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Impact of the Supreme Court's Case -Law on the Realisation of Procedural and Substantive Rights in Civil Procedure; Specific Aspects in Latvian Civil Procedure

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Abstract- The author's article is devoted to procedural justice in civil proceedings and factors affecting it. The author conducts research in her home country, i.e., the Republic of Latvia, on the practical consequences of the norms governing civil proceedings in connection with the application of case law, which the author associates with a factor affecting procedural justice. It should be explained here that the Republic of Latvia belongs to the continental European law group, therefore, the term case law means the highest court instances, i.e., Judgments of the Senate of the Supreme Court of the Republic of Latvia, which contain explanations about the correct application of the procedural and/or material norm or the interpretation of this norm. The influence of case law on the realization of substantive and procedural rights of individuals in the Republic of Latvia has three negative factors, against which there are still no protection mechanisms, i.e.: firstly, the case law is changing and the Senate of the Supreme Court can abandon its earlier explanations or interpretations regarding the application of the norm, but the new explanations can be diametrically opposed to the so-called " old". It may refer to substantive or procedural law.

Keywords: justice, supreme court's case law, civil procedure, procedural rights.

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Keywords: justice, supreme court's case law, civil procedure, procedural rights.

I. The Impact of Case Law on the Exercising of Rights

Section 5 Paragraph Six of the Civil Procedure Law of the Republic of Latvia was introduced with amendments adopted on 07 April 2004, which entered into force on 01.05.2004. *Case law is in fact created by the Supreme Court and has a direct impact on the procedural as well as substantive rights of individuals*, i.e., how the court will decide the case and how procedural standards will be applied during the proceedings. In this context, it is important to consider the impact of case law within the scope of justice, especially as it is the final product of a process containing legal insights and explanations, as well as reflecting an understanding of what justice is in the eyes of the court and how it is ensured in each case. The purpose of case law is the consequent application and interpretation of legal provisions; therefore, in the author's view, a feature that is characteristic of the activity of the Senate of the Supreme Court – the change in case law – should be emphasized. From a fairness point of view, this feature can be considered particularly dangerous. Changes in case law predictably *erase (abolish)* the previous approach and replace it with a new, possibly even diametrically opposed, interpretation or view of the applicable standard. This leads to the conclusion that the cases of individuals ruled in accordance with the *previous (old)* case law are, *by their nature (at least)*, unfair, and vice versa. A change in case law can have the same impact on cases that are still in process.

According to the explanation of the term "case law" available in the EU e-Justice portal, "*(...) the term 'case law' refers to rules and principles developed in judgments and judicial opinions from courts of law. When deciding a case, the courts make interpretations of the law, which contribute to case law."*[1] *Based on the above, it should be accepted that a change of case law is, by its very nature, a change of interpretation and/or*

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[1] Retrieved: 22.11.2021. From: https://e-justice.europa.eu/content_case_law-11-lv.do

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conclusions. There are different interpretations of the term "case law", as pointed out by Dr hist. V. Blūzma: "*(...) the Latvian term "judikatūra" is traced back to the German Judikatur, which in turn comes from the Latin iudicare - to judge, to decide. (...), and* that *E. Levits' interpretation of the term "judikatūra" has been criticized by Prof. K. Torgāns, pointing out that case law only consists of published decisions (...), emphasizing the thesis that "it is generally not the decisions themselves, but rather the conclusions about the law contained therein that are of interest. (...)".* As mentioned by the author, the amendments to Section 5 of the Civil Procedure Law entered into force on 01.05.2004 in the following wording: *Upon applying legal norms, a court shall consider the case law.* Approximately one year after the implementation of the amendments to the Civil Procedure Law, J. Neimanis published an article in which he mentioned that the annotation of the draft law "Amendments to the Civil Procedure Law" (Reg. 500) and the transcripts of parliamentary sessions do not contain detailed explanations about this legal provision and that it was included in the proposal of the Minister of Justice A. Aksenoks.[2] J. Neimanis also points out that in Latvia's case law is not binding *de jure*, although courts should follow it regularly. The author also points out that only certain types of precedents are binding *de jure* in Latvia: a judgment of the Constitutional Court is binding on all courts, and the interpretation of the law given by the Senate of the Supreme Court, as expressed in the judgment, is binding on the court that reviews the case again.[3] J. Neimanis further points out that the legislator's will thought and justification for the introduction of the respective provision, i.e., Section 5 paragraph Six of the Civil Procedure Law, cannot be ascertained. Section 28^{64} of the Law on Judicial Power states that the Supreme Court shall establish a case law database and that the procedures for the selection and processing of the information to be included in the case law database shall be determined by the President of the Supreme Court after coordination with the Ministry of Justice (Paragraph Five of said Section). The law does not state that case law can be changed, nor does it prescribe how issues are dealt with if case law is changed in a process where the court is hearing a case on the merits or rendering a judgment. The author is not alone in concluding that there is no regulation regarding case law and/or its changes. For example, G. Sniedzīte points out: "*(...) Having assessed the existing regulatory framework on procedural matters in Latvia, it must be concluded that the Latvian legislation does not contain provisions that would directly promote the stability and qualitative development of case law and would provide for special consideration to change the existing rights of judges (...)".*[5] The author of this paper examines the issue from the point of view of the procedural rights of a person whose case may depend on an unforeseeable event that may arise in connection with a change in case law. Referring to the 04 February 2003 judgment by the Constitutional Court of the Republic of Latvia in case No. 2002-06-01, G. Sniedzīte points out that court rulings only adopted in line with the interpretations of legal norms given in the decisions of higher-instance courts may turn out to be unjust if the judge is not allowed to deviate from the decisions of a higher court.[6] It should be clarified here that in its judgment of 04 February 2003 in Case No. 2002-06-01[7] the Constitutional Court ruled on the [8]compliance of Section 49 Paragraph Two of the Law On Judicial Power (in the wording in force until 03 December 2002) with Article 1 and Article 83 of the Constitution of the Republic of Latvia, which was as follows: *The Plenary Session shall adopt explanations on the application of the laws that are binding to the courts*. The above judgment of the Constitutional Court is noteworthy in that the Parliament of the Republic of Latvia (the legislator) explained in its reply to the Constitutional Court that it agreed that the binding nature of the decisions by the plenary session was contrary to the principle of separation of powers.[9] Regarding the judgment of the Constitutional Court of 04 February 2003 in Case No. 2002-06-01, E. Oļševskis points out that what is really important are the findings laid down in this judgment as a basis for the Latvian national legal system, pointing out that in the judgment in Case No. 2002-06-01 the Constitutional Court recognised that "(...) *in view of the task of the court's adjudication – to reach a true and just solution to the case – the judge evaluates the circumstances of the particular case within the framework of the case being heard (...)".* Further down in this chapter, the author will present a somewhat paradoxical situation that has been developing over twenty years and has become today's reality, i.e., the *actual impact of Section 5 Paragraph Six of the Civil*

[2] Neimanis, J.(2005). Case law and its binding force. *Jurista Vārds, 08.03.2005. No. 9 (364);*

[3] Ibid.

[4] The Law on Judicial Power. Adopted 15.12.1992. *Official journal of the Supreme Council and Government of the Republic of Latvia,* 1/2, 14.01.1993. Last amended 10.12.2020;

[5] Sniedzīte, G.(2013). *Tiesnešu tiesības. Jēdziens un nozīme Latvijas tiesību avotu doktrīnā.* (Judicial rights. Concept and meaning in the Latvian doctrine of sources of law.) Riga: Latvijas Vēstnesis, p. 301.

[6] Ibid, p. 294.

[7] Judgment of the Constitutional Court of the Republic of Latvia of 04 February 2003 in Case No. 2002-06-01. Retrieved: 30.12.2021. From: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2002-06-01_Spriedums.pdf

[8] Law on Judicial Power. Adopted: 15.12.1992. *Official journal of the Supreme Council and Government of the Republic of Latvia, 1/2, 14.01.1993. Last amended 10.12.2020. Presented legacy version from: 01.01.2002-02.12.2002. Retrieved: 30.12.2021. From: https://likumi.lv/ta/id/62847-par-tiesu-varu*

[9] Judgment of the Constitutional Court of the Republic of Latvia of 04 February 2003 in Case No. 2002-06-01. Retrieved: 30.12.2021. From: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2002-06-01_Spriedums.pdf, *see Paragraph 5 of the judgment*.

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Procedure Law on the work of courts and the administration of justice is identical to that which the Constitutional Court of the Republic of Latvia, in its judgment of 04 February 2003 in Case No. 2002-06-01, found to be inconsistent with Articles 1 and 83 of the Constitution of the Republic of Latvia. This is confirmed by the content and justification of court decisions, as well as by Supreme Court judgments, legal literature, and other sources which the author discusses later in this chapter.

