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Україна 2022

There are wars that have barely begun militarily when they already appear lost politically. By deciding to viciously attack at the heart of Ukraine, Vladimir Putin has conflated Russia's historic geopolitical concerns with his grotesque hubris concerning his place in Russian history. Nothing is definitively written, of course. Between black swans, serendipity, tactical moves, and strategic redefinitions, the time of the final judgment of "Operation Z" has not yet come. But winning "hearts and minds" in the asymmetric and irregular phase that this conflict will inevitably experience will not be easy. The United States of America [hereinafter U.S.A.] know this from their experience in Afghanistan, the longest war in its history. And everyone remembers how it ended. In the immediate future, the path of total warfare chosen by Russia in Ukraine weakens the internal authority of the Russian President, compromises the country's economy, wipes out years of investment in soft power, brings friends such as Venezuela closer to Washington, and may even unsettle the objective alliance with China. It also rehabilitates the Ukrainian President's reputation, whose virtue had been questioned and restores the backbone of yesterday's world security alliances - like the North Atlantic Treaty Organization [N.A.T.O.], which no one can say is brain-dead anymore, and the list goes on.

"Winter is coming!". Indeed, Putin's Russia has crystallized and mobilized the just resolve of the West. A resolve that had been confused and confounded, especially in the Trump years, but that has emerged invigorated and that contributes to the formation, albeit imperfectly, of a "liberal minilateralism" in combat. Who a few weeks ago still believed in a collective impetus likely to (re)launch the defence of Europe? Who foresaw the European Union ever activating the temporary protection mechanism that it had refused to grant to Syrian refugees? Even multilateralism seems partly reinvigorated. Who would have thought, for example, that the General Assembly would once again play a leading role, as in the heyday of the Cold War, by reactivating the "Acheson" resolution? Who would have imagined that so many international organizations, in fields as varied as sports, human rights, communications, and economic aid, would emerge from their lethargy to adopt disruptive measures against Putin's regime?

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One is reminded of the famous warning from the Soviet diplomat Alexander Arbatov at the time of the fall of the Berlin Wall: "We are going to give you the worst of services, we are going to deprive you of an enemy!". By renewing the Russian threat to Europe, the master of the Kremlin now personifies an antagonist that dwarfs personal and parochial national considerations and has left the free riders of collective security exposed.

There is no need to call for the military involvement of any coalition. At this stage, intervention is neither seriously conceivable nor desirable. The legitimacy of a major war against Russia cannot be decided in the absolutes of any deontological approach. Parallels with the first Gulf War, and its ideal of a "new world order", do not really hold water. The parties are not the same, nor are their interests. Any military intervention requires putting one's emotions at a distance, not allowing oneself to be carried away by passion, and involves analyzing *in concreto* the necessities, the possibilities and the probable effects of the intervention. In keeping with an Aronian vision, a consequentialist type of ethics must be imposed, a morality of responsibility. Of course, it cannot exclude the use of force. Indeed, some resolutely pacifist postures turn out to provoke rather than mitigate conflict. But the circumstances of each case must rule and that includes an understanding of how the issues are perceived from all sides. Ukraine has a profoundly different meaning for Russia than it has for Europe or for the U.S.A. Nor can one ignore the double dealing of some or the shadow cast of nuclear weapons. Which planes for a suicide operation to save Kiev? Who to compensate for Washington's leading from behind? Finally, the risk that would be taken in terms of storytelling should not be overlooked, with Vladimir Putin finding the expected pretext to break his current impasse and play the "rally around the flag" narrative against what would be presented as a new Barbarossa operation. All in all, the situation should still be considered as one of restraint and certain measures that are too direct such as the establishment of a no-fly zone or the recruitment to Ukraine of various militias should be ruled out.

Does this mean that we should just let things happen? This could not be an option regarding what is currently at stake. So how can we win the war without waging war? There is in fact a whole range of possible measures between belligerence and indifference. In other words, it is necessary to defeat Russia without giving it cause to go to extremes. At the military level, it means exploiting the grey areas permitted by the status of "qualified neutrality" in public international law; by facilitating the access of the Ukrainian resistance to various weapons (portable air defence missile systems or combat drones), by sharing all human and electronic intelligence with the regime's regular forces, by supporting cyber operations aimed at jamming the adversary's communications, etc. These measures are not easy to implement, and they are not

without risk. Many old Cold War codes need to be redefined due to the significant evolution, and sometimes even replacement of the instruments of arms control used during that era. Similarly, the grammar of the Europe/Russia opposition needs to be reinvented. At the political level, required action include material support to a Ukrainian Government in exile, weakening the adversary's ability to rely on public opinion support as much as possible, and creative counter measures that include the right balance of effectiveness, efficiency, and acceptability. No nation has ever been so marginalized because of a war it has started. Who would have imagined this possible to Putin and his entourage? Nikita Khrushchev was ousted following the Cuban crisis, and it is hard to see Vladimir Putin resisting the political impact of this disastrous war until 2036 when his term in office is supposed to be up. Hopefully, he will choose to save face, and possibly his head, much before that, as diplomatic avenues will open. In this respect, the Franco-German alliance that has been re- invigorated by Moscow should not spare its efforts, in seizing even the slightest opportunity. Peace must not be abandoned.

Last but not least: accountability. One has to take international criminal justice seriously – both for what it promises on the judicial level and for what it brings on the political level. In the long run, this simply means that Vladimir Putin and Russia's main political and military leaders would be tried for their core international crimes committed in Ukraine. Impossible today, but not tomorrow. The trials of Charles Taylor, Slobodan Milosevic, Hissene Habré stand as precedents. *Hora fugit stat jus.* In fact, effects of international criminal justice can be heard, even before trials are opened. The impact of naming and shaming associated with an accusation of crimes of aggression, war crimes, crimes against humanity, crimes of genocide is considerable. As such it serves as an additional tool in strategic communication, that leads to further sanctions or restrictions, blacklisting in international relations, and generally representing an additional cost in the conduct of a criminal policy. The long-term exercise of international criminal justice will of course have to overcome a number of obstacles linked to the collection of evidence (even if from this point of view, original mechanisms have already been set up), the cooperation of Russia or Belarus, and the functional or personal immunities recognized in international law. But these entail different perspectives, whether local, specific, or universal.

At the local level, it is above all up to Ukraine to deal with the crimes committed against it. At the beginning of 2019, a national court found former president Viktor Yanukovych guilty due to his repression of the Maidan protests and his support for the Russian intervention in Crimea and Donbass. He was tried *in abstentia* and sentenced to thirteen years in prison for treason and crimes against peace. Though instructive, this is

a limited case, and it remains to be seen whether the local authorities will have sufficient means and support to initiate all the necessary proceedings that result from the current war. A situation made more doubtful given the likely collapse of the regime. In the event that the Ukrainian courts are unable or unwilling to deal with the facts at issue today, other national courts could pursue criminals on the basis of universal jurisdiction. This jurisdiction, when provided for in domestic law, authorizes the prosecution of a person solely on the basis of the offence that he or she might have committed elsewhere. Universal jurisdiction remains optional in cases of genocide, crimes against humanity, or serious violations of international humanitarian law. But it is increasingly being used. However, national systems vary in the preconditions for the exercise of this jurisdiction by their criminal courts. Some states, such as Germany, have a relatively open regime for the prosecution of persons accused of crimes under international law - and in particular crimes that may fall within the jurisdiction of the International Criminal Court. This has been seen recently in the trials of Syrian nationals. Other states, such as France, appear to be more cautious and still integrate a number of safeguards (double criminality of the acts in question, "habitual residence" on the territory, for example). Nevertheless, the whole system may prove sufficiently threatening so that leaders who know they might be prosecuted will considerably reduce their travel abroad. Germany, Spain, and Poland have already announced that they are opening investigations and will be able to draw on the mass of refugees in Europe to gather evidence.

Secondly, there is nothing to prevent goodwill from creating a hybrid court for Ukraine. This term is traditionally used to describe any court created with the agreement of the State primarily concerned and whose statutes combine international and national elements in terms of the applicable procedure, the definition of the crimes that fall within their jurisdiction, the composition of the prosecuting or judging bodies, and the source of their funding. The ten models created so far (between 1999 and 2015) have little in common. But some, such as the Special Court for Sierra Leone, the Extraordinary African Chambers, or the Extraordinary Chambers in the Courts of Cambodia, have led to the conviction of former senior officials, if not leaders. And the last two hybrid courts that have been established, i.e., the Special Criminal Court in the Central African Republic and the Kosovo Specialist Chambers, appear to be very active. However, no new *ad hoc* tribunals have been set up in the last seven years, despite several proposals to do so in Liberia, Sri Lanka, or Syria. Today, the Ukrainian authorities themselves are calling for the establishment of such a court to prosecute the Russian leadership for the crime of aggression. This is necessary because the International Criminal Court has no jurisdiction there, since the Court can only deal with acts of

aggression committed between States parties to the Statute that have ratified the amendments relating to the crime of aggression (some forty States are in this situation, but neither Ukraine nor Russia). Many colleagues, around Philippe Sands, also supported this request. This could be an *ad hoc* tribunal established by an international treaty or a specialized domestic court sponsored by an international organization. Such a creation would undeniably send a strong message, but it would not be without practical obstacles (dealing with an ongoing conflict, obtaining and preserving evidence, secure funding, getting suspects, etc.). In addition, there is concern that creating an unprecedented structure, aimed above all at condemning the aggression of Ukraine, would inevitably re-launch accusations of "double standards". No effort was ever seriously envisaged to hold George W. Bush and Tony Blair accountable for the aggression in Iraq nearly twenty years ago. Yet their successors - the same ones who argued for the International Criminal Court's jurisdiction over the crime of aggression to be as restrictive as possible - would now make an example of Vladimir Putin?

Finally, at the universal level, neither Russia nor Ukraine are parties to the Rome Statute establishing the International Criminal Court (1998, entered into force in 2002). Nevertheless, as early as April 2014, a preliminary examination in the context of the situation in Ukraine was made public. Based on a provision of the Statute which allows a third State to consent to the exercise of jurisdiction by the Court in a situation that concerns it, it has allowed the Office to study for six years the numerous communications received on crimes committed in this situation. A first progress report by the Office (2016), moreover, found "an ongoing state of occupation" in Crimea and affirmed the existence of "an international armed conflict" in the context of hostilities in Eastern Ukraine since 14 July 2014 at the latest, in parallel with the non-international armed conflict. This was already a major setback for Moscow, which saw its involvement confirmed, particularly in the Donbass, and its narrative and strategy of "hybrid" warfare disavowed. The assertion that Russia controls the groups operating in Eastern Ukraine is also likely to have implications for international human rights law, and thus echo the procedures opened before the European Court of Human Rights. Russia's reaction was all the stronger. It joined the very closed circle of States (United States, Israel, and Sudan) that chose to "unsign" the Rome Statute in order to mark their opposition to the Prosecutor's strategy. This reaction seemed to paralyze the Court for a while. It was not until late 2020 that the Prosecutor finally announced the conclusion of the preliminary examination of the situation in Ukraine and affirmed the existence of a reasonable basis to believe that war crimes and crimes against humanity had been committed. However, an investigation was not immediately opened.

The Winter 2022 aggression eventually served as a catalyst. On February 28, the Court's new Prosecutor, Karim Khan of Britain, publicly asked the community of parties to the Rome Statute to agree to a formal referral of the situation in Ukraine, which would allow his Office to gain a few months without the need for authorization from the Pre-Trial Chamber. Lithuania promptly responded to this offer, followed by forty other parties (including the entire European Union). On March 2, the Prosecutor officially announced the opening of an investigation into crimes committed in Ukraine since 21 November 2013 (the start of the pro-European protests in Kyiv). Various arrest warrants could then quickly be issued and the parallel request for the first warrants against South Ossetian officials in the situation in Georgia under investigation since 2016 sounds like a first warning. It remains to be seen what resources the Court will actually be able to mobilize to make progress on this situation, as the "serious financial constraints" affecting this international organization does not allow it to open new cases without this being to the detriment of others.

What about criminal responsibility for Vladimir Putin and his highest military commanders within his first circle (including but not limited to Sergei Lavrov, the eternal Minister of Foreign Affairs, Sergei Sheygou, Minister of Defence, Valery Geryasimov, Chief of Staff) for the crimes committed today in Ukraine? The information currently available allows us to envisage the existence of facts constituting war crimes or even crimes against humanity, as a result of attacks intentionally directed against civilians who are not participating in the hostilities or due to the use of weapons and methods of warfare causing unnecessary harm and striking indiscriminately. But, and this is also the advantage of the latter perspective in terms of the perception of justice at work, International Criminal Court's jurisdiction is not one-sided but *in rem*. All those who order or commit crimes under international law are liable to be targeted, regardless of their nationality or which side they are on. Every prisoner has a right to respect and not to be used as a strategic tool. And the use of human shields is expressly prohibited in international armed conflicts. This is not a question of equivalence at all costs. But, without balance, the sword of Justice would never get the authority needed to acquire the deterrence force that international criminal justice still lacks. It is to be hoped, that this other revolution will also emerge from the chaos in Ukraine.

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Legitimate Aims, Illegitimate Aims and the E.Ct.H.R.: Changing Attitudes and Selective Strictness

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ABSTRACT

This article aims to trace the recent changes in the case law of the European Court of Human Rights, pertaining to the legitimate aim test, which has so far not been appropriately considered in existing jurisprudence. It first shows that the legitimate aim test is not just a paper tiger, and has a bigger bite than it has been given credit for, especially for the last ten years. Furthermore, despite its "procedural turn", the Court has recently been more inclined to take the legitimate aim disputes to a factual level by questioning the governments' assertions of legitimate aims with regard to not only their legal justificatory capacities but also as to their factual accuracy. However, this shift towards a stricter, more sceptical approach is only observable against certain member states. This finding aligns with recent scholarship on the Court's differentiated approach towards Member States, often called "the variable geometry".

KEYWORDS

Legitimate Aims; European Court of Human Rights; European Convention on Human Rights; Bad Faith Jurisprudence; Selective Strictness

EDITORIAL NOTE
The Bluebook rules (21st ed., 2020) require the avoidance of a final bibliography or list of cases. May the reader note that - given the peculiar expressivity of Annex I - he will find a list of cases at the end of the article. For further details, please refer to the footnote 68.

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INTRODUCTION

The institution and the case law of the European Court of Human Rights [hereinafter E.Ct.H.R.] has undergone numerous significant changes over the years. These changes were often made in response to criticisms and emerging problems and they have attracted considerable academic attention.[1]

[1] *See generally*, James A. Sweeney, The European Court of Human Rights in the Post-Cold War Era: Universality in Transition (2013). Ed Bates, The Evolution of the European Convention on Human Rights (2011). Jonas Christoffersen & Mikael Rask Madsen, The European Court of Human Rights between Law and Politics (2011). ; Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the Human Rights Regime*, 19 Eur. J. Int'l. L. 125 (2008). John Hedigan, *The European Court of Human Rights: Yesterday, Today and Tomorrow*, 12 Ger. L. J. 1716 (2011). Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 Ger. L. J. 1730 (2011) ; Noreen O'meara, *Reforming the ECtHR: The Impacts of Protocols 15 and 16 to the ECHR*, Icourts Working Paper Series No:31 (2015); Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* at 39 (2001); Steven Greer, *What's Wrong with the European Convention on Human Rights?*, 30 Hum. Rts Q. 680 (2008). Lord Woolf, *Review of the Working Methods of the European Court of Human Rights* 67-70 (2005); Marie-Aude Beernaert, *Protocol 14 and new Strasbourg Procedures: Towards Greater Efficiency? And at What Price?*, 5 Hum. Rts L. Rev. 544, 545 (2004). Eur. Consult. Ass., *Implementation of judgments of the European Court of Human Rights*, Doc. No. 2075, at 7 (2015). *See also* Helen Keller & Cedric Marti, *Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments* 26(4) EUR. J. INT. LAW 830 (2015); George Stafford, *The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part II: The Hole in the Roof*, EJIL:Talk! (2019); L.ucy Moxham, *Implementation of ECHR judgments – have we reached a crisis point?*, UK Human Rights Blog (2017); Robert Harmsen, *The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights in* The European Court of Human Rights between Law and Politics 119 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011) ; Lize R. Glas, *From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights* 20 Hum. Rts L. Rev. 121, 128 (2020) ; L.R. Glas, "Unilateral Declarations and the European Court of Human Rights" 25(5) Maast. J. Eur. Comp. L. 629 (2018).

Among these changes, arguably the biggest, is the Court's recent shift towards a more deferent stance in favour of domestic authorities. This shift came after some Member States', led by the U.K.,[2] voiced growing criticism towards the Court with regard to its alleged "intrusive" and "expansionist" approach that disregards its subsidiary function.[3] As a response to these criticisms,[4] the Court's case law has undergone a well-documented change, which is often called the "procedural turn" of the E.Ct.H.R. .[5] In brief, this "procedural turn" marks the Court's transition from a court that is mostly concerned with the substance of the arguments and their justificatory capacities for the limitation in question, towards a court that primarily focuses on the quality of the national decision-making process leading up to that limitation, without giving decisive importance to the outcome of the decision made.[6] This new deferent approach provides more substantive freedom to national decision-makers, provided that they make an assessment "in conformity with the criteria laid down in the Court's case law."[7] That being so, there is growing doubt in the literature whether all Member States enjoy this recent freedom. There are both qualitative and quantitative studies showing that after the "procedural turn", the Court has started to apply different standards for different

[2] For an elaborate analysis on the criticisms of the European Court of Human Rights in the United Kingdom, *see* Roger Masterman, *The United Kingdom: From Strasbourg Surrogacy towards a British Bill of Rights? in* CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS : SHIFTING THE CONVENTION SYSTEM : COUNTER-DYNAMICS AT THE NATIONAL AND EU LEVEL 447 (Patricia Popelier et al. eds., 2016).

[3] *See* SARAH LAMBRECHT, *Assessing the Existence of Criticism of the European Court of Human Rights*, in Popelier et al., *supra* note 2, at 511.

[4] Some authors find this change to be more linked to the case overload rather than criticism. Oddný M. Arnardóttir, *Rethinking the Two Margins of Appreciation*, 12 EUR. CONST. L. REV. 27, 51 (2016).

[5] *See generally*, JANNEKE GERARDS & EVA BREMS , PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES (2017); PATRICIA POPELIER ET AL., *The Court as Regulatory Watchdog: The Procedural Approach in the Case-law of the European Court of Human Rights in* THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE (Patricia Popelier et al. eds., 2012); Oddný Mjöll Arnardóttir, *The 'Procedural Turn' under the European Convention on Human Rights and Presumptions of Convention Compliance*, 15 INT'L J. CONST. L. 9 (2017); BAŞAK ÇALI, *Towards a Responsible Domestic Courts Doctrine? The European Court of Human Rights and the Variable Standard of Judicial Review of Domestic Court Judgments in* SHIFTING CENTRES OF GRAVITY IN HUMAN RIGHTS PROTECTION (Oddny Mjö Arnardóttir & Antooine Buyse eds., 2016); Eva Brems & Laurens Lavrysen, *Procedural Justice in Human Rights Adjudication: The European Court of Human Rights*, 35 HUM. RTS. Q. 176 (2013); Patricia Popelier & Catherine Van De Heyning, P*rocedural Rationality: Giving Teeth to the Proportionality Analysis*, 9 EUR. CONST. L. REV. 230 (2013); Robert Spano, *The Future of the European Court of Human Rights - Subsidiarity, Process-based Review and the Rule of Law*, 18 HUM. RTS. L. REV. 473 (2018). Leonie M. Huijbers, *The European Court of Human Rights' Procedural Approach in the Age of Subsidiarity*, 6 CAMB. INT'L L.J. 177 (2017); Patricia Popelier & Catherine Van De Heyning, *Subsidiarity Post-Brighton: Procedural Rationality as Answer?*, 30 LEIDEN J. INT'L L. 5 (2017); Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 HUM. RTS. L. R. 487 (2014).

[6] *See* JANNEKE GERARDS, *Procedural Review by the ECtHR: A Typology* in GERARDS & BREMS, *supra* note 5, at 128.

[7] A search for this phrase and its counterpart in French "dans le respect des critères établis par la jurisprudence de la Cour" in HUDOC database returns a total of ninety-three judgments, all decided after 2012.

states and the new deferent approach is mostly limited to Western European consolidated democracies.[8] Notably, Çalı argued that the Court has developed a differentiated approach between Member States through the new "bad faith jurisprudence", that is, the increasing number of violations decided under Article 18 of the European Convention on Human Rights [hereinafter E.C.H.R. or Convention].[9] Çalı's strong and later quantitatively supported[10] position comes to an end with the following note: "The current patchwork of cases discussed here so far shows a piecemeal case-by-case approach that is in need of a more principled defense of distinguishing between good and bad faith attitudes towards the Convention by the Court."[11]

This article aims to contribute to this very end. It does so by looking beyond the *official* bad faith jurisprudence, that is the Article 18 case law, which attracted considerable academic attraction recently. Instead, this paper focuses on its closely connected and grossly ignored little sister, the legitimate aim test [hereinafter L.A.T.]. It argues that, despite what is often suggested, the Court's legitimate aim inquiry has never been a toothless test. In fact, the Court has found more than a hundred violations when applying this test. Moreover, about two thirds of all legitimate aim violations were decided in the last ten years, which indicates a greater scrutiny on the Court's part in recent years. Indeed, while the recent "procedural turn" of the Court essentially means less substantive judicial scrutiny, the L.A.T. has undergone a shift towards a more evidence-based *in concreto* assessment. That is to say, the grounds that the Court relied on when finding a breach of the legitimate aim condition are gradually changing from an *in abstracto* assessment of the invoked aims' justificatory capacity towards an *in concreto* examination based on the factual circumstances surrounding the case.

Also, it further finds that this increased judicial scrutiny of legitimate aims is noticeably selective, since it is only directed on certain Member States. While for each region the ratios of legitimate aim violations to all violations were similar before 2010, there are significant differences between Northern and Western States, and Southern and Eastern States after 2010. In fact, for Eastern European States, this ratio is now about ten times higher than Northern and Western European States. More importantly, after 2010, the legitimate aim frequency ("legitimate aim violations/all violations" decided against all Member States of the region) decreased significantly for Northern and

[8] Başak Çalı, *Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights*, 35, Wisc. Int'l. L. J. 237 (2018). Øyvind Stiansen & Eric Voeten, *Backlash and Judicial Restraint: Evidence from the European Court of Human Rights*, 64 Int'l. Stud. Q. 770 (2020). Mikael Rask Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?*, 9 J. Int'l. Disp. Settlement 199, 219 (2018).

[9] Çalı, *supra* note 8, at 270.

[10] Stiansen & Voeten, *supra* note 8; Madsen, *supra* note 8.

[11] Çalı, *supra* note 8, 274.

Western European States; but it increased significantly for Southern and Eastern European States. These findings -which are elaborated below- show that the increasing intensity of scrutiny in terms of the L.A.T. is not directed against all states, and it rather seems concentrated on certain Southern and Eastern European States.

This Work is the product of an extensive study on the Court's case law, with a particular focus on its practice within the legitimate aim inquiry. In the scope of this study, the violations found by the Court owing to the breach of the legitimate aim condition [hereinafter legitimate aim violations or L.A. violations] decided until November 2020 have been noted, categorized and evaluated. In addition to that, the cases where the Court raised doubts on the legitimacy of the invoked aims or raised particular concerns on the legitimate aim question were noted and referred to where necessary, as can be seen below. The numbers given in Parts 1 and 2 can be verified by consulting Annex I, which presents the full list of the legitimate aim violations found under this study.

Examining recent changes in the Court's jurisprudence through the L.A.T. has two major benefits that make this study a contribution to the existing literature. First, it, in fact, eliminates the problem of small sample sizes. Some studies, both qualitative and quantitative,[12] suffer from inferring wide-reaching results from a small number of cases. On the other hand, there are thousands of cases where the Court conducted a legitimate aim analysis and more than a hundred of violations resulting from a breach of the legitimate aim requirement. Second, since the legitimate aim question is closely connected to the bad faith analysis, examining that question covers both novelties in the case law, namely the increased judicial deference and the emergence of the new Article 18 case law. As opposed to that, most existing literature is bound to cover only the former or the latter.

To that end, Part 1 discusses the importance of the L.A.T. and especially violations found under it. Section 1.1 is dedicated to the numbers and presents the total number of legitimate aim violations found under this study, their dispersion over time and over substantive articles. That section demonstrates that the L.A.T. has much more teeth than it has been given credit for and there are enough legitimate aim violations to work on for the following analyses. Then Section 1.2 introduces three different types of legitimate aim violations and shows that different types of violations indicate different levels of strictness on the Court's part, while Section 1.3 shows that the dispersion of these types of legitimate aim violations over time suggests an increasing judicial strictness in the 2010s. The final Part 2 shows that this increased judicial strictness is only directed against some Member

[12] Both Çalı and Madsen admit that this might be seen as a deficit in their works, *see Id.* at 275; Madsen, *supra* note 8, at 218.

States. It shows that the Court in fact adopts a "variable geometry", but the article takes it one step further: it also shows that for those states that are deemed to be disrespectful towards the Convention values, the Court's *selective strictness* goes beyond Article 18 cases and extends to the legitimate aim analysis as well. Conclusion summarizes the findings of the study.

1. LEGITIMATE AIM VIOLATIONS: NUMBERS, FORMS AND CHANGES

The Convention does not contain a uniform mechanism of restrictions for all rights guaranteed under it. Some articles explicitly stipulate that any interference with the corresponding right should pursue a legitimate aim, and some do not. While not every article in the Convention explicitly stipulates that condition, as the Court stated repeatedly, "any interference with the enjoyment of a right or freedom recognized by the Convention must pursue a legitimate aim".[13] Accordingly, the Court regularly examines the aim(s) of the interferences with Convention rights as to whether those aims are legitimate in the sense of the Convention, notwithstanding whether the underlying article explicitly stipulated that condition or not. Thus, the L.A.T. has a vast scope of application.

That being so, there is only a small number of studies specifically focused on this test.[14] There are some comprehensive studies on accommodation clauses, but often with only a brief part dedicated to the L.A.T. .[15] There are also studies that specifically focus on certain legitimate aims individually, but without dwelling on the L.A.T. itself.[16]

[13] Broniowski v. Poland, 2004-V Eur. Ct. H.R. 1, 58.

[14] To my knowledge, two brief studies by Richard Gordon and Peter Kempees and a relatively longer article by Wojciech Sadurski. *See* Richard Gordon, *Legitimate Aim: A Dimly Lit Road*, 7 Eur. Hum. Rts. L. Rev. 428 (2002). PePeter Kempees,*"Legitimate Aims" in the Case-Law of the European Court of Human Rights, in* Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal 659 (2000). Wojciech Sadurski, *Is There Public Reason in Strasbourg?*, Legal Studies Research Paper No: 14/46 (2015). I wish to express my gratitude towards Mr. Gordon for taking his time to share his work with me when I had problems getting to it.

[15] *See* Jukka Viljanen, The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law: A study of the Limitations Clauses of the European Convention on Human Rights (2003). Loukēs G. Loukaidēs, *Restrictions or Limitations on the Rights Guaranteed by the European Convention on Human Rights*, 4 Finn. Y. B. Int'l. L. 334 (1993).

[16] See, for example, Marta Szuniewicz, *The State's Security as a Legitimate Aim of Limitation of Foreigners' Human Rights - Are There Any Boundaries?,* 12 Us-China L. Rev. 76 (2015). Roberto Perrone, *Public Morals and the European Convention on Human Rights,* 47 Isr. L. Rev. 361 (2014).

General commentaries on the E.C.H.R. refer to this test, but again often to a very limited degree.[17] This scarcity of research, I believe, is mostly due to the widespread belief that the legitimate aim inquiry is remarkably easy to satisfy and does not cause significant problems for the states.[18] The Court itself pointed out that its practice is "quite succinct when it verifies the existence of a legitimate aim".[19]

I beg to -somewhat- differ, especially when considering the last ten-fifteen years. While it is evidently true that the Court still does not dwell on the L.A.T. as much as the other inquiries, I argue that the test has always been more relevant than it has been given credit for, and recently, much more so. This assertion, I believe, holds true even against the recent "procedural turn"[20] of the Court, and maybe even *stronger* with that turn. Indeed, the current President of the Court Judge Spano recently suggested that the recent trend in the Court's case law towards a more *process-based review* might raise the question "whether the Court should engage in a methodological shift towards a more strict, evidentiary-based assessment of invoked legitimate aims."[21] This seems like an interesting take when one thinks of the nature of the procedural turn, but -at least against some states- it actually holds true, as what follows will show.

1.1. THE NUMBERS: IS THE L.A.T. REALLY *A PAPER TIGER*?

As mentioned, scholarship seems to accept that the L.A.T. is rather abstract and often easy to satisfy.[22] When arguing for its ineffectiveness, there seems to be an almost universal ground: the scarcity of violations found under this regime.[23] This is certainly not without merit. Found breaches of the legitimate aim condition are significantly lower than the breaches found of the other two conditions of the so-called threefold test.

[17] *See generally* David J. Harris et al., Law of the European Convention on Human Rights (3d ed. 2014). Pieter van Dijk et al., Theory and Practice of the European Convention on Human RigHts (5th ed. 2018). William A. Schabas, The European Convention on Human Rights: A Commentary (2d ed. 2017). Christoph Grabenwarter, European Convention on Human Rights: Commentary (2014). Philip Leach, Taking a Case to the European Court of Human Rights (4th ed. 2017). Bernadette Rainey et al., Jacobs, White and Ovey: The European Convention on Human Rights (8th ed., 2017).

[18] All the commentaries mentioned in fn. 17 commonly suggest that the Court gets satisfied easily when conducting the L.A.T. .

[19] Y.Y. v. Turkey , App. No. 14793/08, 461, 481(June 10, 2015), https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-153134%22].

[20] Arnardóttir, *supra* note 5.

[21] Spano, *supra* note 5, at 61.

[22] All numbers given in this section are valid as of 05.11.2020. Judgments delivered after that date are not included. The reader is kindly invited to verify all data provided under this study by resorting to Annex I.

[23] Another, but less common ground is the broad wording of the legitimate aims and the Court's flexible handling of them. But it is ultimately the Court that gives meaning to these terms and thus the broad wording of the legitimate aims can be overcome by the interpretation of the Court.

That being so, the number of violations found under the L.A. assessment is often undersold, and the number has been on the rise recently.

A detailed review of the case law reveals -at least- 111 judgments in which the Court held a clear violation of the legitimate aim requirement under a substantive article (for the full list, see Annex I).[24] This number is much higher than it has ever been suggested. For example, Van Dijk et al. refer to four violations.[25] Harris, O'Boyle and Warbrick cite only one.[26] Jacobs, White and Ovey merely mention a couple of cases where the Court doubted the legitimacy of the invoked aim.[27] Schabas, cites four.[28] Grabenwarten refers to none when examining Articles 8 to 11, and only cites a limited number under Article 14.[29] Even a study that is specifically dedicated to arguing against the lenient approach of the Court concerning the L.A.T. only cites cases in which the Court "expressed some mild doubts", without mentioning any of the violations under that regime.[30] Admittedly, none of those studies claims to offer a complete number.[31] Again, admittedly, 111 is not a particularly impressive number, given that the Court had found more than 15.000 violations in approximately sixty years. But it should not be forgotten that since the Court's case law is now mostly comprised of "repetitive" cases, distinctive judgments are *destined* (emphasis added) to be in relatively small numbers.

What follows are three charts and accompanying data that show the dispersion of the legitimate aim violations across time and over substantive articles.[32] Chart I below illustrates the legitimate aim violations by year.[33]

[24] Sometimes the Court raised its "doubts" under the L.A.T. or found the justifiability of the interference by the invoked aim "questionable". Similarly, and predominantly in cases concerning Article 14, the Court sometimes found a lack of "objective and reasonable justification" without specific reference to the aim or purpose of the distinction. These are legitimate aim "problems" rather than violations, and for that reason they are not included in this number.

[25] *See* Van Dijk et al. , *supra* note 17, at 314-15.

[26] *See* Harris et al. , *supra* note 17, at 510.

[27] *See* Rainey et al. , *supra* note 17, at 347-48.

[28] *See* Schabas , *supra* note 17, at 405, 436 and 513. There is no separate chapter for limitation clauses in that study, thus it is possible that the number I give is lower than the actual.

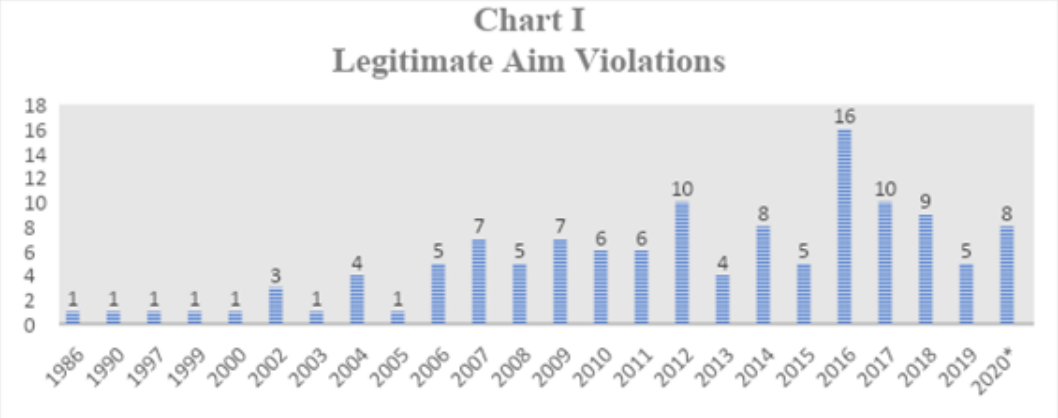
[29] *See* Grabenwarter , *supra* note 17, at 350-51.

[30] *See* Sadurski, *supra* note 14, at 3.

[31] Neither do I, actually. But I am convinced that I cover most of them.

[32] Since citing each and every case comprising the data on the following charts would hamper the main text, the reader is kindly asked to verify those numbers by resorting to Annex I. All numbers are valid as of November 2020.

[33] Article 18 violations are included. If a case included a legitimate aim violation in a substantive article as well as an Article 18 violation, it is counted as one.



As can be seen, before 2000, the Court found violations under the legitimate aim regime only in four different years and found only one violation in each of those years. Of all legitimate aim violations, about 85% (106 of 125) were decided in the last twenty years; more than 77% (ninety-seven of 125) were decided in the last fifteen years; and about 65% (eighty-one of 125) were decided in the last ten.

