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"LEGISLATIVE INFLATION" – AN ANALYSIS OF THE PHENOMENON IN CONTEMPORARY LEGAL DISCOURSE

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ABSTRACT

The article analyses the phenomenon of legislative inflation from three perspectives: historical, legal and political. The term "legislative inflation" is widely used by various European legal and political scientists and means an increase in the amount of legal norms. Issuing a considerable number of new legal norms consequently raises the question about the balance between the quality and quantity of the work of the legislator(s). There are three relatively similar, yet essentially different terms: "effectiveness, efficacy and efficiency" of laws, each of which should be considered and evaluated by legislators. Legislative inflation, if not adequately perceived, can lead to legal nihilism – a phenomenon mostly attributed to Russian and post-Soviet societies, but by substance an acute problem in all Western societies.

KEYWORDS

Legislative inflation, European legal development, symbolic laws, effectiveness of law, legal nihilism

NOTE

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Trop de lois tue la loi[1]

INTRODUCTION

During the past decades in many democratic countries there has been an ever increasing tendency to devise legal norms and laws as a tool for "exerting social control", "guaranteeing consensus in the society", "planning and prognosticating consequences" and even applying certain pressures to instigated the "necessary action" by (for) the legislator. Furthermore, these efforts, unfortunately, quite frequently are evaluated by the citizens themselves as being redundant and, therefore increase unexpected conflicts or even produce indifference toward the authority of the state.

This tendency, which is often called legislative inflation, is similar to what the economic processes means, namely, an increase in the amount, but decrease in the value of legal norms. Although legislative inflation is widely accepted as a price for modern globalisation and the drastic increase of various legal statuses a person gains during his/her lifetime, it is not an unknown phenomenon in the history of the Western legal system. Even more, legal scholars deem it a way to explain the processes of legal development when viewed from a historical perspective.

1. THE HISTORICAL PERSPECTIVE ON LEGISLATIVE INFLATION

The medieval Christian conception of the law guaranteed deep respect for the law, which was rooted in the conviction that "right and just" in legal issues is deeply related with God, nature, ideals and equity. Medieval legal philosophy saw the law as primary and the governing figures only as secondary, because it conceived it as a mere instrument for putting the law into effect. "Neither upheaval nor development, but continual revelation, clarification or purification of the true law, which is always struggling against wrong, obscurity, misunderstanding and forgetfulness – neither evolution nor revolution, but reformation – that is the medieval principle"[2].

Latvian professor of jurisprudence, Sanita Osipova, suggests that the reason for "legal flooding" is based in the history of Europe and the modern separation of Church and State. As a result of Reformation processes, "the new, modern view of

[1] Too many laws kill the law (Fr.)
[2] Fritz Kern, "Approach to Law: Medieval and Modern": 110; in: Volkmar Gessner, Armin Hoeland, and Csaba Varga, eds., *European Legal Cultures* (Cambridge: Dartmouth, 1996).

society (...) pointed to the necessity of creating new social sciences, and having them search for answers to questions, which before were the exclusive competence of Christian theology"[3]. Secularisation and the division of Church and State powers resulted in a radical decrease in respect for the law in society. The legal transformations during the 17th and 18th centuries were not easy for lawyers, as they complained of legal uncertainty, and of being "confused about the mass of Justinian compilations and the chaos of later interpretations"[4].

Originally, the way to seek real values in the legal field was devised by Historical School of Law, which based the law in the language, customs, historical development and culture of the nation, thereby placing emphasis on the idea of organic development of law. The most distinguished scholar of the Historical School of Law, Friedrich Carl von Savigny, expressed complete distrust in the saving force of statutes. He maintained that it is a misconception that legislature can achieve any improvements in life. If in a society there is no notable, detectable effort made for generating improvement, any legislative attempt to put things right, will only escalate harm[5]. Although the Historical School of Law is somewhat dated, Savigny's hostility "towards the legislator, who with a stroke of the pen could sweep away the most cherished doctrinal constructions, is not at all difficult to understand"[6].

The reduction of law to written form became a manifestation of the rise of political authorities and the transformation of law from customary norms based on "the relations of individuals arising out of chance circumstances" to "an aspect of political power"[7]. By the last decades of the 19th century, it was becoming apparent that the legal professions of Western societies would have to be reconciled with the fact that legislation was becoming the obviously dominant source of new law.

The period of secularization of the State and the idea of separating Catholic Church from the State, fuelled the development of the Positive Law School in the 19th century. During that time positivism was the dominant legal scholarship in most of Europe and it was closely related to the positivism in the sciences. Law, similarly to biology or physics, was regarded as an empirical science, that which is observable, measurable and scientifically explainable. This turned the greater attention to the legislator, who generated "positive laws" according to its understanding of the necessities of the society and political aims. Legislative

[3] Sanita Osipova, *Ievads tiesību socioloģijā (Introduction to Sociology of Law)* (Rīga: Tiesu namu aģentūra, 2010), p.158.
[4] Pavel Ivaanovich Novgorodcev, "Istoriceskaja skola juristov. Ejo proishozdenije I sudba" (Historical School of Law. Its Origins and Destiny) (1896): 28; in: *Nemeckaja istoriceskaja skola prava. (German Historical School of Law)* (Celyabinsk: Socium, 2010) [in Russian].
[5] *Ibid*.: 89-90.
[6] Raoul Van Caenegem, *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press, 1992), p. 174.
[7] Henry Levy-Bruhl, *Sociologie du droit (Sociology of Law), 6th edn*. (Paris: Presses Universitaires de France, 1961), p. 75-77.

positivism declared that "only the legislator determines what the law is, and what the legislator determines is law"[8]. At the core of this positivistic concept was an attempt to construct a self- limitation system, where the state controls the laws it itself issued. The role of the legislator as an expression of "human reason" became embodied in the 19th century ideals of the liberal state, which "can change (...) positive law at any time"[9]. During the 20th century the world experienced tragic unexpected consequences of cruel and blind belief in the power of positive laws – for example, Nazi "laws", which prescribed torturing and killing innocent people, the sterilization of women, etc. The Nuremberg process commanded the world to accept the German legal philosopher Radbruchs' formula, which allows the judge not to apply "unbearably unjust" statutes.