II. The Nature and Predictability of Case Law in the Circumstances of Changes of Case Law

The Latvian legal system belongs to the Romano-Germanic legal family, given its historical development and location in continental Europe. J. Neimanis points out: "*(...) The Latvian legal system has historically belonged to the Romano-Germanic legal family. (...)*"[10] Scientific literature indicates that the Romano-Germanic legal system is characterised by the central and decisive role of the law. The Romano-Germanic legal system differs from others in that the legal acts are structured and arranged, while the rights themselves are based on the principles of justice and reason.[11] (*underlined by me - K. N.*) It is also pointed out that in most countries belonging to the Romano-Germanic legal system, legal precedent is considered a secondary source of law.[12] A comparison of approaches and use of legal precedent among different countries shows that, for example, in France, a court of appeal is entitled to reject a plea based solely on previous court decisions because "it has no adequate legal basis", whereas in the German legal system precedent (*prajudiz*) generally means any previous court decision that is in any way related to the case at hand.[13] Thus, the observation made more than twenty years ago in scientific papers comparing the role and participation of judges in law-making in the so-called Common Law countries and the Civil Law countries is also true, pointing out that today it would not be correct to say that a judge in the so-called Civil Law[14] countries would be merely an enforcer of the law, since the law-making function and, consequently, the adaptation to changing circumstances can be realised by means of so-called "general clauses", which give the judge a rather wide discretionary power.[15] This is reinforced by the French Code of Civil Procedure, pointing out that, according to Article 4 of the Code, a judge is guilty of refusing to hear a case if they refuse to hear it on the grounds that the law is "silent", unclear or insufficient.[16] Other authors who have addressed the nature of case law and judicial precedent mention another noteworthy aspect, namely that in the perception of many legal practitioners and judges alike, case law and judicial precedent are virtually equivalent to or even superior to the law.[17] When speaking about case law (judicial precedent) as a source of law, law scholars and professors in the Republic of Lithuania have said: "*(...) Case law/court precedent is recognised in Lithuania as a source of law in accordance with the judgment of the Constitutional Court of the Republic of Lithuania of 28 March 2006 (...).*"[18] In his paper on the modernisation of civil procedure in the Russian Federation, Dmitry Maleshin said: "(...) "Guiding explanations" of supreme courts stems from the Soviet times, when they were required to fill gaps in the legislation.", however this is not typical of today's situation. The court is independent and subject to the law, resulting in the prohibition on "guiding explanations"; however, the actual situation shows that this does not prevent courts from using the "guiding explanations" to justify their judgments.[19]

However, this does not explain what constitutes a change in case law, how it has occurred, what consequences it has for general legal certainty and fairness, what means can be used to counteract the foreseeably negative consequences for any given individual who, under certain conditions, may be affected by the respective situation. In discussions among professionals in the field on the role of case law, Dr. iur. D. Apse points out that "*(...) a deeper study of the continuity of the case law concept content development in Latvia is desirable, especially in relation to the justification of the need for case law change (...)*." The author has already mentioned that a change in case law changes the approach to the substantive meaning of a legal provision, regardless of whether it applies to a

[10] Neimanis, J. (2004). *Ievads tiesībās*. (Introduction to Rights) Riga: sworn attorney Jānis Neimanis, p. 66.
[11] Abgulaev, M.I., Komarov, S.A. (2003). Problems of the theory of state and law. Methodology issues. Society and the state. Society and law. St. Petersburg: Piter, p. 529.
[12] Lyashkov, S.V. (2014). Monograph. Significance of the decisions of the plenum of the Supreme Court of the Russian Federation in the Civil Process., Moscow: LLC ID "Biblio-Globus, p. 46.
[13] Ibid, pp. 42-43.
[14] *The Civil Law* system is also referred to as the Continental or Romano-Germanic system of law; the definition of the term is retrieved on: 30.12.2021. From: https://www.law.lsu.edu/clo/civil-law-online/what-is-the-civil-law/
[15] Yu Seon Bong (1999). The Role of the Judge in the Common Law and Civil Law systems: The Cases of the United States and European Countries. *International Area Review, Vol. 2, No. 2 Fall 1999,* p. 8. Retrieved: 30.12.2021. From: https://journals.sagepub.com/doi/pdf/10.1177/223386599900200203
[16] Ibid;
[17] Samsonov, N.V. (2019). On the place and significance of judicial practice and legal precedent in Russian civil procedural law. *Vestnik of Saint Petersburg University. Law 2: 293–310*, Retrieved: 30.12.2021. From: https://doi.org/10.21638/spbu14.2019.207
[18] Beinoravičius, D., Vainiuté, M. (2016). A brief overview of sources of law in Lithuania. *Jurista Vārds, 10.05.2016. No. 19 (922),* p. 23.
[19] Maleshin, D. (2010). Russian Civil Procedure: an exceptional mix. *"Civil Procedure Review", V.1., No. 1 Mar/Jun, 2010*, p. 110. Retrieved: 08.01.2022. From: www.academia.com database downloads

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substantive or a procedural legal provision. A possible change in case law can predictably give rise to and contribute to inequality and contradictions, and the *time of occurrence* of a change in case law cannot be predicted – it occurs instantly. The Civil Procedure Law in its current wording, i.e., at the time of writing the thesis, does not foresee any procedural instruments that person could use to request a case to be re-adjudicated if a change in the case law of the Senate of the Supreme Court would create more favourable consequences for them than the *previous (old)* case law. The author would like to highlight another important aspect, namely that neither the application of case law, even if it is in direct contradiction with the law, nor its change can be the subject of a constitutional complaint. There is no such option and thus there are no remedies.

Changeable case law does not promote justice either, as it works against the principle that "similar cases should be decided in a similar way". Furthermore, are all cases that are apparently similar also similar by substance/facticity? of course, not. {Thus, in the author's view, *similarity* can only be superficial, but not in the substance or specific details of the matter. Meanwhile in the adjudication of civil cases, it is the substance, circumstances, facts, etc., of each particular case that matter. It is questionable whether equality and/or legal certainty can be achieved with changing case law. In 2012, G. Zemrībo, expressing doubts about the amendments introduced by the legislator to the hearing of cases in the cassation instance, including the de-facto rewriting (as stated by G. Zemrībo) of Section 388[1] of the Administrative Procedure Law, additionally pointed out that the case law of the Senate is nothing permanent and the Senate itself has changed its case law several times.[20] G. Sniedzīte notes that: *"(...) Legal certainty requires that the court is obliged to justify its judgment with legal provisions and that a person should be able to anticipate the expected reasoning of the court to some extent. The aspect of predictability of a judgment is based on the principle of equality that states that similar cases should be decided in a similar way (...)"*[21] *In the context of the quotes above, the author emphasises that a person, under circumstances of changing case law, predicts the anticipated reasoning of the court, which applies not only to the application of substantive law but also, as shown by examples of case law, to the application of procedural standards.* In conditions of changeable case law, clarification of rights or their foreseeable application cannot be achieved by receiving so-called *relevant advice* either, as the Constitutional Court has indicated in its judgments in relation to the assessment of the degree of clarity and specificity of the provisions adopted by the legislator. For example, in Paragraph 16 of the judgment of 20 December 2006 in Case No. 2006-12-01[22], the Constitutional Court, with reference to Article 90 of the Constitution of the Republic of Latvia, states: *"(...) only a person who knows their rights is able to exercise them effectively and to defend them in a fair court in the case of unjustified infringement (...)".* Meanwhile in Paragraph 12 of the judgment of 30 March 2011 in case No. 2010-60-01,[23] in which the Constitutional Court referred to its judgment of 20 December 2006 in case No. 2006-12-01, the Constitutional Court stated: *"(...) In order to establish whether persons had a legitimate expectation of the preservation or exercise of particular rights, it has to be assessed whether their reliance on the contested provision is lawful, justified and reasonable and whether the legal regulation by its nature is sufficiently established and unchangeable to be relied upon (...)*." It follows from the above that only something that is "*sufficiently established and unchangeable*" can be relied upon; however, the relevant findings of the Constitutional Court have been expressed in relation to provisions issued by the legislator, whereas the relevant criteria do not apply to case law (*which is not a provision issued by the legislator*). In 2017, the Consultative Council of European Judges expressed the following opinion: *"(...) the adoption of divergent decisions, in particular in the last instance, may lead to a breach of the requirement of a fair trial, as enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (...)."*[24] Meanwhile, the President of the Supreme Court of the Republic of Lithuania, G. Kryževičius, speaking at a conference in 2010, stated: *"(...) the Supreme Court is not only a guarantor of consistent interpretation and application of law, but also supports the legislation and its development, as well as makes a significant contribution to the development of legal culture by providing a sense of stability, certainty and predictability to the society with its discretion (...)."*[25]

[20] Zemrībo, G. (2012). Report. Cassation proceedings in civil procedural law and problems arising therefrom. *Presented on 14 December 2012 at the conference on current issues in civil procedure organised by the Ministry of Justice.* Retrieved: 03.01.2022. From: https://www.at.gov.lv/files/uploads/files/docs/2013/ATBiletens6_web.pdf; p. 14.