One can argue that this data may be misleading since the total number of judgments delivered by the Court each year differs significantly and that the number is significantly higher than before the 2000s. To answer this possible objection, it is thus necessary to resort to Chart II below, which clearly illustrates that, after around 2010, there is a gradual increase in the proportion of legitimate aim violations to all violations.[34]

As can be seen, there has been a noticeable increase in the proportion of legitimate aim violations to all violations after around 2016. Furthermore, Chart III below shows the

[34] Only Chamber and Grand Chamber judgments are taken into account for both data. All numbers are obtained from the HUDOC database.

number of L.A. violations for each substantive article[35] including a comparison between violations decided before and after 2010.

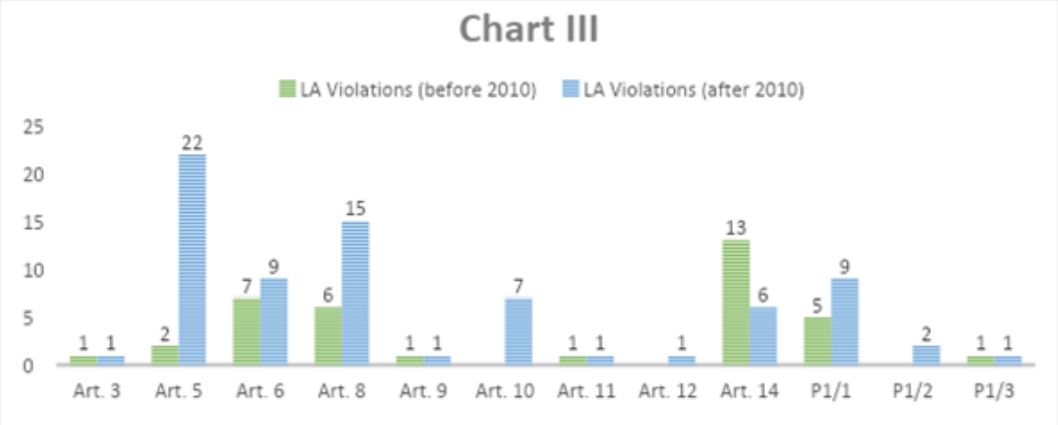


Chart II confirms that the large majority of all L.A. violations had been decided after 2010. The second insight is that after 2010, the Court found L.A. violations in respect to three new articles, namely Arts. 10, 12 and Art. 2 of Protocol No. 1. In fact, arguably, the Court now found a violation in respect to all articles of which an L.A. violation is possible.[36] The increase of the L.A. violations in respect to Arts. 5 and 10 also stands out. This is also meaningful, because the violations under these articles often include much more evidence-based discussion on the substance of the case and require a more *in concreto* assessment on the part of the Court, especially compared to L.A. violations decided under Article 14, which are mostly outcomes of an *in abstracto* assessment and value-based rejection of the aims invoked by the Government to justify the differential treatment in question.[37] Note that, accordingly, Article 14 is the only article as to which the legitimate aim violations decided under is decreased in the last ten years.

Thus, the number of legitimate aim violations is much higher than it has been suggested, and both the number of violations and the ratio of the L.A. violations to all

[35] Article 18 violations found in connection with a substantive right are excluded if there was no separate legitimate aim violation found under the corresponding article. The grand total here is 112 due to the case of Mozer v. Moldova and Russia, App. No. 11138/10 (Feb. 23, 2016), https://hudoc.echr.coe.int/fre#%22itemid%22:[%22002-10885%22] (last visited Jan. 4, 2022), where the Court found legitimate aim violations both under Articles 8 and 9.

[36] It can be argued that the prohibition of torture in Article 3 is not open to L.A. violations. While it is possible to make a conceptual and theoretical discussion on this point (in which I would align with the doubters), in a case law standpoint, I kindly invite the doubters to see Ciorap v. Moldova, App. No. 12066/02, Paras. 83 and 89, (June 19, 2007), http://hudoc.echr.coe.int/fre?i=001-161263 (on substantive limb, last visited Jan. 4, 2022) and Oleksiy Mykhaylovych Zakharkin v. Ukraine, App. No. 1727/04, Para. 74 (June 24, 2010), http://hudoc.echr.coe.int/eng?i=001-99626 (on procedural limb, last visited Jan. 4, 2022).

[37] *See, e.g., Emel Boyraz v. Turkey, App. No. 61960/08, Para. 56 (Dec. 2, 2014),* http://hudoc.echr.coe.int/eng?i=001-148678 (last visited Jan. 4, 2022); Kurić and others v. Slovenia, 2012-IV Eur. Ct. H.R. 1, 69; Thlimmenos v. Greece, 2000-IV Eur. Ct. H.R., 263, 279.

violations are growing gradually. But not all legitimate aim violations are the same, as the next section will show.

1.2. DIFFERENT TYPES OF LEGITIMATE AIM VIOLATIONS

While there is a considerable number of L.A. violations, not all violations tell the same story. Some of them indicate a stricter approach on the Court's part, and some do not. Some involve a direct confrontation with governments on the aims pursued by the interference, some are merely official declarations of the obvious. Thus, it is necessary to make a distinction between the different types of legitimate aim violations.

An in-depth examination reveals that the legitimate aim violations can be categorized under three groups:[38] (1) violations where the national authorities did not invoke a legitimate aim (Type A); (2) violations where invoked aims were unable to justify the measure, while there is no doubt on the Court's part that the invoked aims were in fact pursued (Type B); (3) violations where the government did not actually pursue the invoked aim (Type C).

What follows is the introduction of each category and explanation of what they reveal about the Court's approach to the legitimate aim question.

1.2.1. TYPE A VIOLATIONS: NO AIM INVOKED BY NATIONAL AUTHORITIES

The first type of L.A. violations mainly result from a lack of justification by the government,[39] the domestic courts,[40] or sometimes both.[41] When the domestic decision-makers or the government in question do not raise any argument as regards to the aim pursued by the interference in question, the Court usually "declares" this failure and finds a violation of the legitimate aim requirement. Needless to say, this is the least controversial type of L.A. violations. When the governments do not claim any aim whatsoever, the task of the Court becomes significantly easier and such judgments are significantly less likely to create controversy since they involve no substantive assessment on the part of the Court.

[38] Categorisation of each L.A. violation can be found in Annex I.

[39] *See e.g.*, Bochev v. Bulgaria, App. No. 73481/01, Para. 97 (Nov. 13, 2008), http://hudoc.echr.coe.int/eng?i=001-89608 (last visited Jan. 4, 2022).

[40] *See* Mihal v. Slovakia, App. No. 22006/07, Para. 55 (July 5, 2011), http://hudoc.echr.coe.int/eng?i=001-105513. Pla and Puncernau v. Andorra, 2004-VIII Eur. Ct. H.R. 215, 237-38.

[41] *See* Kostadin Mihaylov v. Bulgaria, App. No. 17868/07, Para 42 (June 27, 2008), http://hudoc.echr.coe.int/eng?i=001-85609; Yanakiev v. Bulgaria, App. No. 40476/98, Eur. Ct. H.R. para. 72 (2006), http://hudoc.echr.coe.int/eng?i=001-76682.

Because of the lack of a substantive assessment, it seems *prima facie* that these violations cannot tell anything about the strictness of the approach of the Court. But this is not quite true. This is because in some cases, old and new, the Court substituted the governments' lack of explanation on the legitimate aim question and found one or several legitimate aims for the interference *proprio motu*, letting the governments pass the L.A.T. without themselves submitting any legitimate aim claim. For example, in *Young, James and Webster v. the United Kingdom*, the Government expressly stated that if the Court finds an interference with a convention right, they would not seek to justify that interference, but the Court found a legitimate aim on their behalf anyway.[42] In the same vein, in *Ciubotaru*, the government did not refer to any legitimate aim, but the Court found one for them.[43] Another example is *Kimlya and Others v. Russia*, where the Government "omitted" to indicate any legitimate aim, the Court was "prepared to assume that the interference complained of pursued a legitimate aim, namely that of the protection of public order".[44] Then, in *Surikov v. Ukraine*, the Court found not one, but four different legitimate aims on behalf of the Government, while the Government "have not commented on the aims",[45] and finally in *National Federation of Sportspersons' Associations and Unions (FNASS) and others v. France*, the Court added a new aim to the ones already invoked by the government.[46] Note that in some of these cases, applicants did not raise an objection in terms of the aims for the interference,[47] which can justify the Court's helping hand to the governments. But in some others, despite that the applicants did raise an objection to the legitimate aims, the Court did not hesitate to fill that gap on behalf of the respondent state.[48]

The practice of substituting governments on the legitimate aims when they were silent on the question, therefore, complicates things, because in more than forty legitimate aim violations,[49] the Court found a violation because the government in

[42] *See* Young, James and Webster v. the United Kingdom, App. Nos. 7601//76 & 7806/77, Para. 60 (Aug. 13, 1981), http://hudoc.echr.coe.int/eng?i=001-57608. Judge Evrigenis dissented to this justification made on behalf of the Government, see (Evrigenis, J, Concurring Opinion).

[43] *See* Ciubotaru v. Moldova, App. No. 27138/04, Para. 55 (Apr. 27, 2010), http://hudoc.echr.coe.int/eng?i=001-98446.

[44] Kimlya and Others v. Russia, 2009-IV Eur. Ct. H.R. 319, 350-51.

[45] Surikov v. Ukraine, App. No. 42788/06, Para. 82 (Jan. 26, 2017), http://hudoc.echr.coe.int/eng?i=001-170462.

[46] National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France, App. Nos. 48151/11 & 77769/13, Para. 166 (Jan. 18, 2018), http://hudoc.echr.coe.int/eng?i=001-180442.

[47] *See*, for example, Sindicatul "Păstorul cel Bun" v. Romania, 2013-V Eur. Ct. H.R. 1, 56; Fratanoló v. Hungary, App. No. 29459/10, Para. 14 (Nov. 3, 2011), http://hudoc.echr.coe.int/eng?i=001-107307; Berrehab v. the Netherlands, App No. 10730/84, 1988 Y.B. Eur. Conv. on H.R. Para. 25 (Eur. Court on H.R.) http://hudoc.echr.coe.int/eng?i=001-57438.

[48] *See*, for example, Frodl v. Austria, App. No. 20201/04, Para. 28 (Apr. 8, 2010), http://hudoc.echr.coe.int/eng?i=001-98132; Young, James and Webster v. the United Kingdom, App. Nos. 7601//76 & 7806/77, Para. 60 (Aug. 13, 1981), http://hudoc.echr.coe.int/eng?i=001-57608.

[49] *See* Annex I.

question failed to invoke a legitimate aim. It is hard to infer whether in those cases the Court saw no proper legitimate aim to substitute the governments with, or it simply adopted a stricter approach against them. It gets all the more complicated when one thinks of the wording it used in some of those legitimate aim violations. For example, in one case against Russia, after noting that the Government did not invoke any legitimate aim for the interference, the Court stated that it is "not *prepared* to substitute the Government on that account".[50] One may tend to infer from this that the criterion here is the "Court's preparedness", but in the absence of further elaboration of this in the jurisprudence, it is still not clear what renders the Court "prepared" as to filling a gap left by the governments.

Interestingly, the Courts' practice of substituting governments for their lack of explanation on the legitimate aim question was contested by one of the "substituted" governments as well. In the Grand Chamber case *Sindicatul "Păstorul cel Bun" v. Romania*, the Romanian government objected to the new aim of "preventing disorder" added by the Chamber. They claimed that the Chamber's *proprio motu* reference to public order was immaterial to the case and the sole aim of the refusal to register the applicant trade union was the one that was originally claimed, which was protecting the rights of the Romanian Orthodox Church.[51] Interestingly enough, the Grand Chamber agreed with the Romanian Government, seeing no reason to take the aim of preventing disorder into account.[52]

1.2.2. TYPE B VIOLATIONS: NO JUSTIFICATION OF MEASURE THROUGH PURSUED AIM

This group of L.A. violations comprises cases in which the respondent government attempted to offer a justification for the interference in question, but the Court rejected that justification. In cases falling under this category, the Court found the problem at the invoked aim itself, without doubting on whether it was in fact pursued by the government. In such cases, the Court found that the invoked aims were incapable of justifying the measure, either because they were not legitimate in the sense of the right

[50] Bezymyannaya v. Russia, App. No. 21851/03, Para. 33 (Dec. 22, 2009), http://hudoc.echr.coe.int/eng?i=001-96486 (emphasis added).
[51] *See* Sindicatul "Păstorul cel Bun" v. Romania, 2013-V Eur. Ct. H.R. 1, 56, para.102.
[52] *Id.* para. 158.

in question[53] or the interference in question was evidently incapable of promoting the invoked legitimate interests.[54]

In *Nolan and K. v. Russia*, for instance, the applicant was excluded from Russia because his religious activities were found to be "of a destructive nature and posed a threat to the security of the Russian Federation" and thereby there was a threat to the national security that "resulted from the applicant's [religious] activities".[55] The Court found a violation since the only aim invoked by the Government throughout all of the proceedings was the protection of national security, which was not, unlike Articles 8, 10 and 11, a legitimate aim prescribed under Article 9.[56] Likewise, in *Karajanov v. the Former Yugoslav Republic of Macedonia*, where the applicant complained about the public disclosure of the Lustration Commissions's decision convicting him for collaborating with the former regime's security service before it became final, the Court found that the aims of "ensuring public access to documents in the applicants file and public scrutiny of the Commission's decision-making" were not capable of being "subsumed under any of the aims listed in Article 8 § 2 of the Convention".[57] As can be noticed, in these two cases the problem was that the invoked aims were not legitimate in the sense of the right in question.

In another case, *Maširević v. Serbia*, an appeal lodged by the applicant, who was himself a lawyer by profession, was dismissed by the Serbian Supreme Court on the grounds that according to the law in force, the appeals could only be lodged through the help of a lawyer. The Court noted that the strict interpretation of that law created a situation that the applicant, who can lodge appeals on behalf of others as a lawyer, could not lodge one for himself. It held that despite what the government had claimed, the dismissal of the appeal therefore "did not serve the aims of legal certainty or the proper administration of justice".[58] Moreover, in *X and Y v. Croatia*, the Court found the institution of the domestic court proceedings with a view to divesting the applicant of

[53] *See*, for instance, Nolan and K. v. Russia, App. No. 2512/04, Eur. Ct. H.R. para. 73 (2009), http://hudoc.echr.coe.int/eng?i=001-91302, where the Russian Government attempted to justify an interference with the right to freedom of religion in reference to the protection of national security, which is not one of the exhaustively listed legitimate aims in the second paragraph of Article 9.

[54] The situation where an interference is evidently incapable of promoting a legitimate interest closely resembles the "suitability" problem under the proportionality assessment. However, there are several examples in the case law where the Court saw it as a problem of legitimacy in regard to invoked aims. See, for example, Karajanov v. the Former Yugoslav Republic of Macedonia App. No. 2229/15 ¶ 75 (April 6, 2017) https://hudoc.echr.coe.int/eng?i=001-172563.

[55] Nolan and K. v. Russia, App. No. 2512/04, Eur. Ct. H.R. para. 73 (2009), http://hudoc.echr.coe.int/eng?i=001-91302.

[56] *Id.*

[57] Karajanov v. the Former Yugoslav Republic of Macedonia App. No. 2229/15 ¶ 75 (April 6, 2017). https://hudoc.echr.coe.int/eng?i=001-172563.

[58] Maširević V. Serbia, 51 Eur. CT. H.R. (ser. B) at 51 (2014)http://hudoc.echr.coe.int/eng?i=001-140775.

legal capacity did not satisfy the L.A.T, because it had never been shown that the applicant was a threat to the rights and interests of anyone, including hers.[59] In these two, the problem was that while the invoked aims were legitimate *in general*, the interferences in question were not capable of serving them, thereby they were not justifiable by those aims.

Just as the Type A violations, Type B violations are rarely controversial as they usually do not involve a direct confrontation with governments on the factual matrix based on factual evidence, but rather a rejection of the invoked aims' capability of justifying the measure in question.

1.2.3. TYPE C VIOLATIONS: NO ACTUAL PURSUIT OF INVOKED AIMS

These violations are different from the ones explained in the previous two sections in the way that in cases categorized here the Court directly challenged the governments' legitimate aim claim on a factual matrix, and found that the aim invoked by the government was not the actual aim pursued by them. In some of these Type C cases, the Court restrained itself to simply holding that the invoked aim was not the actual aim of the interference, without indicating what were the actual aims pursued (Type C.1). In others, it held not only that the invoked aim was not actually pursued, but that there was another aim pursued by the interference and identified what other "ulterior" aim was (Type C.2).

The Type C violations are generally more prone to controversy. This is because, as will be discussed further below, in these cases the Court often carries out an actual *fact-check* by either a) drawing significantly different conclusions from certain evidence than what national decision-makers drew from them, insomuch as to indicate an arbitrariness and/or an ulterior purpose on the latter's part; or by b) engaging with new (direct and/or circumstantial) evidence which had not been referred by national decision-makers which indicate that another aim ("bad faith" or "ulterior purpose") than invoked was pursued.

[59] *See* X and Y v. Croatia, 113-116 Eur. CT. H.R. (ser. B) at 113-116 (2011), https://hudoc.echr.coe.int/eng?i=001-107303.

1.2.3.1. CASES WHERE THE ULTERIOR PURPOSE WAS NOT IDENTIFIED (TYPE C.1 VIOLATIONS)

In these cases, the Court held that the aims invoked by the governments were not actually pursued, but it did not identify whether an ulterior purpose was pursued by the interference.

In *Baka v. Hungary*, a former E.C.H.R. judge and former President of the Hungarian Supreme Court complained about his dismissal from the latter position allegedly as a result of the criticisms he expressed publicly against the constitutional and legislative reforms made in Hungary.[60] The Government attempted to explain the termination of the applicant's mandate with reference to the legitimate aim of "maintaining the authority and impartiality of the judiciary", arguing that the applicant's election for the office was of "governmental nature" and the new method of election after applicant's dismissal would increase the independence of the judiciary. The government denied the alleged link between the applicant's earlier criticisms against the government and his dismissal. The Grand Chamber considered it necessary to "recall the sequence of events". It first noted that the proposal for his dismissal was submitted to the Parliament and adopted by it "within a strikingly short time" after his public criticisms. The Court also made reference to the articles published in Hungarian and foreign press and some Council of Europe documents, all indicating a causal link that exists between the criticisms and the dismissal. After establishing this *prima facie* causal link, the Grand Chamber held that the burden of proof shifted to the government, which, in turn, was unable to convince the Court that the reforms in question were of such fundamental nature to justify the premature termination of the applicant's mandate. Thereby identifying the link between the applicant's exercise of freedom of expression and his dismissal from the post as the President of the Supreme Court of Hungary, the Grand Chamber found that the premature termination of the applicant's mandate defeated the very purpose of maintaining the independence of the judiciary, rather than serving it. It thus held that the interference did not pursue a legitimate aim.[61] In that case, the Grand Chamber did not put the actual purpose of the dismissal into words, but by an evidence-based assessment, it debunked the claims of the government in regard to the actual aim of the dismissal.

Likewise, In *Tkachevy v. Russia*, the applicants claimed that their (centrally located) flat in Moscow was expropriated with no public interest and it was used contrary to the project's declared goals. The Court first noted that the Moscow

[60] *See* Baka v. Hungary, App No. 20261/12 ¶ 123 (June, 23 2016) https://hudoc.echr.coe.int/eng?i=001-163113.
[61] *Id.*

Government justified the expropriation with the public interest of safety with reference to a report delivered by a public agency which found that the building in question was unsafe to live in.[62] Then the Court went onto an *in concreto* assessment of the facts. It first noted that the survey report in question was prepared only after an expropriation decision was already taken.[63] Also, the drafters of the report admitted that someone from the Moscow Government had asked them to classify the flat as unsafe.[64] Furthermore, after the reconstruction, the applicants were not allowed to reoccupy the flat (as it would be fit if the authorities' only concern was the safety of the building). In fact, it was sold to a third party (Tverskaya Finance). Moreover, while the Government stated that the building is now an office space, the Court, by resorting to *a self-conducted internet-search* on the website owned by Tverskaya Finance, found that it had become residential premises, which were commercialized by being prestigious and centrally located.[65] Adding all these considerations together, the Court held that whilst the interest of protecting the safety of the applicants "is in itself legitimate, in the circumstances of the present case, there is a number of inconsistencies that do not permit the conclusion that that interest was held genuinely".[66]

Many more examples underline this point.[67] As can be seen, in the above cases the Court did not find the governments' legitimate aim assertions genuine and questioned whether they actually pursued those aims. But while it found that the invoked aims were not actually pursued, it did not explicitly state that there was another ulterior purpose or a bad faith on the part of the government when interfering. The cases where it did so will be examined below.

[62] *See* Tkachevy v. Russia, App. No. 35430/05, Eur. Ct. H.R. para. 39 (2012),http://hudoc.echr.coe.int/eng?i=001-109060.
[63] *Id.* para. 40.
[64] *Id.* para. 41.
[65] *Id.* paras. 44-48.
[66] *Id.* para. 39.
[67] See, for example, Emin Huseynov v. Azerbaijan, App. No. 59135/09 | 87 (May 7, 2015), http://hudoc.echr.coe.int/eng?i=001-154540; Izmir Savaş Karşıtları Derneği and Others v. Turkey, Eur. Ct. H. R., 36-37, 2006; Nowicka v. Poland, Eur. Ct. H. R., 75-77, 2002.

1.2.3.2. CASES WHERE AN ULTERIOR PURPOSE WAS IDENTIFIED (TYPE C.2 VIOLATIONS)

In at least twenty-four cases,[68] when finding a legitimate aim violation under the substantive article, the Court did not limit itself only to holding that the government in question invoked an aim that they did not actually pursue. It took one step further and held that the government actually pursued an aim other than the one that was invoked by them. In these cases, therefore, the Court found some other agenda that was hidden behind the interference in question.

[68] Since citing all these cases fully would seriously hamper the main text, please find full info for these cases in Annex I. Short citations of them are: *See, e.g.* Hakobyan and others v. Armenia, Eur. Ct. H. R., 123, 2012; Nemtsov v. Russia, Eur. Ct. H. R., 103, 2014; Gafgaz Mammadov v. Azerbaijan, App. No. 60259/11 |108 (September 22, 2015), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Gafgaz%20Mammadov%20v.%20Azerbaijan%22], %22itemid%22:[%22001-157705%22]; Ibrahimov and others v. Azerbaijan, App. Nos. 69234/11, 69252/11 and 69335/11 | 127 (February 11, 2016), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Ibrahimov%20and%20others%20v.%20Azerbaijan%22], %22itemid%22:[%22001-160430%22]; Huseynli and others v. Azerbaijan, App. Nos. 67360/11, 67964/11 and 69379/11 | 147 (February 11, 2016), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Huseynli%20and%20others%20v.%20Azerbaijan%22],% 22itemid%22:[%22001-160429%22]; Ahad Mammadli v. Azerbaijan, App. Nos. 69456/11 and 48271/13 | 57 (June 16, 2016), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Ahad%20Mammadli%20v.%20Azerbai jan%22],%22itemid%22:[%22001-163613%22]; Hajibeyli and others v. Azerbaijan, App. Nos. 5231/13, 8193/13, 8204/13, 8468/13, 14226/13, 14249/13, 17447/13, 17569/13, 17575/13, 17626/13, 31201/13, 45211/13 and 51930/13 | 56 (June 30, 2016), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Hajibeyli%20and%20others%20v.%20Azerbaijan%22],% 22itemid%22:[%22001-164198%22]; Huseynov and others v. Azerbaijan, App. Nos. 34262/14, 35948/14, 38276/14, 56232/14, 62138/14 and 63655/14 | 66 (November 24, 2016), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Huseynov%20and%20others%20v.%20Azerbaijan%22], %22itemid%22:[%22001-168865%22]; Jamil Hajiyev v. Azerbaijan, App. Nos. 42989/13 and 43027/13 | 68 (February 16, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Jamil%20Hajiyev%20v.%20Azerbai jan%22],%22itemid%22:[%22001-171488%22]; Bayramli v. Azerbaijan, App Nos. 72230/11 and 43061/13 | 73 (February 16, 2017), https://hudoc.echr.coe.int/eng; Babak Hasanov v. Azerbaijan, App. Nos. 43137/13 and 43153/13 | 65 (February 16, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Babak%20Hasanov%20v.%20Azerbaijan%22],%22 itemid%22:[%22001-171489%22]; Abbasli v. Azerbaijan, App. No. 5417/13 and 73309/14 | 66 (February 16, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Abbasli%20v.%20Azerbaijan%22],%22itemid%22: [%22001-171487%22]; Bayram Bayramov v. Azerbaijan, App. Nos. 74609/10 57737/11 67351/11 67977/11 69411/11 and 69421/11 | 74 (February 16, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Bayram%20Bayramov%20v.%20Azerbaijan%22],%22 itemid%22:[%22001-171484%22]; Babayev and Hasanov v. Azerbaijan, App. Nos. 60262/11 69437/11 53662/13 | 89 (July 20, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Babayev%20and%20Has anov%20v.%20Azerbaijan,%22],%22itemid%22:[%22001-175973%22]; Tural Hajibeyli v. Azerbaijan, App. No. 69180/11 | 65 (September 28, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Tural%20Hajibeyli%20v.%20Azerbaijan%22],% 22itemid%22:[%22001-177124%22]; Bozano v. France, App. No. 9990/82 | 60 (December 2, 1987), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Bozano%20v.%20France%22],%22itemid%22:[%22001-57447%22]; Campagnano v. Italy, Eur. Ct. H. R., 49, 2006; Ciorap v. Moldova, Eur. Ct. H. R., 89, 2007; Cebotari v. Moldova, Eur. Ct. H. R., 53 2007; Maltseva v. Russia, Eur. Ct. H. R., 36, 2008; Yerogova v. Russia, Eur. Ct. H. R., 36, 2008 Khodorkovskiy v. Russia, Eur. Ct. H. R., 142, 2011); Lutsenko v. Ukraine, Eur. Ct. H. R., 63, 2012; Catan and others v. Moldova and Russia, Eur. Ct. H. R., 144, 2012.

Note that the ulterior purpose detected in these cases were found under substantive articles of the Convention, and not under Article 18.[69]

In a series of Article 5 violations decided against Azerbaijan between October 2015 and September 2017, in a case decided against Armenia in 2012 and in a case decided against Russia in 2014, the Court detected clear "bad faith" when deciding that the applicants of those cases were detained arbitrarily. The common phrase that the Court used in all of them reads: "[The detention of the applicants] had pursued aims unrelated to the formal ground relied on to justify the deprivation of liberty and implied an element of bad faith".[70] The language itself puts these cases to the category of "bad faith jurisprudence", regardless of the fact that they include no violation decided under Article 18.

The Grand Chamber once stated in an Article 18 case that "although *bad faith* and *ulterior purpose* are related notions, they are not necessarily equivalent in each case".[71] This is a confusing take, and the Court's apparent interchangeable usage of these words in the same case does certainly not help to clarify the separation either. But for the sake of the argument, I accept this separation. Here are the "ulterior purposes"[72] that the Court detected in substantive articles:

- *Bozano v. France*: The deprivation of liberty in question "amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of [a domestic court]".[73]

[69] In two of these twenty-four cases, Article 18 violations were found as well: *See* Cebotari v. Moldova, App. No. 35615/06 Eur. Ct. H.R. (2007), http://hudoc.echr.coe.int/eng?i=001-83247 and Lutsenko v. Ukraine, App. No. 6492/11, Eur. Ct. H.R. (2012), http://hudoc.echr.coe.int/eng?i=001-112013.

[70] Hakobyan and others v. Armenia, 123 Eur. CT. H.R. at 123 (2012) https://hudoc.echr.coe.int/eng?i=001-110263; Nemstov v. Russia, 103 Eur. CT H.R. at 103 (2014); Gafgaz Mammadov v. Azerbaijan, App. No. 60259/11, para.108 (Mar. 14, 2016) https://hudoc.echr.coe.int/eng?i=001-168439; Ibrahimov and others v. Azerbaijan, App. No. 69234/11, 69252/11, 69335/11, para. 127 (May 11, 2016) https://hudoc.echr.coe.int/eng?i=001-160430; Huseynli and others v. Azerbaijan, App. No. 67360/11, 67964/11, 69379/11, para. 56 (Feb. 11, 2016) https://hudoc.echr.coe.int/eng?i=001-160429; Huseynov and others v. Azerbaijan, 66 Eur. CT H.R. at 66 (2012) https://hudoc.echr.coe.int/eng?i=001-166154; Jamil Hajiyev v. Azerbaijan, App. No. 9626/14, 9717/14, para. 68 (Apr. 22, 2021) https://hudoc.echr.coe.int/eng?i=001-212032; Bayramli v. Azerbaijan, App. Nos. 72230/11 and 43061/13, para. 73 (Feb 16, 2017); Babak Hasanov v. Azerbaijan, App. No. 6814/13, para. 65 (2013); Abbasli v. Azerbaijan, 66 Eur CT H.R. (ser. B) at 66 (2021); Bayram Bayramov v. Azerbaijan, App. No. 74609/10, para. 74 (2014); Babayev and Hasanov v. Azerbaijan, App. No. 60262/11, para. 89 (July 20, 2019); Tural Hajibeyli v. Azerbaijan, App. Nos. 6477/08 and 10414/08, para. 65 (july 19, 2018).

[71] Merabishvili v. Georgia, App No. 72508/13 ¶ 283 (November 28, 2017) https://hudoc.echr.coe.int/eng?i=001-178753.

[72] Cases where the Court did not use the term "bad faith" but found that there was another aim pursued than the one invoked by the government and identified what that aim was.

[73] Bozano v. France, App No. 9990/82, 60 Eur. Comm'n H.R. Dec. Rep. (1986) , https://hudoc.echr.coe.int/eng?i=001-57448.

- *Campagnano v. Italy*: The law that disenfranchises persons who have been declared bankrupt "has no purpose other than to belittle persons who have been declared bankrupt, reprimanding them simply for having been declared insolvent".[74]

- *Ciorap v. Moldova*: The force-feeding of the applicant was "not prompted by valid medical reasons but rather with the aim of forcing the applicant to stop his protest".[75]

- *Cebotari v. Moldova*: "The real aim of the criminal proceedings and of the applicant's arrest and detention was to put pressure on him in a view to hindering [a company affiliated with the applicant] from pursuing its application before the Court".[76]

- *Maltseva v. Russia & Yerogova v Russia*: Reopening of proceedings after quashing a binding and enforceable final judgment "was not aimed at correcting a judicial error or a miscarriage of justice but rather was an abuse of procedure used merely for the purpose of obtaining a rehearing and fresh determination of the case".[77]

- *Khodorkovskiy v. Russia*: "The circumstances of the applicant show that, albeit formally, he was apprehended as a witness . . . the investigator's real intent was to charge the applicant as a defendant and, thus, to change the venue of the eventual detention proceedings to a more convenient one".[78]

- *Lutsenko v. Ukraine*: The real purpose behind the applicant's deprivation of liberty was "not to bring him before a competent legal authority within the same criminal case, but to ensure his availability for . . . a different set of criminal proceedings".[79]

- *Catan and others v. Moldova and Russia*: The language policy adopted by the Moldavian Republic of Transnistria (which was effectively controlled by Russia), as it appears, "was intended to enforce the Russification of the language and culture of the Moldovan community living in Transnistria".[80]

[74] Campagnano v. Italy, 2006-IV Eur. Ct. H.R. 197, 212.
[75] Ciorap v. Moldova, Eur. Ct. H. R., 89, 2007.
[76] Cebotari v. Moldova, Eur. Ct. H.R. at 11 (2007).
[77] Maltseva v. Russia, Eur. Ct. H.R. at 8 (2008); Yerogova v. Russia, Eur. Ct. H.R. at 8 (2008).
[78] Khodorkovskiy v. Russia, Eur. Ct. H.R. at 37 (2011).
[79] Lutsenko v. Ukraine, Eur. Ct. H.R. at 27 (2012).
[80] Catan and others v. Moldova and Russia, 2012-V Eur. Ct. H.R. at 52 (2012).

As can be seen, these are clearer detections of hidden agendas under substantive articles.[81] Thus, although most of them do not involve a violation under Article 18, they well-deserve to be categorized as "bad faith jurisprudence".

Concluding this section, we have seen that the legitimate aim violations in the Court's case law can be classified under three groups based on the grounds that the Court relied on when finding a breach of the legitimate aim condition. The first type of violations (Type A) often involved no discussion on the legitimate aim question other than the Court's noting that the government did not invoke a legitimate aim claim for the interference. In the second type of violations (Type B), the Court focused on the claimed aim itself, on a rather abstract basis, rather than questioning the government's intentions. In the third type (Type C), the Court carried out a vigilant scrutiny on factual grounds, discussing direct and circumstantial evidence, raising doubts when sequences of events suggest an aim other than invoked and inferring results from incoherencies. In some of them it even explicitly detected an ulterior purpose and identified what that purpose was (Type C.2). Thus, different types of L.A. violations indicate different degrees of judicial strictness. Next section discusses the changes in the dispersion of these types over time and what it tells us.

[81] One can ask that if these are clear ulterior purposes, then why the Court had not decided a violation under Article 18? In two of them (See Ceboatri v. Moldova, ¶53; See Lutsenko v. Ukraine), it did. In most of the others, Article 18 was not brought up by the applicants. But for the ones that they did, the answer is neither short nor straightforward. In here, therefore, I will limit myself merely noting that I find Tsampi's *countre-pouvoirs* approach highly convincing. According to that approach, the Court finds an Article 18 violation only if 1) the interference was made for the purpose of eroding (economic, social, political) *counter-pouvoirs* within that state; and 2) all institutional powers within that state are in failure to effectively counter that erosion. *See* Aikaterini Tsampi, *The New Doctrine on Misuse of Power Under Article 18 ECHR: Is it About the System of Contre-Pouvoirs Within the State After all?* 38 Neth. Q. Hum. Rts. 134 (2020).

