarnautojai, atliekantys įstatymuose nustatytas funkcijas, kuriomis užtikrinamas statutinei įstaigai įstatymuose nustatytų uždavinių ir funkcijų įgyvendinimas, turintys įstatymų suteiktus viešojo administravimo įgaliojimus dėl sau nepavaldžių asmenų ir (ar) vadovaujantys kitiems pareigūnams.

Kiekvienam Lietuvos piliečiui yra svarbus jų saugumas, o ypač nuo asmenų, kuriems yra taikoma valstybės prievartos priemonė – bausmė. Bausmė yra valstybės prievartos priemonė, skiriama teismo apkaltinamuoju nuosprendžiu asmeniui, padariusiam nusikaltimą ar baudžiamąjį nusižengimą, apribojant nuteistojo teises ir laisves, o jos skyrimo pagrindus reglamentuoja Lietuvos Respublikos baudžiamasis kodeksas, kartu nustatydamas, kad skirdamas bausmę, teismas atsižvelgia į padarytos nusikalstamos veikos pavojingumo laipsnį, kaltės formą ir rūšį, nusikalstamos veikos motyvus, tikslus, nusikalstamos veikos stadiją, kaltininko asmenybę, atsakomybę lengvinančias bei sunkinančias aplinkybes (Laurinavičius, 2002). Bausmės paskirtis – galutinis rezultatas, kurio nustatydama ir taikydama bausmes siekia valstybė. Šiam tikslui įgyvendinti buvo sukurta statutinės valstybės tarnybos (Vyriausybės strateginės analizės centras..., 2021), kuri viena iš jų yra Kalėjimo departamento statutiniai pareigūnai užtikrinantys nuteistųjų priežiūrą. Minėtiems pareigūnams keliamas esminis uždavinys – įgyvendinti pareigas, kurios yra būtinos, siekiant tikslingai ir efektyviai užtikrinti valstybės garantuojamą teisinę ir socialinę tvarką (Kalanta..., 2016). Kiekvieną kartą keičiantis valdžioms, daromos reformos, po kurių nuolat sumažėja pareigūnų skaičius.

Tyrimo objektas: statutinių pareigūnų, išskiriant dirbančius Kalėjimų departamente, parengimas ir kompetencijos.

Tyrimo tikslas: išanalizuoti KD statutinių pareigūnų parengimą.

Tyrimo metodai: darbe taikoma teisės aktų bei mokslinės literatūros analizė, kuri padeda įsigilinti į pareigūnų parengimą, analizuojami teisės aktai, reguliuojantys statutinių pareigūnų atitikties reikalavimus, taikomas apibendrinimo metodas.

Statutiniams pareigūnams taikomi reikalavimai ir jų parengimas

Vidaus tarnybos statutas nustato, kad pretenduojantiems į vidaus tarnybą asmenims taikomi reikalavimai šie reikalavimi:

1. pretenduojantis į vidaus tarnybą asmuo turi:

    1) būti Lietuvos Respublikos pilietis ir mokėti lietuvių kalbą;
    2) būti sukakęs ne mažiau kaip 18 metų ir ne daugiau kaip 60 metų;
    3) būti nepriekaištingos reputacijos - asmuo nelaikomas nepriekaištingos reputacijos, jeigu jis pripažintas kaltu dėl tyčinio nusikaltimo padarymo, nesvarbu, ar teistumas išnyko, ar yra panaikintas, arba pripažintas kaltu dėl kitos nusikalstamos veikos padarymo ir nuo teismo nuosprendžio įsiteisėjimo dienos nepraėjo 5 metai, arba turi teistumą dėl padaryto nusikaltimo. Anksčiau ėjo statutinio valstybės tarnautojo pareigas, dirbo teisėju, notaru, prokuroru, advokatu ar krašto apsaugos sistemoje ir buvo atleistas atitinkamai už pareigūno vardo pažeminimą, teisėjo vardą žeminantį poelgį, notarų profesinės etikos ir tarnybinius nusižengimus, prokuroro vardo pažeminimą, advokato profesinės etikos ir profesinės veiklos pažeidimus ar kario vardą žeminančius teisės pažeidimus arba šio statuto 39 straipsnio 8 dalyje numatytu atveju buvo pripažintas pažeminusiu pareigūno vardą;