[21] Sniedzīte, G. (2013). *Tiesnešu tiesības. Jēdziens un nozīme Latvijas tiesību avotu doktrīnā.* (Judicial rights. Concept and meaning in the Latvian doctrine of sources of law.)Riga: Latvijas Vēstnesis, p. 266.

[22] Judgment of the Constitutional Court of the Republic of Latvia of 20 December 2006 in Case No. 2006-12-01. Retrieved: 30.12.2021. From: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2006-12-01_Spriedums.pdf

[23] Judgment of the Constitutional Court of the Republic of Latvia of 30 March 2011 in Case No. 2010-60-01. Retrieved: Retrieved: 30.12.2021. From: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2010-60-01_Spriedums.pdf

[24] Indrūna, Z., (2018). *Judgments Bureau of the Senate of Latvia. Findings of the Senate of Latvia on the application of the provisions of the Civil Law (1938-1940).* Riga: Courthouse Agency, p. 14.

[25] Kryževičius, G. (2010). The role of the Supreme Court in the development of Lithuanian case law. *Conference materials. "Augstākās tiesas judikatūra un tās loma tiesiskās domas attīstībā Latvijā"*

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It follows from the above that consequent interpretation and application provides stability, certainty and predictability; however, the question is whether this is possible in the conditions of changing case law. Speaking at the aforementioned conference, Prof. Dr. h. c. *Assessor E. Levits expressed a similar view, i.e.: "*[26](...) Adherence to case law also creates legal certainty and predictability for the society and strengthens public confidence in the fairness of state institutions and, in particular, the courts, which is necessary in a law-governed state (...)." *The author emphasises that at least one direct and logical conclusion follows from the above, i.e., that legal certainty or predictability cannot arise in the conditions of changing case law.* Regarding the meaning and practical application of case law, E. Levits was even more specific: "*(...) in administering justice and making case law, the judge is independent, but not free. The judge is bound by law, by legal method and by case law (...). When administering justice, the judge has only two options: either to follow the existing case law or to create new case law. (...) By contrast, when a court judges differently, regardless of whether it is right or wrong, compelling, or not, it creates new case law. (...) This means that, in case law, court rulings are mostly applications of case law, because there are relatively few instances where the court has to decide something new on the merits, where it has to legally assess a factual situation for the first time (a so-called hard case) (...)."*[27] *Based on the explanations above, in conjunction with the facts confirmed over time that are manifested in the activity of the courts, i.e., in justifying judgments, the author points out that in Latvia there is a vertical movement (top down), within which there is essentially no innovation, but rather only the application of the case law that is created* (determined) by the Supreme Court. This situation is (most likely) caused by the much-discussed right of the Senate of the Supreme Court provided for in Section 464.[1] Paragraph Two Clause 1 to not accept cassation if the judgment is in accordance with the case law, yet if the judgment is not in accordance with case law, then, by logic, cassation should be accepted, and the judgment annulled. Thus S. Osipova is correct in saying that: *"(...) a right is what the higher court instances have recognised as a right – until subsequent changes in case law (...).* "[28] This is a long-known issue, for example, as early as in the 19th century, the professor of Polish descent G. F. Shershenevich wrote on the subordination of lower-instance courts to the Senate: "*(...) the case law eagerly swallows every admonition by the cassation department, trying to align their actions with the views of the Senate... The contest before the court is not based on logic, knowledge of the Constitution and the law, nor the ability to express oneself or explain, but rather on references to the cassation rulings (...)".*[29] The matter of the compatibility of changing case law with fairness, predictability or legal certainty becomes especially relevant because it demonstrates that, in any single civil case being heard in court, changes in case law in a dispute on the application of substantive or procedural legal provisions will result in the court applying the new (changed) case law) (*the author has already mentioned that this can happen at any time and cannot be foreseen in advance*). The examples of the Supreme Court Senate analysed below will substantiate the view expressed; however, before looking at specific examples, it is worth noting the view on case law expressed by Assoc. prof. Dr. iur. *D. Rezevska in 2010:* "(...) The source of the legal system is the sovereign; thus, the sovereign determines what kind of legal system they will live in and what general principles of rights will determine the content of this legal system. *The function of the legislature is to try to write down the pre-established legal provisions of the sovereign (which objectively already exist in the legal system in unwritten form and can resolve any dispute between members of the sovereign) to make life easier for the sovereign. (...) However, the legislator is not always able to do this, it is liable to errors or fails to foresee something, and at that moment, according to the modern interpretation of the theory of separation of powers, the judiciary steps in as a reviser and corrector of the legislator's work, looking for the pre-existing legal provision in the legal system that the sovereign has already foreseen for himself but the legislator has not yet verbalised it or has verbalised it inappropriately (...)."*[30] In other words, the court performs

(Supreme Court Case Law and its Role in the Development of Legal Thought in Latvia), Supreme Court Bulletin of the Republic of Latvia No. 1/2010, November, p. 13. Retrieved: 30.12.2021. From: https://www.at.gov.lv/files/uploads/files/docs/2011/at_biletens2010_01_web.pdf

[26] Levits, E. (2010). Judikatūra – pamati, problēmas, piemērošana (Case law – foundations, problems, application). *Conference materials.* "Augstākās tiesas judikatūra un tās loma tiesiskās domas attīstībā Latvijā" (Supreme Court Case Law and its Role in the Development of Legal Thought in Latvia), Supreme Court Bulletin of the Republic of Latvia No. 1/2010, November, p. 32. Retrieved: 30.12.2021. From: https://www.at.gov.lv/files/uploads/files/docs/2011/at_biletens2010_01_web.pdf

[27] Levits, E. (2010). Judikatūra – pamati, problēmas, piemērošana (Case law – foundations, problems, application). *Conference materials.* "Augstākās tiesas judikatūra un tās loma tiesiskās domas attīstībā Latvijā" (Supreme Court Case Law and its Role in the Development of Legal Thought in Latvia), Supreme Court Bulletin of the Republic of Latvia No. 1/2010, November, pp. 32-33. Retrieved: 30.12.2021. From: https://www.at.gov.lv/files/uploads/files/docs/2011/at_biletens2010_01_web.pdf

[28] Osipova, S. (2016). Tiesiska valsts vai "tiesnešu valsts" (Law-governed state or "state of judges"). *Jurista Vārds, 05.07.2016./No. 27 (930),* pp. 12-15.

[29] Shershenevich G. F. (2003). Science of civil law in Russia. Moscow: Statute, p. 241.

[30] Rezevska, D. (2010). Judikatūra kā tiesību avots: izpratne un pielietošana (Case law as a source of law: understanding and application). *Conference materials.* "Augstākās tiesas judikatūra un tās loma tiesiskās domas attīstībā Latvijā" (Supreme Court Case Law and its Role in the Development of Legal Thought in Latvia), Supreme Court Bulletin of the Republic of Latvia No. 1/2010, November, p. 29.

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the tasks of the legislator when there is no law (no written law or it contains no regulation), or the law is inadequate. If there is no law or it contains no regulation, the situation is straightforward because the court must rule on the case, yet the situation is different in the case of the term "inadequate". Dr.iur. *I. Kronis has stated:* [31]"(...) If there is no law governing the contested relation, a court shall apply a law governing similar legal relations, but if no such law exists, a court shall act according to general legal principles and meaning. (Section 5 Paragraph 5 of the CPL) (...)." *It is fitting to mention the scientific research of M. Cappelletti in the early 1980s, because the scholar had analysed the risks associated with the court task declared by D. Rezevska in 2010 as early as in 1981, stating, inter alia: "(...)* If a judge is free to base its decision on unwritten and utterly vague equity precepts, its activity cannot be differentiated, substantively, from that of a boundless legislator"*, and further: "(...) If the judge is a legislator, then it undermines the fundamental democratic idea of the separation of powers (...)."*[32] The quoted author points out that this is a serious dilemma, but it will have to be understood because it is a trait of the times, and the author himself does not oppose the idea that the judge to some extent is the creator of the law, pointing out that the law is a myth and therefore requires interpretation in order to apply it in each given case, thus judicial interpretation and also the interpretation of substantive law is always case law.[33] It should also be noted that on the question of whether a judge is a creator of law, the British House of Lords judge Rt. Hon. Lord Bingham of Cornhill, has pointed out that there are four "schools", the first of which denies entirely that the judge is the creator of law; the second school acknowledges that judges do make law but urges that this should be refrained from and calls for certain caution because it is unacceptable constitutionally that there should be two independent sources of law-making at work at the same time. The third school to which most modern *common law* judges belong acknowledges that judges do make law; it is a proper function of the court within the framework of each particular case to be adjudicated. The fourth school not only acknowledges a law-making role for judges, but glorifies that role and asserts a right to pursue it wherever established law impedes the carrying out of justice in an individual case.[34] In his lectures, Rt. Hon. Lord Bingham of Cornhill has explained the traditional approach to the role of the court, namely it being based on three basic positions, i.e., the principle of separation of powers– the legislature must make such laws that will enable good governance, whereas the executive power is tasked with applying these laws in practice and the court has the task of interpreting and applying the legal provisions in cases of ambiguity, according to the law made by Parliament, but the judges have no power to change it.[35] Justice of the US Supreme Court Antonin Scalia described the common-law countries and judges as creators of justice very accurately by saying that it has to be acknowledged that judges in common-law countries do in fact "create the law" and each state has its own law (author's note: *A. Scalia's work discusses, inter alia, matters of the US legal system*). The author has mentioned the above for the purpose of comparison because scientific papers on the development and evolution of law in Europe express the view of the rapprochement and convergence of Anglo-Saxon (*common-law*) and Romano-Germanic legal systems. The President of the French Court of Cassation and Chief Justice G. Canivet is one of those who have written about it.[36] At the same time, rapprochement and convergence do not mean that there are no longer key differences. This is the point made by authors studying the European Union's common civil procedure and related issues, who emphasize *that the national procedural laws of states are part of the tradition of the national legal system, reflecting a belief (a vision) of the best solution to ensure the functioning of the judicial system, the speed of proceedings and fair judgments (...). The procedural frameworks of EU member states vary widely, and these differences can be fundamental (...)."*[37] Thus, the explanations given by D. Rezevska in 2010 are the next stages in the natural and logical development of the process that M. Cappelletti addressed in 1981. Despite the opinions of the authors analysed and quoted above, it is doubtful that the sovereign in Latvia, whom D. Rezevska has pointed to as the source of the legal system, in 2009 wanted the