1.3. THE CHANGING MIEN OF THE LEGITIMATE AIM VIOLATIONS OVER TIME

When one examines the L.A. violations decided before 2010, two points are clear even at first glance: Most - around 75% - of them do not include a discussion on the facts of the case based on the evidence in hand. They are either Type A violations where no legitimate aim was invoked, or Type B cases involving an *in abstracto* discussion on whether the invoked aim(s) could *theoretically* (emphasis added) be considered legitimate for the right(s) in question.[82] In other words, the overwhelming majority of the legitimate aim violations decided before 2010 are either Type A or B violations.[83]

After around 2010, there is an observable change. The E.Ct.H.R. recently seems more and more inclined to challenge the governments' genuineness on the legitimate aim question. It appears to be more willing to take the dispute onto a factual matrix rather than contemplating in an abstract, theoretical realm as it usually did before. When it sees fit to take the dispute onto a factual matrix, it does so either by making its own individual assessment of the same facts and thereby challenging the reasoning given by the national decision-makers, or by resorting to other evidence and "telltale signs" signifying a deceit or an ulterior aim (Type C violations).[84]

The relative increase of Type C violations over Types A and B is not the only indicator of this change. The increases in legitimate aim violations decided under Article 5 (two to twenty-two, before and after 2010) and Article 10 (zero to seven, before and after 2010) themselves are important indicators,[85] because the rights under Articles 5 and 10 require an *in concreto* assessment of the facts by their nature. Of course, the

[82] It should be noted that it is certainly true that there are cases decided before 2010 in which the Court questioned the legitimacy of the invoked aim on an evidentiary basis, and thus conducted an *in concreto* assessment, but these cases are in the clear minority. According to my findings, of thirty-seven L.A. violations decided before 2010, only nine cases include an L.A. assessment with some regard to the factual circumstances of the case: *See* İzmir Savaş Karşıtları Derneği and Others v. Turkey, Eur. Ct. H.R. at 5-6 (2006); Campagnano v. Italy, 2006-IV Eur. Ct. H.R. (2006);Tuleshov and others v. Russia, Eur. Ct. H.R. at 7-8 (2007); Zagorodnikov v. Russia, Eur. Ct. H.R. at 4-5 (2007); Ciorap v. Moldova, Eur. Ct. H.R. at 22-23 (2007); See Maltseva v. Russia, ¶ 34-36; See Yerogova v. Russia, ¶ 34-36; Khuzhin and others v. Russia, Eur. Ct. H.R. at 24 (2008); Glor v. Switzerland, 2009-III Eur. Ct. H.R. 33, 57.

[83] Annex I shows my classification of all L.A. violations as Type A, B or C.

[84] It is impossible to cite the whole list, but to cite a few examples: *See* Khodorkovskiy v. Russia, Eur. Ct. H.R. at 37 (2011); Shimovolos v. Russia, Eur. Ct. H.R. at 12 (2011); Catan and others v. Moldova and Russia, 2012-V Eur. Ct. H.R. at 52 (2012); Dimitrovi v. Bulgaria, App. No. 12655/09, ¶ 53-55 (March 3, 2015), http://hudoc.echr.coe.int/eng?i=001-152624; Baka v. Hungary, App. No. 20261/12, ¶ 148-49, 156-57 (June 23, 2016),http://hudoc.echr.coe.int/eng?i=001-163113; Bayev and others v. Russia, App. Nos. 67667/09 and 2 others, ¶ 65-83 (June 20, 2017), http://hudoc.echr.coe.int/eng?i=001-174422; Navalnyy v. Russia, App. Nos. 29580/12 and 4 others, ¶ 124-26 (November 15, 2018), http://hudoc.echr.coe.int/eng?i=001-187605. The reader is kindly invited to resort to Annex I for the full list.

[85] See Chart III above.

growing number of Article 18 violations in the case law is another sign, proving that the Court is recently much more active in the legitimate aim discussion.

The changing mien of the L.A.T. in the 2010s gets much more interesting when one thinks that much of that decade is commonly referred as the "Age of Subsidiarity".[86] The term refers to a new era for the Court in which it tends to limit itself to reviewing whether the issue has been properly handled by the domestic decision-makers in compliance with the principles already set out by the Court (*process based review*), rather than carrying out an individual assessment of the issue itself (*substance based review*).[87] The new deferent approach in favour of the national decision-makers should *prima facie* mean an even less judicial scrutiny on the L.A.T., because one of the main reasons of the relative lack of strictness of this test has always been the difficulty of fact-checking the real intention of the governments,[88] as it requires the Court to actively engage with circumstantial evidence,[89] indicators showing deceitfulness on the governments' part[90] and such. Thus, directly confronting the governments as to their real intentions hardly seems fitting to this new era. President Spano, the *proclaimer* of the "Age of Subsidiarity", does not seem to agree with this. In an article presenting his take on the process based review, he wrote:[91]

> Looking to the future, it is interesting to ponder whether the Court's traditional approach of applying a very formal and rational relations-type analysis to a Government's invoked legitimate aim, thereby leaving all the legwork of the necessity assessment to the test of proportionality, needs some reformulation: in other words, whether the Court should engage in a methodological shift towards a more strict, evidentiary-based assessment of invoked legitimate aims
> . . .

There is no doubt that an evidence-based assessment would improve the strictness of the L.A.T. . But as indicated above, it is hard to understand how it would fit in the general trend of the process based review, which can be characterized by the Court's deference from engaging in an individual assessment of the evidence at hand and instead focusing on the domestic decision-makers' handling of the issue. Interestingly enough, whether it

[86] Spano, *Universality or Diversality*, *supra* note 5, at 491. Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 Hum. Rts. L. Rev. 487, 491 (2014).
[87] *Id.* at 480.
[88] *See also* Tsampi, *supra* note 81, at 140.
[89] *See* Tănase v. Moldova, 2010-III Eur. Ct. H.R. 361, 409; Tkachevy v. Russia, Eur. Ct. H.R (2012).
[90] *See* Makhmudov v. Russia, Eur. Ct. H.R. at 14 (2007).
[91] Spano, *The Future of . . .* , *supra* note 5, at 488 (fn. 61).

fits or not, we do observe "a methodological shift towards a more strict, evidentiary-based assessment of invoked legitimate aims",[92] as shown above.

However, the next section questions whether this confusing shift is directed against all states or it is concentrated only on certain states.

2. A SELECTIVE STRICTNESS?

Since the first L.A. violation in 1986,[93] the Court found an L.A. violation in at least one case against at least twenty-eight different Member States. As far as my study goes, the states that breached the legitimate aim condition the most are Russia with twenty-five violations and Azerbaijan with nineteen violations. Bulgaria was found in violation of that condition in twelve cases. Poland and Turkey follow them by five violations each. Hungary violated this requirement four times. Then come Armenia, Croatia, France, Italy, Moldova, Romania, Slovakia and Ukraine, each with three violations. The United Kingdom, the Netherlands and Germany have two violations each. Eleven Member States violated the L.A. requirement once: Sweden, Cyprus, Greece, Austria, Malta, Georgia, Switzerland, Slovenia, Serbia, Macedonia and Andorra.[94]

Table I shows the number of L.A. violations decided against each member state, as well as the regions they are in and the year the judgments were decided (divided as "prior or after 2010").[95]

[92] *Id.*
[93] *See* Bozano v. France, App No. 9990/82, 59-60 Eur. Comm'n H.R. Dec. Rep. (1986) https://hudoc.echr.coe.int/eng?i=001-57448.
[94] All numbers can be verified by resorting to Annex I.
[95] Violations decided in 2010 are in the "after 2010" group.

Region[96]	Member States[97]	L.A. Violations (before 2010)	L.A. Violations (after 2010)	Total
Northern Europe	Sweden	1		1
	The UK	1	1	2
	Total	2	1	3
Western Europe	Austria	1		1
	France	3		3
	Germany	1	1	2
	Switzerland	1		1
	The Netherlands	2		2
	Total	8	1	9
Southern Europe	Andorra	1		1
	Croatia		3	3
	Greece	1		1
	Italy	1	2	3
	Malta	1		1
	North Macedonia		1	1
	Serbia		1	1
	Slovenia		1	1
	Total	4	8	12
Eastern Europe	Armenia		3	3
	Azerbaijan		19	19
	Bulgaria	4	8	12
	Cyprus	1		1
	Georgia	1		1
	Hungary	1	3	4
	Moldova	2	1	3
	Poland	3	2	5
	Romania		3	3
	Russia	8	17	25
	Slovakia	1	2	3
	Turkey	2	3	5
	Ukraine		3	3
	Total	23	64	87
Grand Total		37	74	111

Table I: Dispersion of the L.A. violations over Time, Member States and Regions.

[96] The Regions section is largely based on the grouping made by the United Nations Statistics Division, https://unstats.un.org/unsd/methodology/m49/ (last accessed on 28.10.2020). The only difference is that while Armenia, Azerbaijan, Cyprus, Georgia and Turkey are classified as Western Asia on that data, they are included in Eastern Europe in this list since they are commonly considered Eastern European in the Council of Europe sphere.

[97] Only the states against which the Court found a L.A. violation at least once.

The most significant data Table I provides us are the following:

- While the number of L.A. violations has dropped in Northern and Western Europe, it has increased in Southern and Eastern Europe. Especially in Eastern Europe, the increase is remarkable.[98]
- After 2010, only two legitimate aim violations were decided against Northern and Western European States, while this number is eight for Southern and sixty-one for Eastern European States.
- After 2010, eight new states were added to the L.A. violations list from Southern and Eastern Europe, while there is no new addition in Northern and Western Europe.
- Most increases are against Azerbaijan (zero to nineteen) and against Russia (eight to seventeen).

These are interesting findings, especially the remarkable difference between Northern and Western Europe, and Southern and Eastern Europe. However, a careful reader might respond by indicating that the evident increase might simply be the result of the recent increase of overall number of the Southern and Eastern European cases before Strasbourg. In other words, the L.A. violation numbers may only be high because the total number of judgments decided against those states are high. This is an important objection, and needs to be addressed.

In order to do so, Table II illustrates the proportion of L.A. violations to total number of judgments delivered against all Member States of each region.

Region	L.A. Violations/All Judgments (before 2010)	L.A. Violations/All Judgments (after 2010)
Northern Europe	0,0023	0,0017
Western Europe	0,0049	0,0012
Southern Europe[99]	0,0011 (0,0021)*	0,0054 (0,0052)*
Eastern Europe	0,0036	0,0135

Table II: Ratio of L.A. violations/All judgments before and after 2010, by region.

[98] It is not to be forgotten that most Southern and Eastern European States are new members to the Court's jurisdiction. But the effect of this should not be overestimated. Until 2002, which is the year that almost all Eastern European States (apart from Montenegro and Serbia, which in total have one violation against) were now covered by the Court's jurisdiction, there were only a total of five legitimate aim violations decided by the Court anyway.

[99] The numeral deviation in respect to Southern Europe is most probably due to vast bulk of cases in the '90s against Italy concerning the right to trial within reasonable time. When Italy is neglected in the calculation, the ratios are 0,0021 and 0,0052, before and after 2010 respectively.

Table II provides us with some important data as well. Accordingly,

- Before 2010, the ratios were relatively close for all regions. After 2010, there were significant differences as Eastern European States were remarkably more likely to be found in violation of the L.A. condition.

- Internal analyses of each region confirm that the Court is significantly stricter against Southern and especially Eastern European States after 2010. The ratio has dropped by about 28% for Northern European; and about 73% for Western European States after 2010. The same ratio increased by about 250% for Southern European[100] and by 375% for Eastern European States.

- Overall, after 2010, Eastern European Member States have been found in violation of the L.A. condition about eleven times more than Western European; eight times more than Northern European; and 2.5 times more than Southern European States. In addition to that, internally, the frequency of the L.A. violations against Eastern European States after 2010 has almost quadrupled in comparison to the same frequency before 2010.

In sum, the overall ratio of legitimate aim violations has increased significantly in the last ten years. This increase suggests a stricter approach on the part of the Court. That being so, the increase in strictness is, as above data show, *selective*, i.e. it covers the jurisprudence against some states, and not the others.

The L.A.T. case law under Article 5 confirms this point from a qualitative aspect. As already remarked, Article 5 case law, especially when it involves the question whether the detention at hand was arbitrary or not, by its nature, requires a substantive, *in concreto* assessment. Almost all, if not all legitimate aim violations found under Article 5, therefore, include an *in concreto* assessment and thereby indicate a stricter approach by the Court. In the *Merabishvili* case, the Court made a list of the cases showing that "a deprivation of liberty was chiefly meant for an ulterior purpose".[101] When one examines the Court's list, an interesting fact stands out: except for one case, which was decided about thirty-

[100] When calibrated in accordance with fn 99.

[101] Merabishvili v. Georgia, App. No. 72508/13, ¶ 301 (November 18, 2017), http://hudoc.echr.coe.int/eng?i=001-178753. While the wording suggests otherwise, this list was not a complete list of such cases up until then. It lacks the case of Giorgi Nikolaishvili v. Georgia, Eur. Ct. H.R. at 15 (2009), in which the Court found that the applicant's arrest "served to acquire additional leverage over the unrelated criminal proceedings" and the case of Khodorkovskiy v. Russia, *supra* note 78, para. 142 where the Court found "albeit formally [the applicant] was apprehended as a witness . . . the investigator's real intent was to charge the applicant as a defendant and, thus, to change the venue of the eventual detention proceedings to a more convenient one".

five years ago,[102] all cases in the list were decided against four Eastern European States, namely Azerbaijan, Russia, Armenia and Ukraine.[103]

These findings clearly show that while there is an observable change in the Court's case law towards a stricter and *in concreto* judicial scrutiny in terms of the L.A.T., this change is directed towards certain, mostly Eastern European States. Significantly, this finding corresponds to the general trend of weakening democracies in Southern and Eastern Europe, as reports indicate,[104] as has been noted by the high-level officers of the Council of Europe,[105] and as literature shows.[106]

The findings of this article thus provide output supporting the argument that the Court indeed seems to adopt a more heterogeneous approach towards Member States. In that sense, it acknowledges its subsidiary position against Convention-respecting, mostly Northern and Western European States; and adopts a more intrusive, suspicious approach towards suffering democracies in Southern and Eastern Europe.[107] And that approach against Eastern European States does not present itself only in the Article 18 jurisprudence; it extends to the legitimate aim assessment as well.

CONCLUSION

This article argued several points. First, it aimed to show that the L.A.T. is not a dormant test as it has often been suggested, and as the figures show, it has more teeth than ever, in particular in recent times. In fact, within the scope of this study, 111 legitimate aim violation decisions were found in the body of case law. Moreover, about two thirds of all legitimate aim violations were decided in the last ten years.

[102] *See* Bozano v. France, App No. 9990/82, 59-60 Eur. Comm'n H.R. Dec. Rep. (1986),https://hudoc.echr.coe.int/eng?i=001-57448.

[103] Merabishvili v. Georgia, supra note 101, para. 301.

[104] *See*, Freedom House, *Nations in Transit: Dropping the Democratic Facade*, 2020, https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf (last accessed on 28.10.2020), See also, European Intelligence Unit, *Democracy Index 2019*, https://www.eiu.com/topic/democracy-index (last accessed on 28.10.2020).

[105] Eur. Consult. Ass., *Piotr A. Świtalski, Democracy on the Precipice,* at 14 (2011-2012) https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046eb9b.

[106] Attila Ágh, Declining Democracy in East-Central Europe: The Divide in the EU and Emerging Hard Populism (2019). Vedran Džihić, *Grey Zones Between Democracy and Authoritarianism: Rethinking the Current State of Democracy in Eastern and South-Eastern Europe, in* Problems of Representative Democracy in Europe 21, 23-25 (Jan Marinus Wiersma, Ernst Stetter & Sebastian Schublach eds., 2014). Licia Cianetti et al., *Rethinking "Democratic Backsliding" in Central and Eastern Europe - Looking Beyond Hungary and Poland*, 34 East Eur. Pol. 243 (2018).

[107] Çalı, *supra* note 8, at 275.

Second, while the recent "procedural turn" of the Court essentially means less substantive judicial scrutiny, the L.A.T. has undergone a shift towards a more evidence-based *in concreto* assessment and the Court accordingly seems to apply a stricter judicial review under the L.A.T. . The grounds that the Court relied on when finding a breach of the legitimate aim condition are gradually changing from *in abstracto* assessments of the invoked aims' justificatory capacities for the measure in question towards an *in concreto* examination based on the factual circumstances surrounding the case. Thus, it now engages "in a methodological shift towards a more strict, evidentiary-based assessment of invoked legitimate aims", as the current President of the Court once conceived.[108] This shift means an increased intensity of judicial review under the legitimate aim inquiry.

Third, this increased intensity is obviously selective. While the ratio of legitimate aim violations to all violations for each region was similar before 2010, there are significant differences between Northern and Western States, and Southern and Eastern States after 2010. In fact, for Eastern European States, this ratio is about ten times higher than Northern and Western European States. More importantly, while the legitimate aim frequency ("legitimate aim violations/all violations" decided against all Member States of the region) decreased significantly for Northern and Western European States after 2010; it increased significantly for Southern and Eastern European States. These findings show that the increasing intensity of scrutiny in terms of the L.A.T. is not applied to all states, but seems rather concentrated on certain Southern and Eastern European States.

Furthermore, These results fit perfectly with the recent scholarship arguing that the Court's recent case law exhibits two distinct approaches against different states. Stiansen and Voeten found that, after 2010, the Court has become less inclined to find violations against the 'consolidated democracies' that were publicly critical of the Court, while the same cannot be said for the other publicly critical states that are not consolidated democracies.[109] Madsen showed that margin of appreciation requests coming from certain Western European States are more likely to be accepted by the Court compared to same requests coming from certain Eastern European States.[110] Çalı argued that the Court now has a multi-faceted jurisprudence, allowing more interpretational room for right-respecting states while developing a bad faith jurisprudence for those states that are disrespectful towards the convention values. The domestic bodies in the former states, which are mostly the Western European founders,

[108] Spano, *The Future of . . .*, *supra* note 5, at fn. 61.
[109] *See* Stiansen & Voaten, *supra* note 8, at 780.
[110] *See* Madsen, *supra* note 8, at 219.

now enjoy a broader margin of appreciation and the Court limits itself to reviewing the procedural justice in their decision-making process.[111] On the other hand, for the "bad faith interpreters", which are mostly comprised of the semi-authoritarian Eastern European States' domestic bodies who "flout the well-established Convention standards, not merely by error . . . but with suspect grounds of intentionality and lack of respect for the overall Convention acquis",[112] it formed a bad faith jurisprudence by developing a broader read of Article 18.[113] My findings substantially concur with this argument and add that the Court's differentiated judicial strictness against the latter states is not limited to the Article 18 case law, but extends to the legitimate aim inquiry as well. At one point of her study, Çalı states that the Court's jurisprudence now "ranges from the quality-based deference approach, to standard case law interpretations, to findings of bad faith violations."[114] My study therefore proposes a minor tweak to that statement, because "standard case law interpretations" seem not *that* (emphasis added) standard recently, either.

ANNEX 1

Case Name	First App. No	Judgment Date	Paragraph	Article	Violation Type
Bozano v. France	9990/82	18.12.1986	59-60	5	C
Darby v. Sweden	11581/85	23.10.1990	33-34	14(P1/1)	A
Van Raalte v. the Netherlands	20060/92	21.02.1997	43-44	14(P1/1)	B
Larkos v. Cyprus	29515/95	18.02.1999	31	14(8)	B
Thlimmenos v. Greece	34369/97	6.04.2000 1.	47	14(9)	A
A.B. v. the Netherlands	37328/97	29.01.2002	83	8	A
S.A. Dangeville v. France	36677/97	16.04.2002	57-58	P1/1	B
Nowicka v. Poland	30218/96	3.12.2002	75-77	8	A
Sommerfeld v. Germany	31871/96	8.07.2003	46 ; 93	14(8)	A
Broniowski v. Poland	31443/96	22.06.2004	158, 175	P1/1	A

[111] Çalı, *supra* note 8, at 256-63.
[112] *Id.* at 241.
[113] *Id.* at 263-69.
[114] *Id.* at 270.

Pla and Puncernau v. Andorra	69498/01	13.07.2004	61	14(P1/1)	A
Ünal Tekeli v. Turkey	29865/96	16.11.2004	68	14	B
P.M. v. the United Kingdom	6638/03	19.07.2005	28	14(P1/1)	B
İzmir Savaş Karşıtları Derneği v. Turkey	46257/99	2.03.2006	37	11	B
Campagnano v. Italy	77955/01	23.03.2006	49	P1/3	C
Zarb Adami v. Malta	17209/02	20.06.2006	82	14(4)	A
Zeman v. Austria	23960/02	29.06.2006	40	14(P1/1)	A
Yanakiev v. Bulgaria	40476/98	10.08.2006	72	6	A
Aon Conseil et Courtage S.A. and another v. France	70160/01	25.01.2007	46	P1/1	B
Tuleshov and others v. Russia	32718/02	24.05.2007	47	P1/1	A
Zagorodnikov v. Russia	66941/01	7.06.2007	26	6	B
Ciorap v. Moldova	12066/02	19.06.2007	89	3	C
F.C. Mretebi v. Georgia	38736/04	31.07.2007	48	6	A
Cebotari v. Moldova	35615/06	13.11.2007	53	5	C
Luczak v. Poland	77782/01	27.11.2007	59	14(P1/1)	B
Kostadin Mihaylov v. Bulgaria	17868/07	27.03.2008	42	6	A
Maltseva v. Russia	76676/01	19.06.2008	36	6	C
Yerogova v. Russia	77478/01	19.06.2008	36	6	C
Bochev v. Bulgaria	73481/01	13.11.2008	97	8	A
Alekseyenko v. Russia	74266/01	8.01.2009	88	8	A
Nolan and K. v. Russia	2512/04	12.02.2009	73	9	B
Weller v. Hungary	44399/05	31.03.2009	35, 38	14(8)	A
K.H. and others v. Slovakia	32881/04	28.04.2009	53	8	B
Glor v. Switzerland	13444/04	30.04.2009	85	14(8)	B
Tsonkovi v. Bulgaria	27213/04	2.07.2009	26	P1/1	B
Bezymyannaya v. Russia	21851/03	22.12.2009	33	6	A
Jaremowicz v. Poland	24023/03	5.01.2010	60	12	B
Oleksiy Mykhaylovych Zakharkin v. Ukraine	1727/04	24.06.2010	74	3	A
Georgieva and Mukareva v. Bulgaria	3413/05	2.09.2010	38	P1/1	B

Maria Atanasiu and others v. Romania	30767/05	12.10.2010	184	6	A
Boris Popov v. Russia	23284/04	28.10.2010	104	8	A
Putter v. Bulgaria	38780/02	2.12.2010	55	6	A
Maggio and others v. Italy	46286/09	31.05.2011	48	6	C
Khodorkovskiy v. Russia	5829/04	31.05.2011	142	5	C
Shimovolos v. Russia	30194/09	21.06.2011	57	5	C
Mihal v. Slovakia	22006/07	5.07.2011	55	6	A
Stoycheva v. Bulgaria	43590/04	19.07.2011	59	P1/1	A
X and Y. v. Croatia	5193/09	3.11.2011	116	8	B
Kerimli and Alibeyli v. Azerbaijan	18475/06	10.01.2012	41	P1/3	B
Tkachevy v. Russia	35430/05	14.02.2012	50	P1/1	C
Hakobyan and others v. Armenia	34320/04	10.04.2012	123	5	C
Kuric and others v. Slovenia	26828/06	26.06.2012	394	14(8)	B
Lutsenko v. Ukraine	6492/11	3.07.2012	65	5	C
Koch v. Germany	497/09	19.07.2012	67	8	A
Najafli v. Azerbaijan	2594/07	2.10.2012	69	10	A
Catan and others v. Moldova and Russia [G.C.]	43370/04	2.10.2012	144	P1/2	C
P. and S. v. Poland	57375/08	30.10.2012	133	8	A
Hode and Abdi v. the United Kingdom	22341/09	6.11.2012	53	14(8)	A
Karabet and others v. Bulgaria	38906/07	17.01.2013	347	P1/1	A
M.S. v. Croatia	36337/10	25.04.2013	106	8	A
Nataliya Mikhaylenko v. Ukraine	49069/11	30.05.2013	40	6	B
Franek v. Slovakia	14090/10	11.02.2014	54	6	A
Masirevic v. Serbia	30671/08	11.02.2014	51	6	B
Velyo Velev v. Bulgaria	16032/07	27.05.2014	42	P1/2	B
Krupko and others v. Russia	26587/07	26.06.2014	40	5	B
Nemtsov v. Russia	1774/11	31.07.2014	103	5	C
Atudorei v. Romania	50131/08	16.09.2014	154	5	B
Emel Boyraz v. Turkey	61960/08	2.12.2014	56	14(8)	B
Dimitrovi v. Bulgaria	12655/09	3.03.2015	53-55	P1/1	B
Emin Huseynov v. Azerbaijan	59135/09	7.05.2015	86-87	5	B

Chiragov and others v. Armenia [G.C.]	13216/05	16.06.2015	201	P1/1	A
Oliari and others v. Italy	31443/96	21.07.2015	185	8	B
Gafgaz Mammadov v. Azerbaijan	60259/11	15.10.2015	108	5	C
Salamov v. Russia	5063/05	12.01.2016	47	P1/1	A
Ibrahimov and others v. Azerbaijan	69234/11	11.02.2016	77, 81, 85, 127	5	C
Huseynli and others v. Azerbaijan	67360/11	11.02.2016	147	5	C
Mozer v. Moldova and Russia	11138/10	23.02.2016	194, 199	8 ; 9	A
Pajic v. Croatia	68453/13	23.02.2016	83	14(8)	A
Domazyan v. Armenia	22558/07	25.02.2016	43	6	A
Ahad Mammadli v. Azerbaijan	69456/11	16.06.2016	57	5	C
Baka v. Hungary [G.C.]	20261/12	23.06.2016	155-157	10	B
Hajibeyli and others v. Azerbaijan	5231/13	30.06.2016	56	5	C
Tomov and Nikolova v. Bulgaria	50506/09	21.07.2016	51	P1/1	B
Chakalova-Ilieva v. Bulgaria	53071/08	6.10.2016	41	6	A
Kasparov v. Russia	53659/07	11.10.2016	56	5	B
Ermenyi v. Hungary	22254/14	22.11.2016	37	8	B
Huseynov and others v. Azerbaijan	34262/14	24.11.2016	66	5	C
Jamil Hajiyev v. Azerbaijan	42989/13	16.02.2017	68	5	C
Bayramlı v. Azerbaijan	72230/11	16.02.2017	73	5	C
Babak Hasanov v. Azerbaijan	43137/13	16.02.2017	65	5	C
Abbaslı v. Azerbaijan	5417/13	16.02.2017	66	5	C
Bayram Bayramov v. Azerbaijan	74609/10	16.02.2017	74	5	C
Karajanov v. Macedonia	2229/15	6.04.2017	75-76	8	B
Bayev and others v. Russia [G.C.]	67667/09	20.06.2017	83	10	B
Babayev and Hasanov v. Azerbaijan	60262/11	20.07.2017	89	5	C
Tural Hajibeyli v. Azerbaijan	69180/11	28.09.2017	65	5	C

Magyar Ketfarku Kutya Part v. Hungary	201/17	23.01.2018	40-46	10	B
Aleksandr Aleksandrov v. Russia	14431/06	27.03.2018	29	14(5)	A
Hülya Ebru Demirel v. Turkey	30733/08	19.06.2018	35	14(8)	B
Aliyev v. Azerbaijan	68762/14	20.09.2018	184-187	8	B
Navalnyy v. Russia [G.C.]	29580/12	15.11.2018	126	11	B
Resin v. Russia	9348/14	18.12.2018	41	8	A
Khadija İsmayilova v. Azerbaijan	65286/13	10.01.2019	147	8	A
Navalnyy v. Russia (no.2) [G.C.]	43734/14	9.04.2019	80-81	10	B
Kamoy Radyo Televizyon Yay. v. Turkey	19965/06	16.04.2019	50-51	P1/1	A
Khodorkovskiy and Lebedev v. Russia (no.2)	11082/06	25.07.2013	596-597	8	A
Kövesi v. Romania	3594/19	5.05.2020	196-199	10	A
P.T. v. Moldova	1122/12	26.05.2020	29	8	A
OOO Flavus and others v. Russia	12568/15	23.06.2020	38, 44	10	B
Yunusova and Yunusov v. Azerbaijan	68817/14	16.07.2020	152-157	8	B

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Sale of Quotas for Greenhouse Gas Emissions as a Type Civil Sale and Purchase Contract

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ABSTRACT

The article examines the emergence, development and current legal regulation of the sale and purchase agreement and reveals the place of sale of quotas for greenhouse gas emissions in the system of civil contracts. The character of the sale of emission of quotas between states is considered, as well as the legal nature of the quota sale (in carbon units) contract in the framework of national jurisdictions. The authors conclude that the term "quota" means a quantitative limitation of greenhouse gas (G.H.G.) emissions, which should be understood as gaseous waste (G.W.), which has not received clear regulation in the national (Russian) law. Recognition of G.W. as a kind of industrial waste will make it possible to better understand and explain its legal nature, and directly the alienation of a certain amount (quota) of G.W. within the framework of civil legislation is the conclusion of a contract of sale of property rights belonging to the owner of G.W. to another business entity for a fee and for a certain period.

KEYWORDS

Climate; Contract; Emissions; Greenhouse Gases; Quota

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INTRODUCTION

Civil law is one of the most important branches of law in the modern world. After thousands of years of history, modern civil law can boast of various contractual patterns, both strong enough to be tested by time and weak enough to vanish without leaving trace. In the current system of civil contracts, the sale and purchase contract occupies a special place. Having emerged in the early stages of the state - and thus of the legal system, it has undergone a long evolution, during which it showed its viability, entering the civil codes of all modern states of the world. Of course, throughout all historical eras, there can be no question of any single legal regulation of sale and purchase, but at the moment the general trend in most developed countries shows a gradual understanding that globalisation and digitalisation of public life cannot but contact the scope of contract law.

Another question is how the state and society should respond to these challenges. There can hardly be a universal answer to this question.

In our opinion, the answer is necessarily linked to national legal traditions, the level of economic development, cultural and religious characteristics of certain countries - and sometimes the very historical course of development of a particular state and of its legal system. In this sense, Russia and other former Soviet republics are of particular interest due to a unique model of economic reforms associated with the transition from a planned economy to a market economy, which entails “catch-up development” on many issues, including contract law. At the same time, it seems that the law, despite its natural conservatism, should not always only react to emerging social relations which require some regulation. The predictive function of law expects the study and forecast of the development in various spheres of public relations, and it requires an early legal impact on them, this is in the interests of the state and society. One of such promising areas of the legal institution of sale and purchase is the trading of quotas for greenhouse gas emissions, which has officially been recognised by the United Nations [hereinafter U.N.] Framework Convention on Climate Change 1992 with the Kyoto Protocol (1997). This was the first time that the UN has ever proposed a non-standard approach to solving the problems associated with climate change and with the increasing of average annual temperatures. The authors of the Kyoto Protocol assumed that the countries produced different amounts of greenhouse gases which are harmful to the atmosphere and climate, and therefore, they could sell part of such quotas to other countries, thereby reducing the total amount of emissions on a global scale.

This trend was followed by the 2015 Paris Climate Agreement. But even though emission trading has been in practice for many years, this instrument has not yet fully been implemented. At the same time, another question is how the emission quota of a certain state should be differentiated according to national territories and industrial zones. In case this issue is solved positively, amendments should be made to the national civil legislation to regulate this new type of sale and purchase contract. However, it remains unclear what is the subject of this agreement, since the emission of quotas still needs to be recognised as an asset, commodity or property interest.

Therefore, the purpose of our research is to prove that trading in quotas is a new level of development of the sales contract, which requires a change in doctrinal ideas about this contract, as well as the theoretical development of its types, subjects, terms of the contract and several other issues.

Given this, the first Part of our article will try to identify the historical features of the origin and development of the sale and purchase contract; the second Part will be devoted to the modern classification of types of sale and purchase; in the third Part of this article, we will explore the impact of the 2015 Paris Climate Agreement on tackling climate change. Finally, in the fourth Part of the article, we study the civil law specifics and the legal nature of emissions trading and formulate certain proposals for improving national civil law.

1. THE HISTORY OF THE DEVELOPMENT OF THE SALE AND PURCHASE CONTRACT IN THE WORLD AND IN RUSSIA

The history of the sale and purchase contract dates back to centuries ago. Having arisen after the barter and torts agreement, the sale and purchase contract owes its emergence to goods-money relations. We find references to buying and selling in the very early legal documents.

The analysis of the Old and New Testaments shows how the economic issues were regulated in biblical history. Matters of ownership, as well as the transfer of property rights through purchase and sale, are no exception. As early as the Pentateuch of Moses mentioned or, in some cases, described in detail transactions with real estate, the purchase and sale of land plots. Most importantly, the Torah laid down the foundations of both

the Old Testament and the New Testament views on the source of property rights and, in particular, of private ownership of land.[1]

A more detailed description of the property sale and purchase can be found in the Code of Hammurabi, as well as other legal acts of Egypt and Mesopotamia, which require the obligatory presence of witnesses, a written form, a clear indication of the subject of the contract, and oaths as prerequisites for their validity, etc. With the development of trade and the rise of individual cities, during the period of antiquity, this agreement was further detailed in the legal acts of Ancient Greece, and, especially, in those of the Ancient Rome.

It is in Roman law that the original contractual patterns (including sale and purchase) acquired the traits that are familiar to us. Among them: the differentiation between real and consensual contracts (purchase and sale were attributed to the latter) and the definition of a sale and purchase contract as an obligation of one party (seller) to transfer an asset (goods) to the other party (buyer), with the imposition of an obligation on the buyer to pay a certain amount of money for it. The subject of the contract could be anything belonging to the seller and was not withdrawn from the Roman civilian turnover.

A special feature of Roman law (which had not been seen before) is the emergence of the possibility of concluding a sale and purchase contract on a suspensive condition (about a thing that the seller does not own at the moment, for example, the sale of a future crop), and as early as the price was recognised as a significant condition of the contract. According to several researchers, the sale of intangible goods (including the right of claim) corresponds to the specified construction proposed by Roman law.[2]

After the fall of the Roman Empire, subsistence farming prevailed in medieval Europe, and the sale and purchase contract lost its former relevance. However, with the development of crafts and cities, there was a gradual revival of Roman law and its contractual patterns. That trend resulted in the adoption of Napoleon's Civil Code of 1804 and the German Civil Code of 1896, which contained the provisions on buying and selling that are familiar to us today.

In Russia, in the first legal documents (Russkaya Pravda, dating back to the eleventh century), various types of sale and purchase are mentioned, including the sale

[1] Sergey V. Lukin, *The Bible on Land Ownership, Sale and Purchase and Land Valuation,* Probs. of Mod. Econ., 2004.