4) būti lojalus Lietuvos valstybei - asmuo nelaikomas lojaliu Lietuvos valstybei, jeigu jis, turėdamas Lietuvos Respublikai priešiškų interesų, bendradarbiauja ar yra bendradarbiavęs, palaiko ar palaikė ryšius su **užsienio valstybės žvalgybos ar saugumo tarnyba arba su asmeniu, bendradarbiaujančiu ar palaikančiu ryšius su užsienio valstybės žvalgybos ar saugumo tarnybą. Dalyvauja arba dalyvavo teroristinės organizacijos ar teroristinės grupės veikloje arba palaiko ar palaikė ryšius su asmeniu, priklausančiu teroristinei organizacijai ar grupei;** Gauna arba yra gavęs pajamų iš **užsienio** valstybių karinių, žvalgybos ar saugumo tarnybų, jeigu tai nėra numatyta Lietuvos Respublikos tarptautinėse sutartyse ar susitarimuose; ir. T.t.
5) turėti ne žemesnį kaip vidurinį išsilavinimą;
6) būti tokios sveikatos būklės, kuri leistų eiti pareigas vidaus tarnybos sistemoje. Sveikatos būklės reikalavimus nustato vidaus reikalų ir sveikatos apsaugos ministrai;
7) būti tokio fizinio pasirengimo, kuris leistų eiti pareigas vidaus tarnybos sistemoje. Pareigūnų fizinio pasirengimo reikalavimus nustato vidaus reikalų ministras, suderinęs su finansų ir teisingumo ministrais.

2. Pretenduojantys į vidaus tarnybą vidaus reikalų ministro valdymo srities statutinėse įstaigose asmenys taip pat turi būti baigę vidaus reikalų ministro valdymo srities statutinę profesinio mokymo įstaigą ar Lietuvos aukštąją mokyklą (toliau – kita švietimo įstaiga) ministro nustatyta tvarka išduotu siuntimu arba vidaus reikalų ministro valdymo srities statutinės profesinio mokymo įstaigos įvadinio mokymo kursus.

3. Ministras ar jo įgalioti centrinių statutinių įstaigų vadovai gali nustatyti papildomų reikalavimų, taikomų asmenims, pageidaujantiems mokytis statutinėje profesinio mokymo įstaigoje ar kitoje švietimo įstaigoje arba pretenduojantiems tarnauti tam tikruose statutinių įstaigų padaliniuose. Šie papildomi reikalavimai siejami su asmens intelektiniais, fiziniais ir praktiniais gebėjimais, moraliniu ir psichologiniu tinkamumu vidaus tarnybai ar tinkamumu eiti pareigas tam tikruose padaliniuose.

Asmenų tikrinimas ir siuntimų į statutines profesinio mokymo įstaigas ar kitas švietimo įstaigas išdavimas

Asmuo, pageidaujantis mokytis statutinėje profesinio mokymo įstaigoje ar statutinės profesinio mokymo įstaigos įvadinio mokymo kursuose, turi kreiptis dėl siuntimo į statutinę profesinio mokymo įstaigą išdavimo, o asmuo, pageidaujantis mokytis kitoje švietimo įstaigoje, – dėl siuntimo į kitą švietimo įstaigą išdavimo. Asmenims siuntimai į įvadinio mokymo kursus statutinėje profesinio mokymo įstaigoje ar siuntimai stoti į kitą švietimo įstaigą išduodami atrankos būdu. Atrankos dėl šių siuntimų išdavimo ir siuntimų išdavimo tvarką nustato ministras.

Asmens, pageidaujančio mokytis statutinėje profesinio mokymo įstaigoje, statutinės profesinio mokymo įstaigos įvadinio mokymo kursuose ar kitoje švietimo įstaigoje, tikrinimas vyksta taip:

1. Centrinė medicinos ekspertizės komisija patikrina šio asmens sveikatą ir pateikia išvadą dėl jo sveikatos būklės ir psichologinio tinkamumo vidaus tarnybai;
2. ministro nustatyta tvarka asmuo tikrinamas valstybės informacinėse sistemose ir registruose (prireikus – ir kriminalinės žvalgybos subjektų informacinėse sistemose);
3. statutinės įstaigos prašymu Lietuvos Respublikos valstybės saugumo departamentas pateikia informaciją dėl šio statuto 10 straipsnyje nurodytų aplinkybių buvimo;
4. kai yra nustatytų šio statuto 8 straipsnio 3 dalyje nurodytų papildomų reikalavimų, ministro ar jo įgaliotų centrinių statutinių įstaigų vadovų nustatyta tvarka tikrinama, ar asmuo atitinka papildomus reikalavimus;
5. asmens bendrasis fizinis pasirengimas tikrinamas atitinkamai atrankos į statutines profesinio mokymo įstaigas metu arba atrankos dėl siuntimo į kitą švietimo įstaigą išdavimo metu.

Nustačius, kad pageidaujantis mokytis statutinėje profesinio mokymo įstaigoje, kitoje švietimo įstaigoje ar statutinės profesinio mokymo įstaigos įvadinio mokymo kursuose asmuo atitinka šio statuto

8 straipsnio 1 dalies 1, 2, 3, 5, 6 punktuose ir 3 dalyje nustatytus reikalavimus ir nėra šio statuto 16 straipsnio 1 dalies 1, 2, 3, 6 ir 7 punktuose nurodytų aplinkybių, šiam asmeniui išduodamas siuntimas į statutinę profesinio mokymo įstaigą arba, atsižvelgiant į ministro nustatytą pareigūnų rengimo pagal atitinkamas studijų programas poreikį, išduodamas siuntimas į kitą švietimo įstaigą:

1. asmeniui, turinčiam ne žemesnį kaip vidurinį išsilavinimą, – siuntimas dalyvauti atrankoje į statutinę profesinio mokymo įstaigą;
2. asmeniui, turinčiam aukštąjį universitetinį ar jam prilygintą išsilavinimą, aukštąjį koleginį, iki 2009 metų įgytą aukštesnįjį arba iki 1995 metų įgytą specialųjį vidurinį išsilavinimą, – siuntimas į įvadinio mokymo kursus statutinėje profesinio mokymo įstaigoje;
3. asmeniui, pageidaujančiam mokytis kitoje švietimo įstaigoje, – siuntimas stoti į kitą švietimo įstaigą.