Retrieved: 30.12.2021. From: https://www.at.gov.lv/files/uploads/files/docs/2011/at_biletens2010_01_web.pdf

[31] Kronis, I. (2021). Likumības princips civilprocesā: formālas lietu vešanas kārtības pamats civillietās (The principle of legality in civil procedure: the basis for a formal procedure in civil cases). *RSU electronic journal of legal scientific articles SOCRATES, 2021 No. 1 (19)*, p. 113. Retrieved: 30.12.2021. From: https://dspace.rsu.lv/jspui/bitstream/123456789/4266/1/Socrates-19_09_Kronis_110-119.pdf.

[32] Cappelletti, M. (1981). The law-making power of the judge and its limits: A comparative analysis. *Monash University Law Review, Vol 8, September, '81,* p. 8. Retrieved: 30.12.2021. From: http://classic.austlii.edu.au/au/journals/MonashULawRw/1981/8.html,

[33] Ibid, p. 41.

[34] Rt. Hon. Lord Bingham of Cornhill (1997). *The Judge as Lawmaker: An English perspective.* Retrieved: 27.12.2021. From: http://www.nzlii.org/nz/journals/NZLRFSP/1997/11.pdf

[35] Rt.Hon.Lord Bingham of Cornhill (2005). *The Judges: Active or Passive. Maccabean Lecture in Jurisprudence*. Read at Cardiff Law School 27 October 2005, Retrieved: 27.12.2021. From: https://www.thebritishacademy.ac.uk/documents/2026/pba139p055.pdf

[36] Canivet, G. (2003). The Interrelationships Between Common Law and Civil Law. *"Louisiana Law Review", Volume 63, Number 4, Summer 2003,* pp. 937-944. Retrieved: 27.12.2021. From: https://digital-commons.law.lsu.edu/cgi/viewcontent.cgi?article=5995&context=lalrv

[37] Vernadaki, Z. (2013). Civil procedure Harmonization in. the EU: Unravelling the Policy Considerations. *Journal of Contemporary European Research, Volume 9, Issue 2*, p. 303. Retrieved: 27.12.2021. From: file:///C:/Users/User/Downloads/ lis1md,+ Journal+ manager, +297+Vernadaki.pdf

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Senate of the Supreme Court to *annul* the application of Section 1 of the Civil Law in cases of the division and termination of joint ownership. Thus, with the Court's participation, a basis was established for the exercising and application of rights, which the Senate of the Supreme Court opposed ten years later, i.e., in 2019, by changing the case law.

III. The Impact of Case Law on the Exercising of Substantive Rights

As regards the impact of case law on the exercising of substantive rights of individuals, the most prominent cases are those concerning the termination/division of joint ownership and other issues pertaining to the rights/obligations of the joint owners. The consequences of the case law and its changes in joint ownership cases clearly mark the trend highlighted by the author before, namely that the actual impact of Section 5 Paragraph Six of the Civil Procedure Law on the administration of justice is identical to that which the Constitutional Court of the Republic of Latvia, in its judgment of 04 February 2003 in Case No. 2002-06-01, found to be inconsistent with Articles 1 and 83 of the Constitution of the Republic of Latvia. Inter alia, it should be noted that this is confirmed by the findings expressed by the Senate of the Supreme Court in its 17 December 2019 decision in case SKC-259/2019, which the author analyses in more detail below in this chapter. The change of case law of the Senate of the Supreme Court has repeatedly affected the rights of joint owners and the possibilities of exercising them, including limitations or adjustments. The most prominent examples are the explanations by the Senate of the Supreme Court about no applying Section 1 of the Civil Law in cases of division of joint property, as well as on the issues of exercising the pre-emption and redemption rights, where it is appropriate to bring attention to the 21 September 2011 decision of the Senate of the Supreme Court in case No. SKC-1089/2011,[38] which is a change of case law on the issue of recording the refusal to exercise the pre-emption right in the Land Register.[39] By said decision the Senate abrogated from the practice that had been applied since 2005, for example, the 09 February 2005 decision in Case No. SKC-128, which was also referred to by the Senate of the Supreme Court in its 26 May 2010 decision in Case No. SKC-838.[40] Regarding the consequences of the change of case law on the exercising of the pre-emption right, Dr. iur. I. Kudeikina has expressed the opinion that consistency of transaction conditions is important and points out that amendments to the Civil Law and the Land Register Law are needed to address issues related to joint ownership rights.[41] *Legal literature explains the substance and meaning of the right of pre-emption in joint ownership as follows: "(...) the right of pre-emption of joint owners is aimed at avoiding the "entrance" of strangers into the jointly-owned property without the consent of the other joint owners (see Rey, N 653). (...) the joint owners cannot be indifferent as to who their fellow-owner is (...)."*[42] Meanwhile, in Case No. 2011-01-01,[43] in which the Constitutional Court of the Republic of Latvia ruled on the compliance of Section 1068 Paragraph One of the Civil Law with Article 105 of the Constitution of the Republic of Latvia, it pointed out that joint ownership as a type of property is ancient, but has not lost its meaning and relevance today. It can therefore be acknowledged that in the case of joint ownership we are dealing with a complex form of property and rights, for which there should be clear procedures or a case law explanation where such procedures are lacking or where they are incomplete and unclear. However, so far neither the procedural clarity, nor a positive impact of case law can be ascertained. It should be noted here that until the change of case law in 2011, the Senate's accepted approach to the issue of recording the refusal to exercise the pre-emption right in the Land Register provided an opportunity to create some certainty by giving persons the possibility to record a refusal to exercise this right, especially given that the procedural arrangements for exercising the pre-emption right, as well as the possibilities of protecting this right directly in terms of the pre-emption right are weak, since Section 1073 of the Civil Law does not specify where and how the pre-emption right holder may assert their right. This procedure is left entirely to the good faith of the alienator, while the Land Register Law[44] does not require a person to submit, along with the request for corroboration, credible evidence that they have complied with the requirements in Section 1073 of the Civil Law or previously issued waivers of such rights by entitled persons. Thus, failure to comply with the rights of the joint owners entitled to pre-emption does not have

[38] Judgments and decisions of the Senate of the Supreme Court of the Republic of Latvia (2012). Riga: Latvijas Vēstnesis, p. C-257.

[39] Judgment of the Senate of the Supreme Court of the Republic of Latvia of 26 May 2010 in case No. SKC-838. Retrieved: 03.08.2020. From: http://www.at.gov.lv downloadlawfile download

[40] Judgment of the Senate of the Supreme Court of the Republic of Latvia of 26 May 2010 in case No. SKC-838. Retrieved: 03.08.2020. From: http://www.at.gov.lvdownloadlawfile

[41] Kudeikina, I. (2013). Kopīpašums: novitātes tiesu praksē. (Joint ownership: innovations in case law) *RSU Scientific Conference, 21 and 22 March 2013.* Retrieved: 07.01.2022. From: https://www.rsu.lv/sites/default/files/imce/Zin%C4%81tnes%20departaments/VIII%20sekcija/kopipasums.pdf

[42] Grūtups, A., Kalniņš, E. (2002). *Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums.* (Commentaries on the Civil Law. Part Three. Rights in rem. Property.)Riga: Courthouse Agency, pp. 270-271.

[43] Judgment of the Constitutional Court of the Republic of Latvia of 25 October 2011 in Case No. 2011-01-01. Retrieved: 19.02.2018. From: https://www.satv.tiesa.gov.lv/ cases/?search%5 Bnumber%5D =2011-01-01

[44] Land Register Law. Adopted on 22.12.1937. *Journal* 16/17, 29.04.1993. Last amended on 16.11.2021.