Legal history clearly shows that processes of legal development, although surrounded by completely different social and political contexts, may be explained in a systemic way. For example, legal scholarship differentiates four phases of a cycle, which are periodically repeated during the history of legal development[10]:

During the *initial period* the legislator aims to issue abstract and general laws. Special significance is attributed to the courts, lawyers and institutions, their ability to use and to adapt abstract terms, clear explanations of which are not given by the legislator. This period characterizes the new beginning and forming of the legal system in a newly established state or at the period of recent change of political regime or major transformations in the state.

The *consolidation phase* denotes the ability of courts and lawyers to interpret statutes. Only in cases of incompleteness or shortcomings of the law does the legislators' attention turn to the fact that the law must be changed. Legislators' activity of creating laws is welcomed and widely accepted in the society. The necessity of issuing laws is unquestionable, because the statutes deal with general and global issues. The courts and lawyers consolidate their knowledge and efforts in order to help legislator to fund a new order and help the system "work". Unwritten consensus exists between society, lawyers and politicians.

The *degradation phase* is a period when the body of legislation and governmental regulations increase substantially. Legal texts are composed almost like an administrative act, namely, including individual and concrete terms, which limit lawyers' possibilities to solve the case according to the principle of fairness. "But instead of evaluating the entire legal system and challenging the underlying principles of the system, governments react by introducing ever more laws and

[8] Randall Lesaffer, *European Legal History* (Cambridge: Cambridge University Press, 2009), p. 462.
[9] Fritz Kern, *supra* note 2: 107.
[10] Diāna Apse, "Kazuistikas nozīme Latvijas tiesību teorijā un vēsturē" (The Meaning of Casuistics in Latvian Legal Theory and History), *Likums un Tiesības (Law and Justice)* 10, Nr. 6 (106): 180-181.

regulations. Not only is this doomed to failure, but the 'solution' has become part of the problem"[11]. The idea of law is often hard to fulfil, because legal norms leave almost no possibilities for manoeuvring and interpretation according to the situation and the necessity. Laws are composed too narrowly, and risk becoming "old" the day after publishing, because they have been structured too concretely.

Returning to the initial period points to a common understanding that the system is at an impasse and no longer capable of functioning effectively. The state is faced with pressure to exert substantial effort to evaluate and, where necessary, drastically change the system. The purpose of the effort is to restore the basics of the legislation to a quality that would not be an obstacle to the economic and social development of the citizenry. This period can be characterized as a "revolution time", when profound, even revolutionary transformations of the legal system are implemented. Significant ages of social change and mobility almost always involve great use of law and litigation[12]. The result of these changes sooner or later turns to the initial period – the authority of general and abstract laws.

Analysis of the legal literature and political processes in the European Union gives some hints about which phase of development could best characterise the actual problems of the European legal systems at the beginning of the 21st century.

During the 1970s a new branch of legal research – legisprudence – was first introduced in Germany. The term "legisprudence" originated as a combination of Latin words *legis/lex (law)* and *prudentia (knowledge)*, which means to "study legislative problems from the angle of legal theory"[13]. In the continental European legal system the dominating accent on the adopted legal provisions and the judge as the central figure in application of the law was expanded by taking into account the legislator and the legislative process. The reason for the emergence of the study of the legislating process was in accordance with the widely accepted belief that much of the legislation "is not understood even in outline by most members of society. Many people are unaware even of the existence of much of it".[14]

"Inflation of norms" is a phenomenon which is seriously regarded both on the national level and European Union level. As Dace Luters-Thümmel, legal expert of the European Commission, has precisely pointed out, a legislator should be able to issue laws which are „abstract enough, in order to group several facts (which, of course, cannot be done in criminal law, where special laws dominate), but also concrete enough, so that the bureaucrat and the lawyer could apply them clearly

[11] Randall Lesaffer, *supra* note 8, p. 511.
[12] Robert Nisbet, *Twilight of Authority* (New York: Oxford University Press, 1975), p. 173.
[13] Jean Luc Wintgens, *Legisprudence: A New Theoretical Approach to Legislation* (Oxford-Portland: Hart Publishing, 2002), p. 2.
[14] Roger Cotterrell, *The Sociology of Law. An Introduction* (London: Butterworths, 1992), p. 45.

enough"[15]. The battle against the "legislative machinery", which inherently signifies a tendency to become uncontrollable, has been a vivid platform of action also on the European level. For example, the European Commission, the other EU institutions as well as the Member States implemented the "Better Regulation strategy", which deals with contemporary problems of "inflation of legislation". Simplification, codification, impact assessment, consultation, evaluation and recasting are just some of the methods to analyse and make sure the legislative efforts have met the set objectives.[16] In France the inflation of laws is acknowledged as an essential problem. In order to observe the principle that "nobody is supposed to ignore the law", the French are obliged to know more than 10 500 statutes, 120 000 decrees, 7400 treaties, 17 000 EU texts, and tens of thousands of pages of seventy-two different codes.[17]

2. "LEGAL PERFECTIONISM" – A NEW CHALLENGE FOR SOCIETY AND LAWYERS

The twentieth century has brought new concepts of using "the law of the state to restructure, plan and encourage economic enterprise on a massive scale, to promote peaceful revolution in social relations (for example, through anti-discrimination law)".[18] Modern law works as an ideological tool to promote, for example: tolerance, patriotism, and self- assurance in society. Law has now become recognized as an agency of power, "it has become possible to talk about law *acting upon* society, rather than as an aspect of society".[19] The power is most often not physical, but is expressed as an invisible network of various ideological forces through state-funded social projects, "information campaigns" in the mass media, and in the process changing the attitude of society toward the legal, economic and other processes.