Atitiktis šio statuto 8 straipsnio 1 dalies 4 punkte nustatytam reikalavimui įvertinama per 60 darbo dienų nuo Centrinės medicinos ekspertizės komisijos išvados, kad asmuo tinkamas vidaus tarnybai, gavimo statutinėje įstaigoje dienos.

Stojimo į vidaus tarnybą sutartis yra Lietuvos Respublikos piliečio, statutinės profesinio mokymo įstaigos ar kitos švietimo įstaigos ir centrinės statutinės įstaigos rašytinis susitarimas, kuriuo kursantas įsipareigoja laikytis šiame statute ir kituose teisės aktuose kursantams nustatytų reikalavimų, atlikti jam pavestas pareigas, o asmuo, nusiųstas mokytis į kitą švietimo įstaigą, – laikytis šios įstaigos nustatytų reikalavimų, statutinė profesinio mokymo įstaiga ar kita švietimo įstaiga įsipareigoja sudaryti tinkamas mokymosi sąlygas, o centrinė statutinė įstaiga įsipareigoja užtikrinti, kad baigęs statutinę profesinio mokymo įstaigą kursantas ar kitą švietimo įstaigą baigęs asmuo bus paskirtas į jo išsilavinimą ir profesiją atitinkančias pareigas statutinėje įstaigoje, jam bus sudarytos tinkamos tarnybos sąlygos, užtikrintos šiame statute ir kituose įstatymuose nustatytos pareigūnų teisės ir socialinės garantijos.

Lietuvos Respublikos vidaus reikalų, teisingumo ir finansų ministrų valdymo sričių statutinėse įstaigose dirba daugiau nei 19016 pareigūnų . Pažymėtina, kad statutinėse įstaigose taip pat dirba valstybės tarnautojai ir darbuotojai, dirbantys pagal sutartis. Atsižvelgiant į i alternatyvų vertinimo ataskaitai keliamus tikslus ir uždavinius, pagrindinis dėmesys yra skiriamas pareigūnų rengimui ir jų kvalifikacijos tobulinimui.

Pareigūnų išsilavinimas ir jo lygis yra labai svarbus veiksnys, sąlygojantis ne tik atliekamų funkcijų kokybę, bet ir didele dalimi apsprendžiantis pareigūnų priskyrimą atskiroms pareigybių grupėms.

Pareigūnų pareigybės skirstomos į 15 pareigybių grupių. Aukščiausia yra 1 grupė, žemiausia – 15 grupė. Pirminės grandies pareigūnams yra priskiriami Statuto priede nurodytų 11, 12, 13, 14 ir 15 pareigybių grupių pareigūnai. Šios grupės pareigūnams reikalingas ne žemesnis kaip vidurinis išsilavinimas ir įgyta kvalifikacija.

Vidurinės grandies pareigūnams yra priskiriami Statuto priede nurodytų 8, 9 ir 10 pareigybių grupių pareigūnai. Šios grupės pareigūnams reikalingas ne žemesnis kaip aukštasis koleginis išsilavinimas, iki 2009 metų įgytas aukštesnysis išsilavinimas arba iki 1995 metų įgytas specialusis vidurinis išsilavinimas.

Aukštesniosios grandies pareigūnams yra priskiriami Statuto priede nurodytų 2, 3, 4, 5, 6, ir 7 pareigybių grupių pareigūnai. Šios grupės pareigūnams reikalingas ne žemesnis kaip aukštasis universitetinis arba jam prilygintas išsilavinimas.

Aukščiausiosios grandies pareigūnams priskiriami 1 pareigybių grupės pareigūnai ir jiems, vadovaujantis Statuto 29 straipsnio 2 dalimi, būtinas ne žemesnis kaip aukštasis universitetinis laipsnis ir magistro kvalifikacijos laipsnis arba jam lygiavertė aukštojo mokslo kvalifikacija.

Pareigūnų statusą, priėmimą į statutines profesinio mokymo įstaigas ir mokymąsi jose, vidaus tarnybos principus ir kitus pareigūnų darbo bei veiklos aspektus nustato Statutas.

Pareigūnų pirminis profesinis mokymas vyksta statutinėse profesinio mokymo įstaigose pagal patvirtintas IV lygio formaliojo profesinio mokymo programas.