[2] Boris D. Zavidov, История развития договора купли-продажи товаров в римском частном праве, в праве дореволюционного периода и времена Союза ССР (комментарий законодательства в сопоставлении с нормами ГК РФ [*The History of the Development of the Sale and Purchase Contract in Roman Private Law, in the Law of the Pre-revolutionary Period and the Times of the USSR],* 82-84, 2019, Консультант Плюс [Consultant plus] (last visited Jul. 24, 2021); Oleg A. Kudinov, Римское право [Roman Law] 182-85 (2013).

of enslaved people, for which the presence of witnesses was considered necessary. Since the fifteenth century, the purchase and sale of real estate acquired a mandatory written form.[3] The Cathedral Code of 1649 reproduced many previously existing rules on purchasing and selling and established several restrictions on the Church's rights to sell land. The sale of real estates, livestocks, fisheries, grains and other products, beavers, and handicrafts (pots, iron products, fabrics, etc.) was getting more common. However, the Russian purchase and sale contract acquired the classic modern features of an obligation characterised by a mutual, compensated, consensual nature after the end of Peter the Great's reign, in 1727. Notarization of a pro-real estate transaction appears only in 1886.[4]In Russian jurisprudence of the nineteenth century, the understanding of the legal nature of sale and purchase differed: some authors (D.I. Meyer) considered the sale and purchase as a bilateral agreement;[5] others (K.P. Pobedonostsev) called the sale and purchase an action when one party transfers another thing to the other for a certain price, rather than a contract.[6] At the same time, the Code of Laws of the Russian Empire (1832) does not mention purchasing and selling in general but mentions selling and buying separately.[7] However, it was in this legal document that all the modern elements of this contract were designated, including the consent of the parties (and the requirements for them), the form of the agreement, types of agreement (movable and immovable things, sale of shares in a common property), the essential clauses of the contract.[8]It was noted that the contract object could only be a thing that was not limited in circulation. Moreover, if the purchase and sale were applied to movable things, then the sale of real estate couldn't be considered a type of contract, but only as a way of acquiring property rights.[9] Along with the sale of movable and immovable things, in the nineteenth century the auction sale of certain types of property (goods) was seen as a definite type of a deal, while the likelihood of a sale was limited to tangible things. The rules of sale and purchase did not apply to property rights.[10] The pre-sale (preliminary

[3] Vladimir A. Slyshchenkov, *Purchase and Sale as an Obligation in the Light of the History and Philosophy of Civil Law*, 12 Proc. Inst. State & L. RAS, 2017 No.5, at 58, 61.

[4] Slyshchenkov, *supra*, at 63, 65-7.

[5] Dmitry I. Meyer, Русское гражданское право. В 2 частях. часть 2 [Russian Civil Law. In 2 parts. Part 2] 575 (1997).

[6] Konstantin P. Pobedonostsev, Курс гражданского права. Часть третья: Договоры и обязательства [Course of civil law. Part 3: Contracts and Obligations] 300-30 (Синодальная Типография [Synodal Printing House] 1896).

[7] Georgy T. Slanov & Marina B. Tsalikova, *Evolution of the "Purchase and Sale Agreement"*, 1 Int'l Student Sci. Bull. 28 (2015).

[8] Elena V. Pechurina, *Purchase and Sale Agreement: History and Modernity*, Don's Young Explorer, 2021, No.1, at 90, 91.

[9] Elena V. Mishina, *The Apprenticeships About the Sale Contract in Soviet and Modern Civil Science,* Bull. St. Petersburg Univ. Ministry Internal Aff. Russ., 2008, No.2, at 140.

[10] S.A. Nikishina, *The History of the Development of the Sale and Purchase Agreement in the Law of the Pre-revolutionary Period*, Society and People, 2010, No.1, at 39, 40-1.

contract) and delivery of goods (i.e., transfer of property in the future) got closely related to the sale and purchase contract.[11] During the period of the U.S.S.R., with the abolition of private property and the nationalisation of the economy, the scope of the sale and purchase contract narrowed. However, it is precisely the Soviet law to which we owe the energy supply contracts, public supply of goods and contracting (supply of agricultural products).

Therefore, the development of the sale and purchase contract went through both the improvement of the legal technique of securing its provisions and the refinement of its subject matter, subjects, conditions, etc. Some types of sale and purchase disappeared (sale of slaves), while others, on the contrary, were created (energy supply, contracting). However, a radical quantitative and qualitative growth of fundamentally new types of sales and purchases occurred only in the late twentieth century is due to the information or "digital revolution", which will be discussed further in the next section of this article.

2. TYPES OF PURCHASE AND SALE AGREEMENTS IN MODERN CIVIL LAW

The issue of classifying contracts, including sale and purchase contracts, is significant in the theory of contract law. The theoretical substantiation of the classification backs up a clear system of types and subspecies of contracts in civil legislation codification acts, allowing better resolution of specific issues arising in law enforcement practice.[12] Thanks to the classification, we can identify the similarities and differences between certain types of sale and purchase contracts, which allows us to predict the further development of the contract system, identify potential challenges and eliminate them.

Currently, under the Russian legal system, sale and purchase contracts are subdivided into contracts for the sale of a thing and property rights; commercial and non-commercial; wholesale and retail; the sale of movable and immovable things. Among the varieties of purchase and sale, the Civil Code of Russia differentiates between contracts for retail sale and purchase, supply of goods, supply of goods for public needs, contracting, energy supply, sale of real estate and sale of an enterprise. In other countries, such lists of types of sales and purchases may vary. The French Civil Code does

[11] Julia G. Serova, Institute of Sales in Russian Law of the 18th-19th centuries 9 (2007) (unpublished thesis, Lobachevsky Nizhny Novgorod State University); Yulia Valerevna Repnikova, *Preliminary Contract (agreement to sell) - the Method of Securing the Performance of Obligations?*, 8 Just. & L. 47 (2019).

[12] Hong Ch. L., Sale and Purchase Contract Under the Laws of Russia and Vietnam 54-55 (2000) (unpublished thesis, St. Petersburg State University of Economics and Finance).

not generally contain a comprehensive list of sale and purchase types, although on many occasions it mentions the sale of real estate (including land), shares, food and fodder, commercial complexes, retail sales, sale of properties at public auctions, etc...

The Civil Codes of Georgia, Germany and Turkmenistan are similar to the French Code. In turn, the Civil Codes of Armenia, Belarus, Kazakhstan, Ukraine, and the Kyrgyz Republic are built according to the Russian model, where they define different types of sales and purchases. All these Codes feature a classic set of sale and purchase types, which has not changed for several decades, although the law and society of these countries have changed dramatically.

A similar trend can be observed in private international law. The U.N. Convention of April 11, 1980 "On contracts for the international sale of goods" applies to contracts for the sale of "common" goods between commercial enterprises located in different states. However, this international convention does not reflect the peculiarities of the sale and purchase generated by the "informatization" and digitalisation of the legal space, limiting itself to the traditional understanding of the "product".

Thus, the civil legislation of most countries qualifies a typical set of sale and purchase types. And although they do not mean the literal coincidence of legal regulation measures in this sphere of social relations, we can talk about making a distinction between wholesale and retail sales; the sale of movable and immovable things; establishing a list of objects of civil legal relations, withdrawn, or restricted in circulation, etc. In addition, we can talk about particular rules governing the purchase and sale of an enterprise,[13] establishing the rules of both domestic and international trade[14] (especially when selling oil or other hydrocarbon raw materials - take-or-pay settlement formula),[15] peculiarities of the sale and purchase of natural resources (for example, holding auctions to conclude a sale and purchase agreement for forest plantations or the right to lease a forest plot in the Forest Code of the Russian Federation). In relation to other natural resources, the same structure is established for the sale of the right to use (lease) them (only land plots can transfer to private ownership from the public one in Russia), mainly through tenders. An exception here is

[13] E.A. Malinovskaya, Elena N. Luneva, Особенности купли-продажи предприятия как имущественного комплекса [*Features of the Purchase and Sale of an Enterprise as a Property Complex*], 10-3 Modern Science 189-191 (2019).

[14] P.A. Guseva *On the Issue of Legal Regulation of Relations Arising from an International Sale and Purchase Agreement*, 2 actual problems of jurisprudence 5-10 (2018); M.Ya. Babaev, Условия договора международной купли-продажи товаров [*Terms of the Contract for the International Sale of Goods*], 6 Закон и Право [Justice and Law] 82-84 (2019).

[15] V.A. Saushkin, D.D. Michurin, Договор «бери или плати» в нефтегазовом секторе: нарушаются ли права бизнеса? [*Take-or-Pay in the Oil and Gas Sector: Are Business Rights Violated?*] 45 Молодой Ученый [Young Researcher] 163 (2020).

atmospheric air, the right to use which (for example, in terms of emissions of harmful gases) is regulated by the administrative (public) order, through the establishment of standards for emissions of harmful substances.

A more human treatment of animals can highlight the issues of registration and sale of pets.[16] Within the framework of the classical concepts of a sale and purchase contract, judgments are made about the nature of the electricity purchase,[17] blood and its components,[18] human organs and tissues,[19] future real estate[20] and construction objects in progress,[21] business,[22] property rights[23] and parking spaces in an apartment building as a new property.[24]

In the above examples, despite some specificity of the subject of sale and purchase, "common" objects of civil rights are present, many of which (real estate) existed in the days of Roman law, and the rest (electricity) have also long become "classics".

Meanwhile, the twenty-first century has posed new problems to which the scientific community is still searching for a reasonable and effective response. In recent years, we have received a study on the issues of the purchase and sale contract of a game

[16] M. Timofeeva, Животные как объекты гражданских прав и предмет договора купли-продажи [*Animals as Objects of Civil Rights and the Subject of a Sale and Purchase Agreement*], *in* Актуальные проблемы правотворчества и правоприменительной деятельности [Actual problems of lawmaking and law enforcement. Materials of the Scientific and Practical Conference] 145-148(2010), http://lib.lawinstitut.ru/ru/virtualexposition/newbooks/43-677679.pdf.

[17] Ya.Yu. Zaharenkova, Понятие, стороны, содержание, ответственность и прекращение договора энергоснабжения как разновидности договора купли-продажи [*Concept, Parties, Content, Responsibility and Termination of an Energy Supply Agreement as a Variety of a Sales Agreement*], *in* Сборник научных статей по материалам международной научно-практической конференции. В II частях [Actual Problems of Economics and Law. Collection of papers of the International Scientific and Practical Conference In II parts], (B.M. Magomedova ed.) (Rostov-on-Don: Rostov Institute (branch) of the All-Russian State University of Justice, 2020) 132-135, https://www.elibrary.ru/item.asp?id=43860446.

[18] A.N. Zhigulskikh, Кровь и ее компоненты как объекты купли-продажи в действующем законодательстве [*Blood and its Components as Objects of Sale and Purchase in the Current Legislation*], 1 Административное и Муниципальное Право [Administrative and Municipal Law] 8-11 (2013).

[19] S.A. Mazulina, Ya.V. Emelkina, *Article 120 of the Criminal Code of the Russian Federation: Efficiency and Development Prospects. Can Human Organs and Tissues be Recognized as Objects of Civil Turnover?*, 1 Union Criminalists & Criminologists 139 (2021).

[20] A.X. Chagaeva, *The Legal Nature of the Contract of Purchase and Sale the Future of Real Estate,* 1 Bulletin Ural Inst. Econ., Mgmt. & L. 81 (2018).

[21] *See* Z.K. Kondratenko, R.R. Galiullin, Проблемы судебной практики при рассмотрении дел, связанных с гражданским оборотом объектов незавершенного строительства [*Problems of Judicial Practice when Considering Cases Related to the Civil Circulation of Objects of Unfinished Construction*], 7 Юрисконсульт в строительстве [Legal Advisor in Construction] 44-49 (2018); A.A. Neznamova, Особенности договора купли-продажи объекта незавершенного строительства [*Features of the Contract of Purchase and Sale of an Object of Construction in Progress*], 11 Юридический мир [Legal World] 29-33 (2014).

[22] *See* V.V. Fayustova, Проблема покупки и продажи бизнеса [*The Problem of Buying and Selling a Business*], *in* Prospects for the Development of Enterprises in the Context of an innovative Orientation of the Economy Papers of the III International Scientific and Practical Conference (V.I Budina, A.N. Opekunova eds.) (Penza State University, 2017) 144-148.

[23] *See* E.K. Drapeko, *Property Rights as an Object of the Purchase and Sale Agreement*, *in* Legal System and Challenges of Modernity. Materials of the XIV International Scientific Conference of Students, Postgraduates and Young Scientists in the framework of the II International Legal Youth Forum (Ufa: Bashkir State University, 2017) 88-91.

[24] *See* Olga Grigorievna Lazarenkova, *On the Dual Legal Regime of a New Real Estate Object, Parking Space and a Single Problem in the Execution of Purchase and Sale Transactions*, 3 Notary, 2019, at 26.

account[25] (or, in general, any other transactions for the purchase of game content on the Internet),[26] information and technology,[27] sale of "beautiful" subscribers' telephone numbers,[28] cryptocurrencies,[29] domain names,[30] purchase and sales of a ready-made business on the Internet (and online stores),[31] sale and purchase of mobile applications on the Internet by smartphone users,[32] digital rights or digital civil rights objects,[33] etc... The terms "e-commerce" and "mobile commerce" are spreading,[34] and the likelihood of using robots when concluding contracts are being discussed.[35] Historical bans on human trafficking persist,[36] sale of state awards (orders, medals),[37] drug sale[38] and sale of

[25] *See* I.N. Merkulenko, *Game Account Sale and Purchase Agreement*, *in* LXIII International Scientific Readings (in memory of A.A. Bochvar): Collection of papers of the International Scientific and Practical Conference (Moscow: LLC «European Fund for Innovative Development», 2020) 30-32.

[26] *See* V.K. Kalmyk, Проблемы квалификации сделок по приобретению игрового контента несовершеннолетними в сети Интернет [*Problems of Qualifying Transactions for the Acquisition of Gaming Content by Minors on the Internet*], 8 Вопросы Российской Юстиции [Issues of Russian Justice] 165-176 (2020).

[27] *See* V.V. Braun, Информация и Технологии как объект купли-продажи [*Information and Technology as an Object of Purchase and Sale]*, 21 Наука и современность [Science and Modernity] 198-201 (2013).

[28] *See* P.Yu. Kostin, Абонентский номер и его оборот: вопросы гражданско-правовой квалификации [*Subscriber Number and its Turnover: Issues of Civil Legal Qualifications*], 5 Актуальные проблемы российского права [Actual Issues of Russians Law] 788-793 (2014).

[29] *See* G.A. Petrosyan, *Legal Regulation of the Cryptocurrency Purchase and Sale Agreement*, *in* Constitutional Development of Modern Russia: Problems, Patterns, Prospects. Materials of the All-Russian Scientific Conference (Rostov-on-Don: Individual entrepreneur S.V. Bespamyatnov, 2020) 150-154.

[30] *See* V.V. Kostenko, *Russian practice of domain name evaluation*, 11-4 Intellectual Property Exchange 24-30 (2012).

[31] *See* A.V. Samigulina, Особенности купли-продажи готового бизнеса и нормативного регулирования купли-продажи предприятия в сфере компьютерной сети интернет. Интернет-магазин – объект купли-продажи [*Features of the Sale and Purchase of a Ready-made Business on the Internet. Online Store - an Object of Purchase and Sale]*, *in* Проблемы и перспективы развития наук гражданско-правового цикла. Сборник материалов научно-практической конференции кафедры гражданского права [Problems and Prospects for the Development of Civil Law Cycle Sciences. Collection of Materials of the Scientific-Practical Conference of the Department of Civil Law] (Lyubertsy: Russian Customs Academy, 2014) 44-47.

[32] Nadezhda Kuznetsova, *The Features of Mobile Application Purchase*, 2 Electronic Supplement to the J. Russian L. 73 (2018).

[33] O.S. Grin, *Legally Binding Relationships with Regard to Digital Objects of Civil Rights*, 10 Lex Russica 21 (2020). On the sale of digital financial assets, *see also* Federal'nyi Zakon RF, O Tsifrovykh Finansovykh Aktivah, Tsifrovoi Valute i o Vnesenii Izmeneniy v Otdel'nye Zakonodatel'nye Akty Rossiiskoi Federatsii [Federal Law On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation], Sobranie Zakonodatel'Stva, Rossiiskoi Federatsii [Sz Rf] [Russian Federation Collection of Legislation], 2021, No. 21, item 3495.

[34] *See* D.A. Turicyn, Договор купли-продажи в условиях цифровизации договорного права [*Sale and Purchase Contract in the Context of Digitalization of Contract Law*], 12 Гуманитарные, социально-экономические и общественные науки [Humanities, Socio-Economic and Social Sciences] 309-312 (2019).

[35] V.K Shaydullina, *Transformation of contract law in the conditions of digital economy*, 9 Baltic Humanitarian J. 390 (2020).

[36] *See* A.V. Serebrennikova, A.V. Staroverov, *Socio-criminological and legal nature of human trafficking*, 1-1 Bulletin of the State University Dubna, Series: Science About Man and Society 24-32 (2020).

[37] *See* S.V. Shashuro, *On criminal liability for the acquisition or sale of state awards of the USSR and the RSFSR*, 2 Bulletin of the Belgorod Law Institute of the Ministry of Internal Affairs in Russia 17-24 (2021).

[38] *See* M.V. Borisenko, A.M. Kalyak, *Analysis of the situation of drug consumption, drug trafficking and the fight against their illicit trafficking at the present time*, 4 Interactive Science 170-172 (2017).

weapons (with the establishment of special rules in international law) are not permitted.[39] Foreign trade transactions related to the import and disposal of hazardous waste from one state on the territory of another requires a separate study.[40] A brief review above shows that at the moment in Russian civil law - though not only in Russia, there is a growing number of "non-standard" sale and purchase contracts that are not known to the former legal order. Accordingly, we can classify all existing sale and purchase contracts into four groups: classic types, which have not changed much since the time of Roman law; post-classical, included in the Civil Code of Russia and many other countries of the world; post-classical, not included in the Civil Code, but generally falling within its frames; informational, not fully reflected in civil legislation, requiring further study. This circumstance requires a revision of the contract law concept, including a change in attitudes about the types of sale and purchase, the very action for agreeing, its parties and conditions, for which the Russian legislator is not yet ready. A particular case within this trend is the emerging need for the legal regulation of greenhouse gas trade, which can be both international and domestic in nature.

It should be noted that in the development of modern contract law, in connection with the introduction of more and more new objects into circulation, the legal thought of European scientists and scientists of the United States [hereinafter U.S.A.] is ahead of the Russian one. The same can be said about the inclusion of environmental requirements in the legislation of the Member States of the European Union and in the U.S.A., whereas in Russia the inclusion of environmental requirements in legislation is fragmentary.[41] Nevertheless, a number of scientists pointed out the universal "untapped capacity of existing laws to increase the resilience of socio-ecological systems".[42] Too many actors with divergent interests in this area hinder the advancement of a large-scale reform to restructure legal systems with a focus on the environmental safety of the whole world. As experts note: "There is little evidence that the United States, the European Union, or other nations are prepared and willing at this time to initiate that scale of reform".[43] It is proposed to combine the insights from climate science and economics ("integrated assessment models") to "estimate how industrial and agricultural processes might be transformed to tackle global warming".[44]

[39] *See* A. Haruca, Topical Issues of International Legal Regulation of Arms Sales in the Modern World 8-9 (2011) (unpublished thesis) (Institute of History, State and Law of the Academy of Sciences of Moldova).
[40] *See* I.Yu. Zhilina, *International trade in waste*, 4 Social Sciences and Humanities, Domestic and Foreign Literature. Series 2: Economics Abstract Journal 42-47 (2018).
[41] T.Y. Khabrieva, *Cylic Normative Arrays in Law*, J. Russian L. No. 12, 2019 at 5, 12.
[42] Jason MacLean, *Learning to Overcome Political Opposition to Transformative Environmental Law*, 117 Proc. Nat'l Acad. Sci. 8243 (2020).
[43] Ahjond Garmestani et al., *Untapped Capacity for Resilience in Environmental Law,* 116 Proc. Nat'l Acad. Sci. 19899 (2019).
[44] Wei Peng et. al., *Climate Policy Models Need to Get Real About People Here's How*, 594 Nature 174 (2021).

3. CLIMATE CHANGE AND THE ROLE OF THE PARIS CLIMATE AGREEMENT IN THE EMERGENCE OF NEW FORMS AND METHODS OF COMBATING GREENHOUSE GASES

The growth of industrial production and emissions of harmful substances in the twentieth century had a significant impact, both on the condition of nature (waters, lands, forests, etc.), and on the state of the climate. The main reason for these changes is traditionally associated with the increase in greenhouse gases in the Earth's atmosphere, which entails a growth in average annual temperatures, melting glaciers and a rise in the level of the Oceans. In turn, these changes are driving an increase in climate refugees,[45] desertification, floods, forest fires, and a reduction in permafrost areas in the Arctic north.[46] Two strategies were then proposed: mitigation and adaptation to climate change, which was reflected first in the Kyoto Protocol and then in the Paris Agreement on Climate 2015. In the framework of the latter, most countries in the world have pledged to reduce their greenhouse gas emissions to prevent 1.5 degrees Celsius global air temperature rise. The world community believes that a two-degree increase in temperature will have a catastrophic effect on the Earth's climate.[47]

It should be noted that the Paris Agreement does not expect international payments for emissions, and there are no sanctions for non-compliance with its provisions, which makes it vulnerable and allows us to assume non-fulfilment cases by states.[48] Moreover, the Paris Agreement does not include clear and quantifiable financial commitments from developed countries to help developing countries achieve mitigation and adaptation, and does not impose specific climate change policies or binding emission reduction targets.[49] The agreement's vulnerability was evidenced when the United States withdrew from the Paris Agreement signed in 2016 by President Barack Obama during the presidency of D. Trump, but in 2021, under President J. Biden, the United States returned to it. Given such instability, it is quite expected that various proposals are made in the scientific literature aimed at increasing the level of trust between the parties to the Paris Agreement of 2015 and improving the efficiency of its operation, for

[45] Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, Global Envtl. Pol., Feb. 1, 2010, at 60.

[46] S. Kuvaldin, *Nuclear energy and climate change mitigation in the context of the Paris Climate Agreement*, 22, 3-4 Security Index 43 (2016).

[47] O.L. Dubovik, K.N. Averina *Significance of the Paris Agreement for climate protection: large-scale plans and problems with their implementation*, 4 International Law and International Organizations 22 (2018).

[48] Noah M. Sachs, *The Paris Agreement in the 2020s: Breakdown or Breakup?*, 46 Ecology L.Q. 865, 872 (2019); Tatiana Rovinskaya, *U.S. Withdrawal from the Paris Climate Agreement and Its Possible Consequences,* 64 World Econ. & Int'l Rel. No. 4, 2020, at 106, 108.

[49] Paul Lewis & Giovanni Coinu, *Climate Change, The Paris Agreement, and Subsidiarity*, 52 Uic John Marshall L. Rev. 257, 268 (2019).

example, through the creation of a system of deposits of all U.N. countries, which would not be subject to refund in case the country violates its obligations.[50] Alternatively, we can consider the proposal to introduce a carbon tax for the products of countries that do not participate in the 2015 Paris Climate Agreement.[51]

One of the tools to combat climate change, initiated by the Kyoto Protocol, is emissions trading. In its most general form, this measure means that the state or individual economic entities on its territory can sell and buy quotas for greenhouse gas emissions on the national, regional, and international markets.[52]

The development of this emissions trading system was initially based on the trading platforms that already existed when the Kyoto Protocol was signed - the European Union Greenhouse Gas Emissions Trading System and the Regional Greenhouse Gas Initiative signed by a number of northeastern states and the state of California (U.S.A.).[53] It should be noted that the Paris Agreement does not strictly link its goals with the emission trading mechanism, but it also does not contain obstacles to the use of flexible mechanisms for reducing greenhouse gas emissions. Therefore, quotas are still traded, as it is obvious from Article 6 of the Agreement.[54] At the twenty-sixth meeting of the Conference of the Parties [hereinafter C.O.P.26], held from October 31 to November 12, 2021 in Glasgow, in addition to agreements on administrative approaches to reduce emissions in the fight against the climate crisis, states reached new agreements on market mechanisms that support the transfer of emission reductions between states, encouraging the private sector to invest in environmentally friendly solutions. These solutions correlate with the conclusions of those experts who associate the reduction of the load on nature with the motivation of entrepreneurs to attract the best technology, who, due to this, will be able to sell the quotas provided to them and receive additional benefits. In addition, C.O.P.26 solutions related to market-based regulation of emission reductions should push the Paris Agreement member states to introduce national policies that encourage support for enterprises selling their allocated allowances and therefore reducing emissions. Nevertheless, as it is impossible to solve all the details of such a mechanism at the C.O.P.26 level, they must be solved at the level of national legislation. Thus, the question of the legal nature of such trade in quotas, and, in particular, the subject and elements of the contract for their sale, remains open.

[50] Bryan H. Druzin, *A Plan to Strengthen the Paris Climate Agreement*, 84 Fordham L. Rev. Res Gestae 18, 21-22 (2016).
[51] *See* Annum Rashedi, *Can the EU Carbon Tax the U.S. in Retaliation?*, 17 SUSTAINABLE DEV. L. & POL'Y, n. 1, 2017, at 18, 18-19.
[52] *See* Siarhei Zenchenko, *Paris Agreement on Climate Change: Tasks for Belarus and Russia*, *in* Russian-Belarusian Integration: From Idea to Implementation. Collection of Scientific Articles 66 (2016).
[53] *See* David Wirth, *The Paris Agreement as a New Component of the UN Climate Regime*, 12 Int'l Org. Rsch. J., n. 4, 2017, at 185, 192.
[54] *Id.* at 207.

4. GREENHOUSE GAS [HEREINAFTER G.H.G.] EMISSION QUOTAS SALE AND PURCHASE AGREEMENT: SUBJECT, PARTIES AND OTHER FEATURES OF LEGAL REGULATION

4.1. PUBLIC LAW BACKGROUND FOR THE SALE OF G.H.G. EMISSION QUOTAS

The sale of quotas for greenhouse gas emissions between states is one of the most effective tools in combating an increase in average annual temperatures, as well as one of the most important guarantees of environmental human rights.[55] Currently, trading in quotas has not become widespread, because of many reasons. In our opinion, a stimulus for its acknowledgement could be the development of a framework agreement on the emission of quotas' sale, which could be recommended by the U.N. to the Paris Agreement parties. However, the development of such a treaty will inevitably entail discussion of several of its substantive aspects of international and national law. In this regard, we will try to identify the features of national and international systems of quota trading. The pricing mechanism in the carbon market introduced by the Kyoto Protocol is potentially one of the most promising economic methods for the transition of any country to a "green economy", a tool for reducing greenhouse gas emissions.[56] In the scientific literature, attitudes towards greenhouse gas emissions trading are rather conflicting. Some authors compare "emissions trading" with "air trading",[57] thus rejecting the positive role of market mechanisms in the fight against greenhouse gas emissions. Other authors are researching some moral objections to greenhouse gas emissions trading.[58] Others still endorse and support the emissions trading mechanism.[59]

In our opinion, the main advantage of using carbon markets among other measures to reduce greenhouse gas emissions, is that they stimulate emission reductions where it is economically viable, which allows achieving emission targets through lower economic costs. Initially, the volume of emissions is set by the government of each country by

[55] David Hunter, Wenhui Ji & Jenna Ruddock, *The Paris Agreement and Global Climate Litigation after the Trump Withdrawal*, 34 Md. J. Int'l L. 224, 232-33 (2019).

[56] S.Zh. Smoilov, *Issues of legal support of the mechanism of economic regulation of environmental protection and nature management in the Republic of Kazakhstan* (Lev Gumilyov Eurasian National University, Working Paper, 2018) 16.

[57] *See*, e.g., Vladimir Pavlenko & Lesya Tychkovska, *Inward Territorial Capital of National Economy Sustainable Development*, Economics of Nature and the Environment 156, (2012).

[58] *See*, e.g., Ragnhild Haugli Braaten, Kjell Arne Brekke & Ole Rogeberg, *Buying the Right to Do Wrong - An Experimental Test of Moral Objections to Trading Emission Permits*, 42 Res. & Energy Econ. 110, (2015).

[59] *See, e.g.*, N.V. Kichigin, N.I. Hludeneva *Legal mechanism for the implementation of the Kyoto Protocol in Russia* (Moscow: Институт законодательства и сравнительного правоведения при Правительстве РФ [Institute of Legislation and Comparative Law under the Government of the Russian Federation], 2009).

political decisions, but then the total limit is distributed among economic entities, which should not emit more CO2 into the atmosphere than they were prescribed. Those who substantially cut their emissions can sell their surplus. This scheme operates both nationally and internationally, shaping the sales market. Currently, according to some estimates, there are eighteen emission trading schemes in the world, and their number is growing every year. These schemes include the European Emissions Trading System, the Swiss Emissions Trading System, the Kazakhstan Emissions Trading System, etc..[60] Each of them has its features. For example, in China, pilot carbon trading projects were first launched in seven provinces and municipalities (Beijing, Tianjin, Shanghai, Guangdong, Hubei, Shenzhen, and Hebei). In December 2016, Fujian Province became China's eighth pilot carbon trading region with a series of policy documents, including the Fujian Provincial Carbon Trading Market Implementation Plan and Fujian Provincial Carbon Trading Interim Measures.[61] Then these projects started mushrooming in the country. As of May 2019, 310 million tons of carbon dioxide quotas were sold in the pilot carbon trading market in China, with a total value of 6.8 billion yuan. At the same time, the existing schemes for allocating carbon rights consider only the population size and the economic development needs; they rarely reflect differences in natural resources and the environment. But the natural factors of the regions (climatic factors, energy resources, the availability of forest resources) strongly affect the accumulation of carbon.[62]

In Kazakhstan, the mechanism for trading in quotas is stipulated in the Environmental Code of the Republic of Kazakhstan dated January 2, 2021[hereinafter E.C.]. The Code, notes that the carbon quota is the quantitative volume of quota greenhouse gas emissions established for the period of validity of the National Carbon Quota Plan and credited to the corresponding account of the operator of the quota plant in the state register of carbon units. The carbon trading system consists of primary and secondary carbon markets. In the primary market, the carbon trading system operator sells carbon credits from the relevant reserve category of the National Carbon Credit Plan to the carbon market entities at an auction. In the secondary market, the subjects of the carbon market buy and sell carbon units through a direct transaction or a commodity exchange (Article 299 of the E.C. of the Republic of Kazakhstan). In its turn, in 2003 the European Union [hereinafter E.U.] adopted Directive 2003/87/EC on the organisation of the system of trading in emissions of greenhouse gases, according to

[60] *See* Veronica Caciagli, *Emission Trading Schemes and Carbon Markets in the NDCs: Their Contribution to the Paris Agreement.* In: Theory and Practice of Climate Adaptation 541-550 (Fàtima Alves et. al. Eds., 2018).

[61] *See,* e.g.*,* Gang Ding & al., *A Study on the Classification of China's Provincial Carbon Emissions Trading Policy Instruments: Taking Fujian Province as an Example* 5 Energy Rep., 1543 (2019).

[62] *See* Huijun Zhou et. al., *China's Initial Allocation of Interprovincial Carbon Emission Rights Considering Historical Carbon Transfers: Program Design and Efficiency Evaluation*, Ecological Indicators, Feb. 2021, at 1.

which the internal European market for emissions trading started on the 1st of January, 2005. While trading, emission certificates are transferred, and this system includes air traffic in Europe and beyond. Trade does not involve countries, but enterprises. Either the enterprise emissions can be reduced, or additional rights to emissions are bought. For example, in Germany, this Directive was transformed into national law through a special law on greenhouse gas emissions trading.[63] Subsequently, the E.U. adopted several directives and resolutions on this issue.

One of the examples is the Regulation No. 1031/2010 of the European Commission "On the timing, administration and other aspects of auctioning of greenhouse gas emission allowances under Directive 2003/87/EC of the European Parliament and the Council establishing the scheme for greenhouse gas emission allowances trading within the Community" (it defines the requirements for the auctions, establishes bans on abuse during auctions, etc.). Note that the E.U. member states have now decided to raise their targets for reducing greenhouse gas emissions by at least fifty-five per cent compared to 1990 levels by 2030. This is a significant improvement compared to the forty per cent emission reduction target set in 2019. In December 2019, the European Commission launched a European Green Deal to achieve zero carbon emissions by 2050. This target is reflected in the E.U.'s long-term budget package of $2.2 trillion, which was agreed upon and signed by the E.U. members. The aforementioned trends in the development of emissions trading at the level of individual countries or their communities until recently, found little practical response in one of the parties to the Paris Agreement, Russia.

As noted above, in contrast to the Kyoto Protocol, the Paris Agreement does not establish strict limits on emissions, leaving the states to decide this issue themselves. For example, Russia has set a target to reduce G.H.G. emissions to seventy per cent relative to 1990 levels by 2030.[64]

Having signed the Kyoto Protocol, Russia (like other countries) faced a dilemma of whether to use only administrative tools or market mechanisms to achieve this goal. The general climate strategy was formed in 2009 when the Climate Doctrine of the Russian Federation was approved. It focused on the assessment of climate changes, their analysis, the development of measures to mitigate and adapt to climate change, etc.[65]

[63] *See*, e.g., Völkerrecht [International law], Wolfgang G. Witzthum et. al., Международное право [International Law] 670 (2d ed. 2015).

[64] Decree of the President of the Russian Federation of November 4, 2020 No 666 «On reducing greenhouse gas emissions». In: Legal reference system «Consultant Plus», access date 24.07.2021.

[65] *See also* Order of the President of the Russian Federation of 12/17/2009 No. 861-rp «On the Climate Doctrine of the Russian Federation». In: Legal reference system «Consultant Plus», access date 24.07.2021.

Soon, the Government of the Russian Federation ordered to create a register of carbon units,[66] determine the amounts of greenhouse gas emissions,[67] monitor and verify quantities of greenhouse gas emissions,[68] etc... A special federal law[69] commissioned to experiment on administrative (non-market) emission quotas.

The adoption of these measures was necessary because the international transfer of quotas for G.H.G. emissions is specifically linked to certain projects. In other words, one should not just expect the benefits of emissions trading, as this trading is not possible until a national G.H.G. accounting system, an emission inventory and a register of G.H.G. emission allowances transactions are in place.[70] Russian measures resulted in 108 approved projects aimed at reducing G.H.G. emissions with a total carbon potential of 311.6 million tons of carbon dioxide equivalent. Thus, Russia becomes a leader in the global carbon market after China with a project portfolio of 700 million tons of carbon dioxide equivalent, ahead of a number of its competitors.[71]

These trends are of particular interest because, according to the World Bank, the value of the market for emissions quotas can reach two-three trillion dollars per year (in Russia - 1.5-three billion dollars by 2030).[72] 2021 has been marked by two important events in Russia. First, the federal law of July 2, 2021 No. 296-FZ "On limiting greenhouse gas emissions" was accepted. The law provides for accounting and registering carbon units, their circulation and offset, targets for reducing greenhouse gas emissions, etc... Second, an experiment on trading greenhouse gas emissions began on Sakhalin Island, with the goal to achieve the region's carbon neutrality by 2025. This is meant to create optimal conditions to reduce greenhouse gas emissions. As part of the experiment, a

[66] Russian register of carbon units, *see* Российский реестр углеродных единиц, http://www.carbonunitsregistry.ru/default.htm (last visited July 24, 2021).