Paradoxically, the problem of instability of laws has emerged, as legislators more and more strive to develop, strengthen and ensure security of legal system by issuing new laws. Unfortunately, new legal norms often become an obstacle or even a cause of misunderstandings not only for society, but also for the legislator himself. In order to characterize this process, where a state, in a negative meaning, "becomes overgrown" by various normative regulations, legal scholars offer many colourful and descriptive designations, for example "inflation of norms", "casuistry",

[15] Diāna Apse, *supra* note 10: 181.
[16] European Commission, *Better regulation strategy* // http://ec.europa.eu/governance/better_regulation/key_docs_en.htm (accessed October 1, 2011).
[17] Philippe Sassier and Dominique Lansoy, *Ubu loi*, Summary of the Book (France: Fayard, 2008) // http://www.decitre.fr/livres/Ubu-loi.aspx/9782213636184 (accessed October 1, 2011).
[18] Roger Cotterrell, *supra* note 14, p. 44.
[19] *Ibid.,* pp. 44-45.

"overproduction of normative regulation", "law floods", "floods of norms", "legislating nomophily" or even "atom-bombing of texts".

The "quantity" of law varies with the quantity of stratification and culture in a society. It is remarkable that the "inflation of norms" is succeeded by "symbolic laws" or "illusion-creating laws", which in essence are legally formed political visions, or targets, creating the illusion that universal values are being defended by the law and rule of law is ensured, for example, in Youth Law (Republic of Latvia):

> Section 1. Purpose of this Law
>
> The purpose of this Law is to improve the life quality of young people – persons from 13 to 25 years of age – by promoting their initiatives, participation in decision-making and social life, as well as by supporting youth work.[20]

The phenomenon of casuistry is well- known in many countries, and the action of states represents efforts to reduce the amount of norms and to reduce the state bureaucracy. The modern legislative influence is the subject of ruthless criticism, because it has compelled the judiciary to work inefficiently. If the legislator has foreseen everything in a too detailed mode, then, implicitly, there will be a situation which is not exactly reflected in statutes, therefore the judge is forced to interpret if there is a "gap in the law" (intended or unintended by the legislator). Discussions about the limits of courts' law–making "are in particular important to modern democracies, because the rule that all the state power is derived from the people demands that law- making must principally belong to the representatives of the people, that is, the Parliaments".[21]

In recent years doubts about the intrusion of law into fields that are ill-fitted to regulate have been strongly echoed in literature from a number of Western countries, discussing, often critically, the "juridification" or " legalisation" of such social spheres as industrial relations, family life, commercial activity and the organization of business enterprises.[22] A lively debate was started in Latvia[23], when the parliament in 2005 voted for the amendments in the Constitution of Latvia banning same-sex marriage: "Article 110. The State shall protect and support marriage – a union between a man and a woman, the family, the rights of parents and rights of the child".

This amendment, having no legal impact and being classified as redundancy, is clearly symbolic, since The Civil Law of Latvia already permits marriage only

[20] *Youth Law (Jaunatnes likums)*, Latvijas Vēstnesis ["Latvian Herald", Official Publisher] (2008, 82 (3866)), sec.1.
[21] Ulrich Everling, "On the Judge-Made Law of the European Community's Courts": 41; in: *Judicial Review in European Union Law* (The Hague: Kluwer Law International, 2000).
[22] Mauro Zamboni, "The "Social" in Social Law – An Analysis of a Concept in Disguise," *Stockholm Institute for Scandianvian Law 1957-2010* (2007): 513-39 //http://www.scandinavianlaw.se/pdf/50-33.pdf (accessed October 1, 2011).
[23] Laura Sheeter, "Latvia Cements Gay Marriage Ban," *BBC News* (December 15, 2005) // http://news.bbc.co.uk/2/hi/europe/4531560.stm (accessed October 1, 2011).

between a man and a woman. The author of this article supposes that the purpose of these amendments to the Constitution were clearly symbolic, and helped the majority of conservative society to strengthen the illusion of security and demonstrate the negative attitude towards new political tendencies, such as, for example, anti-discrimination and same-sex partnership issues.

It is disputable whether legal norms should include definitions of words, which are commonly known and used in the language (for example, Czech lawyers find it odd to read in a statute a definition of "thermometer", which, according to the legislators' definition "is a device for measuring temperature").[24]

Latvian Parliament (*Saeima*), in order to maintain and defend the positions of the Latvian Language, has introduced a statute according to which a parent in Latvia should give a name to their newborns. "Parents named their newborn boy 'Otto' (spelt with double 't'). However, the public authority refused to register the name because Latvian grammar rules which are included in the statutory law do not allow double 't's' in words like that. The parents did not want to name their child "Oto" (with single "t"), therefore they appealed against the public authority's decision".[25] The Supreme Court established that the name "Otto" is widespread in Latvia – 159 persons from different generations have this name.[26] "Thus the Court found a norm of living law which allowed giving the name 'Otto'"[27], although the statutory law ruled the opposite. This decision, if unexpected and unintended by the public authorities, was welcomed by society and strengthened the belief in the power of the Court and general principles of law, such as proportionality of restrictions and freedoms of the private life and name identity.