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negative consequences for the alienator, but the procedures for exercising the pre-emption right, as also explained by the Senate of the Supreme Court, establish a completely different, i.e., more complex procedure, which displays contradictions between the substantive and procedural provisions of the law. The decision of the Senate of the Supreme Court of 21 September 2011 in case No. SKC-1089/2011 recognised the pre-emption right existing on the basis of the law as obligation rights, and the Senate's explanations on the recording of the existence of this right in the land register entries are based on the decision of 21 September 2011, while the 2018 summary on the application of the Land Register Law prepared by the Supreme Court of the Republic of Latvia states: *"(...) Obligation rights shall only be registered in the Land Register in such exceptional cases where it is provided by law (e.g., Sections 2057, 2063, 2126 of the Civil Law) (...)"*[45] For comparison, it is worth noting that in the Czech Republic, the legislator has amended the Civil Code of the Czech Republic[46] in matters of joint ownership and exercise of pre-emption rights; in particular, it has been established that the pre-emption right of joint owners of immovable property shall be entered in the Land Register, giving this right an in rem *character*, increasing the certainty of the rights of joint owners.[47] Whereas Section 4.79 Paragraph Two of the Civil Code[48] of the Republic of Lithuania provides that in the event of alienation of immovable property held in joint ownership, the notice of alienation shall be sent to the joint owner through a notary, while in the event that the person entitled to pre-emption has not applied within the time limit[49] or refused, the joint owner who offered the pre-emption right shall be entitled to alienate their share to any third party. *Another key difference is that the Lithuanian Civil Code provides for the right of a person to bring an action for granting pre-emption rights*. Section 4.79 Paragraph Three of the Lithuanian Civil Code provides that if the procedure established by law for offering the right of pre-emption to a joint owner is not observed, the joint owner whose rights have been infringed, within three months, has the right to bring an action in court and request the transfer of the right to buy from the buyer to the joint owner. Thus, the substantive legal provision provides a way in which a joint owner may defend and claim the exercise of the right of pre-emption before a court. It should also be noted that Section 4.79 Paragraph Four of the Civil Code of the Republic of Lithuania establishes joint responsibility for compliance with the statutory right of pre-emption for both the joint owner who alienates their share and the purchaser who wishes to purchase it. These examples from other countries demonstrate that the mechanisms for exercising and defending pre-emption rights are at least twofold. In her thesis dedicated to matters of joint ownership, Dr. iur. I. Kudeikina has stated: "(...) At present, the law does not provide for special legal proceedings in cases arising out of the legal relations of joint ownership. *In joint owners' disputes, more emphasis should be placed on the prejudicial settlement of disputes (...).*"[50] It follows that finding more effective solutions, for example, to ensure the exercise of pre-emption rights could reduce (for example) the number of redemption actions brought to court, especially given that the inconsistencies and loopholes in the existing legal framework could not be considered as an equivalent means of protection of the rights of the joint owner. The Senate of the Supreme Court has provided clarifications on the issue of the exercise of the right of redemption, and this approach is well established. Referring to the provisions of Section 337 Paragraph Two Clause 3 of the Civil Procedure Law, the Senate of the Supreme Court has stated in the judgment of 16 April 2008 in case No. SKC-159/2008[51] (refer to Paragraph 6.4) the prerequisites for the recognition that the right of redemption is being exercised. Regarding the preconditions for the exercise of the right of redemption, K. Loboda, referring to the above-mentioned judgment, states: *(...) As evident, the Senate of the Supreme Court acknowledges the procedure established by law for the exercise of the right of redemption, and deviations from this procedure are not permissible (...).*"[52] However, the fact that case law in this matter remains unchanged for the time being does not exclude the existence of a problem in the procedural and substantive legal provisions, nor does it solve it. Section 1384 of the Civil Law provides that the pre-emptor must pay the acquirer all amounts referred

[45] Supreme Court of the Republic of Latvia. Tiesu prakse par zemesgrāmatu likuma piemērošanu. (Case law on the application of the Lan download, p. 16

[46] Czech Rep d Register Law) (2006-2018). Retrieved: 07.01.2022. From: https://www.at.gov.lv/lv/tiesu-prakse/tiesu-prakses-apkopojumi/civiltiesibasublic: Law 89/2012, the Civil Code of the Czech Republic [Czech Republic], Published on: 03.02.2012. Retrieved: 07.01.2022. From: https://www.refworld.org/docid/5da57dd04.html

[47] Janku, M.(2014). Statutory Pre-Emption Right as Changed by the New Civil Code. *Enterprise and the Competitive Environment 2014 conference, ECE2014, 6-7 March 2014, Brno, Czech Republic,* p. 264. Retrieved: 07.01.2022. From: https://www.sciencedirect.com download. DOI: 10.1016/S2212-5671(14)00343-8.

[48] Civil code of the Republic of Lithuania. Adopted on: 18.07.2000. Law No. VIII-1864. Last amended on 12 April 2011, No. XI-1312. Retrieved: 11.02.2018. From: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495

[49] *Author's note* – The time limit for immovable property in the Civil Code of the Republic of Lithuania is one month.

[50] Kudeikina, I. (2015). *Kopīpašuma institūta problemātika darījumos ar nekustamo īpašumu.* (Problems of joint ownership in immovable property transactions)Doctoral thesis. p. 131. Retrieved: 18.12.2021. From: https://www.rsu.lv/sites/default/files/dissertations/Kudeikina_disertacija_DRUKAI.pdf

[51] Judgments and decisions of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia, 2008 (2009). Riga: Courthouse Agency. p. 118.

[52] Loboda, K. (2017). Izpirkuma tiesību izmantošana. (Exercising of pre-emption rights) *Jurista Vārds, 18.08.2017. No. 32 (884),* p. 31.

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to in Section 1388 of the Civil Law, but it is not possible to ascertain all amounts in advance, as is also demonstrated by the provisions of Chapter 45 of the Civil Procedure Law, i.e., Section 338. Similarly, the acquirer does not know where to pay the amounts when claiming its right (i.e., in the prejudicial stage), as the Civil Law does not state this. Section 1384 of the Civil Law provides that amounts *are to be paid into court if the buyer has refused to accept them.* It should be noted that, when referring to the payment of all amounts, Section 1384 of the Civil Law refers to Article 1388 of the Civil Law, which means that all amounts due immediately include those provided for in Article 1388 of the Civil Law. As already pointed out by the author, some of the amounts specified in Section 1388 of the Civil Law cannot be ascertained by the pre-emptor. The Civil Procedure Law contains Chapter 45 "Pre-emption of Immovable Property", which is a special adjudication procedure, *yet Section 337 of the Civil Procedure Law does not require the pre-emptor to provide evidence as to whether the purchaser has refused to accept the payment of the amount*. Grammatical interpretation of Section 1384 of the Civil Law implies that, to go to court, a person must have proof that the acquirer has refused to accept the amount, while the legal literature explains that the right of redemption must be exercised immediately through court, referring to Chapter 45 of the Civil Procedure Law[53]. This is not confirmed by the Civil Law, as it does not provide that the right of redemption should be claimed in accordance with the procedure laid down in Chapter 45 of the Civil Procedure Law, and it contradicts the studies of Prof. K. Torgāns on the application of Chapter 45 of the Civil Procedure Law in practice. For example, Prof. K. Torgāns points out: "*(...) when studying the application of the provisions of this chapter in practice, it should be noted that there is not a single case concerning the redemption of immovable property that has been heard on its merits under the special adjudication procedure. By contrast, there are relatively many cases that have been dealt with by way of recourse procedure. (...)".*[54] Similarly, Prof. K. Torgāns notes: *"(...) in practice, hearing a case according to Chapter 45 of the Civil Procedure Law usually means longer and more complex legal proceedings, rather than a shorter and simplified procedure for the redemption of immovable property. (...) To avoid such situations, in practice the recognition of the right of redemption is sought from the outset through recourse procedure. (...)*[55] This reveals the multi-layered nature of the problem, where the influence of case law is one of the aspects; however, it does not lead to the absolute impossibility of exercising the rights or vulnerability, although it does create problems of certain types and nature for those entitled to pre-emption and redemption.