[67] Order of the Ministry of Natural Resources and Environment of the Russian Federation of June 30, 2015 No. 300 «On approval of guidelines and guidelines for quantifying the volume of greenhouse gas emissions by organizations carrying out economic and other activities in the Russian Federation». *See also* Legal reference system «Consultant Plus» (last visited 24 Jul. 2021).

[68] Order of the Government of the Russian Federation of 04/22/2015 No. 716-r (revised on 04/30/2018) «On approval of the Concept for the formation of a monitoring, reporting and verification system for the volume of greenhouse gas emissions in the Russian Federation». *See also* In: Legal reference system «Consultant Plus», access date 24.07.2021.

[69] Federal Law of July 26, 2019 195-FZ «On an Experiment on Quoting Pollutant Emissions and Amendments to Certain Legislative Acts of the Russian Federation to Reduce Air Pollution». *See* In: Legal reference system «Consultant Plus», access date 24.07.2021.

[70] *See* Серебренникова А.В., Староверов А.В, Yu.V. Smirnova, [International standards for the regulation of anthropogenic emissions of pollutants into the atmosphere in the field of civil aviation], 3 Транспортное Право [Transport Law] 22-27 (2008).

[71] *See also* A.A. Averchenkov, A.Yu. Galenovich, A.Yu. Safonov G.V., Yu.N. Fedorov Регулирование выбросов парниковых газов как фактор повышения конкурентоспособности России [Regulation of greenhouse gas emissions as a factor in increasing Russia's competitiveness] (Moscow: Национальная организация поддержки проектов поглощения углерода [N.O.P.P.P.U.], 2013) 54.

[72] The Expert Estimated the Turnover of Trading in Carbon Units in Russia by 2030. *See* In: <https://1prime.ru/commodities/20210619/833975603.html> (last visited July 24, 2021).

regional inventory of greenhouse gas emissions and removals will be carried out on the island. In 2022, an information system to maintain registers of experiment participants, climate projects, and carbon units will be tested. Carbon trading will start the same year.[73] Nevertheless, according to research by the "Skolkovo" Moscow School of Management Energy Center, published in the report "The Global Climate Threat and the Russian Economy: In Search of a Special Path", in Russia the problem of climate change "is not among the priorities of state policy, both at the federal and at the regional level, however, there is a growing interest from corporations in reducing their carbon footprint".[74] Different political forces have different attitudes to quota trading. Some believe that Russia should take part in the global quota trading market, while others advocate self-isolation and reducing the country's dependence on European processes and emissions quota reforms.[75] Within the framework of this discussion, we advocate the expansion of Russia's contacts with the EU, the growth of quota trade, and approve the conduct of an experiment in one of the Russian regions (Sakhalin Island), which in itself may be of interest to the world community for exploring the potential of the chosen path of development in a particular region and spreading this experience (if good results are obtained) on the territory of other subjects of the Russian Federation and other countries of the world.

Despite the progress of individual countries, the demand of states to buy quotas for greenhouse gas emissions from each other is unlikely to grow.[76] Major discrepancies between intentions to purchase and sell raises new questions about the chances for developing countries seeking to generate additional revenues to meet part of their climate change mitigation commitments through carbon markets to receive the financing they expect. Meanwhile, such cases of carbon cooperation are well known. For example, in December 2010, the Russian Gazpromneft and two Japanese companies (Mitsubishi and Nippon Oil) agreed to develop the Ety-Purovskoye field in the Yamalo-Nenets Autonomous District, within the framework of which Gazpromneft fields pipelines through which associated gas was transported (instead of burning) to the

[73] *See* Duel A. Sakhalin will start trading carbon units, RG.RU, https://rg.ru/2021/01/19/reg-dfo/na-sahaline-nachnut-torgovat-uglerodnymi-edinicami.html (last visited July 24, 2021).

[74] Report of the Moscow School of Management «Skolkovo»: Global Climatic Threat and Russian Economy: Searching for the Way, Представительство Европейского Союза в Российской Федерации [Delegation of the European Union to the Russian Federation], https://www.eeas.europa.eu/delegations/russia/опубликовано-исследование-«глобальная-климатическая-угроза-и-экономика-россии-в_ru (last visited Dic. 20, 2021).

[75] The national market of carbon units will protect exporters. *See* https://www.kommersant.ru/doc/4936775. (last visited Dic. 19, 2021); *see also* Environmentalists object to the trade in «Kyoto quotas» (last visited Dic. 20, 2021), https://ria.ru/20080129/97963595.html (last visited Dic. 20, 2021).

[76] Although at the moment, despite the coronavirus pandemic, emission quotas have risen by thirty percent in 2020.

processing facilities of SIBUR in exchange for compensation of Gazpromneft with technologies and equipment.[77] This transaction in the Russian papers is characterised as the sale of emission of quotas,[78] while it looks more like another economic instrument under the Kyoto Protocol, "The Clean Development Mechanism",[79] when a developed country, instead of reducing its G.H.G. emissions, invests in a project to reduce them in a developing country, offsetting its own commitments to reduce G.H.G. emissions under the Kyoto Protocol.

Thus, now, thanks to the reform of national legislation in many countries of the world, prerequisites have been created not only for the further development of national carbon markets, but also for the development of emissions trading between states. In the latter case, the subject of such an agreement will be an emission quota, the volume of which depends on the extent to which the buying state exceeds the quota of G.H.G. emissions on its territory over its obligations, and the price of the quota can be determined based on the results of negotiations or at auctions (tenders).

4.2. PRIVATE LAW FEATURES OF THE SALE OF G.H.G. EMISSION QUOTAS

Since the Paris Agreement assigns the main responsibility for efficient climate protection to national governments (while international institutions have mainly the coordination function),[80] it is necessary to study the mechanism for reducing G.H.G. emissions through national law. The design of any type of sale and purchase contract assumes that the seller transfers the goods to the buyer with the obligatory payment, which makes this contract bilateral, reciprocal and compensated. However, most countries do not define the legal concept of a commodity. From the context of their provisions, however, we can conclude that a "product" is an object of the material world that has a consumer value. Researchers usually focus on this aspect of the subject of the sale and purchase contract saying that the main property of a product is its ability to be consumed, while it is noted that consumption can be directed not only to the thing itself, but also to the object, not a thing. However, such an object must still be tangible.[81] But is a quota a commodity or some other tangible object? Many researchers answer this

[77] *See* Винницкий Д.В [D.V. Vinnitsky], Международное налоговое право: проблемы теории и практики [International Tax Law: Problems of Theory and Practice] 463(Статут [Statute], 2017).

[78] *See generally* M.M. Kakitelashvili, *Prospects for Russia's participation in the Kyoto Protocol*, 2 Environmental law 28-32 (2016).

[79] Daniya R. Minnekaeva, *Market Mechanisms of the Kyoto Protocol*, Bulletin of T.I.S.B.I., No. 2, 2005, at 84.

[80] *See, e.g.*, Igor A. Makarov & Iliev A. Stepanov, *Paris Agreement on Climate: Impact on World Energy and Challenges for Russia*, Topical Issues of Europe, No.1, 2018, at 77, 81.

[81] *See* Vasilisa M. Marukhno & Yevgenya Y. Rudenkko, *The Ability of Goods to Be Consumed as Their Main Property*, Sci. J. «Epomen», 40 2020, at 223.

question negatively[82] others strongly object to recognizing emission quotas as another natural resource[83] (although some researchers accept it this way, demanding a new policy on its use).[84]

Still others (G. Vinter) point out that G.H.G. quotas are a new type of commodity that is traded like any other commodity. At the same time, it is justly emphasised that trading in emission quotas makes sense for the environment only if the environmental justification of the limit is provided. Otherwise, the trade will not have a positive impact on the environment.[85] Similarly, D.S. Bocklan points out that "greenhouse gas quotas are themselves a commodity".[86]

This view is fully supported by I.V. Zamula and A.V. Kireitseva, who believes that "quotas are a special type of asset that can be a commodity and does not have a material form [. . .]".[87]

No less noteworthy opinion is expressed by Yu.S. Sorokina, argues that quotas for greenhouse gas emissions are neither a commodity nor a service, they are actually a licence that gives the right to a person to carry out regulated activities for the emission of greenhouse gases.[88] This approach is very interesting, but in Russia, greenhouse gas emissions are not subject to licensing,[89] and the sale of quotas for greenhouse gas emissions itself is still of a market and not of an administrative nature. Yu.V. Solovey believes that a quota is the maximum amount of greenhouse gases allowed for free emission into the atmosphere, the ownership of which belongs to a specific individual or legal entity legally registered as a source of greenhouse gas emissions.[90] Opposing him, V.A. Belov points out that "quantity" in itself cannot be an object of civil legal relations

[82] *E.g.*, Vadim A. Belov, *Civil Legal Relations in the Sphere of Turnover of Quotas for Greenhouse Gas Emissions,* Legislation, No.3, 2006, at 7.

[83] *E.g.*, Tatiana Y. Sidorova, *Implementation of the Idea of Differentiated Responsibilities from the Kyoto Protocol to the Paris Agreement*, Siberian L. Herald, No.1 2018, at 138-140.

[84] *See*, *e.g.*, D. Dudek, A.A. Golub & E.B. Strukova, Сопряженные рынки *[Related Markets],* Alfar http://www.alfar.ru/smart/4/838/ (last visited Mar. 03, 2022).

[85] Gerd Winter, *Climate is not a Commodity: Intermediate Results of the Emissions Trading System*, Env't. L., No. 2, 2010, 31-33.

[86] Боклан Д.С [Daria Sergeevna Boklan], Взаимодействие международного экологического и международного экономического права (диссертация доктора наук) [*Interaction Of International Environmental And International Economic Law (Doctoral Thesis)*], Московский Государственный Институт Международных Отношений (место защиты) [Moscow state Institute of International Relations (Place of Defence)] 53, (2016) https://www.prlib.ru/item/680618 (last visited Apr. 19, 2022).

[87] Irina V. Zamula & Anna V. Kireitseva, *Quotas for Greenhouse Gas Emissions as an Object of Accounting at Ukrainian Enterprises*, 46 Int'l. Acc. 50, 52 (2014).

[88] Yu.S. Sorokina, Issues of International Legal Regulation of Trading in Quotas for Greenhouse Gas Emissions 7 (2004) (unpublished thesis) (Peoples' Friendship University of Russia).

[89] [Federal Law of the Russian Federation on Licensing Certain Types of Activities] No 99-FZ (4 May 2011) (Consultant Plus).

[90] Yu.V.Solovey, Civil Law Regulation of Activities in the Field of Emission and Absorption of Greenhouse Gases 16 (2005) (unpublished thesis) (Russian State University for the Humanities).

but is only one of the possible characteristics of an object. By declaring the quota as a "limit on the amount of greenhouse gases", we are to call the greenhouse gases themselves an object of civil legal relations, i.e., we come to what the author of the concept of "quota-quantity" was so eager to distance from.

V.A. Belov then believes that "the prohibition of the emission of greenhouse gases - absolute or exceeding the quota - is, therefore, the border (limit) of such an element of legal capacity as the possibility of exercising subjective civil property rights".[91] This really explains the mechanism for limiting emissions, but does not answer the question of what exactly is sold to another person under the contract for the sale of quotas for greenhouse gas emissions. N.S. Zinovkin proposes to recognise the assimilation potential of the atmosphere as an independent object of civil rights. Then we can talk about owning a "share of the assimilation potential".[92] On the contrary, M.I. Vasilieva[93] believes that securing the right of ownership to the assimilation potential (or to atmospheric air) is impossible due to the "intangible nature" of this object. This remark is not devoid of logic, but the sale of non-material things has been practised since Roman law.

In our opinion, when trading emission quotas, air alienation (or assimilation potential) does not occur. But another important question remains open: can we consider gas (and its emission quota) as a special type of product? On the one hand, such an attitude to the problem is quite possible, because if the subject of the sale and purchase contract can be electricity, a game character, or a domain name, then why can such an emission not be a quota? At one time, the theory of civil law discussed the issue of the legal nature of the contract for the electricity supply. Many researchers were confused by the fact that electricity can not be attributed either to things or property rights. Therefore, the electricity supply agreement was proposed to be considered a kind of contractor agreement.[94] Later, several researchers argued that energy is a commodity, but not a thing.[95] Other Russian Civil Law experts concluded that energy as an object of civil rights "is a movable, simple, divisible, consumable thing, determined by generic characteristics".[96] Perhaps is there a similar problem with emission quotas?

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[91] Vadim Anatolyevich Belov (Белов Вадим Анатольевич), *Civil Law Aspects of the Implementation of the Kyoto Protocol: General Remarks and the Problem of the Object of Legal Relations*, 1 Legislation, 2006 at 9, 16.

[92] N.S. Zinovkin, Payment for Negative Impact on the Environment as an Environmental and Legal Regulator of Economic Activity 135 (2015) (unpublished thesis) (Moscow State Law University).

[93] M.I. Vasileva, *Legal Support for the Implementation of the Kyoto Protocol*, 25 On the Way to Sustainable Development of Russia (2003).

[94] *See* M.M. Agarkov, Подряд (текст и комментарий к статьям 220 - 235 ГК РФ) 13-14 (Law and Life, 1924).

[95] *See,* e.g., Mikhail Isaakovich Braginsky, Vasily Vladimirovich Vitryansky (Брагинский Михаил Исаакович, Витрянский Василий Владимирович), Contracts for the Transfer of Property 459 (4th ed. 2000).

[96] I. D. Egorov et al., Civil Law. Volume 2 83 (A.P. Sergeev & Yu.K. Tolstoy eds, Prospect, 1997); Vladimir Pavlovich Kamyshanskiy et al., Гражданское право: Часть вторая: Учебник для вузов Подробнее 41 (V. P. Kamyshansky, N. M., Korshunova & V.I. Ivanova eds., Eksmo, 2007).

It seems that the very recognition of a quota as a commodity fits well into the existing standards of legal technology when the legal fiction methodology is used. This means that certain legal subjects or phenomena are officially assigned signs (or functions) that they objectively lack. For example, Article 130 of the Civil Code of Russia recognises aeroplanes and ships as real estate objects, although, in reality, this is completely different (they are completely movable objects).

Similarly, it would be possible to deal with emission quotas, having recognised them as a commodity in a regulatory manner. However, in this case, another question arises: will it be a useful and legally practical expedient? Before answering this question, let us consider another scientific concept that offers explanations for the legal nature of emission of quotas. Its authors consider it expedient to fix the emission of quotas as a kind of property right - a separate type of object of civil legal relations mentioned in Article 128 of the Civil Code of Russia.

In particular, the emission quota is considered the property right by T.I. Semkina,[97] M.I. Vasilieva,[98] V.M. Shumilov[99] and other researchers. The authors of the adopted law "On limiting greenhouse gas emissions" adhere to the same position. What are the arguments in favour of this point of view? In the theory of Russian Civil Law, property rights are subdivided into property rights, obligations, and exclusive rights. At the same time, the following features of property rights are highlighted: they always belong to a certain person; represent a means of realising property interests; they can be alienated from one person to another; they have a monetary value.[100] Proceeding from the indicated signs, the right to release is a property right, has a monetary value and can be alienated.

The Civil Code of Russia mentions several special types of sale and purchase contracts, distinguished by the nature of the alienated object (contracts for the sale and purchase of securities, currency values, certain types of goods, as well as property rights), which, under the Civil Code of the Russian Federation, do not have special structural subdivisions, but at the same time, they have direct access to certain legislation with the priority of its specific rules (Paragraphs 2-4 of Article 454 of the Civil Code of the Russian Federation). In our case, such legislation is environmental legislation, which, however, in Russia (as opposed to Kazakhstan) does not contain special requirements for trading in quotas. Moreover, in the Russian Federation, the

[97] T.I. Semkina, *Determination of the Place of Sale of Services when Transferring Quotas for Greenhouse Gas Emissions*, 2 Tax Policy and Practice, 37 (2011).
[98] Vasileva, *supra* note 93.
[99] *See* V. M. Shumilov, International economic law: textbook 269 (Phoenix 2003).
[100] D.E. Menshikov, *Property rights as objects of civil rights*, 3 Ural journal of legal research 409-410 (2019).

climate itself is not object of environmental legal relations, although Russia has signed both the Kyoto Protocol and the Paris Climate Agreement.

While recognising the scientific value of the above concept, it should still be noted that property rights are derived from the possession of any type of property, but what kind of property is it in the case of trading in quotas? The doctrine does not specify nor solve this issue.

We believe that greenhouse gas is the result of the production activity of an enterprise, which adversely affects the environment, and belongs to the owner of the enterprise, who can alienate it on a paid basis by the quota established for him by public authorities (measured in tons). Accordingly, when an enterprise work is in progress, it produces a product (having a market value) and a by-product (emissions, discharges, waste) that the enterprise needs to dispose of. The issue of solid waste and the right of ownership to them as tangible objects have long been resolved in the Federal Law of 24.06.1998 No. 89-FZ "On production and consumption waste". According to Article 1 of this Law, such wastes are understood as "substances or objects that are formed in the process of production, the performance of work, provision of services or in the process of consumption, which are disposed of, intended for disposal, or subject to disposal". The enterprise will be charged a fee for the disposal of such waste.

An enterprise is also charged with a fee for emissions and discharges of hazardous substances; however, the issues of ownership of hazardous gases and liquid waste are not legally regulated. It seems that it is necessary to apply the legal precedent, equalling solid waste (sawdust, shavings, food waste, etc.) as objects of the material world to emissions (discharges) of harmful gases and liquids. In this case, it will become clear what exactly the owner is selling - gaseous waste [hereinafter G.W.], limited to a certain amount (quota). Solid waste can be expensive and can be sold in the market. The same approach should be applied to G.W., at least to greenhouse gases. Like the owner of solid waste, the owner of gaseous waste is limited by the quotas of their production, but there is one difference - the owner of gaseous waste can sell them at a quota auction; the owner of liquid and solid waste is deprived of such a right.

Given the Civil Law, gaseous waste is not a thing or a commodity (and not a property right). This, like solid waste, is a special type of object of environmental (and not civil) legal relations.

To eliminate this contradiction, Article 128 of the Civil Code of the Russian Federation should be supplemented with the following regulatory prescription:

> In cases provided for by federal laws, solid, liquid, and gaseous waste products of production and consumption, as well as other objects of the material world that meet the characteristics of the object of civil rights and are capable of being in civil circulation, may be recognized as objects of civil rights.

Here is the main issue: the current categories of civil and environmental law that emerged at the end of the twentieth century, fail to explain the objective reality, which has appeared and is rapidly developing in the twenty-first century. This explains the multitude of scientific concepts that try to understand the legal nature of emission quotas, and yet they are all equally feeble. Without claiming much, we will state several considerations.

1. G.W. can be recognised with legal status as a thing of a "special nature" that has no consumer value, but, on the contrary, poses a threat to the environment. Similar decisions have already been taken concerning solid waste, for example, radioactive waste, which has special requirements for sale and import into the country for disposal.

2. All-natural resources have their value and an owner. There are three forms of ownership in Russia - state, municipal, and private. Some natural resources can only be state owned, others can only be municipally owned. Private property may include land plots and small water bodies - ponds. There is no ownership of atmospheric air, although, for example, the public ownership of atmospheric air is secured in China, which is logical. In Russia, *de facto*, the air is also state owned, so the state authorities dispose of it - setting limits and standards, as well as emission quotas, receiving corresponding funds from nature users. Thus, our understanding of greenhouse gases will require a revision of the concept of ownership of natural resources. At the current state, there are five natural resources - land, forests, subsoil, etc., which are provided with different forms of ownership, while there is no special ownership on the sixth natural resource, the air. This does not seem logical, especially since all-natural resources are equally important and should be in the same system of "legal coordinates" in terms of issues of ownership of them.

3. The sale of emission quotas means the sale of property rights, or, more precisely, delegated by the G.W. owner the property right to release a certain amount (quota) of G.W. to another economic entity that is unable to emit gases due to the

restrictions on greenhouse gas emissions established by public authorities. As for solid waste, it can be both delivered to the landfill by the owner and disposed of by a certified company. In our case, the "landfill" (i.e., airspace) will in any case receive the amount of gaseous waste established by the state, but G.W. can get there at different times and from different sources (for example, one ton from one pipe and one ton from another).

4. The issue of dividing the territory of the Russian Federation into industrial zones according to the volume of greenhouse gas emissions requires discussion and resolution, and this may result in creating conditions for domestic quota trading.

5. A separate issue is the amending of the Civil Code of the Russian Federation with an additional paragraph on the sale and purchase of new types of civil rights objects, the number of which in the modern digital time is increasing every year. Among other things, it is necessary to develop a draft contract for the sale and purchase of property rights on G.W., while indicating the requirements for its subjects, essential conditions, and subject matter (quota size, type of greenhouse gases), and the contract price, terms, etc... At the same time, we note that the sale of such an object at auction should be legislatively fixed as the most efficient way of determining the price (as is done in the E.U. in Directive 2003/87 EC and Regulation No. 1031/2010).

6. It is necessary to create a pattern for registering quotas, a pattern for maintaining a turnover register, as well as the selection of a responsible public authority which can manage climate protection issues. This has already been partially done in Federal Law No. 296-FZ dated 02.07.2021 "On limiting greenhouse gas emissions", however, this law is too much framework in nature, which requires the adoption of many by-laws, the drafts of which are still under development.

7. In a federal state (including Russia), the effectiveness of these measures will strongly depend on the powers and activities of the subjects of the federation. Thus, the subjects of the federation should participate in the distribution of quotas throughout the country, defending the interests of their citizens and entrepreneurs. In this sense, the experience of the United States is very interesting: states are empowered to establish a maximum limit on greenhouse gas emissions on their territory, imposing restrictions on business entities and making commitments to reduce emissions by a certain year. Moreover, states are free to enter into agreements with each other (and with Canadian provinces) to coordinate emission reductions and emissions trading.

CONCLUSION

The conducted research concludes:

1. Climate change is naturally a global issue and it is closely related to one of the Sustainable Development Goals – which aims at taking urgent measures to combat climate change and its consequences (Goal 13). This goal cannot be achieved through the individual effort of the states. Such understanding led to the enhancement of international cooperation, through the adoption of the United Nations Framework Convention on Climate Change (U.N.F.C.C.C.), the Kyoto Protocol and the Paris Agreement on Climate 2015. Unlike the Kyoto Protocol, the provisions of the Paris Agreement are not mandatory. The intention of the authors of the Agreement is clear: not to overload it with legally binding obligations, so as not to scare away potential participating states. Despite the fact that the Paris Agreement does not specifically provide for the mandatory sale of quotas (although sales of quotas between states are gradually growing), it can be assumed that the aggravation of climate problems will lead to the signing of another agreement with stricter requirements and obligations, including emissions trading. Today, the growing number of signing countries of the Paris Agreement entails the rapid development of national legislation on quota trading, with China and the Republic of Kazakhstan being the leaders. Meanwhile, the civil codes of most countries do not include norms or chapters regulating the nature of such sales and purchases. This is the evidence of a discrepancy between the provisions of civil and environmental legislation.

2. Greenhouse gas must be legally recognised as an issue that, although devoid of consumer value, poses a threat to the state of the environment. The sale of a "quota" means the alienation of the property right to release a certain amount of greenhouse gases from one economic entity (owner of the G.W.) to another. Accordingly, the term "quota" itself is only a quantitative indicator of the alienated thing - G.W., and the gas itself, due to the specifics of this object of civil and environmental legal relations, does not pass from hand to hand, although its owner is changing. As in the case of solid waste, the new owner of a certain volume (quota) of gas pays for the placement of such gaseous waste (within the limits of the quota established by him - to the state, in terms of the purchased quota - to another economic entity).

3. The scope of the sale and purchase agreement has historically been extended to various objects of the material world (including the slave trade), and only in the digital age does it move to the Internet (sale of "virtual reality" or objects of the material world using computer technology)? Meanwhile, the emergence of an environmental global threat (including climate change) called for not only administrative but also market (civil) instruments that create incentives to reduce greenhouse gas emissions. Since both tendencies are poorly reflected in the national civil legislation, the latter requires a thorough reform. Among the issues, G.W. must find its location in the system of objects of civil legal relations, and in the field of environmental legal relations. Climate must be included in the object of civil legislation system.

4. The need to build a three-level legal strategy for climate protection (international-national-regional (local) legislation), is becoming more and more recognised by most countries of the world that are developing market mechanisms for nature protection, establishing partnerships between the public and private sectors to attract business to purposeful efforts to reduce the climate threat.

5. Setting emission quotas and trading in surplus quotas can be an effective tool to reduce greenhouse gas emissions and stimulate the introduction of innovative environmentally friendly technologies. Emission trading must be considered an important, though not the only, strategy in the legal regulation of climate.

In conclusion, we note that in the classic film "Indiana Jones and the Last Crusade", the antagonist must choose one among several bowls to identify the Holy Grail. Seduced by a shiny, bejewelled cube, he drinks from it and turns to dust. The old knight, watching this, sarcastically remarks: "He chose . . . wrong". This plot bears a strong resemblance to the contemporary climate challenge we face. And here - either the peoples of all countries of the world will be able to make the right choice and save the Earth's ecosystem, or the history of human civilisation will end. Given the interest in the climate issue of most countries and peoples of the world, as well as their growing cooperation, let's hope for a favourable outcome!

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Controlling Shareholders and Intra-Group Transactions: A Special Framework

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ABSTRACT

Controlling shareholders and their activities in publicly traded companies have long stirred debate and controversy. Still dominating the corporate landscape across the world, concentrated ownership has been associated with both extraction of private benefits of control (P.B.C.) and entrepreneurship. Drawing on the theories on corporate control, this article contributes to accomplishing the law's goal of promoting the entrepreneurial role of controlling shareholders, yet keeping P.B.C. extraction under restraint at the same time in the specific context of intra-group transactions – a breeding ground for both P.B.C. extraction and the implementation of an entrepreneurial idea by corporate controllers. The article submits nuanced and different means of overseeing intra-group transactions in a way that would optimally allow the implementation of a business plan by a controlling shareholder in a corporate group and protect minority shareholders, along with the examination of other issues that are relevant to the oversight of intra-group transactions.

KEYWORDS

Controlling Shareholders; Related-party Transactions; Intra-group Transactions; Corporate Groups; Minority Shareholder Protection

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INTRODUCTION

In most jurisdictions across the world, share ownership of public companies is characterised by a blockholding that effectively grants the control of the company to that shareholder.[1] While the existence of a controlling shareholder is associated with certain benefits, it also gives rise to a conflict of interest between the controlling shareholders and minority shareholders.[2] Most importantly, controlling shareholders can extract P.B.C.[3] to the detriment of the company and thus, of minority shareholders.[4]

Corporate controllers take different shapes.[5] And the question of why these corporate controllers hold onto the control of the company rather than disposing of the

[1] Only in the U.S., the U.K. and partly in Japan, dispersed share ownership is more common. *See*, *e.g.*, Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. Fin. 471 (1999); Mara Faccio & Larry H.P. Lang, *The Ultimate Ownership of Western European Corporations*, 65 J. Fin. Econ. 365 (2002); Julian Franks et al., *The Ownership of Japanese Corporations in the 20th Century*, 27 Rev. Fin. Stud. 2580 (2014); Stijn Claessens et al., *The Separation of Ownership and Control in East Asian Corporations*, 58 J. Fin. Econ. 81 (2000).

[2] *See* John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, *in* The Anatomy of Corporate Law 29, 30 (Reinier Kraakman et al. eds., 2017).

[3] On private benefits of control, *see* Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 Harv. L. Rev. 1641, 1663 (2006) (distinguishing between *pecuniary* private benefits of control and *non-pecuniary* private benefits of control). The former is defined as "the nonproportional flow of real resources from the company to the controlling shareholder" while the latter indicates "forms of psychic and other benefits that, without more, involve no transfer of real company resources and do not disproportionately dilute the value of the company's stock to a diversified investor such as social or political status resulting from the control of a large company." *Id.* at 1663–64.

[4] These private benefits of control are documented in studies that examine the control premia charged for controlling blocks or the price differentials between high- and low-voting shares. *See* Michael J. Barclay & Clifford G. Holderness, *Private Benefits from Control of Public Corporations*, 25 J. Fin. Econ. 371 (1989); Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. Fin. 537 (2004); Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. Fin. Econ. 325 (2003). Some studies also show that the market values the same cash flows/investments differently, depending on whether they can be expropriated by controlling shareholders or not, which reflects again private benefits of control. *See*, *e.g.*, Bernard S. Black et al., *Does Corporate Governance Predict Firms' Market Values? Evidence from Korea*, 22 J. L. Econ. & Org. 366 (2006); Bronwyn H. Hall & Raffaele Oriani, *Does the Market Value R&D Investment by European Firms? Evidence from a Panel of Manufacturing Firms in France, Germany, and Italy*, 24 Int'l J. Indus. Org. 971 (2006).

[5] Corporate controllers can be companies, individuals, families, institutional investors, the state etc.

controlling block of shares and pursuing a diversification strategy is vehemently debated. A common view is that corporate controllers exist because of the private benefits of control available to a controller in a jurisdiction that has implemented rather weak measures against tunnelling.[6] A relatively recent view argues that corporate controllers are entrepreneurs and hold a controlling block in order to be able to implement their idiosyncratic vision.[7] In this article, drawing on these theories associated with corporate controllers, I set out to examine a special context where controllers can both extract P.B.C. and implement an entrepreneurial vision: intra-group transactions.

Intra-group transactions as related party transactions [hereinafter R.P.T.s] are a breeding ground for corporate controllers to divert company value to themselves.[8] In jurisdictions dominated by controlled companies, corporate groups and intra-group transactions are prevalent.[9] Via such transactions, corporate controllers may divert value from a (public) company in a corporate group to another where their economic stake is greater.[10] On the other hand, intra-group transactions can be beneficial; even necessary. In particular, they can be important for corporate controllers to implement their idiosyncratic vision. In such a case, companies enter into intra-group transactions within the context of an entrepreneurial idea where market transactions would not serve towards this purpose. In other words, transactions with unrelated parties would not be able to substitute the goods or services received under the R.P.T. for the implementation of the idiosyncratic business plan.

Acknowledging that intra-group transactions can be used for both consuming private benefits of control and implementing an idiosyncratic vision (in accordance with the view that corporate controllers can be both entrepreneurs and P.B.C.-consumers), I propose a special framework for the oversight of intra-group transactions as R.P.T.s that not only monitors private benefit extraction but also allows corporate controllers to

[6] Tunnelling is a term used to describe the practices of corporate insiders to divert company value to themselves. *See* Simon Johnson et al., *Tunneling*, Am. Econ. Rev., 2000, at 22; Vladimir A. Atanasov et al., *Law and Tunneling*, 37 J. Corp. L. 1 (2011).

[7] *See infra* notes 17–19 and accompanying text.

[8] On intra-group transactions, *see generally* Sang Yop Kang, *Rethinking Self-Dealing and the Fairness Standard: A Law and Economics Framework for Internal Transactions in Corporate Groups*, 11 Va. Bus. L. Rev. 95 (2016); Jens C. Dammann, *Related Party Transactions and Intragroup Transactions*, *in* The Law and Finance of Related Party Transactions 218 (Luca Enriques & Tobias H. Tröger eds., 2019).

[9] Some jurisdictions even have a special regime for corporate groups in general and for intra-group transactions in particular. *See* Luca Enriques et al., *Related-Party Transactions, in* The Anatomy of Corporate Law 145, 163-64 (Reinier Kraakman et al. eds., 3rd ed., 2017).

[10] For an example, see Kang, *supra* note 8, at 117–18. In particular, corporate controllers can achieve corporate control despite a very low economic stake in a company through dual-class shares, cross-shareholding and pyramid structures. *See generally* Lucian A. Bebchuk et al., *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, *in* Concentrated Corporate Ownership 295 (Randall K. Morck ed., 2000).

implement their entrepreneurial idea. In addition, I examine several other issues in screening intra-group transactions.

The article proceeds as follows: Section 1 introduces the theories associated with corporate controllers and concludes that corporate controllers do not have clear-cut characters. Therefore, one must differentiate between transactions that can be used to divert value (*value-decreasing*) or to accomplish entrepreneurial controllers' vision (*value-increasing*). In this respect, Section 2 turns attention to intra-group transactions, proposing a proper framework for their oversight and addressing several other issues related to their screening. The last Section summarises the findings of this article and concludes.

1. CORPORATE CONTROLLERS: THIEVES OR ENTREPRENEURS

The issue of the existence of corporate controllers and their activities have long occupied the minds of many law and finance scholars.[11] This is important because a precise understanding in this regard will lead to a more effective and efficient regulation of corporate controllers and their actions. Two main views have emerged, offering different theories of corporate control and its implications.[12]

Corporate controllers are generally associated with expropriating (*stealing*) corporate wealth at the expense of (minority) shareholders and ultimately creditors. The reason why they hold onto corporate control, it is argued, is because of the existence of private benefits of control.[13] In other words, concentrated ownership results from the availability of private benefits of control in controlled companies for the controlling shareholder.[14] Such a view is not without criticism.[15] And it is unable to explain the

[11] For a survey of empirical research on fundamental questions associated with blockholders, *see* Clifford G. Holderness, *A Survey of Blockholders and Corporate Control*, Econ. Pol'y Rev., April 2003, at 51.

[12] Admittedly, the following examination of several theories will necessarily be incomplete. Especially, political economy accounts of corporate control are missing. *See in this regard*, Mark J. Roe, Political Determinants of Corporate Governance: Political Context, Corporate Impact (2003).

[13] *See*, *e.g.*, Lucian A. Bebchuk, *A Rent-Protection Theory of Corporate Ownership and Control* (Nat'l Bureau of Econ. Research Working Paper No. 7203, 1999), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=203110; Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 Stan. L. Rev. 127, 142–49 (1999).

[14] A related literature shows that concentrated ownership is more common in countries that provide weak shareholder protection. *See*, *e.g.*, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. Pol. Econ. 1113 (1998).