Already in 1979 French professor Jean Carbonnier coined the term "moratorium of legislation"[28], suggesting that "legislative silence is gold".[29] The French professor's exaggeration regarding the total stoppage of creating statutes is acceptable only if "legislative silence" is followed by a systemic change of legal order. A mechanical decrease or cut of laws is dangerous, as this may cause more problems than solutions. It seems as if nowadays legislators are forced to publicize

[24] *Vyhláška ze dne 11. července 2006, kterou se stanoví požadavky na teploměry používané ke stanovení spalného tepla pro bilanční měření. 379/2006 Sb. Ministerstvo průmyslu a obchodu (Regulation from 11th of July 2006, on Laying down Requirements for Thermometers Used to Determine the Calorific Value Measurement for Assets. 379/2006 Sb, Ministry of Industry and Trade)*, Czech Republic, Article 1.40.
[25] Gatis Bardins, "Dialogue as Precondition for Application of Living Law in Courts"; in: Maciej Mikuła, Władysław Pęksa, Kamil Stolarski, eds., *Possessio ac iura in re - History of the Real Law* (Kraków: Jagiellonian University Press, 2012) [to be published].
[26] *Judgment of 17 November 2010 of the Senate Department of Administrative Cases of the Supreme Court of the Republic of Latvia*. Case SKA-890/2010.
[27] Gatis Bardins, *supra* note 25.
[28] Jean Carbonnier, *Droit et passion du droit sous la Ve République (Law and Passion for Law in the 5th Republic)* (Paris: Flammarion, 1996), p. 112.
[29] Jean Carbonnier, *Essays sur les lois (Essays about Law)*, 2e ed. (Paris: Répertoire du Notariat Defrènois, 1995), p. 313.

activities in production of new legislation, which is a consequence of political lobbying, interest group activities, NGOs and international "players". It would be misleading to declare: if there is smaller number of statutes, then access to law will be easier!

Pauline Westerman has observed that it becomes difficult to even group the norms. In addition to the traditional mandatory rules of the prohibitive type, Westerman suggests new types of norms: a) aspirational norms, which "directly prescribe the achievement of goals", for example "safe environment conditions"; and b) result-prescribing norms, for example, food storage standards or allowing loud music in a club.[30] These new types of norms are regarded as outcome-oriented, bearing similarities to business management strategies.

Even where law is created by democratically elected assemblies, the legislation is often not the result of the popular mandate. The recent events in Hungary regarding the adoption of the new constitution (which is believed to weaken democratic checks and balances even if it improves state finances), clearly shows that the abstract ideals about the agreement of the sovereign in creating the "basic norm" is very far from the real world. The parliament accepted a new Constitution, which is not absolutely in accordance with the society's opinion. As the opposition declared, "We can't say this constitution is based on a national consensus".[31]

Twentieth century politics acted with a dominating view that legislation is able to regulate almost all the spheres of society. Nowadays, it has been clearly defined that there are limitations to the effects of legislation.

Already in 1917, Roscoe Pound offered his view about the factors that limit effective legislation:

1. Laws can only govern external actions, not the internal sentiments of individuals;

2. Laws have to rely on the institutional background that will ensure the implementation of legislation;

3. It is possible to point out interests and aims in the laws, but it is no guarantee that these aims will be regarded as important during the life of the law.[32]

According to most contemporary legal thinkers, the "law's effect may be to create uncertainty, chaos, distrust or hostility rather than to regulate

[30] Pauline Westerman, "The Emergence of New Types of Norms": 117; in: Jean Luc Wintgens, ed., *Legislation in Context: Essays in Legisprudence* (Hampshire: Ashgate Publishing Company, 2007).
[31] Dunai Marton, "Thousands protest over Hungary constitution change" (April 15, 2011) // http://uk.reuters.com/article/2011/04/15/uk-hungary-constitution-idUKTRE73E6MI20110415 (accessed October 1, 2011).
[32] Roger Cotterrell, *supra* note 14, p. 51.

appropriately".[33] It is considered that these aforementioned "effects" will signify either a total failure of legislature, or, if intended, its permanent unavailability for further research and enhancement of the knowledge of society.

The history of law knows several large and expensive examples of legal *fiasco*, creating a perverted attitude toward the law. In the USA, efforts to ban the production, transportation and selling of alcohol in the 1920s and 1930s were provided by draconian sanctions, but still, they did not manage to achieve the desired results. Between 1920-1932 more than 750 000 persons were arrested, fines of approximately USD 75 million were imposed, but still it succeeded in corrupting, violating and even threatening individuals' health as they searched for alternatives to alcohol.[34] However, the consumption of alcohol did not disappear from the business and professional environment – it simply became prestigious to drink alcohol. It is interesting that approximately at the same time in another part of the world – the new Soviet Union – exactly the same ban of the usage of alcohol was introduced, and also became a *fiasco*.

3. THE NOTION OF EFFECTIVENESS IN CONTEMPORARY SOCIOLOGY OF LAW

The notion of effectiveness has become more relevant to both the political and legal studies, especially when the qualitative and quantitative indicators of the work of state institutions (first of all, parliament and executive power) are analysed. "Legislative inflation" in most of the European countries can be easily observed by comparing the number of laws and regulations issued during a particular period of time. This raises the next question: are the potential (positive and negative) effects of these laws sufficiently investigated before the text of law becomes an obligation for the society? Or the legislator just "assumes" and hopes for the desired results of the legislation?

The relationship between the "inflation of norms" and the real effect of statutes in order to achieve political goals has attracted the attention of sociologists of law. It should be noted that in legal literature there exists a vast misunderstanding as far as various nuances regarding "effectiveness, efficacy and efficiency" of laws are concerned.

It is possible to propose clear and distinct explanations of these three terms in order to correctly evaluate the multitude effects legislation can have. "Effectiveness" is a word derived from the Latin word "effectivus", meaning

[33] Gunther Teubner, *Juridification of social spheres: A comparative analysis in the areas of labor, corporate, antitrust, and social welfare Law* (Berlin: New York: De Gruyter, 1987), pp. 6-9.
[34] Mike Thornton, "Alcohol Prohibition was a Failure," *Policy Analysis* 157 (1991) [Cato Institute] // http://www.cato.org/pub_display.php?pub_id=1017 (accessed October 1, 2011).

something that is working and creates an effect (Fr. "effectivité", Ger. "Effektivität"; Rus. "эффективность"). Effectiveness is related to quantitative (statistical) conformity with the model prescribed in the legal norm. The general principle of effectiveness can be defined in economic terms: "the law is being respected, if it works like in a market – if it can be sold".[35] This picturesque comparison is used to illustrate two important factors (which are) crucial for the general effectiveness of the law: the information or explanations concerning the existence and contents of the new statute, and the necessity for the statute to be generally accepted by the society. Measurements of effectiveness of legal norms usually have little practical application, because invariably it is difficult to come to conclusions with an added value for future politics.