Profesinis mokymas statutinėse profesinio mokymo įstaigose tiek, kiek nereglamentuota Vidaus tarnybos statute, organizuojamas vadovaujantis Lietuvos Respublikos profesinio mokymo įstatymu (LR Profesinio mokymo įstatymas..., 1997).

Pataisos įstaigų pareigūnų profesinį mokymą vykdo Kalėjimų departamento Mokymo centras (toliau – Mokymo centras). Mokymo centras yra statutinė profesinio mokymo įstaiga. Mokymas vykdomas pagal pirminio ir tęstinio profesinio mokymo programas. Įstaiga vykdo pareigūnų įvadinį mokymą. Pataisos įstaigų pareigūnų mokymas vykdomas pagal „Pataisos pareigūno modulinę profesinio mokymo programą" (kodas pagal Tarptautinę standartizuotą švietimo klasifikaciją (ISCED) – 4541032, valstybinis kodas - M44103204). Programos apimtis – 60 mokymosi kreditų. Sėkmingai pabaigusiems profesinio mokymo programą suteikiama pataisos pareigūno kvalifikacija, LTKS IV, išduodamas profesinio mokymo diplomas. 2018-2020 m. m. Mokymo centro profesinio mokymo programą vidutiniškai kasmet baigdavo 28 asmenys. 2021 m. Kalėjimų departamento mokymo centro profesinio mokymo programą baigė 12 pareigūnų.

Efektyviam pareigūnų darbui užtikrinti reikalingos aukšto lygio kompetencijos, geri praktiniai gebėjimai, nuolatinis kvalifikacijos tobulinimas ir asmeninis pareigūnų tobulėjimas. Kvalifikacijos tobulinimu laikomas pareigūnų specialių žinių plėtimas, įgūdžių ir gebėjimų tobulinimas, mokymasis, kai po jo baigimo neįgyjama profesinė kvalifikacija.

Pataisos pareigūnų rengimo sistema

Statutiniai valstybės tarnautojai užtikrina visuomenės saugumą, viešąją tvarką, gesina gaisrus, atlieka gelbėjimo darbus, vykdo ikiteisminį tyrimą, saugo valstybės sieną, prižiūri bausmę atliekančius asmenis, vykdo prekių (krovinių) muitinį patikrinimą ir t. t. Įvertinus statutinių valstybės tarnautojų vykdomų funkcijų svarbą ir siekiant užtikrinti kvalifikuotą jų vykdymą, turėtų būti skiriamas ypatingas dėmesys tinkamam pareigūnų parengimui ir nuolatiniam jų mokymui.

Bausmių vykdymo sistemoje (toliau – BVS) nuo 2017 m. siekiama įgyvendinti dinaminį saugumą, t. y. padidinti nuteistųjų elgesio kontrolės veiksmingumą, sumažinti nuteistųjų nekontroliuojamą judėjimą už savo būriui priskirtos teritorijos ribų, geriau užkardyti nuteistųjų tarpusavio smurto atvejus, padėti nuteistiesiems vietoje išspręsti jiems rūpimus klausimus. Dinaminė priežiūra orientuota į konstruktyvų ir pozityvų pareigūno dialogą su nuteistuoju. Šios interakcijos palaikymu siekiama konkrečių uždavinių – pozityvaus poveikio nuteistajam, savalaikio informacijos pateikimo ir grįžtamojo ryšio gavimo, profesionalių santykių palaikymo ir sustiprinimo, abipusio supratimo ieškojimo. Be to, dinaminė priežiūra leidžia užtikrinti nuteistojo asmens elgesio korekciją, jam taikyti turimas intervencines priemones ir įvertinti šių priemonių poveikį. Dinaminė priežiūra turi būti suvokiama kaip reguliarus, nuolatinis bendravimas su įkalintu asmeniu, surinktos ir turimos informacijos apie asmenį analizavimas ir perdavimas kitiems įstaigos padaliniams, kurie gali imtis papildomų priemonių. Pareigūnų ir kitų darbuotojų profesionalumas. Dinaminė priežiūra neįmanoma be profesionalių darbuotojų. Pats modelio aprašymas, pateikimas, funkcijų išgryninimas ir aprašymas nėra pakankamas konstatuojant, kad dinaminė priežiūra įdiegta ir veikia. Tik atrinkti ir dinaminės priežiūros išmokyti pareigūnai gali įgyvendinti dinaminiam saugumui keliamus uždavinius. Dinaminio saugumo laisvės atėmimo vietų įstaigose koncepcijoje pakankamai aiškiai išskiriami šie tikslai: - užtikrinti įstaigose esančių darbuotojų ir kitų asmenų saugumą; - stiprinti (plėsti) įkalinimo įstaigų personalo kompetenciją; - mažinti subkultūros apraiškas; - įgyvendinti socialinės integracijos ir individualaus darbo su nuteistaisiais programas; - mažinti žalingą laisvės atėmimo vietos poveikį nuteistojo asmenybei ir nuostatoms; - užkirsti kelią neformaliai elgesio taisyklių sklaidai. Tarptautinėse rekomendacijose nurodoma, kad dinaminio saugumo įgyvendinimas turi būti grindžiamas metodika ir lydimas procedūrų, ypač – tinkamos darbuotojų atrankos ir jų mokymo (Uscila, 2020).