[15] *See*, *e.g.*, Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, (2016) 125 Yale L. J. 560, 572 (arguing that "it assumes that most controllers around the world are opportunists who take advantage of imperfect markets and weak protections for minority shareholders").

prevalence of concentrated ownership in countries where the law is supposedly good enough to constrain private benefits of control and P.B.C. extraction remains very low (e.g. Sweden).[16]

A different theory considers corporate controllers as entrepreneurs who hold onto the control of a company not to extract P.B.C. but to be able to implement their vision in a manner they see fit.[17] Control protects entrepreneurs from subsequent midstream investor doubt and objections resulting from asymmetric information or differences of opinion regarding their idiosyncratic vision.[18] The controller -entrepreneurs' vision is defined broadly as 'any business strategy that the entrepreneur genuinely believes will produce an above-market rate of return'.[19] Such a theory, as Goshen and Hamdani claim, explains why concentrated ownership exists even in countries with strong investor protection laws.[20]

Both theories combined suggest that investors, lawmakers, and courts need to balance the objectives of minority shareholder protection (against controllers' extraction of P.B.C. and abuse of control) and allowing the controller-entrepreneurs to pursue their idiosyncratic vision (which can produce above-market returns that will be shared among controlling shareholders and investors on a *pro rata* basis). In the context of self-dealing practices of corporate controllers, this understanding ultimately leads to the conventional wisdom's dichotomy of value-increasing R.P.T.s and value-decreasing R.P.T.s, and to the aim of devising an R.P.T. regime that optimally screens R.P.T. (preventing value-decreasing ones while allowing value-increasing ones).

Related party transactions can be both a way of implementing the idiosyncratic vision of the entrepreneurial controller and a way of expropriating minority shareholders.

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[16] *See generally* Gilson, *supra* note 3. Gilson however argues that *non-pecuniary* private benefits of control help explain the existence of concentrated ownership in countries with strong investor protection laws. *Id.* at 1665–67. *See also* Roe, *supra* note 12, at 5 (noting that many nations that have very good institutional structures and strong institutions (corporate, legal, and otherwise) have nevertheless concentrated ownership).

[17] *See generally* Goshen & Hamdani, *supra* note 15. *See also* Alessio M. Pacces, *Controlling the Corporate Controller's Misbehaviour*, 11 J. Corp. L. Stud. 177, 187–88 (2011)(noting that "the pursuit of long-term strategies and rewards to firm-specific investments is what normally motivates a controlling shareholder to bear the costs of an undiversified investment").

[18] Goshen & Hamdani, *supra* note 15, at 565. *See also* Eric Van den Steen, *Disagreement and the Allocation of Control*, 26 J. L. Econ.& Org. 385 (2008)(studying the allocation of control when there is disagreement about the right course of action).

[19] Goshen & Hamdani, *supra* note 15, at 560, 577–79 (detailing the features of the entrepreneur's idiosyncratic vision). Goshen and Hamdani distinguish between the pursuit of idiosyncratic vision by the controller-entrepreneurs and the pursuit of nonpecuniary benefits of control. While the former will benefit all shareholders equally (as the pursuit of idiosyncratic vision is *believed* to produce above-market returns), the latter refers to benefits that only the controller derives (e.g., personal satisfaction, pride, fame, and political power). *Id.* at 566, fn. 16. Above-market returns indicate positive net present value of a project. *Id.* at 577, fn. 53.

[20] *Id.* at 572, 575.

In particular, intra-group transactions in a corporate group (as R.P.T.s) provide a special context for both implementing entrepreneurial vision and extracting P.B.C. . The next section examines this tension and proposes a framework which monitors value-diversion from the company and also allows the controllers the freedom of action that is necessary to realise the idiosyncratic vision.[21]

2. INTRA-GROUP TRANSACTIONS

Related party transactions are a key matter of concern for minority shareholder protection.[22] However, as mentioned above, while such transactions can be used by corporate controllers to divert company value, they can also be value-increasing.[23] In this regard, R.P.T.s can be instrumental in implementing a business plan that is supposed to produce above-market returns for *all* shareholders. This necessarily creates a tension between the controller-entrepreneurs and minority shareholders, and challenges for lawmakers and courts in preventing value-decreasing transactions while allowing value-increasing ones.

Such challenges and tensions in conflicted transactions involving controller-entrepreneurs are clearly presented by a recent high-profile case, namely the acquisition of SolarCity by Tesla.[24] SolarCity was a private company, specialising in solar energy services. It was co-founded and controlled by the entrepreneur Elon Musk. Tesla, a public company controlled also by Elon Musk,[25] acquired SolarCity in 2016. Such a transaction was clearly subject to conflicting interests because of Elon Musk's stake in

[21] *See id.* at 560 (arguing that "corporate law for publicly traded firms with controlling shareholders should balance the controller's need to secure her idiosyncratic vision against the minority's need for protection").

[22] *See* Atanasov et al., *supra* note 6, at 5–9 (detailing how insiders can extract value from firms through self-dealing transactions); Simeon Djankov et al., *The Law and Economics of Self-Dealing*, 88 J. Fin. Econ. 430 (2008)(presenting the anti-self-dealing index as a new measure of legal protection of minority shareholders against expropriation by corporate insiders).

[23] *See, e.g.*, Luca Enriques, *Related Party Transactions: Policy Options and Real-World Challenges (with a Critique of the European Commission Proposal)*, 16 Eur. Bus. Org. L. Rev. 1, 6-7 (2015); Alessio M. Pacces, *Procedural and Substantive Review of Related Party Transactions (RPTs): The Case for Noncontrolling Shareholder-Dependent (NCS-Dependent) Directors*, *in* The Law and Finance of Related Party Transactions 181, 182 (Luca Enriques & Tobias H. Tröger eds., 2019); Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 Cal. L. Rev. 393, 400 (2003).

[24] *See* Stuart C. Gilson & Sarah L. Abbott, *Tesla: Merging with SolarCity* (December 2017, revised November 2018), available at https://www.hbs.edu/faculty/Pages/item.aspx?num=53652 (last visited April 9, 2022).

[25] Although Mr. Musk's share ownership amounts to only 22.1% of Tesla shares, in a recent litigation, the Delaware Court of Chancery found that Mr. Musk was a controlling shareholder. *See, e.g.*, *In re Tesla Motors, Inc. Stockholder Litig.*, WL 1560293 (Del. Ch. Mar. 28, 2018)(consolidated C.A. No. 12711-VCS (Del. Ch. Feb. 4, 2020).

both companies.[26] Tesla argued that the acquisition of SolarCity was crucial for the implementation of its business plan and will offer unique synergies.[27] However, at that time, SolarCity was in a liquidity crisis and faced some issues in its business, which triggered a negative investor sentiment against the transaction and a ten percent decline in share price on the announcement.[28] Some Tesla shareholders also brought a liability suit challenging the transaction, claiming that it was an attempt to rescue a company in which Elon Musk had a substantial stake at the expense of Tesla shareholders.[29]

This article will specifically focus on intra-group transactions, which most clearly reflect these tensions and challenges. On the one hand, in corporate groups, such transactions may be used to divert value from listed companies where the controlling shareholder has a lesser economic stake. For example, assume that in a corporate group, a parent company has an eighty percent equity stake in Company B, while holding only forty percent of shares of Company A. In such a case, the parent company will have incentives to divert value from Company A to Company B via intra-group transactions.[30]

On the other hand, some intra-group transactions remain important and even essential, especially within the context of implementation of an idiosyncratic vision (a business plan). Within a group structure where sister companies produce inputs for a

[26] Not only Mr. Musk but also a few of Tesla directors and his relatives had an interest in SolarCity. *See* sources cited in *infra* note 28 (detailing the sources of conflicts of interest surrounding the transaction).

[27] *See* TESLA, *Tesla and Solar City* (Nov. 1, 2016), https://www.tesla.com/blog/tesla-and-solarcity (last visited, April 9, 2022)(arguing that "Tesla's acquisition of SolarCity is an important part of creating [its vision for] t[he] future"). It is further argued that people first doubted Tesla's vision that the future of automobiles lies in electric vehicles, which proved to be true. And "those same naysayers" will have similar doubts about solar and storage, and Tesla's acquisition of SolarCity. *See id.* However, the fact that idiosyncratic vision can fail without producing any value for the shareholders is demonstrated by Elon Musk's own confession that he would not support the transaction if he could go back in time. *See* M. Matousek, *Elon Musk said he probably wouldn't support Tesla's controversial SolarCity deal if he could go back in time*, Business Insider (Oct. 28, 2019), https://www.businessinsider.de/international/elon-musk-says-he-would-not-support-solarcity-acquisition-again-2019-10/?r=US&IR=T.

[28] *See* Lora Kolondny, *Tesla's Elon Musk knew SolarCity faced a "liquidity crisis" at time of 2016 deal, legal documents show*, CNBC (Oct. 28, 2019, 3:41 PM EDT), https://www.cnbc.com/2019/10/28/musk-deposition-stockholders-v-tesla-solarcity.html (last visited April 9, 2022); Dana Hull & Austin Carr, *Elon Musk's Solar Deal Has Become the Top Threat to Tesla's Future*, Bloomberg Businessweek (Nov. 13, 2019, 11:00 CET), https://www.bloomberg.com/news/articles/2019-11-13/elon-musk-s-solar-deal-has-become-top-threat-to-tesla-s-future (last visited April 9, 2022); Linette Lopez, *The future of Elon Musk's empire was in peril in 2016, and new documents reveal more about the desperate plan to save it*, Business Insider, https://www.businessinsider.de/international/elon-musk-tesla-solarcity-merger-frenzied-plan-new-filings-show-2019-10/?r=US&IR=T (last visited April 9, 2022).

[29] *See* Steven Haas & Richard Massony, *Fiduciary Duties of Buy-Side Directors: Recent Lessons Learned,* Harv. L. Sch. F. on Corp. Governance (2018), https://corpgov.law.harvard.edu/2018/06/30/fiduciary-duties-of-buy-side-directors-recent-lessons-learned/. Recently, the Delaware court has ruled in favor of defendant Elon Musk, denying any fiduciary liability for the SolarCity acquisition. See Lora Kolodny Jessica Bursztynsky, *Elon Musk wins shareholder lawsuit over Tesla's $2.6 billion SolarCity acquisition*, CNBC (Apr. 27, 2022, 9:06 PM EDT), https://www.cnbc.com/2022/04/27/elon-musk-wins-shareholder-lawsuit-over-the-companys-2point6-billion-solarcity-acquisition.html (last visited May 19, 2022).

[30] The parent company will enjoy eighty percent of the gain of Company B from value-diversion while only bearing forty percent of the (equivalent) loss of Company A.

downstream company or provide services for an upstream company, the controller-entrepreneur can tailor the products and services according to the needs of his or her business plan for the downstream/upstream company. This can be exemplified by the following scenarios. A public company in a corporate group (Company A) produces and sells home appliances to consumers. The controller-entrepreneur makes firm-specific capital (including human capital) investments (via the parent company) in another sister company (Company B) to produce a technology that he or she believes will make home appliances more efficient and thus more environment-friendly and will ultimately attract more customers than other firms that rely on standard technology. A transaction whereby Company B provides such a technology to Company A will be an intra-group transaction conducted in the implementation of an idiosyncratic vision. Such a vision, in the example, includes *inter alia* a belief that such a technology is necessary to make products more efficient, and that generating more environment-friendly products (through new technology) will attract more consumers who are becoming more environment-conscious and ready to spend more money to reduce their carbon footprint. Another example would be entering into a distribution agreement with a sister company that aims to reach overlooked potential customer areas and implement a different strategy (than other distributors) which is believed to be capable of capturing more of the market.

The task therefore is to create a workable legal regime that will achieve the optimal balance between preventing value-diversion via R.P.T.s and allowing corporate controllers to implement their ideas via the same.[31] For non-conflicted transactions, the protection afforded by the business judgement rule in the case of a court review of business decisions in a company provides ample room for controlling shareholders to implement their business plans.[32] However, in the case of conflicted transactions, like intra-group transactions, the need to protect minority shareholders necessarily limits the freedom of action of corporate controllers. Furthermore, while it is important to provide controller-entrepreneurs with a certain freedom of action to enable the implementation of their idiosyncratic vision, protecting minority shareholders by preventing/limiting the private benefit extraction will also facilitate the emergence of

[31] *See generally* Goshen & Hamdani, *supra* note 15, at 595–97. *See also* Filippo Belloc, *Law, Finance and Innovation: The Dark Side of Shareholder Protection*, 37 Cambridge J. Econ. 863 (2013)(finding that "countries with stronger shareholder protection tend to have larger market capitalisation but also lower innovative activity").

[32] *See* Goshen & Hamdani, *supra* note 15, at 598–601. *Cf.* Albert H. Choi, *Concentrated Ownership and Long-Term Shareholder Value*, 8 Harv. Bus. L. Rev. 53, 79 & 80-81 (2018)(arguing for a heightened scrutiny of controlling shareholders' business decisions even if no conflicts of interest are present). On the business judgement rule, *see also* John Armour et al., *The Basic Governance Structure: The Interests of Shareholders as a Class*, *in* The Anatomy of Corporate law: A comparative and Functional Approach 49, 69-71 (Reinier Kraakman et al. eds., 3rd ed. 2017)(providing a comparative analysis of the review of business decisions by courts).

controllers that are best positioned to increase firm value (like entrepreneurs) rather than those controllers that are best positioned to syphon value from the company and thus are willing to pay the most for a controlling stake.[33]

Not all intra-group transactions will involve the implementation of an idiosyncratic vision. Such transactions lend themselves to be differentiated and thus will be subject to a normal review. In other cases where an intra-group transaction *can* serve towards the attainment of an entrepreneurial idea, several difficult issues arise in terms of finding an optimal regime where mistakes are minimised in protecting the minority and allowing controller-entrepreneurs to conduct transactions in a manner they see fit. The following parts will examine both groups of R.P.T.s.

2.1. INTRA-GROUP TRANSACTIONS INVOLVING HOMOGENOUS PRODUCTS/SERVICES

Intra-group transactions may involve transacting in homogenous products/services that the company could easily acquire via transacting with unrelated third parties. An example would be to buy certain commodities as inputs from a sister company that operates in the upstream market. Since such transactions involve buying a *standard* product from a related party, they do not form a crucial part of any idiosyncratic vision.[34] The company can implement its business plan also by transacting with unrelated parties.

Normally, such transactions are inefficient because they produce no surplus different than arm's length market transactions but create monitoring costs.[35] The latter stems from the need to screen such transactions to ensure that the company at issue does not lose value by transacting with a related party. However, entering into such intra-group transactions can still be justified on various grounds.

Corporate groups are an intermediate form of coordinating resource allocation in production that sits between a fully integrated business enterprise and spontaneous market transactions.[36] In corporate groups, although each entity preserves its legal

[33] *See* Jens Dammann, *Corporate Ostracism: Freezing Out Controlling Shareholders*, 33 J. Corp. L. 681, 705-06 (2008). It will also permit good controllers to raise capital at a lower cost, preventing the adverse selection problem.

[34] *See* Raghuram G. Rajan, *Presidential Address: The Corporation in Finance*, 67 J. Fin. 1173, 1193 (2012)(stating that "[s]tandardization therefore reduces the idiosyncratic and personalized aspects of the entrepreneur's role, allowing her job to resemble that of a typical CEO, and making it easier for an employee or outsider to replace her as CEO").

[35] *See, e.g.*, Robert C. Clark, Corporate Law 183 (2d ed. 1986); Melvin Aron Eisenberg, *Self-Interested Transactions in Corporate Law*, 13 J. Corp. L. 997, 997 (1988) (expressing that "in perfect markets involving only homogeneous goods, there would usually be no reason for a corporation to transact with a director or senior executive rather than transacting on the market").

[36] *See* Tobias H. Tröger, *Corporate Groups - A German's European Perspective*, in German and Nordic Perspective on Company Law and Capital Markets Law 157, 192-93 (Holger Fleischer, Jesper Lau Hansen & Wolf-Georg Ringe eds. 2015).

personality (different from fully integrated firms) they are closely integrated (different from transactions between independent firms in a market). This form of organisation provides a number of benefits. While preserving the positive effects of asset partitioning between separate legal entities,[37] the potential transaction costs are minimised when market frictions are present.[38] In such a case, corporate groups prevent problems resulting from these frictions by internalising the relevant product/service line, bringing about beneficial intra-group transactions.[39] For instance, if buying a commodity from an external supplier in a long-term relationship would cause unstable and low-quality supply, and thus disrupt the business, transacting with an upstream sister/parent company for the purchase of this commodity will avoid these problems. Such benefits would, in turn, justify intra-group transactions that only involve homogenous products/services concluded at market price but produce monitoring costs.[40]

As intra-group transactions that involve only homogenous products/services generate no issue of allowing the controller-entrepreneur to implement his or her idiosyncratic vision, the need to protect minority shareholders becomes central. Available tools in screening self-dealing can be used to their full extent.[41] In other words, these transactions should be subject to procedural safeguards (e.g., approval by independent directors or disinterested shareholders) or to a court review of their merits,

[37] On asset partitioning, *see generally* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L. J. 387 (2000); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006).

[38] Especially, markets may involve monopolies/oligopolies, information asymmetries and hold-up risk from market participants. For market frictions, *see generally* Oliver E. Williamson, *Markets and Hierarchies: Some Elementary Consideration*, 63 AM. ECON. REV. 316 (1973). *See also* Henry Hansmann, *Ownership and Organizational Form, in* THE HANDBOOK OF ORGANIZATIONAL ECONOMICS 891, 899-02 (Robert S. Gibbons & John Roberts eds., 2012).

[39] *See* Hansmann, *supra* note 38, at 899 ("There are a variety of costs associated with arm's length contractual transactions that can be reduced by bringing the contracting parties under common ownership"). *See also* Kang, *supra* note 8, at 108–109 (enumerating the benefits of internal transactions between affiliated companies); Tarun Khanna & Jan W. Rivkin, *Estimating the Performance Effects of Business Groups in Emerging Markets*, 22 STRAT. MGMT. J. 45 (2001) (examining business groups in emerging markets where market failures and high transaction costs abound).

[40] *Cf.* Pacces, *supra* note 23, at 196 (stating that "RPTs that have a business purpose cannot be identical to an arm's length transaction"). Of course, such intra-group transactions may also involve prices less than the market price. In such cases, along with avoiding possible market frictions, it is even more in the interest of the relevant company to transact with an affiliate company rather than transacting in the market.

[41] Yet, in order to reduce monitoring and transaction costs of R.P.T.s, jurisdictions may exclude R.P.T.s that are routine, or at market price, or in the ordinary course of business (like most intra-group transactions involving only homogenous products/services) from the review mechanisms or provide lighter review of such transactions. *See*, *e.g.*, Directive 2017/828, of the European Parliament and of the Council of 17 May 2017 amending Directive 36/EC, 2007 O.J. (L 184) as regards the encouragement of long-term shareholder engagement, 2017 O.J. (L 132) 1, art. 9c(5)(stating that review mechanisms shall not apply to transactions entered into in the ordinary course of business and concluded on normal market terms, and for such transactions, the (disinterested) administrative or supervisory body of the company shall establish an internal procedure to periodically assess whether these conditions are fulfilled).

both of which would normally involve the practice of comparing the substantive terms of the R.P.T.s in question with those of arm's length deals.[42]

2.2. INTRA-GROUP TRANSACTIONS INVOLVING DIFFERENTIATED/SPECIAL PRODUCTS/SERVICES

Intra-group transactions may also involve differentiated/special products/services rather than homogenous ones. As exemplified above, those transactions may serve towards the end of implementing an idiosyncratic vision[43] and therefore call for a special attention in the balancing act of protecting minority shareholders and maximising returns from the controllers' entrepreneurship. Because such transactions are necessarily different from market transactions and involve idiosyncratic elements, a common way of judging the merits of R.P.T.s - comparing their terms to those of arm's length transactions - may fail.[44] In the simplest terms, the intra-group transaction between Company A and Company B regarding the special technology Company B produces for Company A's products is different from a market transaction that involves standard technology, and will inevitably contain distinctive (and most likely costlier) terms. Such transactions should be permitted in order to allow controller-entrepreneurs to implement their business plan.

From the perspective of the controller-entrepreneur, for Company A, market transactions involving other products will not serve towards the attainment of idiosyncratic vision. Furthermore, contracting with an arm's length market participant

[42] *Cf.* Kang, *supra* note 8, at 136 (arguing that in return for a stable and trustworthy supply from an affiliated company, paying a higher price than the market price may be reasonable when the risks from transactions in a market are considered).

[43] *See* Rajan, *supra* note 34, at 1177, stating that:

> To create NPV [net present value], the entrepreneur has to go out on a limb, distinguishing herself from the rest of the herd of potential competitors and thus potentially earning sustainable profits (provided that the limb is narrow enough, the firm's capabilities distinctive enough, or its innovation continuous enough that others cannot follow). Thus, the process of creating positive NPV invariably implies differentiation—whether in creating new products or product varieties that nobody else manufactures, in developing production methods that are more efficient than that of the competition, or in targeting customer populations or needs that have hitherto been overlooked.

[44] In the case of differentiated products/services, the arm's length test translates into an exercise of discerning the range of prices in which a reasonable buyer or seller would be willing to buy or sell the asset/service, dealing under arm's length conditions. *See* Eisenberg, *supra* note 35, at 999. However, intra-group transactions that involve idiosyncratic elements pose a challenge. Consider the above example. Understanding the price Company A would be willing to pay as a reasonable buyer dealing at arm's length for Company B's products would require the relevant body reviewing the transaction to determine the value of the differentiated/special products for Company A – an exercise which is both impractical (*see infra* text accompanying notes 53–55) and tantamount to reviewing the idiosyncratic vision underlying the transaction itself.

for the production of a differentiated product in this regard may not be feasible because in such a case, each party may expose itself to opportunism by the other party. The controller may also prefer to implement his or her business plan through a fully integrated firm (i.e. a multidivisional company) or a corporate group involving only wholly-owned subsidiaries if he or she reckons that the implementation of the business plan through intra-group transactions concluded between two separate legal entities (involving minority shareholders) is not feasible due to legal restrictions on intra-group transactions in such a case. By allowing controller-entrepreneurs a certain freedom of action in concluding intra-group transactions that are different and costlier than market transactions, a legal regime may also support corporate groups involving separate legal and public entities as an organisational form and possible benefits thereof.[45]

However, at the same time, these transactions should be reviewed in order to ensure that they are not a tool of expropriating minority shareholders. The task is therefore to devise an R.P.T. regime that would achieve both ends in an optimal way.[46]

In this regard, Goshen and Hamdani advocate for a liability-rule regime[47] to minimise the interference of minority shareholders in the process of conducting related party transactions while protecting them from value diversion.[48] Such a regime envisages the *ex-post* court review of the merits of R.P.T.s without any *ex ante* vetting of such transactions through procedural safeguards.[49] They do not however clarify how courts would review related party transactions that involve idiosyncratic elements. Pacces, on the other hand, argues that courts cannot review the substantive fairness of

[45] *See also* Dammann, *supra* note 33, at 696 & 707 (noting the benefits of maintaining the controlled company's status as a publicly traded corporation). In the end, "the organization structure most conducive to innovation varies with the characteristics of technology, which dictates the relative advantages and costs of different forms". *See* Sharon Belenzon et al., *The Organization of Innovation Across Countries and Industries* (2013), 1, https://pdfs.semanticscholar.org/e389/d660ab42a1a7415105c5c44ea25d5a3c5ed3.pdf.

[46] *See also* Pacces, *supra* note 23, at 193–94 (referring to allowing value-decreasing R.P.T.s as "false negatives" and preventing value-increasing R.P.T.s as "false positives", and noting that "[e]fficient enforcement requires that the joint cost of these errors be minimized").

[47] For the distinction between "liability rules" and "property rules", *see* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972). If the transfer of an entitlement can only happen in a voluntary transaction where the value is agreed upon by the seller, the entitlement is protected by a property rule. On the other hand, if its transfer can occur at an objectively determined price despite the unwillingness of the seller to sell at that value, it is protected by a liability rule. *Id.* at 1092.

[48] *See* Goshen & Hamdani, *supra* note 15, at 610.

[49] Applying the framework of "property rules" vs. "liability rules" (*see supra* note 47) to legal safeguards against value-diversion via R.P.T.s, Goshen identifies a legal protection as a property rule if "any contemplated transaction tainted with self-dealing cannot proceed without the minority owners' consent". On the other hand, "a liability rule allows transactions tainted with self-dealing to be imposed on an unwilling minority but ensures that the minority is adequately compensated in objective market-value terms". *See* Goshen, *supra* note 23, at 398. The *ex-post* court review of R.P.T.s without any procedural safeguard qualifies as a liability rule regime because in such a regime, corporate controllers can engage in R.P.T.s without any consent of disinterested parties provided that such transactions are "fair". *Id.* at 408.

such transactions because they usually apply the arm's length criterion, which is not useful in such cases.[50] Instead, he proposes a review of R.P.T.s by non-controlling shareholder-dependent directors.[51] Similarly, Pacces does not delineate how these directors would review these transactions. Below, without expressing any preference for court review of R.P.T.s or any procedural safeguard, I propose several ways of reviewing intra-group transactions that involve idiosyncratic elements. These review methods can be applied both in the case of *ex post* court review of R.P.T.s and when procedural safeguards (disinterested shareholder vote on R.P.T.s or independent directors' review of R.P.T.s) are in place.[52] The aim is to look after the minority shareholders' interests with minimal interference in the controller-entrepreneurs' freedom of action.

A reasonable way of reviewing transactions that are clearly conflicted but entered into within the context of implementing an idiosyncratic vision is to find out how much value the implementation of the idiosyncratic vision (via intra-group transactions) would produce/has produced and whether the amount the company would spend/has spent on the project (in transacting with related companies) is less or more than this value.[53] However, there are two difficulties with this approach. First, an idiosyncratic vision that is *bona fide* supposed to produce above-market returns can fail.[54] If these failures will make controlling shareholders liable to minority shareholders for value-diversion, there is risk of over-deterring controller-entrepreneurs from pursuing such projects. Second, it is very difficult to verify the extent of the value produced by the implementation of an idiosyncratic vision (via intra-group transactions).[55] Consider the above example again. The controller-entrepreneur engages in producing a special technology via Company B and makes firm-specific capital investments. Company A buys this technology from Company B to beat the competition and earn handsome profits.

[50] *See* Pacces, *supra* note 23, at 183 & 196–97. He further states that there exists no standard that allows a judge to make a substantive assessment of an R.P.T., particularly whether dealing with a related party has any business purpose at all. *Id.* at 196.

[51] According to his proposal, a minority of the board of directors should be composed of "non-controlling shareholders-dependent directors" who are exclusively nominated, appointed, and removed by the minority shareholders. These directors should have the *sole* mandate of screening R.P.T.s *See id.* at 209–16 (detailing his proposal and potential criticism thereof).

[52] While shareholders do not need to justify their votes on R.P.T.s, institutional investors (that increasingly dominate shareholding across the world) have a fiduciary duty to ultimate beneficiaries of shares, and this duty requires them to vote in the best interest of the company (value). The following ways of reviewing intra-group transactions explained in the text would help institutional shareholders to identify value-increasing/value-decreasing transactions.

[53] *See* Pacces, *supra* note 23, at 189 (stating that "the price of a tailor-made engine could depart from the price of a standard engine up to a point (the "no-tunneling" point) in which noncontrolling shareholders expect to receive at least as much in terms of return from asset specificity").

[54] *See* Goshen & Hamdani, *supra* note 15, at 578, fn. 55 & 600, fn. 122 (acknowledging that the idiosyncratic vision of the controller-entrepreneur can fail).

[55] *See also* Pacces, *supra* note 23, at 197–98.

Whether such a business plan will be successful, or the extent of its success is uncertain and non-verifiable.

Useful insights can be gained however by considering the dynamics in markets involving different products. Product differentiation creates monopolistically competitive markets.[56] In such markets, each firm is a monopoly in that it is the only producer of the unique product. However, unlike monopolies where there are no alternatives, each product is also a close substitute.[57] Monopolistically competitive firms have demand curves less elastic than the one in a perfectly competitive market but more elastic than in a monopolised market. This means that such firms can raise their prices without losing all the demand.[58]

In arm's length transactions, a monopolistically competitive firm will charge a price that reflects the demand for the output produced at an amount where its marginal costs are equal to its marginal revenue.[59] If its average total cost is lower than the market price, the firm will make profits and vice versa.[60] In related party transactions, however, such a firm can charge any price without regard to the demand, transforming into (more than) a pure monopolistic position.[61] In our case, for example, Company B is in such a position *vis-à-vis* Company A because the transaction is imposed on Company A through the controlling power of a controlling shareholder and the terms of the transaction are not determined in an arm's length manner. A few considerations may help understanding whether there is a value-diversion from Company A to Company B in such transactions.

First, if Company B is also transacting with external parties for the same product,[62] there will be a market price (which will be determined in accordance with the dynamics of a monopolistically competitive market). This market price could provide a benchmark to determine value-diversion: whether Company A is charged above this price or not.

However, if Company B is not transacting with external parties (i.e., supplying the relevant product only to Company A), there will be no market price and hence no

[56] *See* Karl. E. Case, Ray. C. Fair & Sharon E. Oster, Principles of Economics 344–59 (12th ed. 2017).
[57] *Id.* at 353.
[58] *Id.*
[59] *Id.* at 354.
[60] *Id.*
[61] A monopolistic firm sets the market price. However, related party transactions will grant more power to a company than a monopolistic firm has because even monopolies can lose customers if they raise their prices too much as consumers may shift their limited resources to other markets. *See Id.* at 299. For a related party (that has control over the counterparty), the demand will be stable because the other party will not be able to decide of its own volition not to transact any more. Moreover, while a monopolistic firm has to lower the price it charges to raise and sell its output, a related party does not. *Id.* at 302.
[62] The product Company B is producing is specifically tailored for Company A's needs. But it does not mean that it cannot sell it to other parties. For example, rather than selling its product to the competitors of Company A, it may transact with companies from other unrelated industries that may benefit from the same (efficient and environment-friendly) technology that Company B produces for Company A.

benchmark.[63] In such cases, I propose considering whether and to what extent the related company (Company B in the example) has charged prices over its average total cost[64] in transacting with the relevant company (Company A in the example).

A default standard would consider any price more than the average total cost of Company B as value-diversion and prohibit it therefore from charging prices over the average total cost. In such a case, while there will be no losses for Company B, this will leave it with zero profits. Nevertheless, such a situation can still be justified. First, in the case of intra-group transactions entered into in pursuit of an idiosyncratic vision, the controller-entrepreneur's main interest lies in securing above-market returns with his/her business plan for Company A. And he or she dictates Company A to enter into a transaction with Company B to be able to implement his or her idiosyncratic vision. Arguably, the controller-entrepreneur should not be allowed to further use his or her power over Company A to pay prices over the average total cost of Company B where his or her economic interest is greater. The firm-specific capital investment the controller-entrepreneur makes via Company B would not also be stifled or disincentivized if not allowed to charge prices over its average total cost and to make profits because the purpose of such investment is to produce above-market returns via Company A in the first place. Such a rather drastic approach is arguably essential to prevent Company A from paying more than the necessary for a project the value of which is uncertain, and ultimately to protect minority shareholders from expropriation. Second, in the long-run equilibrium, the profits for a monopolistically competitive firm (such as Company B) must be (and will be) zero anyway.[65] One should note that adopting this standard would effectively necessitate Company B to be a wholly-owned subsidiary (with no minority shareholders) because, although there is a certainty of breaking even, public investors would refrain from investing in the equity of such a company as there is no prospect of profit.[66]

[63] *See* Dammann, *supra* note 8, at 219 (stating that "affiliated corporations may produce some of their products and services solely for other affiliated companies, making it difficult to determine their arm's length value").

[64] "Average total cost is total cost divided by the number of units of output". *See, e.g.*, Case, Fair & Oster, *supra* note 56, at 207.

[65] For an explanation of why in the long-run equilibrium there will be zero profits for a monopolistically competitive firm, *see id.* at 354-56. Furthermore, while transacting at price = average total cost provides no profits, it is more advantageous to the related party company than a hypothetical (but possible) scenario where it would transact with external parties, however at a loss (at a price < average total cost) because of weak demand for the differentiated product. *See Id.* at 354. Benchmarking price against average total cost will also allow adaptation to changes in the costs of the related company in producing/rendering the differentiated product/service, which enables it in turn to operate continuously at no loss. Overall, these would help securing the idiosyncratic vision of the controller.

[66] Note that in the scenario where such a standard would be applicable, Company B does not transact with any party other than Company A. Creditors (bondholders, banks and non-bank lenders) would still lend to such a company as they would be paid in full. Capital contributed by creditors and public shareholders would count as fixed cost. *See Id.* at 199.

Alternatively to this (default) standard, it can be agreed that value-diversion would arise when the related company charges prices which are *a certain percentage* higher than the average total cost (which serves as the threshold). For example, a price which is only twenty percent higher than the average total cost can be accepted as justified. This will enable the related party to make profits, which can be important in terms of the ability to finance itself in the first place.[67] Determining the threshold – the percentage margin between the price and the average total cost – would be left to the controller and minority shareholders.[68] Controllers would have an incentive to agree on such a threshold (among others, to leave a certain room of profit for the related party itself–Company B in the example), which gives minority shareholders leverage in the negotiation. Minority shareholders would also have an incentive to diverge from the default standard to allow the supplier-related party to finance itself (on more favourable terms or with more financing options) and ultimately to produce tailored products for the company of which they are a shareholder that would then earn some above-market returns (Company A in the example).[69]

Along with a review of the terms of an intra-group transaction concluded in pursuit of an idiosyncratic vision along the above-explained lines, another useful examination could be to scrutinise whether there is/was a *reasonable* case to pursue such an idiosyncratic vision and to enter into intra-group transactions that are different (and costlier) than market transactions in the implementation thereof. Normally, the business judgement rule would (and should) largely protect the controllers from any interference of a third party (including courts) in determining the business strategy of a company.[70] However, in our case, a conflict of interest taints the transaction.[71] And arguably, an intermediate standard of review may apply, namely whether the R.P.T. in question is/was *reasonably* (emphasis added) implemented in pursuit of an idiosyncratic vision.

In such an examination, courts or other disinterested parties would not police whether the business plan followed by the controller-entrepreneur produced or would

[67] This would be especially relevant for equity finance. In terms of debt finance, the cost of capital can be lower.

[68] A mechanism to achieve this would be an amendment to the corporate charter, which states the threshold for value-diversion in intra-group transactions and which would have to be consented to by (a majority of) minority shareholders. *See also* Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 Harv. L. Rev. 1641, 1663 (2006), (arguing for a framework where controlling shareholders are permitted to contract with investors over private benefit levels).

[69] Admittedly, such an approach may not be frictionless as there may be opportunistic or conflicted minority shareholders as well as those that would suffer under too much information asymmetry to make a reasonable decision.