If the legislator concludes that statistically the law is observed, this information might not give any further explanations for the real effects of the law. It is possible that a study of the real effects of a law should be widened (see the relation of law X to the effects of law Y) and analysed, together with the intentions and ideas the legislator had when adopting a new law. That is where the research of the efficiency and productivity of laws becomes essential.

One recent example in Latvia illustrates this problem. Due to the financial crisis Latvia' s parliament decided in January 2009 to increase the VAT on books from the reduced rate of 10% to the standard 21%. In the annotation of the law, the legislator had estimated the resultant increased income in the State budget. If the effectiveness of the law was around 100% (of course, in the shops the new VAT 21% rate was applied), then totally different results could be found when assessing the total amount of income for the State budget. The Latvian society stopped buying expensive books, consequently the total turnover of book sales decreased by 40%.[36] That caused a crisis in the book publishing business (insolvency proceedings were initiated for several bookstore chains), whereas the income of other related taxes – Corporate Income Tax, Social Security payments and Personal Income Tax – dropped dramatically.

The second term usually paired with "effectiveness" is "efficacy" of law, which means "the force and impact of law" *(*Fr. "efficacité", Ger. "Wirksamkeit, Einwirkung, Effizienz", Rus. "воздействие"*)*. Efficacy shows the level of achieving the legislature's targets with the aid of legal prescript. Efficacy indicates the desired result, the goal of the legal statute, therefore, it is an ideal way to evaluate the

[35] Marie-Anne Frison-Roche, "L'amour intéressé des lois particulières (Analyse sociologique du droit économique)" (Love interested in particular laws (Sociological analysis of economical laws): 349; in: Josiane de Boulad-Ayoub and Bjarne Melkevik, dir., *L'amour des lois: la crise de la loi moderne dans les societes democratiques (Love for laws: crisis of modern law in democratic societies)* (Québec: L'Harmattan: Les Presses de l'Universite Laval, 1996).
[36] Latvian Publishers' Association, "Argumenti PVN atvieglotās likmes saglabāšanai" (Arguments for Preserving the Reduced VAT Rate) (2011) [unpublished].

quality of legislature's work. It should be mentioned that in Europe (as opposed to the USA) scientific research of the achievements of legislative goals has developed more slowly. In Europe the interest for sociological and economic effects of law became notable only in the 1960s and 1970s. The concept of efficacy is much wider than that of effectiveness. It is not enough to study the effectiveness. As French legal scholar François Rangeon has pointed out: „Law can be effectively implemented even when not being efficacious".[37]

To cite an example, the desperate wish of Latvian legislators to solve the State budget problems in 2009 showed that low quality laws without argumentation and control mechanisms make the idea of legislation questionable if not deplorable. The government was planning to obtain 38 million lats (54 million euros) by introducing a new "company car tax", by providing that payments should vary depending on the engine size and on the basis of the employer's consideration whether the employee will use the car for private purposes, for example: "drives home after work" and in such a way gains personal economic benefit.

The newly implemented "company car tax" encouraged companies to change the ownership of the cars from the company to the employee, thus avoiding the tax. In the period from 01.01.2009 - to 29.07.2009 there were 1799 re-registrations of cars; but in the period from 01.12.2009 to 29.12.2009 there were 4030 cases of re-registration of the car from the company to the employee.[38] Since 2011, companies need to install a GPS device in the cars in order to prove that the car is used only for business needs and that the tax must not be paid. Efficacy of this law can be evaluated as doubtful, and the society sees this law as one more example of inefficient administration by the state and the politicians' lack of a more perceptive vision on how to enhance a more positive business and economic environment in Latvia. Allot has rightly pointed out that „laws are often ineffective, doomed to stultification almost at birth, doomed by the over-ambitions of the legislator and the under-provision of the necessary requirements for an effective law".[39]

Sociology of law employs the term "efficiency" (productivity, expediency), which can also create confusion (Fr. "efficience", Ger. "Effizienz; Wirtschaftlichkeit", Rus. "целесообразность"). The origin of the concept can be found in economics, referring to the similarities with a balance sheet: the balance of income and expenses. This *input/output* concept is explicitly utilitarian and searches for the

[37] François Rangeon, "Réflections sur l'effectivité du droit" (Reflections on the Effectiveness of Law): 131; in: *Les usages sociaux du droit (The Social Uses of Law)* (Paris: PUF, 1989).
[38] Santa Kvaste, "Kā likumīgi izvairīties no "dienesta auto" nodokļa?" (How Legally to Avoid the "Company Car Tax"?), *Apollo.lv* (December 30, 2010) // http://www.tvnet.lv/zinas/latvija/298409-ka_likumigi_izvairities_no_dienesta_auto_nodokla (accessed October 1, 2011).
[39] Antony Allot, *The Limits of Law* (London: Butterworths, 1980), p. 287.

result, taking into account the return of investments: "the question is how much it costs to implement the norm".[40] Therefore, it can be an interesting perspective to evaluate whether the legislator is prudent enough while introducing new laws. The principle of proportionality can play the crucial role in evaluating the efficiency (productivity) of legal prescripts. Of course, not all productivity will be declared in numbers and tables, but it allows a comparison of the alternatives and calculation of the most useful results. The criteria of productivity are most often considered from an economic standpoint, but it is possible to choose a more global perspective, political comparison, "green thinking" perspective, etc.

The analysis of such terms as "effectiveness, efficacy and efficiency" of laws illustrates the necessity to develop the legislator's ability to create rational legislation, taking into account the actual situation and knowing how to solve the problematic issues with legal instruments. If the law lacks the connection between the "theoretical effectiveness" and "actual effectiveness", there is a high risk of promoting the "legislative inflation" in a negative sense, which might result in legal nihilism.