Atitinkamo ministro nustatyta tvarka išduotu siuntimu būsimi pareigūnai rengiami ir kitose Lietuvos aukštosiose mokyklose.

Vienas iš pagrindinių tikslų, keliamų studijų institucijai, yra pareigūnų, turinčių reikiamas kompetencijas, gebėjimus ir praktinius įgūdžius, reikiamą kvalifikaciją ir galinčių po studijų baigimo pradėti efektyviai vykdyti tarnybines funkcijas, parengimas. Tokiems tikslams pasiekti gali būti pasirinktos koleginės studijos, grindžiamos profesine praktika, kuriose būtų teikiamas aukštasis koleginis išsilavinimas.

Kolegija turėtų užtikrinti pakopinį pareigūnų rengimo organizavimą, kai žemesnių pakopų studijų ar mokymosi rezultatai ir įgytos kompetencijos yra įskaitomi tolimesnėse studijų pakopose.

Kolegija savo veikloje turėtų integruoti profesinį mokymą ir aukštąjį mokslą, užtikrinti veiksmingą ir efektyvų išteklių panaudojimą.

Teisingumo ministro valdymo srities Kalėjimų departamento prie Lietuvos Respublikos teisingumo ministerijos strateginėse veiklos gairėse 2022-2030 m., patvirtintose Kalėjimų departamento prie Lietuvos Respublikos teisingumo ministerijos direktoriaus 2022 m. vasario d. įsakymu Nr. v-12, strateginės krypties „Bausmių vykdymo personalas ir jo valdymas“ strateginis tikslas „Personalo mokymas ir kvalifikacijos kėlimas“ numato priemones „Užtikrinti šiuolaikišką ir kokybišką profesinio ir įvadinio mokymo vykdymą“ bei „Užtikrinti, kad Kalėjimų tarnybos personalas turėtų reikiamas kompetencijas ir sudaryti sąlygas jo nuolatiniam kvalifikacijos kėlimui“ (Centralizuotos vidaus tarnybos sistemos pareigūnų rengimo kvalifikacijos tobulinimo sistemos..., 2022).

Pataisos pareigūnų žinių pritaikymas darbo aplinkoje

Kalėjimų departamento ir jam pavaldžių įstaigų pareigūnai priimami į tarnybą, o po to per vienerius metus turi būti nusiųsti į įvadinius mokymus, kurių metu jiems paliekamos einamos pareigos ir mokamas nustatytas darbo užmokestis. Pareigūnai prieš pradėdami tarnauti turi būti įgiję tarnybinių ginklų naudojimo, pirmosios medicinos pagalbos ir higienos įgūdžius ir turėti atitinkamus pažymėjimus.

Viena iš nustatytų funkcijų – esant būtinumui, panaudoti specialiąsias priemones ar šaunamąjį ginklą Lietuvos Respublikos įstatymų nustatyta tvarka. Pareigūnai pradeda tarnauti statutinėje įstaigoje neatitikdami pareigybių aprašymuose nustatytų reikalavimų. Todėl statutinės įstaigos, esant būtinumui, negalės efektyviai panaudoti žmogiškųjų išteklių, nes ne visi statutiniai pareigūnai turės atitinkamas teises ir reikiamus įgūdžius vykdyti pareigybės aprašymuose numatytas funkcijas.

Augant kompetencijoms bei darbo kokybei galima kurti modernią valstybės tarnybą, kuri pasižymėti dinamiškumu, racionaliu išteklių valdymu (Raipa..., 2014).

Šioje statutinėje įstaigoje dirbu jau 14 metų, praėjus įvadinius kursus, kvalifikacijos kėlimo kursus, galiu teigti, kad ne visi pareigūnai yra pasiruošę tarnybai. Naujai atėjusio pareigūno žinios yra dar nepamirštos, tačiau ne visi pareigūnai gali panaudoti specialiąsias priemones ar šaunamąjį ginklą. Labai svarbus yra psichologinis pasirengimas, teisinių žinių bagažas. Didesnį dėmesį skirti dinaminio saugumo vykdymui pataisos įstaigose, nes dinaminės priežiūros specialistas šiuo metu atlieka daugiau kaip „išvedžiotojo“ funkcijas, o ne tos, kurios apibrėžiamos dinaminio saugumo modelyje. Manau, kad reikia nuolat ugdyti žinias bei taktinius įgūdžius. KD Mokymo centras rengia kvalifikacinius mokymus, tačiau to nepakanka. Įstaigoje yra sudaryta galimybė eiti sportuoti, tobulinti taktinius įgūdžius, tačiau dėl didelio darbuotojų trūkumo, padidėja darbo krūvis, todėl sąlygų tobulintis taktinius įgūdžius nėra galimybių.