[70] *See supra* note 32 and accompanying text.

[71] It is in the personal interest of the controller to divert value via the transaction from Company A to Company B where his or her economic stake is greater.

produce sufficient value for the company to compensate for transacting differently than the market conditions.[72] Rather, they will examine whether there is/was indeed a *reasonable* case to make such a business decision in the first place. After all, since the definition of idiosyncratic vision is quite broad,[73] every corporate controller can claim to be pursuing intra-group transactions under a business plan that is believed to be capable of producing above-market returns. Untrammelled discretion for corporate controllers to conduct intra-group transactions may produce inefficient transactions. For example, assume that Company A desires to enlarge its business through entering into new territories (geographic markets), and there are several feasible options (territories) along with one that would entail buying land, building or distribution facilities from a related party (i.e., affiliated company). Further assume that choosing each option would entail different costs and benefits but the latter (the R.P.T. option) is costlier than other options and its benefits are not clear. Normally, a decision of which of the feasible territories a company should expand into is an idiosyncratic assessment of the controller-entrepreneur made under uncertain conditions. However, under the pretence of this assessment, the controller-entrepreneur may try to sell these unused assets of Company B (in order to invest the proceeds in better projects) to Company A, which would be in fact better off in expanding into other territories. In other words, situations may exist where the idiosyncratic assessment loses its significance in terms of a business decision and a prudent reasonable businessperson would (easily) realise that the R.P.T. option is a worse option for the company.

A *reasonableness* test may therefore prevent controllers from pursuing pet projects via harmful intra-group transactions under the pretence of pursuing an idiosyncratic vision. One can object whether such a test would constitute an invasive second-guessing of business strategy. However, it should be noted that even the business judgement rule in non-conflicted situations does not allow ones in charge of decision-making to follow wasteful projects.[74] After all, if the corporate controller cannot persuade the court (or independent directors or minority shareholders) that there is/was a reasonable case for pursuing his or her vision through intra-group transactions, one may infer that there is/was none in the first place. One can also define reasonableness differently, making it a more, or less, strict test. One way to define reasonableness that would only minimally meddle with business decisions is to ask whether the outcome is one which no reasonable decision maker acting reasonably could

[72] For difficulties associated with such a review, *see supra* notes 53–55 and accompanying text.
[73] *See supra* text accompanying note 19.
[74] For example, in the U.S., the classic case law is such that the business judgement rule does not protect directors if they commit an act of corporate "waste". *See* Bayless Manning, *The Business Judgment Rule in Overview*, 45 Ohio State L. J. 615, 621 (1984).

have reached, which is close to irrationality. Furthermore, similar to the contours of a duty of care review by the courts of company directors' decisions, some objective standards of conduct for the controllers can be developed under the reasonableness test. For example, the controllers can be required to sufficiently inform themselves before making their decisions following their idiosyncratic assessment, or to acquire an outside view to mitigate the effects of possible bias or blind spots under which they are suffering.

Such an intermediate standard of review becomes even more important when one considers the overconfidence and optimism bias under which the corporate controllers, especially entrepreneurs, suffer along with the explicit conflict of interest.[75] Such biases may make value-decreasing transactions look value-increasing even for well-intentioned controller-entrepreneurs.[76]

Last but not least, the idiosyncratic vision of corporate controllers may not only relate to business strategies that are believed to be capable of producing above-market returns, but also involve consideration of stakeholder interests (*e.g.* climate-friendly, environment-friendly, labour-friendly etc.).[77] In such cases, R.P.T.s (in the form of intra-group transactions) different and costlier than arm's length market transactions may be necessary to implement such strategies (i.e. to produce an output/service in certain ways). For example, if a necessary input for Company A's products is produced by external companies in which the labour conditions in the production line are repugnant to the values endorsed by the Company A and its controller (and maybe its public investors), then the controller may engage in supplying this necessary product through another controlled company, Company B, which ultimately gives rise to intra-group transactions.

The question is what considerations should apply in these cases in terms of the review of such transactions to prevent value-diversion. An implicit idea in allowing the

[75] It is true that courts may suffer from hindsight bias if they review the decisions of corporate controllers after the outcome of the relevant decision clearly materialises. *See* Armour et al., *supra* note 32, at 70. However, it is also important to consider the biases of corporate controllers in decision-making. The overconfidence and optimism bias are among the most important ones. Many interdisciplinary studies show that in forecasting the outcomes of risky projects, the planning fallacy leads entrepreneurs and executives to make decisions based on delusional optimism rather than on a rational weighting of gains, losses and probabilities. *See also* Daniel Kahnemann, Thinking, Fast and Slow 252 (2011). *See also id.* at 255–65 (explaining "optimistic bias" and overconfidence of entrepreneurs and executives); Malcolm Baker & Jeffrey Wurgler, *Behavioral Corporate Finance: An Updated Survey*, *in* Handbook of the Economics of Finance Vol. 2A 351, 386–87 (George M. Constantinides et al. eds., 2013) (same); Itzhak Ben-David, John R. Graham & Campbell R. Harvey, *Managerial Miscalibration*, 128 Q. J. Econ. 1547 (2013) (finding that executives show miscalibration regarding their own firms' prospects and follow more aggressive corporate policies).

[76] *See*, *e.g.,* Kahnemann, *supra* note 75, at 252 (stating that executives "spin scenarios of success while overlooking the potential for mistakes and miscalculations").

[77] In other words, controller-entrepreneurs may maintain control over the company not only to be able to implement a business plan that he or she believes will produce above-market returns but also to be able to run the company and conduct its business in a certain way.

controller-entrepreneurs the freedom of action in pursuing a business plan is that such a plan may produce above-market returns for minority shareholders and may ultimately increase societal welfare.[78] In other words, a *quid pro quo* for allowing controller-entrepreneurs to pursue their idiosyncratic vision and conduct intra-group transactions on different terms than market transactions (which would normally indicate value-diversion) is to share the benefits of such a plan with investors (and to contribute to the social welfare). However, in the case of intra-group transactions entered into under pure "stakeholderist" aims, there is no promise of above-market returns. On the contrary, intra-group transactions costlier than market transactions will reduce profits.[79]

A case for still allowing such transactions can be made on the ground that public investors (minority shareholders) knowingly invest in such companies that pursue rather "sustainable" policies and share the non-pecuniary benefit resulting from following such a stakeholderist strategy.[80] One can object that the company can switch to sustainability after the investors purchased the shares (i.e., after the shares were offered to the public). But, in such a case, disgruntled investors can exit by selling their shares in a liquid secondary market. Furthermore, regimes where companies should or can take into account societal or stakeholder welfare rather than maximising shareholder value would support entering into such transactions. This would be possible

[78] An innovative business plan (e.g., introducing a new product, method of production or organisation, utilising different inputs, opening up new markets) will either increase efficiency and thus decrease expenses or directly result in more profits. It will also lead to economic growth and more social welfare by improving goods and services and making their production more efficient. *See generally* Joseph. A. Schumpeter, THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE (1911).

[79] In the above example, since Company B will incur more expenses than market counterparties to provide more labour-friendly working conditions, it will charge Company A more for the products it supplies in comparison to external companies which provide the same input. On the other hand, if Company A will be able to sell its products more and thus make more profits as the products are preferred more by consumers who are conscious of the production conditions, then even such intra-group transactions, albeit costlier for Company A in comparison to market transactions, will cause an increase in profits.

[80] Sustainable investing or socially responsible investment is basically an investment strategy that takes into account the concerns about social or environmental issues along with the usual risk and return calculation. Funds invested in companies that follow "sustainable" policies may overperform other funds. *See, e.g.*, Jennifer Thompson, *Sustainable Funds More Likely to Be Top Performers, Study Shows*, FIN. TIMES (Aug. 12, 2019), https://www.ft.com/content/9e71cf86-ba2d-345c-bb3b-0d5887abbc6a. But this may not be the main consideration for investors. *See, e.g.*, Arno Riedl & Paul Smeets, *Why Do Investors Hold Socially Responsible Mutual Funds?*, 72 J. FIN. 2505 (2017)(finding that socially responsible investors expect to earn lower returns and pay higher management fees, which suggests that "investors are willing to forgo financial performance in order to invest in accordance with their social preferences"); Samuel M. Hartzmark & Abigail B. Sussman, *Do Investors Value Sustainability? A Natural Experiment Examining Ranking and Fund Flows*, 74 J. FIN. 2789 (2019) (finding evidence that investors marketwide value sustainability, and no evidence that high-sustainability funds outperform low-sustainability funds, which is consistent with nonpecuniary motives influencing investment decisions).

if the corporate purpose and directors' duties endorsed in a jurisdiction are based on stakeholder value theory which would allow truly sacrificing profits in favour of improving labour conditions.[81] On the contrary, shareholder primacy (and also enlightened shareholder value) would subordinate stakeholder interests to shareholder value and allow the former to be pursued only when it increases the latter.[82]

On the other hand, such transactions can still also be used to divert company value to corporate controllers. Reviews by courts or disinterested players of such transactions along the lines explained above may be further used to ensure that such intra-group transactions (that are necessarily costlier than market transactions) do not expropriate minority shareholders. Consider again the above example. Company B's average total cost of producing the necessary input for Company A will be higher than those of market suppliers (because of providing more labour-friendly conditions). Yet, courts or disinterested parties may police possible value-diversion by preventing Company B from increasing the price of the input further over its average total cost (which benefits the corporate controller at the expense of minority shareholders of Company A) or by allowing only a certain margin.

2.3. OTHER ISSUES REGARDING THE OVERSIGHT OF INTRA-GROUP TRANSACTIONS

Adequate review of intra-group transactions to ensure the prevention of value-diversion by the corporate controllers is not limited to the above explained issues. First of all, not only the terms of the relevant transaction but also how the transaction is carried out matters. For example, even if the terms of an intra-group transaction between Company A and Company B are entirely fair (which is determined according to one of the various standards of review), issues in the performance of the transaction may still result in value-diversion from Company A to Company B.[83] A simple non-performance or

[81] Stakeholder (value) theory calls for a balancing of different interests of company stakeholders such as employees, suppliers, customers, environment/community, and shareholders. No interest of a stakeholder group would have to be prioritised. On stakeholderism, *see further* Lucian A. Bebchuk Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, (2020) 106 Cornell L. Rev. 91, 103–24.

[82] Shareholder primacy and its nuanced but fundamentally same version, called enlightened shareholder value, pursue shareholder value and prioritise it over other interests in a conflict situation. *See id.*

[83] In the famous case of *Sinclair Oil Corp. v. Levien,* 280 A.2d 717 (Del. S. Ct. 1971), for example, minority shareholders who brought the suit argued that the parent company (i.e., Sinclair) had caused the transaction between its two subsidiaries (i.e., Sinven and International) to be breached in favour of the one where its economic stake is greater (i.e., International). *See Id.* at 723 ("[A]lthough the contract called for payment on receipt, International's payments lagged as much as 30 days after receipt. Also, the contract required International to purchase at least a fixed amount of crude and refined products from Sinven. International did not comply with this requirement"). The court ruled that "[u]nder the intrinsic fairness standard, Sinclair must prove that its causing Sinven not to enforce the contract was intrinsically fair to the minority shareholders of Sinven. Sinclair has failed to meet this burden." *Id.*

faulty/late performance of a contract may cause damages to a company. Normally, such issues are within the purview of contract law and in an arm's length relationship, the damaged party would demand compensation and eventually sue the non-performing party. On the other hand, in transactions between related companies (such as intra-group transactions), as both companies are under common control, the damaged company might not sue the other company. For instance, even if Company A suffers harm because of non-performance of an intra-group transaction by Company B, common control of both companies may mean that Company A foregoes its claim in favour of Company B, which may be underlined by a conflict of interest because this benefits the corporate controller who has more economic stake in Company B.

While not only the terms but also the performance of a related party transaction matters in terms of value-diversion, the latter becomes even more important in intra-group transactions because such transactions are often long-term (such as a supply agreement). The issue therefore becomes how to ensure the *constant* screening of an intra-group transaction. The oversight of courts may prove ineffective because the initiators of derivative suits (namely minority shareholders) may not be able to continuously monitor (performance of) all the intra-group transactions of an investee company.[84] A better alternative is to entrust the issue to independent directors. As mentioned above, normally, directors would decide whether to pursue the claims of a company against counterparties in arm's length transactions. In related party transactions, due to conflicts, they may however drop rightful claims against related companies. Independent or minority shareholder-dependent directors could be entrusted with the charge of pursuing such claims along with their duty of reviewing and approving related party transactions in the first place. Or, in companies that often enter into R.P.T.s, permanent R.P.T. committees (similar to remuneration or audit committees) could be formed or mandated to approve and handle all the issues that arise from an R.P.T.[85]

[84] Such an option would also be costly given the administrative costs of litigating all the intra-group transactions. Furthermore, cost considerations may make most, if not all, minority shareholders rationally apathetic in terms of bringing a derivative suit in the name of the company for non-performance. The option of utilising the general meeting for the decision of bringing a suit (through the majority vote of minority shareholders) which would necessitate a company action in the case of an affirmative vote would provide a better alternative, albeit not a swift one unless extraordinary general meetings are held (as well as being possible only in those jurisdictions where lawsuits against directors can be brought also via a shareholder meeting resolution).

[85] There also exist legal regimes which allow offsetting between different costs and benefits arising from the relationship of the relevant company with an affiliate company. For example, even if there are damages for Company A arising from the non-performance by Company B of a contract, if these damages are offset by another benefit Company A derives from its relationship with Company B, then it is considered that there is no value diversion. For an explanation of such legal regimes, *see infra* note 91. *Cf. Sinclair Oil Corp. v. Levien,* 280 A.2d 717, at 723 (Del. S.Ct. 1971)(refusing to allow the parent company a credit or setoff of all benefits provided by it to the subsidiary with respect to all the alleged damages except that setoff is allowed on specific transactions).

Secondly, as stated above, intra-group transactions are often long-term contracts. This situation creates another issue in relation to preventing value-diversion: even if the relevant transaction is fair at the time of conclusion and review/approval, it may become unfair due to changes in market conditions.[86] Obviously, even in arm's length transactions, parties cannot anticipate every possible change in the future that may require an adaptation, and contract accordingly.[87] Or, imbalances in bargaining power may prevent a contracting party from taking measures against possible detrimental outcomes within the contractual framework. In intra-group transactions, however, a conflict of interest may result in omissions of useful terms that would allow a contracting party to maintain a beneficial position in a contract. At a minimum, therefore, courts may also review whether R.P.T.s conform to standard modal contracts, or whether terms that could have been expected from a reasonable or prudent businessperson and allow adaptation in the transaction exist.[88] Relevant disinterested bodies (such as independent directors) may also be entrusted with ensuring that the pertinent intra-group transaction is not only fair at the time of conclusion but also will not be detrimental to the company during the course of the contract. This task can be achieved by confirming that the relevant (long-term) intra-group transaction includes provisions/terms that can enable the company to adjust according to market conditions (thus maintaining the fairness of the transaction) and actually invoking/enforcing such provisions/terms when needed.

A last issue relates to the oversight of intra-group transactions itself. A long-standing debate in this regard is whether, rather than vetting individual intra-group transactions, the total benefits and costs of the overall relationship of the relevant company with the corporate group and affiliated companies should be considered.[89] The latter approach would arguably provide more flexibility in the

[86] *See* Kang, *supra* note 8, at 134 (noting the problem of a corporate group not adjusting an internal transaction price immediately in response to the wide fluctuation of a fair market price).

[87] Incomplete contracts theory suggests that parties to a contract cannot specify all the relevant contingencies. *See*, *e.g.*, Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 Econometrica 755 (1988).

[88] For example, long-term energy supply contracts generally contain clauses of price formula and price revision (such as indexation mechanisms and hardship clauses). *See* Victor P. Goldberg, *Price Adjustment in Long-Term Contracts*, 1985 Wis. L. Rev. 527, 533–34 (1985); Victor P. Goldberg & John R. Erickson, *Quantity and Price Adjustment in Long-Term Contracts: A Case Study of Petroleum Coke*, 30 J. L. & Econ. 369 (1987). *See* also Pietro Ferrario, The Adaptation of Long-Term Gas Sale Agreements by Arbitrators (2017), (discussing several features of long-term gas sale agreements that allow renegotiation and adaptation of the agreement).

[89] *See*, *e.g.*, Klaus J. Hopt, *Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance*, 12 N.Y.U. J. L. & Bus. 139, 181 (2015)(noting that:

> [o]pen for future research is the question whether those Member States that deal with related party transactions and group law by imposing duties on the boards and directors of the parents and the subsidiaries (e.g. the UK and others) achieve equivalent as those that tackle the same problem with a more specific group law; similarly open is the question which one is solving the problem better.)

(citation omitted); *see also* Dammann, *supra* note 8, at 232 (stating that "[o]ne question is whether the law should focus on policing individual transactions or whether the priority should be to ensure that controlling shareholders do not, on balance, prove burdensome to the corporations they control").

management of a corporate group and reduce the costs of conducting intra-group transactions.[90] Some jurisdictions indeed implement such a regime albeit following different approaches.[91] While it is recognized that a comprehensive *ex post* review of the costs and benefits of being part of a corporate group may be extremely difficult,[92] such an approach may also increase *ex ante* the cost of capital, and some value-increasing projects may remain unfinanced because such vague concepts may prove unattractive for outside investors who will as a result apply discounts or demand higher interest rates.[93]

An alternative approach, proposed by Dammann, is to grant minority shareholders the right to compel the controlling shareholder to sell his or her shares and leave the company while loosening the review of self-dealing transactions.[94] The logic behind this proposal is that minority shareholders will be the judge of the benefits and costs of the existence of a corporate controller and *rationally* will expel him or her if (and only if) they consider that the costs of the control exceed its benefits.[95] Apart from certain possible glitches in the workings of such an approach,[96] it is not feasible within the framework of controller-entrepreneurs. The latter assumes that the controlling

[90] *See* Dammann, *supra* note 33, at 708–709 (arguing that "a strictly enforced transaction-centered approach is bound to place a considerable burden on those controlling shareholders who double as the controlled corporation's customers or suppliers"); Pacces, *supra* note 23, at 193, fn. 33 (commenting that strictness of R.P.T. regime may discourage corporate groups with minority shareholders).

[91] Germany, for example, requires losses of the subsidiary resulting from acting in the interest of the group rather than in its particular interest to be compensated. *See* §302 (for contractual groups) and §311 Aktiengesetz [AktG][Stock Corporation Act]. Italian legal regime, more flexibly, does not hold a parent company liable for any damage resulting from an intra-group transaction if it has been offset, considering "the overall results of the parent's management and coordination activity." *See* Codice Civile[C.c.] [Civil Code] Article 2497(It.). Lastly, in France, the *Rozenblum* doctrine allows subsidiaries to sacrifice their own interests for the corporate group as long as the structure of the group is stable, there is a coherent group policy, and an overall equitable distribution of costs and revenues among group members exists. *See generally* Enriques et al., *supra* note 9, at 163–164.

[92] *See* Dammann, *supra* note 8, at 235.

[93] *See also* Tröger, *supra* note 36, at 197.

[94] *See generally* Dammann, *supra* note 33, at 686 (calling this mechanism "corporate ostracism") & 718–725 (detailing his proposal).

[95] *See* Dammann, *supra* note 8, at 235.

[96] The proposal basically depends on the vote of the majority of minority shareholders (to ostracise the controlling shareholder or not). *See* Dammann, *supra* note 33, at 718–719. This leads to a number of problems. *See Id.* at 720–25, 738–40. First, it is not clear how minority shareholders will be able to ascertain the point at which they are better off ostracising the controlling shareholder. Second, there might be opportunistic behaviour by the minority shareholders. For example, activist hedge funds, acquiring a substantial minority stake, may leverage the power to ostracise the controlling shareholder to be able to implement the changes they request from the company. Lastly, conflicts of interest of some institutional investors as minority shareholders may lead to undesirable controllers (creating more costs than benefits) not being ostracised. On the conflicts of interest of institutional investors, *see* Bernard S. Black,*Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 595–608 (1990); John C. Coffee, Jr., *Liquidity versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277, 1321– 22 (1991); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L. J. 445, 469–72 (1991). Furthermore, whether, and if so, for which companies corporate ostracism should be a default rule gives rise to a number of complications. *See* Dammann, *supra* note 33, at 725–734.

stake results from a desire to have the ability to implement a business plan without the interference of outside shareholders in the presence of differences of opinion and information asymmetries.[97] If minority shareholders are allowed to expel the controlling shareholder even when they genuinely believe that the costs imposed by the corporate controller are higher than the benefits he or she brings, controller-entrepreneurs will be deterred from having a controlling stake in the first place because this is exactly the situation they would like to avoid by holding onto the control of the company.[98] In addition, the same differences of opinion and information asymmetries may cause minority shareholders to misjudge the costs and benefits of a controller-entrepreneur and his or her business plan. Overall, vetting intra-group transactions *individually* stands out as a better method in comparison to other ways of conducting an overall evaluation of the affairs of the relevant company with related entities.

CONCLUSION

Contrary to expectations a few decades ago, dispersed ownership is still the exception while concentrated ownership and corporate controllers are very likely to stay and become further diversified.[99] Drawing on the theories on corporate control and controlling shareholders, this article argued that controllers are a diverse group and their activities may simultaneously serve towards various ends such as extracting private benefits of control and implementing an idiosyncratic vision as entrepreneurs.

In particular, intra-group transactions in a corporate group can be a means of both expropriating minority shareholders and implementing an entrepreneurial idea. This tension creates the challenge for lawmakers, investors, and courts to optimally balance the goals of minority shareholder protection and allowing controller-entrepreneurs to implement their business plans. Without any preference for any type of review mechanisms employed by jurisdictions to oversee R.P.T.s (such as court review, approval of independent directors or disinterested shareholders), this article has proposed a legal framework including different categories/types of intra-group transactions and various methods of review. The aim is to ensure that controller-entrepreneurs can pursue intra-group transactions in a corporate group

[97] *See supra* notes 17–19 and accompanying text.
[98] *See also* Goshen & Hamdani, *supra* note 15, at 601–603 (arguing that "the controller should be able to prevent a non-consensual change of control from ever taking place.").
[99] *See* Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. Corp. L. 953 (2019).

within the context of implementation of an idiosyncratic vision without diverting value from a company to another one where their economic stake is greater.

While the terms of an R.P.T. greatly matter in terms of understanding the existence of value-diversion, this article has indicated that two other issues, namely the performance of the transaction and its fairness during the long duration of the contract, are also important to prevent value-diversion from the relevant company to affiliated companies for the benefit of the ultimate controller. Relevant review mechanisms should also be applied or created regarding these issues.

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Legal Aspects of Review of Valid Rulings in Criminal Proceedings in Connection with Significant Violations of Substantive or Procedural Provisions of the Law

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ABSTRACT

The aim of this article is to review the existing discipline of legal institutes in connection with significant violations of substantive or procedural legal norms and its significance in criminal proceedings in the Republic of Latvia and the Republic of Lithuania, their common and different features, problems and case law. The basis of the research is the analysis of regulatory enactments, court rulings, findings and opinions. The research is based on analytical and synthesis methods study of the correlations and differences in the legal regulation of criminal procedural law, comparative method comparison of specific legal regulations in the criminal procedural law of the Republic of Latvia and the Republic of Lithuania. The analytical method has been used to research, clarify and then evaluate the content of legal principles, terms, legal norms. The method has also been used to analyse court decisions. This method makes it possible to identify the main issues at stake in the content of specific legal provisions and to highlight their novelty, relevance or shortcomings. Statistical data processing methods have also been used in the research to collect and analyse data on a specific category of criminal cases in the Republic of Latvia and the Republic of Lithuania. The study analyses the case law of the Republic of Latvia and the Republic of Lithuania in cases where rulings have been re-examined after their entry into force. Data on such cases are summarised in four illustrations (figures). During the study, it has been established that the regulation of criminal procedure for the review of a judgement after its entry into force is similar in both countries, but the results of the reviewed cases are different. The criminal procedure regulations of the Republic of Latvia and the Republic of Lithuania, which provide for a new review of existing rulings if there exist significant violations of substantive or procedural law, are important to reach a fair decision by eliminating such significant violations committed by courts of first instance or appellate courts. Consequently, justice is achieved and the person's right to a fair trial is ensured.

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However, a balance must also be struck between how to ensure the legal force of a valid judgement in accordance with the principle of res judicata, and how to guarantee the rights of individuals to a fair trial. When reviewing an existing decision, the Supreme Court must consider the balance between ensuring the legal force of a valid court judgement in accordance with the principle of *res judicata*, and guaranteeing the rights of individuals to a fair trial if significant violations of substantive or procedural norms of law come to the fore after the judgement has entered into force.

KEYWORDS

Criminal Proceedings; Valid Court Ruling; Review of Court Judgements; Fair Trial; Persons Involved in Criminal Proceedings

TABLE OF CONTENTS

INTRODUCTION

This article focuses on the topicalities of criminal procedure regulation, which is related to the review of a valid ruling due to a significant violation of substantive and procedural law. In doing so, the author also focuses on the study of criminal procedure regulation and case law in the Supreme Courts of the Republic of Latvia and Lithuania in a comparative context.

The aim of the article is to study the review of existing rulings of legal institutes in connection with significant violations of substantive or procedural legal norms and its significance in criminal proceedings in the Republic of Latvia and the Republic of Lithuania, their common and different features, problems and case law.

The basis of the research is the analysis of regulatory enactments, court rulings, findings and opinions. The research is based on analytical and synthesis methods – study of the correlations and differences in the legal regulation of criminal procedural law, comparative method – comparison of specific legal regulations in the criminal procedural law of the Republic of Latvia and the Republic of Lithuania. Statistical data

processing methods have also been used in the research to collect and analyse data on a specific category of criminal cases in the Republic of Latvia and the Republic of Lithuania.

The research context is the legal relations regarding the new review of valid rulings of criminal proceedings. In turn, the object of the research is the legal regulation of a new review of valid rulings due to significant violations of substantive and procedural law.

The tasks of the article are to study the definition of criminal procedure in the Republic of Latvia and the Republic of Lithuania, to review of valid rulings due to significant violations of substantive or procedural law and to study the views expressed by legal researchers, as well as the relevant case law.

The principle of legal stability (*res judicata*) guarantees the non-appealability of a decision which has entered into force. A multi-instance court is provided for in criminal proceedings allowing the convicted person to appeal against a court decision that has not entered into force, thus preventing any mistakes made by the lower court. However, there are cases where the court's judgement has not been appealed at the court of appeal or cassation and has entered into force, but is erroneous. As the rulings have already entered into force, they are considered to be unappealable. However, such judgements cannot be considered lawful.

In certain cases, both in the Republic of Latvia and the Republic of Lithuania, the Supreme Court retains the power to review a ruling which has already entered into force if there are doubts about its legality. In the event of such a new review of a ruling, the right of individuals to a fair trial is considered to take precedence over the principle of legal stability, thus achieving a fair settlement of criminal relations.

The criminal procedural regulation must be such as to ensure that the convicted or acquitted person and the victim have equal opportunity to apply for a new review of an existing decision because of a material violation of the material or procedural laws.

1. REVIEW OF VALID RULINGS DUE TO SIGNIFICANT VIOLATIONS OF SUBSTANTIVE OR PROCEDURAL LEGAL NORMS IN CRIMINAL PROCEDURAL LAW

A judgement which has entered into force is presumed to be enforceable and to have the force of law.[1] The opinion expressed in legal literature is that legal stability is a component of the rule of law and requires not only a regulated legal process, but also a legally sustainable conclusion.[2] Consequently, a court judgement that has entered into force cannot be appealed.

The general principle of *res judicata* is enshrined in international law as one of the general principles of law recognized by civilised nations.[3] The practice of national courts pays close attention to the principle of a fair trial. For example, the Constitutional Court of the Republic of Latvia has recognized that the principle of *res judicata* constitutes the right to a fair trial, where according to this principle no one has the right to review a valid judgement with the aim of obtaining a retrial.[4]

The public as well as the individual expect from the competent authorities that the solution of the criminal relations is fair and the procedural regulations ensure that justice is delivered, i.e., a fair solution (result) is not possible without a fair process.[5] Thus, an essential component of the rule of law is a fair outcome of criminal proceedings, and the state must respect the constitutional right to a fair trial by creating an effective legal mechanism to prevent violations arising from the conduct of criminal proceedings.[6] The author agrees with the above-mentioned opinion and points out that an effective legal mechanism can be manifested through the creation of such criminal procedure regulations - norms of law, which foresee procedural provisions to correct mistakes made by a court.

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[1] On Judicial Power Section 16, in Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs [Rep. of the Supreme Council and Government of the Republic of Latvia], no. 1/2 (14/01/1993). Retrieved from https://likumi.lv/ta/en/en/id/62847.

[2] *See* Pāvels Gruziņš, *Spēkā esošu nolēmumu jaunas izskatīšanas krimināl procesuālā regulējuma attīstība pēc 1990. gada 4. maija, [Development of the criminal procedure regulation for re-examination of valid rulings after May 4, 1990]*, Krimināl procesa likumam-10 Pagātnes mācības un nākotnes izaicinājumi [Criminal Procedure Law - 10 Lessons of the past and challenges of the future] 409-418 (Rīga: Latvijas Vēstnesis, 2015).

[3] *See* Theofanis Rosa, *The doctrine of Res Judicata in International Criminal Law*, 3 International Criminal Law Review 195–216 (2003).

[4] Constitutional Court of the Republic of Latvia, Judgement Jan 9, 2014, Case Nr. 2013-08-01, [7]. Retrieved from https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2013-08-01_Spriedums.pdf.

[5] *See* Kristīne Strada-Rozenberga, *Krimināltiesības: tiesiskā drošība krimināltiesībās un krimināl procesā, [Criminal law: legal certainty in criminal law and criminal procedure]*, in Vispārējie tiesību principi: Tiesiskā drošība un tiesiskā paļāvība [General principles of law: Legal certainty and legitimate expectations] 83, 74-98 (Rīga: Tiesu namu aģentūra, 2017).

[6] *See* Sandra Kaija, *Prokurora loma krimināl procesa atjaunošanā jaunatklātu apstākļu dēļ [Prosecutor's Role in the Resumption of Criminal Proceedings Due to Newly Discovered Facts]*, 2(5) SOCRATES 18, 17-26 (Rīga: Rīgas Stradiņa Universitāte, 2016).

However, there may also be cases where, after the judgement has entered into force, it becomes apparent that there has been a court error in the application of certain legal provisions. The court error may be in the form of incorrect application or interpretation of a substantive rule, or the breach of a procedural rule. When judges interpret a legal norm, an important aspect is the essence of the purpose and spirit of the law, observing that "*errare humanum est*".[7] In turn, in order to be able to eliminate such errors even after the court judgement has entered into force, the legislators have provided for a special procedure, which extends the possibility to review a court judgement that has entered into force to correct an obviously incorrect judgement based on a court error.[8]

Even if a ruling has entered into force in the criminal proceedings presumed as not subject to review, but where after its entry into force, it becomes apparent that there has been a court error in the application of certain legal provisions, any person involved in the criminal proceedings whose rights or legal interests have been adversely affected in the particular criminal proceeding, must have a guaranteed right to a retrial. This means that the right to apply for the initiation of proceedings for review of valid rulings due to significant violations of substantive or procedural legal norms must be guaranteed. In order to initiate such a process, however, there must be a framework of criminal procedure providing for a fair and lawful procedure, respecting well-established human rights standards. Ensuring human rights is a fundamental principle of a democratic state and one of the cornerstones of the rule of law, and these safeguards should also aim at the application of fair rules of criminal procedure, guaranteeing everyone involved in criminal proceedings the right to a fair and lawful decision.

The right of every person to a fair trial is governed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter the Convention].[9] Existing rulings may be reviewed only in exceptional cases where there is reason to believe that the ruling is not legal, because there have been significant violations of substantive or procedural law that have affected the legal interests of the person involved in the criminal proceedings – the convicted person.

[7] Kiril V .Kamchatov, Irina V. Chashchina, Ekaterina V. Velikaya (Камчатов Кирил В., Чащина Ирина В., Великая Екатерина В.), Vozobnovleniye proizvodstva po ugolovnomu delu (Возобновление производства по уголовному делу) [Resumption of criminal proceedings], (Moskva, Rossiya: Akademiya general'noy prokuratury Possiyskoy Federatsii (Москва, Россия: Академия генеральной прокуратуры Российской Федерации) [Moscow, Russia: Academy of the Prosecutor General of the Russian Federation], 2016), pp 9, 139.

[8] *See* Pāvels Gruziņš, *Spēkā esošu nolēmumu jaunas izskatīšanas krimināl*procesuālā *regulējuma attīstība*, *[Development of the criminal procedure regulation for re-examination of valid rulings]*, 12(04) Latvijas Republikas Augstākās tiesas biļetens [Bulletin of the Supreme Court of the Republic of Latvia] 28, 25-28 (2016).

[9] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950.

Chapter 63 of the Criminal Procedure Law of the Republic of Latvia - the review of valid rulings in relation to a significant violation of substantive or procedural law norms, regulates those special cases when it is possible to review rulings that have already entered into force but there are reasonable doubts regarding their legality.[10] The above mentioned criminal procedure provision must be considered in the context of Article 92 of the Constitution of the Republic of Latvia,[11] which guarantees the right of every person to a fair trial. The scope of the aforesaid provision includes not only the right of persons to address the court to appeal decisions of the appellate or cassation instance, but also the guarantees of a new review of valid rulings. In addition, there is no time limit for the submission of such an application or protest.[12] In the event of such an application or protest, it is permissible to infringe the principles of legal certainty and stability, primarily, in order to ensure a person's right to a fair trial, i.e. fair judgement.

In cases where it is likely that court decisions that have entered into force are considered unfair, the principle of justice prevails over the principle of legal stability, and the re-examination of decisions that have entered into force due to a significant violation of substantive or procedural law is a legal institute that has been constituted to guarantee a fair trial in cases specified by the law.[13]

However, only a court can ensure balance in the event of a conflict between the principle of *res judicata* and the principle of fair trial, as the right to a fair trial is guaranteed by a court.[14]

The Supreme Court of the Republic of Latvia has acknowledged that the norms included in Chapter 63 of the Criminal Procedure Law as a favorability principle are special for a convicted person and deterioration of the person's position is not allowed.[15] Thus, this means that when reviewing a court decision, the convicted person may trust that he or she will not be subject to a more severe punishment, even if the court, upon review of the case, recognizes that the applied law has been misinterpreted and was supposed to impose a more severe punishment.