4. LEGAL NIHILISM – A RESPONSE TO MODERN "LEGISLATIVE INFLATION"

The process of speedy "legislative machinery" in Europe (on both national and European levels) forms and creates the legal consciousness[41] and legal culture in society. It is worth mentioning that "aside from the most commonly used 'American' conception of legal consciousness, which echoes the work of Roscoe Pound and which focuses on the '(official) law in action', there is also an important alternative perspective. This 'European' conception of legal consciousness was first introduced by Eugen Ehrlich and looks at people's own ideas and expectations of law".[42] For Eastern Europe and Russia, Leon Petrazycki's psychological theory of law and the analysis of legal consciousness[43] were more influential, as he was a distinguished professor in St. Petersburg State University.

Legal nihilism is seen as a phenomenon existing in the framework of legal consciousness, legal culture and social nihilism. Besides, this phenomenon can be

[40] Liisa Uusitalo, "Efficiency and Legitimation: Criteria for the Evaluation of Norms," *Ratio Juris* 2 (2) (1989): 197.
[41] The idea that law forms and creates legal consciousness, not vice versa, has been already stressed by Rudolf von Jhering in his work "Der Zweck im Recht" (Law as a Means to an End). *See* Rudolf von Jhering, *"Der Zweck im Recht" (Law as a Means to an End)* (Leipzing: Druck und Verlag von Breitkopf und Härtel, 1904), S. 10. Most recent theorists agree that legal consciousness is a form of social consciousness and is leveled at general attitude towards law, opinion and emotions towards legal values, events and legal institutions.
[42] Marc Hertogh, "A "European" Conception of Legal Consciousness: Rediscovering Eugen Ehrlich," *Journal Of Law And Society* Vol. 31, No. 4 (2004): 480.
[43] Which parallels Eugen Ehrlich´s idea of "living law".

studied from two angles: legal nihilism as discursive practice and legal nihilism as social practice.

Legal nihilism *as discursive practice* developed in Russia in the end of the nineteenth century and again evidently re-appeared at the end of 1980s, especially in the post-Soviet countries.

In Russia at the end of the nineteenth century, "legal nihilism (or merely nihilism) as the peculiarity of unique and mystical 'Russian soul' was a very 'profitable' argument and gave a lot of advantages in political game".[44] This phenomena, in the author's opinion, is mostly based on the unique historic situation in nineteenth-century Russia, where social "nihilism" easily served and expanded fit and emerged the general acceptance of sceptical, negative and pessimistic (nihilistic) attitude towards state institutions (courts, police) and law (state regulations) and became a trend of political and public thought. There existed several influential groups of legal thought, among which "conservative wing" and "left wing"[45] took dominance and actively debated about nihilism. Famous citation of Mikhail Bakunin illustrates the general argument: "Germans search for life and freedom in their state; for the Slavs state means the coffin".[46]

Comparative studies of contemporary Western and post-Soviet (mostly Russian) legal literature strongly indicate that the term "legal nihilism" is rarely mentioned in Western[47], but everywhere evident in post-Soviet legal literature regarding themes of "law and society" or "law and state/politics". Western legal and political literature mostly contains the label "nihilistic" concerning and describing revolutionary processes in Russia and Soviet Union, and this has mistakenly expanded as a *cliché,* firstly, giving the impression that nihilism is originally Russian[48] phenomena, secondly, that it actually existed and exists only in Russia and other countries sharing the Soviet history.

The phenomenon of deformations of legal consciousness, including legal nihilism, is an actual problem, both in "old European Democracies", as well as in Eastern European post-Soviet countries, but the difference is that the manifestations of legal nihilism in Western countries (including the US) is analysed

[44] Evgenia M. Ivanova, *Legal Nihilism as Social and Discursive Practice: the Case of Belarus* (Saarbrücken: VDM Verlag Dr. Müller e.K., 2010), p. 76.
[45] For example, Slavophils from the conservative wing denied the necessity to adopt rational laws and even Constitution into life of Russians. Anarchists even advocated the abolition of law and state as they were seen as obstacles on the way to freedom.
[46] Vladimir Aleksandrovich Tumanov, "Pravovoi nigilism v istoriko- ideologiceskom rakurse" (Legal Nihilism in Historical- ideological Aspects), *Gosudarstvo I Pravo (State and Law)* 8 (1993): 54 [in Russian]. Original text in Russian: "Немцы ищут жизни и свободы своей в государстве; для славян же государство есть гроб".
[47] German legal scholars have analysed legal nihilism. *See* Manfred Rehbinder, *Rechtssoziologie (Sociology of Law),* 4 Auflage (München: C.H. Beck, 2000), pp. 137 – 141.
[48] German philosopher Friedrich Heinrich Jacobi is notable for coining the term "nihilism" in 1799. Other influential figures, such as Augustine, Prudon, Nietsche, Heidegger, Kafka, have developed the notion of nihilism in Western philosophical thought.

mostly using different terminology, for example, "ugly consciousness", "failures of legal regulations" or "ambivalence in public perception of law in society". Since the end of the 1980s, especially in the post-Soviet territory, "mentioning of legal nihilism was an attribute of many debates".[49]

Even in various everyday situations society has been blamed by government officials for the occurrence of "legal nihilism", as a result of which "as manifestation of legal nihilism people seek to call different events that they dislike"[50], even if by substance they are usual negative occurrences common also for many Western states (corruption, impeachment procedures, mistakes in legal implementation process etc.).

The difference is the existence or non-existence of positive belief and trust in society and legal participants[51] to have a high level of legal culture and legal consciousness. The crucial question is: have state legislators done everything to promulgate good quality and an adequate quantity of laws, and has society done everything to implement the common targets of the state and respect the rule of law.

Legal nihilism as social practice includes analysis of the theory of legal nihilism (notion and substance of legal nihilism, its forms and types, conditions or causes of development etc.), and, therefore, is closely related with specific states and specific cases.