Išvados

1. KD statutinių tarnautojų parengimo problema galėtų būti sprendžiama atliekant statutinių tarnautojų (dirbančių tiesioginį darbą su nuteistaisiais) apklausas, siekiant nustatyti jų (ne) pasitenkinimą darbu, lūkesčius ir motyvaciją. Statutinis pareigūnas keldamas kvalifikaciją, siekdamas karjeros, turi atsižvelgti į savo gebėjimus, interesus bei polinkius, suprasti, kodėl jis nori būti konkurencingas tarnyboje. Atsižvelgiant į darbo rezultatus, turėtų būti imamasi konkrečių priemonių egzistuojančioms problemoms spręsti. Pagrįsta pareigūnų kvalifikacijos kėlimo svarba ir daroma įtaka jų karjerai.

2. Kokybiškas paruošimas ir nuolatinis mokymas turėtų būti vedamas nuolat organizuojant mokymus teisinėmis bei psichologinėmis temomis, kuriuos privalomai turėtų išklausyti visi pareigūnai. Taip pat mokymus turėtų vesti kompetentingi, kvalifikuoti specialistai, labai gerai įsigilinę į šią specifinę sritį, kadangi dauguma nuteistųjų turi priklausomybių bei psichologinių problemų, taip pat mokantys manipuliuoti valstybės suteiktomis teisėmis ir gerove.

3. Mokymai turėtų būti ilgesni ir orientuoti ne tik į teisines žinias, bet ir praktinius mokymus. KD statutinių valstybės tarnautojų rengimas siejamas su vykdomų funkcijų įgyvendinimo užtikrinimu, kuris įgyjamas įsteigtoje įstaigoje: Kalėjimų departamento mokymo centre. Aukštojo mokslo universitetinės pirmosios pakopos ir antrosios pakopos studijos, susijusios su pareigūnų rengimu, daugiausia įgyvendinamos Mykolo Romerio universitete.

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Implementation of the legal regulation of social and biological parenthood analysis of problems in court practice

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Annotation

The rights of the child, due to their subjective specificity, are distinguished from the general rights of people. The child does not have the opportunity to exercise his rights due to his immaturity, therefore the rights and interests of the child must first of all be taken care of by the parents. Every child has two parents, viz. i.e. father and mother and each child has the right to grow up in his biological family, but for various reasons it happens that the child remains to grow up with one parent or the authority of both parents is limited temporarily or indefinitely. When a child loses one or both parents, there is a need to transfer the responsibilities of biological parents to other persons or institutions. With the emergence of a family that wants to fully fulfill the rights and duties of parents and with whom there is no biological connection, the institute of social parents appears and in most cases, they successfully replace the biological parents.

Keywords: *rights of the child, biological parents, biological parents, social and biological parenthood.*

Introduction

More and more often, the responsibilities of parents to their children, related to biological parenthood, are being transferred to other persons and artificial substitutes for the institution of parenthood are being created. Biological parenting is no longer the only type of parenting, so social parents are increasingly appearing in families who act as parents in the child's daily life. When a guardianship (caring) institute appears in a child's life, it is necessary to assess whether it will really ensure the child's legitimate interests better and the guardians (caregivers) will properly fulfill their rights and duties. In the case of adoption, adoptive parents are equated with biological parents and the child no longer has the right to know his origin, a decision is made for him that determines the child's entire life. In cases of foster care and adoption, the recognition of social parentage certainly has a significant impact on the child's life and will not necessarily serve the best interests of the child. The laws provide for the recognition of biological parentage, but in court practice we see that biological parentage is not considered the main reason for legalizing and maintaining parental relationships. Until the lower period, biological parenthood had priority over social parenthood, but today much attention is paid specifically to the legitimate interests of the child and an attempt is made to find a balance between the interests of adults and the interests of children. It should be noted that the courts adhere to the principle of the supremacy of the child's interests. This article analyzes the importance of biological and social parenthood in the implementation of parental responsibilities, and analyzes court practice related with the implementation of the legal regulation of social and biological parenthood.

Research object. Ensuring the child's rights in cases of social and biological parentage.

The aim. To analyze the implementation problems of the legal regulation of social and biological parenthood in court practice

Results

Taking the child away from the parents or their other representatives is already an extreme measure

and is applied only in cases where there is no possibility for the child to remain in his biological family or in another care environment, taking into account the child's legitimate interests (Berns, 2009; Aidukaitė, et. al., 2019). A child may be taken only in cases where: 1) the child's life or health is in real danger or there is a high probability that such harm will occur; 2) parents or other representatives of the child do not take the necessary measures to ensure the child's safety in accordance with the law (Supreme Court of Lithuania…, 2020).