A more serious problem in matters of joint ownership arises with the case law already mentioned, i.e., the application of Section 1 of the Civil Law and the reversing of the opinion of the Senate of the Supreme Court on the termination of joint ownership. With its judgment of 14 January 2004 in Case No. SKC-5/2004, the Senate of the Supreme Court emphasised the importance and applicability of Section 1 of the Civil Law in deciding matters of the division of jointly owned property, stating as follows: *"(...) The circumstances found in the dismissal of the action are consistent with the content of Section 1 of the Civil Law that rights shall be exercised and duties performed in good faith, which applies to civil law in general, i.e., the principle of good faith, "since the Senate must each time examine the legal question of whether the court has correctly determined the limits of a particular right in good faith and correctly determined the content of the rights" (M. Krons. Section 1 of the Civil Law // Journal of the Ministry of Justice, 1937, No. 2). The principle of good faith means that everyone must exercise their subjective rights and fulfil their subjective obligations while observing the legitimate interests of others. Thus Section 1 of the Civil Law requires that the parties to a civil legal relation must have regard for each other and for the interests of the other party. This helps prevent civil law subjects from exercising their rights or performing their obligations in an unjustified manner or for unjustifiable purposes, following the letter of the law or a legal transaction, but contrary to their true objectives. Thus, in accordance with the principle of good faith, a person may be denied the exercising of subjective rights or the execution of subjective duties if it turns out that the contrary interests of the other party are to be recognized as more important in accordance with the purpose of law and circumstances of the particular case (...)."*[56] A completely opposite position was introduced by the Senate of the Supreme Court in 2009. In its judgment of 25 February 2009 in case No. SKC-54, the Senate of the Supreme Court, referring to the legal doctrine, declared: *"(...) The forms of division of jointly-owned property are regulated by Section 1075 of the Civil Law, which states: "If, in the case of division as set out in Section 1074, the joint owners are not able to agree regarding the form thereof, then a court, considering the characteristics of the subject-matter to be divided and the circumstances regarding the property, (...)." [10.3] According to Section 1075 of the Civil Law, the defendant A. G. specified the form of division of the jointly-owned*

[53] Grūtups, A., Kalniņš, E. (2002). *Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums.* (Commentaries on the Civil Law. Part Three. Rights in rem. Property.)Riga: Courthouse Agency, p. 273.

[54] Torgāns, K. & group of authors (2012). *Civilprocesa likuma komentāri.* (Commentary on the Civil Procedure Law) *Part II (Chapters 29-60¹).* Riga: Courthouse Agency, p. 352.

[55] Ibid, p. 353.

[56] Judgment of the Senate of the Supreme Court of the Republic of Latvia of 14 January 2004 in case No. 5/2004. Retrieved: 03.08.2020. From: https://m.juristavards.lv/doc.php?id=84942&show=true;

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property – to transfer the entire property to her with an obligation to pay J.P. his share in the money. Dismissing the counterclaim, the appeal instance court acknowledged that the defendant's claim did not comply with Section 1074 of the Civil Law because, contrary to the principle of good faith contained in Section 1 of the Civil Law, the defendant sought to exclude the plaintiff from the jointly owned property and, in accordance with that principle, the exercising of the defendant's subjective rights was to be restricted. The Senate considers that the appeal instance court had misinterpreted Section 1074 of the Civil Law, which is inconsistent with the hypothesis of the legal provision that each joint owner may request division at any time. Moreover, this substantive claim has no statute of limitation (see A. Grūtups, E. Kalniņš, Commentary on the Civil Law, Courthouse Agency, 2002, p. 275). Section 1 of the Civil Law, as applied by the court, provides that rights and duties are to be performed in good faith. The Senate considers that the court has wrongly applied Section 1 of the Civil Law, because the defendant's conduct in counterclaiming for the division of the jointly owned property according to one of the forms of division provided for in Section 1075 of the Civil Law cannot be contrary to good faith. The court has failed to consider the fact that the solutions to the conflict set out in Sections 1074 and 1075 of the Civil Law are not abstract. The principle of good faith cannot be regarded as a power given to the court to adopt the solution of each legal situation to general considerations of justice, freely modifying the legal consequences arising from the law or legal transaction(...)." [57]

The author emphasizes that an extensive quote from the reasoning part of the judgment is deliberately given, where the Senate motivates why the application of Section 1 of the Civil Law to the adjudication of joint ownership cases is inapplicable and even incorrect. The author emphasizes that the reasoning for the Senate's judgment only changes in terms of the references to the conclusions or opinions expressed in legal doctrine, which, as a matter of fact, maybe diametrically opposed for different authors, thus leading to a completely different result. Comparison of the reasoning of the Senate in its judgment of 14 January 2004 in Case No. SKC-5[58] with the reasoning in its judgment of 25 February 2009 *presents the conclusion that the 2009 judgment does not contain a single argument that would refute the generally binding and applicable power of Section 1 of the Civil Law on civil rights in general. The Senate also fails to explain at which moment the general legal principle of not using one's rights in an unjustifiable manner and for unjustifiable aims became no longer binding or was cancelled, as well as the inadmissibility of acting according to the letter of the law, but contrary to its spirit and meaning. In 2009, the Senate of the Supreme Court did not consider that in adjudicating joint ownership disputes between individuals the court should take into account Section 1 of the Civil Law, nor that the categories of value and valuation contained in that Section are a tool for the fair adjudication of a case by preventing persons whose actions are contrary to good faith from achieving a formal result without taking the legitimate rights and interests of other persons into account. It should be noted that this approach is completely contrary to the definitions of justice and the substantive meaning of justice, which the author has discussed in detail in the previous chapters of her work.*

Given that the Civil Law was adopted in 1937 and has not undergone any significant changes in the section concerning the legal regulation of joint ownership, and that the content of Section 1 of the Civil Law has not been amended, the author considers the findings expressed at the time of the creation and adoption of the law on the specific meaning and substantive content of Section 1 of the Civil Law worth mentioning, namely: "*(...) The Latvian Civil Law of 1937 is now claimed to offer the Latvian people "People's Justice" for which it has longed and which was "glowing under the icy blanket of unjust law" for such a long time – even if this injustice is universal and not only a Latvian problem, because there have always been different forms of justice, and justice has always been applied in different ways. This path to a new national justice is allegedly best reflected in Section 1 of the Civil Law, as already discussed. This generally applicable basic principle, this categorical requirement, according to the Minister of Justice Apsītis, "resonates and encourages" through the entire Latvian Civil Law (...)".*[59] During the development of the author's doctoral thesis, on 17 December 2019 the Senate of the Supreme Court made a judgment in case SKC-259/2019,[60] in which it deviated from the interpretation established in the judgment of 25 February 2009 in case No. SKC-54/2009, stating that "*(...) it is a misconception that one of the most important principles of civil law is not to be observed in cases of dividing jointly-owned property (...).*[61] Although ten years later the Senate of the Supreme Court was able to see the consequences of the previous, i.e., *old* case law, this does not answer the question of who will remedy the negative consequences

[57] Judgment of the Senate of the Supreme Court of the Republic of Latvia of 25 February 2009 in case No. SKC-54. Retrieved: 03.08.2020. From: http://www.at.gov.lv downloadlawfile download

[58] Judgments and decisions of the Civil Cases Department of the Senate of the Supreme Court of the Republic of Latvia. 2004. (2005). Riga: Latvian Judicial Training Centre, pp. 115-199.

[59] Švarcs, F. (2011). *Latvijas 1937.gada 28.janvāra Civillikums un tā rašanās vēsture*. (The Civil Law of Latvia of 28 January 1937 and its history) Riga: Courthouse Agency, p. 268.

[60] Judgment of the Senate of the Supreme Court of the Republic of Latvia of 17 December 2019 in case No. SKC-259/2019. Retrieved: 30.12.2021. From: https://www.at.gov.lv downloadlawfile download

[61] Judgment of the Senate of the Supreme Court of the Republic of Latvia of 17 December 2019 in case No. SKC-259/2019. Refer to Paragraph 7.4 of the judgment.

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in numerous cases decided by the courts during these ten years, in which the factual circumstances were identical or largely similar, when and how. This question still stands. *All of the above shows that in the specific case of Latvia, the lower instance courts blindly apply the case law of the Senate of the Supreme Court and are ready to abandon even the principles of law and civil law, if doing so is consistent with case law*. In its judgment of 17 December 2019 in case SKC-259/2019, the Senate of the Supreme Court concludes that the appeal instance court had, in the course of the proceedings, accepted as credible the real reasons for the plaintiff's actions presented by the defendants, but, referring to the fact that the principle contained in Section 1 of the Civil Law is not applicable at all in cases of division of jointly-owned property, had upheld the claim for the dissolution of jointly-owned property, while the court of the first instance referred to the judgment of the Senate of the Supreme Court of 25 February 2009 in case No. SKC-54/2009 to support its judgment. The author's own practical experience is identical. For example, on 03 May 2017, Riga City Vidzeme Suburb Court made a judgment in case No. C04271614 where the author represented one of the defendants. Section 1 of the Civil Law was also referenced in Case No. C04271614, pointing out that the claimant wished to terminate the joint ownership which it had entered voluntarily and only a short time ago. Referring to the judgment of the Senate of the Supreme Court of 2009 in case SKC-54/2009, the court decided to uphold the claim and the case proceeded identically in the appeal instance; however, on 19 June 2018, the Senate of the Supreme Court refused to initiate cassation proceedings. In the author's view, it is important to note that the court referred in its judgment to Section 5 of the Civil Law, stating that the court, when choosing the form of division, must judge according to a sense of justice and general principles of law. The author mentions this example because, in addition to the already mentioned case SKC-259/2019 and the findings therein, it demonstrates that there is a *blind* application of case law in the lower instance courts. Thus, it can be concluded that, through case law, the Senate of the Supreme Court may *exclude* the application of a section, or a paragraph of a section of a regulatory enactment and the lower instance courts will comply with it. If the above was an isolated example, it could be regarded as an exception; however, the *activity of the Senate of the Supreme Court also covers interpretations of the application of procedural standards*, thus the practical application of the provisions of the Civil Procedure Law depends on whether the Senate of the Supreme Court has adopted explanatory rulings on any provisions of the Civil Procedure Law.