Legal scientists offer three types[52] of legal nihilism: legal nihilism as such or universal legal nihilism, sociological nihilism and legalistic nihilism. Each of the types has specific causes and conditions of manifestation. We will explore in detail each of the types of legal nihilism in order to promote the idea that one or even two of types of legal nihilism, if not yet recognized *expressis verbis* in Western legal thought, are present and essential in contemporary European legal thought.

a) *Legal nihilism as such* or *universal legal nihilism* means that freedoms and formal equality of participants of the social interactions are not accepted and trusted by mass consciousness as a fundamental value.

This form of nihilism becomes essential after general changes of the state structure and political form. For example, during the 1990s in many Eastern

[49] Evgenia M. Ivanova, *supra* note 44, p.77.
[50] *Ibid*., p.83. This observation is true also in the case of Latvia.
[51] The term "legal nihilism" is supposed as an exclusively negative and exterminable phenomenon and sharp hint to the "bad boy" for the rest of the society.
[52] Natalja Vladimirovna Varlamova, "Pravovoi nigilism: prosloje, nastojascee .. i budusceje Rosiji?" (Legal Nihilism: past, present... and future of Russian?), Konstitucionnoje pravo: vostocnoevropeiskoje obozrenije *(Constitutional law: East European Review)* 1 (30) (2000): 90-93 [in Russian]. There is no consensus between legal scientists about the division of forms of legal nihilism. For example, Latvian legal scientist Voldis Jakubaņecs offers seven forms of legal nihilism, among which are "substitution of justice by political, ideological or economical purposefulness" and "substitution of sovereignty and integrity by separatism and separability ideas". *See* Voldis Jakubaņecs, "Tiesiskā apziņa" (Legal Consciousness), (Riga: Latvijas Policijas Akadēmija, 2001), pp. 154 -155.

European countries such terms as Rule of Law, Democracy or Equality, although widely used also during the Communist era, their substance and meaning was dramatically altered. It also brought specific negative changes in the legal consciousness of these societies. Since radical reform of the legal system is an uncommon phenomenon, the society seeks for additional security and expects fundamental legitimization of the new legal order. As usual, law aspires to stability, to security and to succession. During such transformations the legislators cannot readily embrace these values, and are risking a general acceptance in the society.[53]

Prof. Sanita Osipova and Ieva Roze, having analysed the reasons of legal nihilism in Latvia[54], have demonstrated the specific character of *universal legal nihilism* in post-Soviet countries in Europe. It is possible to find at least two distinct causes and descriptions of *universal legal nihilism*:

1. Political and legal nihilism in some post-Soviet European countries is partially related to the fact, that, although the new regime vigorously professed to follow the new ideology and values, often the new political leaders were the same ex-communist leaders. It was hard for people to comprehend and accept that "political clichés" were not changing; just the terminology, such as "Marxism", had been replaced by "democracy".

2. In general, the dramatic changes in the understanding of the functions of the state often create chaos and a sense of impunity. The former Soviet Socialist government determined and established economic processes, culture, education, socialistic legal order, guaranteed a job for everybody, etc. The individual was controlled, but at the same time felt secure (provided he did not involve himself in any debates on political freedoms and rights) during his lifetime. The new democracies implemented politics with no or minimal interference in the processes of the society. The problem was that the society (at least, a large part of it) was too passive, without any experience in acknowledging and claiming its rights and interests (low level of legal culture). This is why processes, well known and successfully used in the "old European Democracies", such as protests by civil society, an activity in controlling politicians, freedom of speech and freedom to assemble, experienced such a slow acceptance, for example, in Latvia and other Eastern European countries.

The above-mentioned descriptions lead to the conclusion that this type of nihilism is not characteristic for Western countries. Moreover, it has a temporary

[53] Harold Berman,Zapadnaja tradicija prava, epoha formirovanija *(Law and Revolution: The Formation of the Western Legal Tradition)*, (Moskva: Infra-Norma, 1998), p. 32 [in Russian].
[54] Sanita Osipova and Ieva Roze, "Tiesiskā nihilisma saknes Latvijā" (The Sources of Legal Nihilism in Latvia): 42-48; in: *Drošība un tiesiskums Latvijā (Security and Rule of Law in Latvia)*, (Rīga: Latvijas Universitātes Filozofijas un sociołģijas institūts, 2007).

character, and can be related to specific political events and historic period in the development of the state.

It should be noted that the legal nihilism in all post-Soviet countries is closely related to the age of the individual, depending on how many years an individual had lived in the Soviet system. The older the individual was, the harder it was for him/her to adapt to the "new order".

b) *Sociological nihilism* means that people suppose that the legal order (legal reality) is unjust. It includes "neglect of social value of law and intentional ignorance of legal prescriptions",[55] which, according their opinion, are unjust, unnecessary or ineffective. *Sociological nihilism* implies that people already possess legal consciousness to a certain extent, which gives them the opportunity to evaluate, to support or even criticise the political and judicial processes (the quality of laws, court system and administrative process, for example). In the case of *sociological nihilism* there are two keywords, "opinion" and "justice", which lead to social action or active discussion of problems.