Child guardianship is not considered an alternative form of parenting, it is only assistance to the child, the organization of which is the responsibility of the state and self-governing institutions, and the guardian of the child is responsible for the proper performance of the guardian's duties (Amarachi Oti-Onyema, 2020). In the event of improper performance of the guardian's duties, the state and municipal authorities must immediately react and replace the guardian (Senkuvienė, 2018). When parents experience one or another problem while raising their children, the state first of all provides them with help without taking the children from the family (Arlauskas, 2017). However, if the help is not accepted or no positive results can be seen from the help provided, the authorities decide on the issue of taking the child from the family and, in most cases, the issue of limiting parental authority. The issue of taking a child is motivated by the fact that a child cannot wait for an indefinite period of time, the child's needs to live a safe, healthy life, to be educated must be met every day, therefore, if there are grounds established by law, the child is taken from the family. The goal of guardianship is to return the child to the family, so the state continues to provide assistance to the family, but even after the child is taken from the family, if no positive results are seen, permanent guardianship is established for the child or adoption is decided upon (Supreme Court of Lithuania…, 2020).

The Court of Cassation stated, "in cases where the limitation of parental authority is decided, not only the culpable actions or omissions of the parents, which form the basis for the limitation of parental authority established by law, must be determined, but also whether and how the behavior of the other parent must be assessed. It should be noted that parents' behavior must not change episodically, but positive changes must be stable and cover all areas: taking care of children's health, upbringing, communication with educators, solving problems with alcohol consumption, creating a clean and orderly home environment, etc. i.e.

Thus, in the event of a dispute, even recognizing some recent positive changes in the defendant's behavior (due to the improvement of household conditions, concern for the child's health), the main reason emphasized in court decisions, which led to the improper implementation of parental duties, is related to alcohol consumption, which harms the fundamental rights and interests of children. The appellate court that examined the case emphasized that the defendant fulfilled the assigned obligations only partially, the cooperation was mostly at the initiative of the social worker, the defendant is not motivated to change her lifestyle, her behavior has not changed for a long time, the defendant adjusts her behavior for a short time, only in order to return the child to the family , but after the recovery, she does not look after her daughter properly again, there is no evidence that her behavior may change. The Court of Cassation concluded that in this case it was not established that the child can be returned to the family and that the defendant is capable of properly taking care of him, while the temporary guardianship lasts longer than 8 months and at this time a permanent decision in the best interests of the child must be made (Supreme Court of Lithuania…, 2020).

In the practice of Lithuanian courts, the issue of limiting parental authority and guardianship (care) is usually resolved when biological parents abuse alcohol, as a result of which parents lack social skills and children are neglected. One of the examples in the case, when the mother constantly abused alcohol, was treated for this addiction, was registered for a number of years in the register of social risk families raising children, she constantly lacked motivation to take care of children, and was also punished with administrative penalties for drinking alcohol and not providing a safe environment for children, and the father did not take care of the children (Šiauliai District Court…, 2021). The court's decision was to satisfy the claim of the State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labor and temporarily limited the authority of both parents, ordered maintenance from the biological parents, and placed the children in the care of the child and family welfare center. In this case, the parental authority is limited only temporarily, which means that the

parents are still given the opportunity to get the children back (Kudinavičiūtė – Michailovienė, et. al., 2018). Another example, when parental authority is limited for an indefinite period of time, because after temporarily limiting the mother's authority, as well as alcohol consumption, a support plan was drawn up for her, but the mother did not make any efforts to return the children to the family, so the court decided to limit the mother's authority for an indefinite period and assign the children permanent care (Šiauliai District Court, 2021).

When determining guardianship (care) of a child, the interests of the children must always be taken into account, so if there is an opportunity, guardianship (care) is assigned to relatives. In the case (Supreme Court of Lithuania…, 2014) after the death of the mother, the father left the child to be raised and cared for by the grandparents, temporary guardianship was established for the child and the grandmother was appointed guardian, and the father was awarded maintenance (Žalnieriūnas, et. al, 2013). The guardian appealed to the court and asked to temporarily limit the father's authority, because, as she said, the father does not pay maintenance and rarely visits the child (Kudinavičiūtė – Michailovienė, et. al., 2018; Maslauskaitė, 2017). However, the court did not find a single reason why the father's authority should be limited and the decision was to return the child to the father, even though the relationship between the child and the guardian was closer. The appellate instance made the opposite decision and found that the father did not properly perform his duties and that living with the grandparents is currently in the best interests of the child (Supreme Court of Lithuania…, 2014). In making its decision, the Court of Cassation based its decision on the fact that when deciding on the limitation of parental authority, the court must not violate the child's right to family ties, the principle of the United Nations Convention on the Rights of the Child that full and harmonious development of a child is possible while growing up in a family. The court said that, "the panel of judges draws attention to the fact that, when deciding the issue of limiting parental authority, the circumstances that describe the performance of parental duties not in the past, but in the current period, are to be evaluated, not isolated, but consistently repeated actions", the dispute took place precisely at that time, when the father began to fulfill his duties and sought to recover the child, therefore the Court of Cassation upheld the decision of the first instance and returned the child to the father. In this case, even though the principles are established that it is best for a child to grow up in his family and with his biological parents. The situation of each child must be assessed individually and in this situation the father immediately refused the child, after the death of his mother and left him to be raised by his grandparents, but when the court awarded maintenance and the debt arose, the father wanted to raise the child himself. The relationship between father and child can be supported by living with guardians - grandparents, especially since the guardian is a relative and not an outsider (Perkumienė, et., al., 2020; Supreme Court of Lithuania…, 2014). In addition, the child must also be stressed, because he is transferred from a good and caring environment around him to live elsewhere. In another case, the grandparents remained guardians, the child was more mature and the child could express his opinion (Jonynienė, et. al., 2014). It was also established in the case under consideration that the minor lived with the grandparents since birth, they constantly took care of the child, and the father did not maintain any contact, was not interested in the child's life. The child expressed his desire to live with his grandparents and stated that he is afraid of his father and that communication with his biological father causes him only negative emotions. Therefore, the court, taking into account all the circumstances, the child's best interests and the child's expressed wish, left him to live with his guardians - grandparents.