[10] *See* Criminal Procedure Law of the Republic of Latvia (Apr. 21, 2005), Latvijas Vēstnesis, no.74, 11.05.2005 (63). Retrieved from https://likumi.lv/ta/en/en/id/107820.

[11] *See* The Constitution of the Republic of Latvia (Feb. 15, 1922), Latvijas Vēstnesis, no.43, 01.07.1993. (92) Retrieved from https://likumi.lv/ta/en/en/id/57980 (last visited Feb. 5, 2022).

[12] *See* Criminal Procedure Law of the Republic of Latvia (Apr. 21, 2005), Latvijas Vēstnesis, no.74, 11.05.2005, (667) Retrieved fromhttps://likumi.lv/ta/en/en/id/107820 (last visited Feb. 5, 2022).

[13] *See* Constitutional Court of the Republic of Latvia, Judgement Apr. 29, 2016, Case Nr.2015-19-01, (12.3.) Retrieved from https://www.satv.tiesa.gov.lv/wp-content/uploads/2015/08/2015-19-01_Spriedums.pdf (last visited Feb. 5, 2022).

[14] *See Id.;* Separate opinions of judges Osipoava S., Ziemele I. at [9]. Retrieved from https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/08/2015-19-01_Atseviskas_domas.pdf#search= (last visited Feb. 5, 2022).

[15] *See* Republic of Latvia Supreme Court, Decision Dec. 19, 2017, Case Nr.15830029512, SKK-605/2017. Retrieved from https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi (last visited Feb. 5, 2022).

The criminal procedure regulation in the Code of Criminal Procedure of the Republic of Lithuania is similar to that in Latvia; Chapter XXXIV of the Code of Criminal Procedure[16] states that a valid ruling may be re-examined if there are grounds to believe that the Criminal Law has been incorrectly applied.

The criminal procedural regulation of the Republic of Latvia stipulates that an application for review of a valid ruling may be submitted by a lawyer – on behalf of a convicted and acquitted person or a person against whom criminal proceedings have been terminated by a court decision, but the Prosecutor General or the Chief Prosecutor of the Criminal Justice Department of the Prosecutor General's Office may file a protest both on his own initiative and at the request of the above-mentioned persons.[17] It is evident from the above-mentioned regulation that the convicted or acquitted person cannot submit such an application to a court, but may do so only through a lawyer or apply to the Prosecutor General's Office for the submission of such an application to the Supreme Court.

The legislator has deliberately established the right of a lawyer to submit such an application on behalf of certain persons, because it must be sufficiently substantiated and motivated. Moreover, the application must clearly indicate the legal assessment of a substantive violation of a particular norm or several norms of the law and how such violation could have led to an unlawful decision.

Essentially, the criminal procedural regulation of the Republic of Lithuania stipulates that an application for review of a valid decision may be submitted by the convicted person himself, his representative or defence counsel, or a protest may be submitted by the Prosecutor General of the Republic of Lithuania.[18]

Comparing the criminal procedural regulations of both countries, it can be seen that the Lithuanian criminal procedural regulations are broader and allow a convicted person or his/her representative to apply to the Supreme Court without the assistance of a lawyer. However, the question which then arises is whether a person without the assistance of a lawyer would be able to give sufficient legal wording on the interpretation or application of norms by the court. Legally unfounded applications for a review may be rejected, so it is important that such an application is made by a person competent in law.

[16] *See* Code of Criminal Procedure of the Republic of Lithuania (Mar. 14, 2002), valstybės žinios, no.37-1341, 09.04.2002. Retrieved from https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.163482/asr (last visited Feb. 5, 2022).

[17] *See* Criminal Procedure Law of the Republic of Latvia (Apr. 21, 2005), Latvijas Vēstnesis, no.74, 11.05.2005, (663.2.) Retrieved from https://likumi.lv/ta/en/en/id/107820 (last visited Feb. 5, 2022).

[18] *See generally* Code of Criminal Procedure of the Republic of Lithuania (Mar. 14, 2002), valstybės žinios, no.37-1341, 09.04.2002. (452.1.) Retrieved from https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.163482/asr (last visited Feb. 5, 2022).

In turn, both Latvian and Lithuanian criminal procedural regulations do not provide an opportunity for an acquitted person to submit such an application.

Similarly, the criminal procedural regulations of both countries do not provide that the victim or his/her representative, themselves or through a lawyer, are guaranteed the right to apply for a review of a valid decision due to a significant violation of substantive or procedural law. While the opinion expressed in legal literature is that the principle of equality of all persons involved in criminal proceedings declared in Section 8 of the Criminal Procedure Law is formally observed, there may be situations in practice where the victim is not in an equal position with the accused and the victim is not always able to fully defend his/her interests.[19] The author shares this opinion and considers that the opportunity to submit an application for re-examination of existing rulings due to a significant violation of substantive or procedural law is such a case where the victim is in an unequal position with respect to the convicted person.

As the author previously highlighted, the first part of Article 6 of the Convention establishes the right of every person to a fair trial. The term "any person" could be understood to include all persons involved in criminal proceedings, i.e. a convicted or acquitted person, as well as a victim. In addition, the definition in Article 6 of the Convention also includes the right to appeal against court decisions, including the right to appeal rulings that have entered into force, based on a significant violation of substantive or procedural legal norms. The Constitutional Court of the Republic of Latvia has also interpreted the notion of "fair trial" in its judgements. As per this jurisprudence, fair trial includes such an element as a fair result of legal proceedings, namely, a fair judgement and procedural laws set out such requirements as the principle of equality of parties, impartiality and neutrality of court and the correct application and interaction of these requirements leading to a fair judgement.[20]

In the author's opinion, the criminal procedural guarantee to submit an application for review of an existing decision due to a significant violation of substantive or procedural law should also be given to a victim, thus ensuring both the principle of equality and the right to a fair trial guaranteed by Article 6 of the Convention.

The author has studied criminal procedure laws existing in other Member States of the European Union and concluded that this legal institution – revision of final rulings due to a material violation of substantive or procedural rules – is rather rare in the

[19] *See, e.g.*, Rolands Siliņš, *Cietušā statusa krimināl*procesā pilnveides aktualitātes *[The status of a victim in criminal proceedings]*, 3(84) Admin. and crim. justice 22, 21-41 (2018).

[20] *See* Constitutional Court of the Republic of Latvia, Judgement Feb 4, 2003, Case Nr.2002-06-01 (3.) Retrieved from https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2002-06-01_Spriedums.pdf (last visited Feb. 5, 2022).

legislation governing criminal procedure in other countries. It is mostly prevalent in post-Soviet countries. For instance, Articles 622 to 626 of the Criminal Procedure Code of the French Republic refer to "revision of decisions".[21]

However, circumstances referred to as "newly discovered", which have other goal and grounds both in fact and in substance, may be a reason for revising final rulings, namely: a criminal case with a final judgement may be reopened in the event of discovery of any new circumstances that actually existed but were not known to the court. Likewise, the German Code of Criminal Procedure (Part 4 – Reopening of proceedings concluded by a final judgement)[22] defines the procedure for reopening criminal cases based on newly discovered circumstances, while it is not provided that final rulings may be revised due to a material violation of substantive or procedural rules.

Meanwhile, the Criminal Procedure Code of the Russian Federation (Chapter 481 – Proceedings in the supervision court instances)[23] stipulates that rulings may be revised in situations when a material violation of substantive or procedural laws is established. According to this Code, a final ruling may be revised if it is established that the ruling is not legal, there has been a material violation of any provisions, i.e. provisions of the Criminal Code have not been applied correctly, or procedural rules set out in the Criminal Procedure Code have been breached. This is mainly to secure a convicted person's right to a revision of a judicial ruling. It should be noted that, pursuant to the criminal procedure legislation of the Russian Federation, an application for revision of a judicial ruling may be filed not only by convicted or acquitted persons but also by victims. This shows that the legislation governing criminal procedure is based on the principle of equality, which is in line with generally accepted rules of human rights.

In this context, it is also important to emphasise conformity with the principle of *ne bis in idem*.

The rationale of the *ne bis in idem* principle is manifold and traditionally it was linked to the sovereignty and legitimacy of the state and its legal system, as well as respect for the *res judicata* (*pro veritate habetur*) of final judgements.[24]

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[21] Code de procédure pénale [Criminal Procedure Code of the French Republic]. Retrieved from https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154 (last visited Feb. 5, 2022).

[22] *See generally* The German Code of Criminal Procedure (1987), Bundesgesetzblatt [Federal Law Gazette], Part I p. 1074, 1319. Retrieved from https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0025 (last visited Feb. 5, 2022).

[23] *See* Criminal-Procedural Code of the Russian Federation (Уголовно-процессуальный кодекс Российской Федерации) (2001). Retrieved from http://pravo.gov.ru/proxy/ips/?docbody=&nd=102073942.

[24] *See* John A.E. Vervaele, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, 9 Utrecht L. rEV 211-212 (2013).

It should be acknowledged that both international documents dealing with human rights and national criminal procedure laws strictly define that no one may be tried or punished again for an offence for which they have already been convicted or acquitted by a ruling in a criminal case which has been delivered according to the statutory procedure and has become final. It is however laid down that the double jeopardy rule is not applicable in situations when a criminal case is reopened, or a material violation of substantive or procedural rules is detected in a ruling. Accordingly, the principle of *ne bis in idem* will indeed not be infringed in situations where a final ruling delivered by a court in a criminal case is revised due to a material violation of substantive or procedural rules.

2. COURT PRACTICE IN CRIMINAL CASES REGARDING RE-EXAMINATION OF VALID RULINGS DUE TO SIGNIFICANT VIOLATION OF SUBSTANTIVE OR PROCEDURAL NORMS OF LAW

In the Republic of Latvia, in accordance with the provisions of Chapter 63 of the Criminal Procedure Law,[25] the Supreme Court examines applications and protests regarding a new review of a valid ruling due to a significant violation of substantive or procedural norms of the law. During the period from 2015 to 2020, the Supreme Court of the Republic of Latvia has reviewed 273 criminal cases[26] in accordance with Chapter 63 of the Criminal Procedure Law of the Republic of Latvia.[27]

In order to evaluate the trends, the author has prepared a summary of the criminal cases reviewed by the Supreme Court of the Republic of Latvia in accordance with Chapter 63 of the Criminal Procedure Law (see Figure 1).

[25] *See* Criminal Procedure Law of the Republic of Latvia [hereinafter C.L.] (Mar 21, 2005), Latvijas Vēstnesis, no.74, 11.05.2005, (63.) Retrieved from https://likumi.lv/ta/en/en/id/107820.

[26] Republic of Latvia Supreme Court, Division of Case-law and Research July 10, 2020, Nr.40-1/11-921nos (unpublished material).

[27] Republic of Latvia Supreme Court, Archive of case-law decisions. Retrieved from http://at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs.

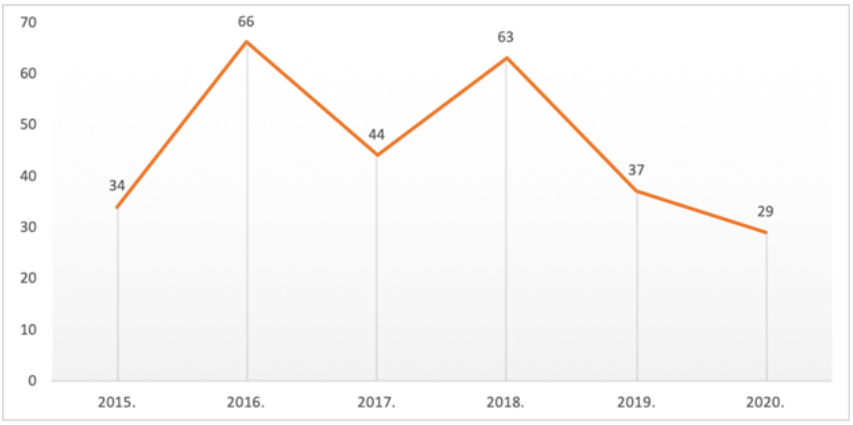

Figure 1: Criminal cases reviewed by the Supreme Court of the Republic of Latvia in accordance with Chapter 63 of the Criminal Procedure Law. [Designed by the author based on data retrieved from: Republic of Latvia Supreme Court, Archive of case-law decisions;[28] *Republic of Latvia Supreme Court, Division of Case-law and Research, 2020, Nr.40-1/11-921nos*[29]]

Examining the case law of the Supreme Court of the Republic of Latvia on cases relating to Chapter 63 of the Criminal Procedure Law, it can be concluded that there is a relatively large number of such rulings (court judgements) for which applications or protests have been submitted for review indicating possible erroneous final judgements.

However, the Supreme Court has not upheld such applications or protests in all cases. In order to assess trends, it is important to examine in how many of these cases the rulings have been left unchanged (i.e. the application or protest has been rejected) and in how many cases breaches of substantive or procedural law have been found (i.e. the court decision has been set aside in whole or in part, the decision has been amended or proceedings have been terminated).

The author has prepared a summary of the rulings adopted by the Supreme Court of the Republic of Latvia in accordance with Chapter 63 of the Criminal Procedure Law (see Figure 2).

[28] *Id.*

[29] Republic of Latvia Supreme Court, Division of Case-law and Research July 10, 2020, Nr.40-1/11-921nos (unpublished material).

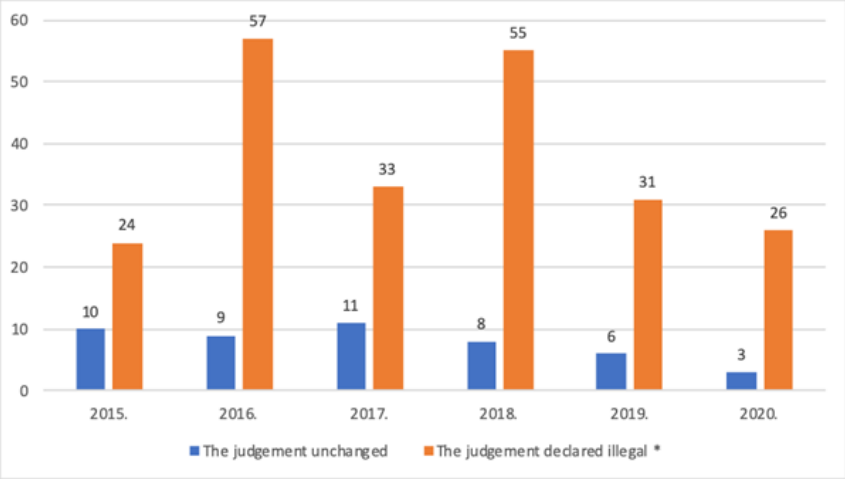

Figure 2: Rulings adopted by the Supreme Court of the Republic of Latvia in accordance with Chapter 63 of the Criminal Procedure Law [Designed by the author based on data retrieved from: Republic of Latvia Supreme Court, Archive of case-law decisions;[30] *Republic of Latvia Supreme Court, Division of Case-law and Research, 2020, Nr.40-1/11-921nos*[31]]
* "*The judgement declared illegal*" – *When reviewing the criminal case in accordance with Chapter 63 of the Criminal Procedure Law, the Supreme Court annulled the ruling in full or in part, amended the ruling, terminated the proceedings or addressed the case to a lower court.*

As can be seen, from the reviewed cases, in most cases the Supreme Court annulled the decisions in full or in part, amended them or terminated the proceedings, thus, the earlier decisions were declared illegal, establishing significant violations of substantive or procedural legal norms.

Article 451 of Chapter XXXIV of the Code of Criminal Procedure of the Republic of Lithuania[32] regulates that an existing ruling may be re-examined if there are grounds to believe that the provisions of the Criminal Law have been incorrectly applied.

Over the five-year period from 2015 to 2019, the Supreme Court of the Republic of Lithuania reviewed 1,721 criminal cases[33] in accordance with Chapter XXXIV of the Code of Criminal Procedure of the Republic of Lithuania.

In order to evaluate the trends, the author has prepared a summary of the criminal cases reviewed by the Supreme Court of the Republic of Lithuania in accordance with Chapter XXXIV of the Code of Criminal Procedure (see Figure 3).

[30] Republic of Latvia Supreme Court, Archive of case-law decisions, Retrieved from http://at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs.
[31] Republic of Latvia Supreme Court, Division of Case-law and Research July 10, 2020, Nr.40-1/11-921nos (unpublished material).
[32] *See* Code of Criminal Procedure of the Republic of Lithuania (Mar. 14, 2002), valstybės žinios, no.37-1341, 09.04.2002. Retrieved from https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.163482/asr.
[33] *See, e.g.*, The Supreme Court of Lithuania, 26.08.2020. No. (1.15)5F-2, not published.

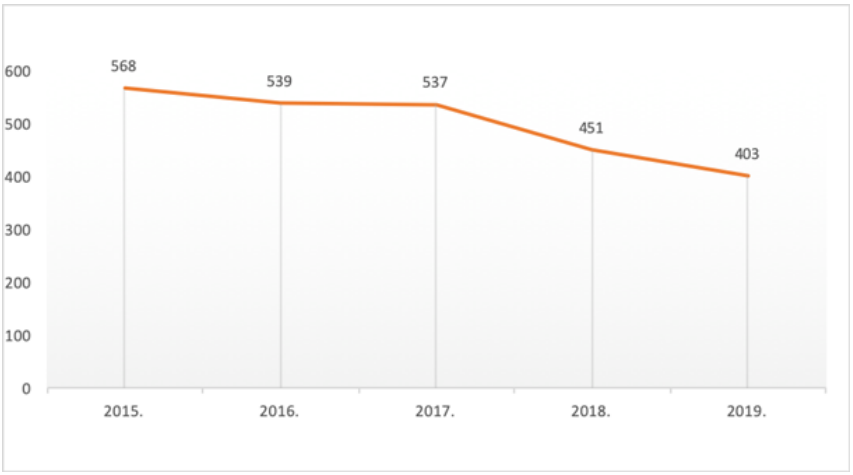

Figure 3: Criminal cases heard by the Supreme Court of the Republic of Lithuania in accordance with Chapter XXXIV of the Code of Criminal Procedure [Designed by the author based on data retrieved from: *The Supreme Court of Lithuania, 2020., No. (1.15)5F-2*[34]*]*

A sharp difference can be seen in the volume of cases reviewed when comparing the practice of the Supreme Court of the Republic of Lithuania with the cases of a similar category reviewed by the Supreme Court of the Republic of Latvia. The large number of judgements reviewed clearly indicates possible erroneous final judgements. On the other hand, the extent to which the final decisions in criminal cases have been erroneous can only be inferred from the rulings adopted by the Supreme Court.

The author has prepared a summary of the rulings adopted by the Supreme Court of the Republic of Lithuania in accordance with Chapter XXXIV of the Code of Criminal Procedure (refer Figure 4).

[34] *See, e.g., Id.*

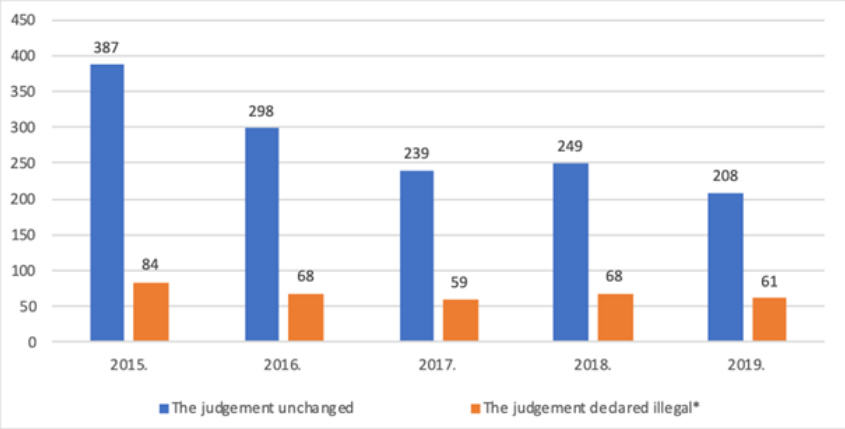

Figure 4: Rulings adopted by the Supreme Court of the Republic of Lithuania in accordance with Chapter XXXIV of the Code of Criminal Procedure [Designed by the author based on data retrieved from: *The Supreme Court of Lithuania, 2020., No. (1.15)5F-2*[35]*]*
* "*The judgement declared illegal*" - *the Supreme Court, upon hearing the criminal case in accordance with Chapter XXXIV of the Code of Criminal Procedure, annulled the decision in full or in part, amended the decision or terminated the proceedings.*

As can be seen from the data in Figure 4, it could be concluded that the Supreme Court of the Republic of Lithuania ruled in most cases in this category that the previous rulings should be left unchanged, and the applications of persons or protests of the Prosecutor General were rejected, indicating that the earlier rulings were legal and justified.

From the information available on the Latvian Court Portal[36] on the rulings published on the thirty-one cases reviewed by the Supreme Court of the Republic of Latvia in accordance with Chapter 63 of the Criminal Procedure Law in 2019, it can be seen that the main subjects of the application are those provided for in Section 663, Paragraph 2 of the Criminal Procedure Law (the Prosecutor General or the Chief Prosecutor of the Criminal Law Department of the Prosecutor General's Office submitting a protest) where in six criminal cases the applications were submitted by lawyers, ensuring defence of the interests of the convicted person and in only one out of those cases the application was upheld and the court judgement was declared illegal. On the other hand, in criminal cases where protests had been filed, only in one case the protest was rejected and the decision upheld, and in all the other cases the decision of the court of first instance or the court of appeal was found to be unlawful in full or in part.

The erroneous rulings were primarily based on the incorrect application of Articles of the General Part of the Criminal Law[37] specified in Section 574, Paragraph 1 of

[35] *See, e.g., Id.*
[36] *See* Latvian Court portal e-service website https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi.
[37] *See* The Criminal Law of the Republic of Latvia [hereinafter C.L.] (June 17, 1998), Latvijas Vēstnesis, no.199/200, 08.07.1998. Retrieved from https://likumi.lv/ta/en/en/id/88966.

the Criminal Procedure Law (For example: Section 50, Paragraphs 2[38] and 5,[39] Section 51,[40] Section 52, Paragraph 5,[41] Section 55, Paragraph 5[42] etc.) – the final decisions Republic of Latvia Supreme Court Senate in the criminal cases: SKK-J-870/2019,[43] SKK-J-817/2019,[44] SKK-J-761/2019.[45]

Thus, the erroneous application of the Criminal Law provisions are mainly related to the determination of the punishment for several criminal offences after several judgements, as well as the incorrect application of the provisions regarding the addition and substitution of punishments.

In several criminal cases, the Supreme Court has also determined significant violations of the Criminal Procedure Law (for example: violation of Section 25[46] of the Criminal Procedure Law, which has led to unlawful deterioration of the situation of a convicted person by applying Section 575, Paragraph 3 of the Criminal Procedure Law) – judgements of the Republic of Latvia Supreme Court Senate in the criminal cases SKK-J

[38] (C.L. 50.2) If all criminal offences constituting the aggregation of criminal offences are criminal violations or less serious crimes, the final punishment shall be determined including the lesser punishment within the more serious or also completely or partially adding together the punishments imposed. In such case, the total amount or period of the punishment may exceed the maximum amount or period of the punishment provided for the most serious of the committed criminal offences, but not more than a half of the maximum amount or period of the punishment provided for the most serious of the criminal offences committed. In drawing up a penal order the public prosecutor may not determine the total amount or period of the punishment which exceeds the maximum amount or term of the punishment provided for the most serious of the criminal offences committed.

[39] (C.L. 50.5) The court shall determine the punishment in accordance with the same procedure if, after a judgement has been rendered or a public prosecutor's penal order has been drawn up, it is established that the person is also guilty of another criminal offence which he or she had committed prior to entering into effect of the judgement or the public prosecutor's penal order in respect of the first matter. In such case, the period of the punishment shall include the punishment which has already been totally or partially served after the first judgement. If the period of deprivation of liberty determined conditionally in a judgement exceeds the period of deprivation of liberty determined in another judgement, the period of deprivation of liberty determined conditionally shall be completely or partially added to the period of deprivation of liberty.

[40] (C.L. 51.1) If, after the judgement has entered into effect, but, prior to serving the full punishment, the convicted person has committed a new criminal offence, a court shall add, completely or partially, the punishment which has not been served after the previous judgement to the punishment determined in the new judgement.

[41] (C.L. 52.5) Arrest, detention, and a part of a served punishment shall be counted as part of the period of a punishment in accordance with the provisions of Paragraph 1 of this Section.

[42] (C.L. 55.5) In imposing a suspended sentence, additional punishments may be imposed. Additional punishment - probationary supervision - shall be executed only if the court decides to execute the basic punishment determined in the judgement.

[43] *See* Republic of Latvia Supreme Court Senate, Decision Dec. 23, .2019, Case Nr.11092021017, SKK-J-870/2019 Retrieved from https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi (last visited Feb. 6, 2022).

[44] *See* Republic of Latvia Supreme Court Senate, Decision Nov. 26, 2019, Case Nr.11181160416, SKK-J-817/2019 Retrieved from https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi (last visited Feb. 6, 2022).

[45] *See* Republic of Latvia Supreme Court Senate, Decision Nov. 4, 2019, Case Nr.13800010718, SKK-J-761/2019 Retrieved from https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi (last visited Feb. 6 2022).

[46] (C.P.L. 25.1) Nobody shall be tried or punished again for an offence for which he or she has already been acquitted or punished in Latvia or in a foreign country by a ruling made in accordance with the procedures laid down in law and in effect in a criminal case or a case of administrative violation.

-610/2019,[47] SKK-J-0613-19.[48] Namely, violations of the *ne bis in idem* principle have been determined.

In several criminal cases, the Senate of the Supreme Court of the Republic of Latvia has established a violation of Section 25 of the Criminal Procedure Law - inadmissibility of double punishment. For example, in criminal case no. 11110005019 (SKK-J-610/2019), it was established that the court of first instance, when making a judgement, had allowed additional penalty to be added to the penalty imposed on a person by another judgement of the court of first instance - deprivation of the right to drive a vehicle - to be applied twice. The Court acknowledged that in imposing a final sentence in accordance with Paragraph 1 of Section 51 of the Criminal Law, and adding the unserved additional sentence to the sentence already imposed on him by another earlier judgement of the court of first instance, unreasonably applied Section 51, Paragraph 1 of the Criminal Law, thus committing a violation of Criminal Law specified in Section 574, Paragraph 1 of the Criminal Procedure Law, as well as committing a violation of the principle of inadmissibility of double punishment (*ne bis in idem*) established in Section 25 of the Criminal Procedure Law, which in turn led to an unlawful deterioration of the convicted person's situation. The Senate of the Supreme Court indicated that a violation of Section 25 of the Criminal Procedure Law shall be recognized as a significant violation within the meaning of Section 575, Paragraph 3 of the Criminal Procedure Law, which led to an illegal ruling.[49]

The enrichment of content of the *ne bis in idem* principle defined in Section 25 of the Criminal Procedure Law of the Republic of Latvia stems from very important sources of international law, including Protocol No. 7 to the Convention on Human Rights. These sources of law define the principle of inadmissibility of double jeopardy both as an element of the principle of justice and as an independent principle of law.[50]

Analysing the case law, the author concludes that the criminal procedural regulations of both the Republic of Latvia and the Republic of Lithuania on the review of valid rulings due to significant violations of substantive or procedural law are not empty rules, but are applied in practice to reach a fair decision, preventing serious infringements committed by courts of first instance or courts of appeal. As can be seen

[47] *See* Republic of Latvia Supreme Court Senate, Decision Nov. 5, 2019, Case Nr. 11110005019, SKK-J-610/2019 Retrieved from https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi (last visited Feb. 6, 2022).

[48] *See* Republic of Latvia Supreme Court Senate, Decision Aug. 27, 2019, Case Nr.11380039617, SKK-J-0613-19 Retrieved from https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi (last visited Feb. 6 2022).

[49] *See* Republic of Latvia Supreme Court Senate, Decision Nov. 5, 2019, Case Nr. 11110005019, SKK-J-610/2019 Retrieved from https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi (last visited Feb. 6, 2022).

[50] *See* Zeppa-Priedīte Violeta, Krimināprocesa likuma komentāri A daļa [Part A of the Criminal Procedure Law] 112-115 (Latvijas Vēstnesis ed., 2019).

from the case law and statistical data, every year the Supreme Courts of both countries recognize a number of court rulings that have already entered into force as illegal, as a result of which errors made by the courts are eliminated. Thus, the convicted person can be sure that such a final decision (by reviewing the decision again) by the Supreme Court is fair, lawful and justified by law.

The author has analysed the above information and aggregated statistical data and concluded that a tendency can be observed in both the Republic of Latvia and the Republic of Lithuania that final judicial rulings may occasionally be recognised as unlawful by the Supreme Court because laws have been misapplied by courts when giving their judgements. Moreover, such cases are considered only on the basis of applications filed by certain persons, i.e., the right to the revision of a ruling is guaranteed only for convicted persons. Meanwhile, no such right is granted to victims, which implies the unequal treatment of parties to criminal proceedings.

As recognised in legal literature, the reopening of criminal cases due to a material violation of substantive or procedural rules is occasionally referred to as "delayed cassation".[51] The author believes that this assertion is underpinned by criminal procedure legislation of both the Republic of Latvia and the Republic of Lithuania, because substantially similar matters – conformity with and construction of substantive rules, including the Criminal Law, and criminal procedure rules – are reviewed as part of cassation proceedings and revision of final rulings due to a material violation of substantive or procedural rules. In addition, it is set forth in criminal procedure legislation that applications concerning final judgements are revised by the Supreme Court, which is also the cassation court.

It can be concluded that denying a victim's right to file an application concerning a final ruling which is substantially unlawful and impairs the victim's legitimate interests infringes the victim's right to a fair trial and a fair final ruling in a case. Moreover, a fundamental principle of law – the principle of equality – is not observed in a situation when the victim is denied the right to seek revision of a court judgement due to a material violation of substantive or procedural rules. Even though the principle of equality of arms is not explicitly expressed in any of the human right treaties, it is clear from European Court of Human Rights case law that the principle falls within the right to a fair hearing. Moreover , the equality of arms principle obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.[52]

[51] Gruziņš, *supra* note 2, at 409, 414.

[52] *See* Mark Klamberg, Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events 56-57 (2013).

As recognized in legal doctrine, the government must respect the constitutional right to a fair trial by designing an effective legal tool that would prevent violations in criminal proceedings. Moreover, a court cannot be independent and fair without successful proceedings, which ensure the ability not only to deliver justice but also to correct unlawful or unreasonable rulings, even if they have already become final.[53]

In the author's opinion, a state governed by the rule of law must ensure that any offender is held criminally liable, meanwhile preventing situations where innocent persons may be convicted or erroneous rulings may be delivered in criminal cases. In this context, a state's duty is to formulate a policy that would strengthen the efforts of law-enforcement bodies in terms of the enforcement of criminal remedies, thereby minimising the likelihood of erroneous rulings. Accordingly, criminal proceedings should lead to a final ruling that would conform to consistent principles – the fundamental principles of lawfulness and the rule of law – and would be fair and not open to appeal.

Accordingly, the legal framework dealing with criminal procedure should secure equal possibilities to seek revision of final rulings due to a material violation of substantive or procedural rules not only for convicted or acquitted persons but also for victims, regardless of whether criminal proceedings have resulted in conviction or acquittal or have been terminated.

Therefore, the author believes that the legislation governing criminal procedure in both the Republic of Latvia and the Republic of Lithuania should be supplemented with a provision whereby the victim would also be allowed to file an application concerning a final ruling due to a material violation of substantive or procedural rules. This would ensure that not only convicted or acquitted persons but also victims may enjoy their right to a fair trial, and a uniform procedure would be guaranteed for persons whose rights or legitimate interests have been impaired in specific criminal proceedings, namely the principle of equality is observed.

[53] *See* Sandra Kaijia, *Prokurora loma krimināl*procesa *Atjaunošanā Jaunatklātu Apstākļu Dēļ* [*Prosecutor's Role in Criminal Proceedings in Connection with the Renewal of Newly Discovered Facts*], 2 Socrates, no. 5, 2016, at 17-18.

CONCLUSIONS

Summarizing the above stated, the author concludes that the criminal procedure regulations of the Republic of Latvia and the Republic of Lithuania provide for a new review of valid rulings, in cases where significant violations of substantive or procedural legal norms are revealed after the entry into force of the judgement. However, certain criteria, which are strictly defined by law, must be met on when or not such a review of an existing decision is permissible.

When reviewing an existing decision, the Supreme Court must consider the balance between ensuring the legal force of a valid court judgement in accordance with the principle of *res judicata* and guaranteeing the rights of individuals to a fair trial if after the entry into force of the judgement significant violations of substantive or procedural norms of law have been discovered.

The criminal procedural regulations of the Republic of Latvia and the Republic of Lithuania, which provide for a new review of valid rulings in connection with significant violations of substantive or procedural legal norms, are not just empty provisions. These regulations are applied in practice in order to reach a fair decision by eliminating significant violations committed by the courts of first instance or appellate instance. Thus, justice is achieved and the person's right to a fair trial is ensured.

The criminal procedural guarantees to apply for a review of a valid decision in connection with significant violations of substantive or procedural law should be available not only to the convicted person but also to the victim, thus ensuring both the principle of equality and the right to fair trial guaranteed by Article 6 of the Convention.

According to the criminal procedure legislation of the Republic of Latvia and the Republic of Lithuania, a victim may not file an application concerning a final ruling due to a material violation of substantive or procedural rules. At present, this right is granted only to convicted or acquitted persons. If a ruling is substantially unlawful, a victim's right to a fair trial and a fair final ruling is infringed.

To this end, the criminal procedure legislation should be supplemented, and Article 663(1) of the Criminal Procedure Law of the Republic of Latvia should be restated as follows: "[1] An advocate may submit an application for revision of a court ruling under the assignment of the following persons:

1. the convicted and acquitted person, or the person against whom criminal proceedings have been terminated with a court decision;
2. the victim, the victim's representative or legal representative".

The author also believes that Lithuania's criminal procedure legislation should be supplemented and the first sentence of Article 452 of the Code of Criminal Procedure of the Republic of Lithuania should be restated as follows:

> "[1] The convicted or acquitted person, the person's legal representative or defence lawyer, and the victim and the victim's legal representative, and the prosecutor general of the Republic of Lithuania may seek reopening of a criminal case through the Supreme Court of Lithuania, referring to Article 451 of this Code [. . .]".

Supplementing the criminal procedure legislation of the Republic of Latvia and the Republic of Lithuania as mentioned above would mainly secure the right of parties to criminal proceedings (not only convicted or acquitted persons but also victims) to a fair trial and guarantee a uniform procedure for all parties to criminal proceedings whose rights or legitimate interests have been impaired in specific proceedings.


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