A high level of legal culture may develop if within the society and among state officials there is a consensus about the right balance between appropriate expectancies from law and adequate effort by legislator. If the balance is not found, various deformations of legal consciousness appear: legal infantilism (lack of legal knowledge, but falsely firm belief in one's legal expertise); legal dilettantism (overly inconsiderate attitude towards law due to disrespect); and legal fetishism (exaggerated perception of the role of law in solving political, social, economic, etc. problems). All these deformations of legal consciousness are present in the contemporary European legal and political debate. One of them – legal fetishism – has many similarities with the contemporary legislators' obsession with issuing new legal regulations, therefore burdening the clarity and transparency of the legal system.[56] It may be argued that "legislative hyperactivity" is often caused outside the parliament. Moreover, nowadays "the 'normative hunger' of the modern society should be accepted as a fact".[57] Although throughout many countries "legal flooding" has received critics, it should be acknowledged that "juridification of social spheres"[58] has been often promoted by interest groups (for example, pensioners, students, lonely mothers etc.) and the non-governmental sector. To many social groups amendments to the laws mean guarantees, state-level acceptance of their

[55] *Ibid.*: 46.
[56] Many examples of legal fetishism have already been outlined in Part 2 of this article ""Legal perfectionism"- new challenge for society and lawyers".
[57] Norbert Horn, *Einführung in die Rechtswissenschaft und Rechtsphilosophie (Introduction to Law and Legal Philosophy)*, 4 neu bearb. Aufl. (Heidelberg: Müller, 2007), p. 76.
[58] Stephan Parmentier and Jean Van Houte, *Law, justice and social change in the 21st century: The case of Belgium* (Bruxelles: King Baudouin Foundation, 2007), pp. 21-23 // http://www.kbs-frb.be/uploadedFiles/KBS-FRB/Files/EN/PUB_1311_Law_Justice_Social_change.pdf (accessed October 1, 2011).

particular needs or interests, or ability to stress the importance of their problems to the whole society. The most adequate term for characterizing this tendency is "legal idealism". Legal nihilism often coexists with legal idealism, which make "two sides of one coin",[59] where the coin itself is deformation of legal consciousness. Therefore, it is incorrect to say that only legal nihilism is dangerous and undesirable phenomenon. The same is applied to legal idealism and legal fetishism.

Exaggerated legal idealism in society indicates problems in legal culture, which, naturally, often creates disillusionment, and, as a result, legalistic nihilism.

c) *Legalistic nihilism* means domination of negative attitude towards legislation, expansion of illegal conduct or ignorance towards concrete laws.

As mentioned above, legalistic nihilism is based on negative experience with the "law in action". If persons continuously face the so-called "legal populism", then sooner or later the force and authority of legal rules will decline, taking into account that large number of them turn out inefficient or ineffective. "Legal populism (...) discredits law as a social value, and promotes legal nihilism, dooms legal regulation to failure".[60] This characterization is of a great importance equally in Russia, Germany, Latvia and other countries.

Ignorance of laws is another answer to the "legislative machinery", and it is widespread in such areas, which are hard to control: tax law, traffic law and State language law (which is the case in Latvia), just to name some examples. Legalistic nihilism in most of its forms (with the exception of illegal conduct) is a problematic object of study since it is practiced by ordinary people, which according to all the statistical data are "good citizens".

Since the end of the 20th century, the European legal system has experienced two parallel tendencies: rapid development of the quality and text of legal norms, but slow and gradual changes in the real implementation of law. Often the first tendency is accented, while the second is ignored by the legislator. This is the core reason for the negative perception of "legislative inflation".

The above-mentioned reasons for legal nihilism clearly confirm that the creation of legal norms, even if their content guarantees certain freedoms and justice, is unable to readily change the political and society's processes. Effective legislation with a positive influence on the social development in the country can only be achieved if the state powers are truly respecting the principle of "rule of law". It is obvious that in this regard there are still many challenges and "a long road to travel". Unintended consequences of legal norms will definitely become

[59] Nikolai Ignatievich Matuzov, "Pravovoi nigilism I pravovoi idealism kak dve storoni odnoi medali" (Legal Nihilism and Legal Idealism as Two Sides of the Same Medal), *Pravovedenije (Science of Law)* 2 (1994): 25 [in Russian].
[60] Aleksandr Vasiljevich Malko, "Populism i pravo" (Populism and Law), *Pravovedenije (Science of Law)* 1 (1994): 3 [in Russian].

apparent if legislators ignore the actual situation in society and create idealistic "paper law". The distance or the gap between the "legal world" and "real world" is one of the reasons why legal nihilism and ineffectiveness occur in society as a constant and even dangerously spreading phenomenon.

CONCLUSIONS

The consequence(s) of any action(s) – political, ideological or legal – can only be evaluated in light of clear targets, strategies and aims. Striving for the ideal of legislative completeness will ultimately only lead to "legislative inflation". This phenomenon is historically acknowledged already centuries ago in European legal systems, which allows agreement among those legal scholars who differentiate several phases of a cycle which are periodically repeated during the history of legal development.

Regarding the angle of structure and number of legal norms, the author of the article supports the four steps development idea: initial period, consolidation phase, degradation phase and returning to the initial period. If the contemporary level of development of European legal systems can be associated with the degradation phase, then this article illustrates several tendencies that are especially acute for most European countries. First of all, the new view towards legal norms – not as strictly regulatory, but also as encouraging and planning programs – should be accented.

Modern law works as an ideological tool to promote, for example: tolerance, patriotism, and self- assurance in society, which is often demanded by the various interest groups themselves. This leads to the next interesting contemporary tendency: the emergence of symbolic laws that have a strong demagogic influence promoting the "juridification of social spheres".

This logically brings up the next crucial question: if the number of legal norms advances so rapidly, what do we mean by the effectiveness of legal norms? The answer is given by offering three relatively close, but essentially different terms: "effectiveness, efficacy and efficiency" of laws. Each of these indicators can help the legislator to choose the best-fitted mechanisms of political and legal action.

The above mentioned issues lead to the problem of legal nihilism (a term widely used in post-Soviet countries, but by substance also discussed in Western legal thought), the source of which is based in the deformation of social consciousness. The neglect of the social value of law and the intentional ignorance of legal prescriptions should no longer be judged solely as a "wrong attitude of citizens".

A perfection of legislative completeness is unattainable; moreover, "it is the failure of a rationalist ideal that has become self-destructive, but has not yet been replaced by a new ideal".[61] The legal model of society can be easily found in the texts of each State Constitution. It is crucial not to lose sight of these ideals in the name of striving for abstract "formal legal completeness".

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[61] Randall Lesaffer, *supra* note 8, p. 511.

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