Although the appointment of guardians (caregivers) is a good means for children to continue growing in the family when they are separated from their parents, guardians (caregivers) do not always perform their duties properly. In a common case, the question of removing a guardian arises because of possible violence in the families of guardians (Legal Research Group of the Supreme Court of Lithuania, 2020). One example is when several (ten named in the case) children grew up in the foster family and the relevant institutions received a report about possible physical violence against one child, but physical and psychological violence is also used against other wards. In this case, the court said that temporary guardianship of children is not possible in this family and the children were transferred for temporary guardianship to other natural persons and guardianship institutions, while another process is underway due to the physical violence experienced by the children. In another example, also due to possible violence, the court suspended the current guardian (Kaunas District

Court..., 2020). The court stated that the evidence in the case confirms that the children were subjected to violence, there were noticeable external signs of violence, the injuries were also diagnosed by the doctor and the court stated that the guardian does not properly perform the functions of the guardian and does not ensure the protection of the rights and interests of the wards, therefore removed her from the duties of the guardian . The legal regulation regarding the determination of child custody (care) and the selection of a guardian (caregiver) is based on the principle of priority protection and defense of the rights and interests of the child. Therefore, in such cases, the court must be guided exclusively by the interests of the child, and if there is a threat to the child growing up in a safe environment, it must make a decision and temporarily remove the guardian from his duties until a decision is made in the criminal case. In judicial practice, there are also other circumstances of suspension of guardians (caregivers), such as alcohol consumption in the family of guardians (caregivers), improper performance of duties or sexual abuse (Legal Research Group of the Supreme Court of Lithuania, 2020).

The Supreme Court has said that child custody is not an alternative form of parenting, it is a service to the child, therefore custody (care) should not be equated with social parenting. When establishing temporary guardianship for a child, parental authority is not limited and the child is not separated from the parents on the basis of Article 3.179 of the Civil Code, but the parents' ability to exercise parental authority over a child who was taken from them in accordance with the law is limited. Child custody is only temporary care and education of a child left without parental care, representation and protection of his rights and interests, and the purpose of custody is to return the child to the family. In addition, guardians (caregivers) of the child have additional obligations in addition to the duties of parental authority, such as cooperating with the authorities and maintaining the child's relationship with the parents. The child should be taken from the guardian (carer) when the child is in real danger at that time and there is no possibility to ensure the child's safety by other means. Gobes (caregivers) are supposed to ensure the best interests of the child, but they do not always fulfill their responsibilities properly. It can also be assumed that children are taken into foster care for financial reasons, since the biological parents still have the duty to take care of their children and provide them with maintenance.

Conclusions

1. In Lithuania, laws exclusively establish only biological parentage, while social parenthood is not established as a form of parenthood, Lithuanian courts form a practice favorable to the interests of the child, taking into account the relationship between the child and the father and thus not distinguishing some form of parenthood as more important.

2. Biological parents cannot ensure the best legal interests of the child in cases where there is a threat to the child in the biological family, therefore, in unavoidable cases, the intervention of state institutions is necessary. When the biological parents cannot provide adequate social care for the child, in that case the state protects the child's rights and interests and provides him with social care that is as good as possible in terms of the child's interests. Although it is established by law that the best environment for a child to grow and develop is his biological family, not all biological parents have enough social skills to raise and raise children properly.

3. The importance of social paternity is reflected in the practice of Lithuanian courts, when solving the question of disputing paternity. It is emphasized everywhere that in all cases the legitimate interests of the child must be taken into account and not in all cases, in the presence of a close relationship between the social father and the child, the courts allow to challenge paternity, thus ensuring the best interests of the child.

4. The child's legitimate interests can best be ensured by growing up in a family. Therefore, when difficulties arise in the biological family, state institutions must intervene in family relations and help the biological family to solve the problems. If this is not possible, the child's legitimate interests can best be ensured by growing up in a social family.

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