The ten-year period without Section 1 of the Civil Law in cases of the division of jointly owned property had certain consequences, as evidenced, for example, by M. Pančenko's extended article in the national specialized law and research journal "JuristaVārds"[62]. In it, the author sharply criticizes the judgment of the Senate of the Supreme Court in case SKC-259/2019 and the subsequent ones, declaring (*author's note - the overall content of the article suggests that the 1937 Civil Law, in particular, Section 1 thereof, is not legitimate*) that the 1937 Civil Law was adopted during the authoritarian dictatorship of K. Ulmanis', which is inconsistent with the Constitution of the Republic of Latvia, which was declaratively suspended on 15 May 1934, whereas the power of Section 1 of the Civil Law was restored by the law of 07 July 1992 adopted by the Supreme Council of the Republic of Latvia, i.e., before 06 July 1993, when the 5th Parliament of the Republic of Latvia convened for its first session[63]. The author's view on the above-mentioned matter is that *the force* of the Supreme Court Senate's case law has not only positive but also negative consequences, but there is currently no solution to prevent the negative consequences. In this case, the thoughts of M. Pančenko quoted above, on the one hand, confirm that Section 1 of the Civil Law plays a very important role in the regulation of civil legal relations and in ensuring justice, but, on the other hand, it shows the results of the case law of the Senate of the Supreme Court.

IV. The Impact of Case Law on the Exercising of Procedural Rights

As already pointed out by the author, the decisions of the Senate of the Supreme Court affect not only the possibilities of implementation of substantive legal norms, but also the implementation of procedural rights. As regards the impact of the rulings of the Senate of the Supreme Court on procedural rights and their implementation, it should be noted that for a long time the Senate of the Supreme Court adhered to a somewhat drastic approach, stating that payment of a security deposit into the wrong account can be considered grounds for not accepting a complaint, which is directly stated on the website of the Supreme Court[64], with references to the assignment sitting decisions in cases SKC-1132/2016, SKC-1741/2016, SKC-537/2019 and SKC-1059/2019. The legislator (rather than the Senate of the Supreme Court) remedied

[62] *Author's note – the journal "JuristaVārds" is the national specialized law and research journal in Republic of Latvia; accessible on-line: https://juristavards.lv/zurnals/*

[63] Pančenko, M. (2021). Civillikuma 1.panta vājums un spēks. (The strength and weakness of Section 1 of the Civil Law) *Jurista Vārds, Domnīca/Brīvais mikrofons, 21.01.2021*. Retrieved: 03.01.2022. From: https://juristavards.lv/mikrofons/161-civillikuma-1-panta-vajums-un-speks/

[64] Retrieved: 22.01.2022. From: https://www.at.gov.lv/lv/jaunumi/par-notikumiem/nepareiza-konta-ieskaitita-drosibas-nauda-ir-pamats-blakus-sudzibas-nepienemsanai-9967?year=2020&month=03

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this situation with the amendments to the Civil Procedure Law of 25 March 2021, which entered into force on 20 April 2021, introducing Section 43.[3] Into the Civil Procedure Law, but until then the need to ensure procedural speed was also used to justify the denial of rights in accidental situations (for example, an error in the account number). *Like the case of the (non) application of Section 1 of the Civil Law, the Senate of the Supreme Court resolves the question of stamp duties payable in joint ownership disputes by the decision of the general assembly of 28 January 2020;*[65] however, no changes have yet been made to the Civil Procedure Law. Although the decision of the general assembly of the Senate of the Supreme Court of 28 January 2020 does have a positive impact, the author observes a strong resemblance to the decision of the plenary session. The payment of the stamp duty is a basic item that affects the access of persons to the court (Section 129, Paragraph Two Clause 1 of the Civil Procedure Law). The provisions on the payment of stamp duty should be clear, comprehensible, and known in advance, and should not depend on when and whether the Senate of the Supreme Court issues clarifications or rulings.

Staying on the subject of the influence of the case law of the Senate of the Supreme Court on the application of the procedural standards, it is especially worth mentioning the decision of 29 April 2020 in Case No. SKC-97/2020,[66] by which the Senate of the Supreme Court effectively *excluded* from further application Section 203 Paragraphs One and Two of the Civil Procedure Law, expanded the possibilities of appeal and introduced new time limits *(30 days and 15 days pursuant to Section 423 Paragraph One and Section 424 Paragraph Three of the Civil Procedure Law)*, declaring that a person has the possibility to file a counter-appeal claim against a judgment of a first instance court even if they have not appealed against such according to the appeal procedure. Among other things, the Senate of the Supreme Court in fact stated that Section 415 of the Civil Procedure Law, with the procedural deadline (20 days) set therein, should also be disregarded because the person would not suffer the negative consequences as provided for in Section 415 Paragraph Three of the Civil Procedure Law, meaning that an appeal filed after the expiry of the deadline will not be accepted and will be returned to the appellant. This decision of 29 April 2020 does not specify where and when the Senate of the Supreme Court has published case law on the interpretation of Section 203 Paragraph One and/or Two or Section 415, or Section 424 of the Civil Procedure Law, whereas the magazine "JuristaVārds" published this information in the "News" section on 12 May 2020.[67] *The decision states that the case law was already established in 2010, so relevant references to the case law should appear in practice, including in the explanatory literature widely used by the courts – "Commentary on the Civil Procedure Law", Part II (Chapters 29-60[1])*[68] *by Prof. K. Torgāns, published in 2012.* As seen from the list of authors of the "Commentary on the Civil Procedure Law. Part II (Chapters 29-60[1])", comments and explanations on Chapter 52 of the Civil Procedure Law "Submission of a Notice of Appeal" and on Chapters 53 and 54 were provided by the Deputy Chairman of the Supreme Court of the Republic of Latvia, Chairman of the Civil Matters Panel[69], whereas Section 424 of the Civil Procedure Law contains no reference to the case law or explanation identical to the one provided in the decision of the Senate of the Supreme Court of 29 April 2020. It can be concluded that in 2012 the existence of such case law in the application of Section 424 of the Civil Procedure Law was not known, otherwise it would have been reflected in the commentary on the respective section. Meanwhile, the commentary on Section 203 of the Civil Procedure Law in the 2016 edition of "Commentary on the Civil Procedure Law. Part I (Chapters 1-28). Second expanded edition" published under scientific review by Prof. K. Torgāns contains no indication that Section 203 Paragraph Two of the Civil Procedure Law should be interpreted so that the judgment in the non-appealed part would only enter into force if the other party does not file a counter-appeal claim *(there should have already been two decisions by the Senate of the Supreme Court on this matter in 2016 – resulting from the decision of 29 April 2020 in case SKC-97/2020)*. The commentaries to the relevant articles of the chapter have been drafted by Prof. Dr. habil. Iur. K. Torgāns and Prof. Dr. Iur. J. Rozenbergs.[70] It follows from the above that the relevant case law of the Senate of the Supreme Court on the application of Section 203 Paragraph Two of the Civil Procedure Law was not known in 2016 either. It is especially worth mentioning that, in their commentary on Section 203 of the Civil Procedure Law, these authors emphasise: "(...) *In Latvia, a court judgment is not a source of law, it has no governing*

[65] Retrieved: 17.01.2022. From: https://www. at.gov.lv/files/uploads/ files/ 6_Judikatura/ Tiesnesu_kopsapulcu_lemumi/ CLD_28_01_2020_ kopsapulces%20lemums.pdf

[66] Judgment of the Senate of the Supreme Court of the Republic of Latvia of 29 April 2020 in case No. SKC-97/2020. Retrieved: 27.12.2021. From: https://www.at.gov.lv/lv/jaunumi/par-tiesu-lietam/ar-pretapelacijas-sudzibu-var-parsudzet-spriedumu-ari-dala-kura-nav-parsudzeta-ar-apelacijas-sudzibu-10056?

[67] Retrieved: 27.12.2021. From: https://juristavards.lv/zinas/276599-ar-pretapelacijas-sudzibu-var-parsudzet-spriedumu-ari-dala-kura-nav-parsudzeta-ar-apelacijas-sudzibu/

[68] Inoriginal: "*Civilprocesa likuma komentāri*"

[69] Torgāns, K. & group of authors (2012). *Civilprocesa likuma komentāri. (Commentary on the Civil Procedure Law) Part II (Chapters 29-60.[1]).* Riga: Courthouse Agency, pp. 697-730.

[70] Torgāns, K. &groupofauthors (2012). *Civilprocesa likuma komentāri. (CommentaryontheCivilProcedureLaw) Part II (Chapters 29-60.[1]).* Riga: Courthouse Agency, pp. 545-549.

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force of law (normative). (...) case law, including the case law of the Supreme Court, is only one of the auxiliary sources of law (...)."[71] Meanwhile the lecture notes of the associate professor of the Faculty of Law K. Čakste in the period from 1937 to 1940 show that the institution of counter-appeal was explained as follows: "(...) *if the party giving the explanations is interested in altering a part of the judgment, then within 1 month from receiving a copy of the notice of appeal it has the right to submit its counter-appeal (independent counter-claims) along with an explanation to the Judicial Panel.*[72] The lecture notes of Associate Professor K. Čakste also contain the following explanation regarding the examination (review) of an appeal by a court of second instance: "*(...) the second instance must confine itself to examining and re-adjudicating the appealed parts of the judgment (...) the appellant's position must not be made worse if the absolute fundamental conditions of the procedure have not been infringed (...).*"[73] From these quotes, it can be concluded that the explanation of the nature of the counter-appeal as explained by Associate Professor K. Čakste does not correspond to the one presented by the Senate of the Supreme Court in its decision of 29 April 2020 in case SKC-97/2020.

In its decision of 29 April 2020 in case SKC-97/2020, the Senate of the Supreme Court mentions the following formula of justice: "*(...) It would be unjust to allow one person to appeal against a judgment concerning the part that they are not satisfied with, but not to allow another person who has not appealed against the judgment within the time limit to do so merely because they would be satisfied with the judgment if the other party did not appeal against it either.*"[74] The next step is to analyse whether the fairness formula *actually works* as quoted. *First, the court cannot allow or prohibit anything regarding the procedural rights of the parties, which are established by law and exercised within the time limits and procedures established by law* (in this case – the Civil Procedure Law). It is the law that allows or forbids something. *The court can only record procedural situations, i.e., whether the parties have exercised their procedural rights, whether they exercised them within the time limits and in accordance with the requirements of the law.* This happens, for example, pursuant to Section 415 of the Civil Procedure Law, in conjunction with Section 46 Paragraph One of the Civil Procedure Law, while the consequences of the expiration of procedural time limits are also set out in Section 49 of the Civil Procedure Law. Secondly, the procedural time limit for filing an appeal "runs out" equally for all parties to the proceedings (the author does not discuss exceptional cases here), thus a party to the proceedings cannot know in advance whether the other party to the proceedings will or will not file an appeal, especially in cases where the court has ruled on both the claim and the counterclaim, as well as where the court has partially upheld the claim and/or the counterclaim. *Thus, the procedural situation stated by the Senate of the Supreme Court in the motivation of its decision of 29.04.2020 in case SKC-97/2020, i.e., "to be satisfied with the judgment if the other party does not appeal against it", essentially cannot and did not arise because the failure to perform the procedural actions means only one thing – the party, who does not exercise the procedural right to appeal against the judgment in the part with which it is not satisfied, loses this right.* The law defines it explicitly and there can be no discussion on the lack of regulation or loopholes. Thirdly, the adversarial principle and the principle of disposition apply in civil procedure, thus the exercise of procedural rights is decided by the litigants according to the procedural time limits established by law, *and the court cannot change the time limits established by law. This follows from Section 46 Paragraph One of the Civil Procedure Law*. Fourthly, the Senate of the Supreme Court cannot change the time limits or procedural procedures laid down by law through case law, nor can it *cancel* the effectiveness of the law, expand, or narrow it, or make it more specific. If such situations exist, they contradict Article 90 of the Constitution of the Republic of Latvia,[75] because in such circumstances persons have no knowledge of their rights and this contradicts the explanations given by the Constitutional Court of the Republic of Latvia on the essence of Article 90 of the Constitution. Like the case of application of Section 1 of the Civil Procedure Law discussed above, practice in this case also shows that the Senate of the Supreme Court can adjust the application and practical functioning of the provisions of the Civil Procedure Law by means of case law. The author has included a relevant practical example (in Civil Case No. *C29404716, which is in the first instance court at the time of preparation of the thesis and the first instance court has made judgment)* as an annex to the thesis. It is important to note that the decision of the Senate of the Supreme Court of 29 April 2020 in Case No. SKC-97/2020 refers to the Judgment of the Constitutional Court of the Republic of Latvia of 02 June 2008 in Case No. 2007-22-01,[76] which is used to substantiate the correctness of the explanations expressed in the

[71] Ibid, p. 546.
[72] Čakste, K. (2016). *Civilprocess. 1937.-1940.gada lekcijas.* (Civil Procedure. 1937-1940 lectures)Riga*:* H. Neverževskis, SIA "Grāmata", p. 115.
[73] Ibid, p. 116.
[74] Refer to paragraph [7.3] of the decision of the Senate of the Supreme Court of 29 April 2020 in case SKC-97/2020.
[75] Constitution of the Republic of Latvia. Adopted 15.02.1922. Published: Latvijas Vēstnesis, 01.07.1993. No. 43, Last amended 04.10.2018.
[76] Judgment of the Constitutional Court of the Republic of Latvia of 02 June 2008 in Case No. 2007-22-01.Retrieved: 30.12.2021. From: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2007-22-01_Spriedums.pdf, refer Paragraph 16.2.

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decision of the Senate; however, having familiarised with the judgment of the Constitutional Court and the explanations given therein, it could be said that the decision of the Senate of the Supreme Court of 29 April 2020 indirectly contradicts what the Constitutional Court had explained in its judgment of 02 June 2008 in Case No. 2007-22-01, stating: "*(...) Civil procedure constitutes a unified system of public-legal relations. To ensure the exercise of the right to a fair trial, the Civil Procedure Law must not contain any internal contradictions that would render the right to a fair trial ineffective (...).*" [77]

In conclusion, it is essential to mention that the decision of the Senate of the Supreme Court of 29 April 2020 in Case No. 97/2020 is not unanimous and is accompanied by the separate opinions of three Senators of the Supreme Court stating, inter alia, that "*(...) We, the senators who remained in the minority in the vote, consider that in this case the Senate, when considering the case in expanded composition, has misinterpreted Section 203 Paragraph Two, Section 413 Paragraph One and Section 414 Paragraph One, as well as Section 423 Paragraph One and Section 424 of the Civil Procedure Law.* The Senators of the Supreme Court provide detailed explanations about which laws were adopted during the inter-war period and after the restoration of independence of the Republic of Latvia and at which time, emphasising that: "*(...) after the restoration of independence of the Republic of Latvia, the Civil Procedure Law of 1938, Section 876 of which contained the right to appeal a judicial decision in the part that has not been appealed by means of a counter-appeal, was not reinstated. Similarly, the adoption of the Law "Amendments to the Latvian Code of Civil Procedure" on 13 September 1995 and the Law on Civil Procedure on 14 October 1998 took place without taking over the regulation on filing of a counter-appeal contained in the 1938 Civil Procedure Law. (...) For the above reason, the inter-war case law and the Senate's explanation of the nature of counter-appeal, as well as the opinions expressed in the legal literature of the time (...), are not applicable today.*"[78] *It should also be mentioned that Section 424 of the Civil Procedure Law was included in the law at the time of its adoption, i.e., in the version of the law that entered into force on 1 March 1999, and the article has not been substantially amended*, except for a minor editorial amendment in 2009, which is irrelevant in this case. However, for more than twenty years, the Senate of the Supreme Court has not approached the legislator (*as, for example, in the judgment of 17 December 2019 in case SKC-259/2019*) and has not pointed out the inconsistencies in the Civil Procedure Law related to this matter, the need for amendments and/or the lack of clarity of the regulation.

In summary, the author concludes that the authority of the Senate of the Supreme Court should provide opportunities to enhance justice, while the existing structure raises a number of important issues that should be explored in more detail. The authority of the Senate of the Supreme Court is demonstrated by the influence of the case law on the judgments of lower courts in the application of substantive and/or procedural provisions. This influence is identical in content and consequences to that which the Constitutional Court recognized as incompatible with Article 1 and Article 83 of the Constitution in its judgment of 04 February 2003 in Case No. 2002-06-01. Currently, there is no legal framework (procedural instruments) to prevent the adverse consequences on the ability of individuals to exercise their procedural and/or substantive rights which may be triggered by a change in the Supreme Court's case law on the application of substantive and/or procedural rights during proceedings. It is also impossible to predict the timing and trends of changes in case law, so there is no certainty or predictability in this respect. The author concludes that the problems that have been identified require further research as they extend beyond the scope of this paper.

[77] Judgment of the Constitutional Court of the Republic of Latvia of 02 June 2008 in Case No. 2007-22-01. Retrieved: 30.12.2021. From : https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2007-22-01_Spriedums.pdf, refer to Paragraph 16.2.

[78] Separate opinions of Senators A. Keišs, I. Lauka and M. Senkāne of the Supreme Court, 14 May 2020. Retrieved: 30.12.2021. From: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?year=2020, refer to Paragraph 6.10.

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