ORGANIC LAWS IN MODERN LEGAL SCIENCE

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In this paper I tried to develop some relevant concepts concerning organic laws: such as hierarchy of norms, sources of law and form of law. The article also shows the main nature of Lithuanian constitutional laws (konstituciniai įstatymai) with French organic laws (lois organiques) and through short comparative research tries to answer to the question, why these legal instruments were introduced into legal system of Lithuania. All this is done in order to try to develop some ideas about Lithuanian constitutional laws and to provoke the discussion on that subject among Lithuanian lawyers.

1. Introduction

In the beginning of XXI century, it is a big challenge to write a paper concerning the positive law. From the second part of XX century it is very popular to talk about soft law, about decentralisation of state, alternative dispute resolution (ADR), about law not as a 'pyramid', but as a network [1, p.1–8]. Institute of organic laws (because of its specific domain and adoption procedure) can be also explained as something like hartian secondary rules, referred to legislator and other branches of public power [2, p.161–164] and in this sense also can be considered as a 'pure' law. But in this paper I will try to show that it is not the case. History of the origin of organic laws shows that they are very depended on (judicial) interpretation and social/political context as well.

In 1992 Lithuanian people in referendum adopted a new Constitution (before it was adopted by the Parliament). One of the novelties of this Constitution is that in the first time in Lithuanian legal history it is introduced a provision concerning organic laws'. In the text

expressis verbis translation of the provision of the Art. 69(3) should be 'constitutional laws' (Lit. konstituciniai įstatymai'). In this paper I use the term of 'organic laws' (for it better conforms to terminology of French lois organiques'), which are the origin of this kind of legislative instruments), when I am talking about this kind of sources of law in general.
of Lithuanian Constitution we can found more than 30 references to specific (but ordinary) laws which should be adopted in order to regulate certain constitutional questions. An art. 69(3) specifies the specific adoption procedure of organic laws, but the problem is that the Constitution does not describe which laws should be passed as 'organic' and refers to certain list, which should be adopted by the legislator.

Normally, the practice in different countries concerning the institute of organic laws is that the main source of its legitimation is provided in the text of the Constitution itself (by reference to organic laws). Therefore, the reference to legislator and a list of organic laws in this case can be considered as a certain gap in the coherence and consistency of the text of Lithuanian Constitution. Lithuanian legislator during 8 years after the adoption of the Constitution did not pass the list of organic laws and this constitutional provision is probably the only one still not applied provision concerning constitutional duty of the Parliament.

The main purpose of this paper is to show the nature of organic laws, short history of their origin and to discuss their main aims and functions.

2. Hierarchy of norms and concept of sources of law

In this paper I would like to continue in developing the concept of sources of law, which I started in this journal No 35 and which is also relevant for this article. First of all, it is necessary to say that legal science have not developed a comprehensive theory of sources of law as such so far. Such answers to the questions as - 'what are the difference between 'source of law' and 'form of law' or 'whether the concept of 'sources of law' also includes justification/legitimation of law' - still waiting to be developed.

Traditional positive legal theory (in Continent) in XIX century and beginning of XX century was talking only about written law and custom as main sources of law. Written law (jus scriptum) was classified according to organs of adoption: constitutional laws – come from constituent power; legislative power enacts ordinary laws; and executive power adopts decrees. This theory, in which the hierarchy of legal acts is depended on the hierarchy of public organs, is called organic theory [14, p.39-43].

It is interesting to mention here that in Anglo-American legal tradition law (and sources of law) never has been understood in such a structural and hierarchical way. Thanks to phenomena of common law, positive law here always was only one of the sources (sometimes even secondary) of law side by side with certain common values and principles. In Continent, on the other hand, ‘unwritten legal principles’ in legal reasoning has appeared only after II world war [26, p.128]. The question, whether human rights have to be considered as a type of general principles or – as an independent source of law – is not clear. In France, for instance, since 1976 Conseil Constitutionnel has typically referred to ‘principles having constitutional values’ (principes à valeur constitutionnelle). This phrase includes both: written texts and other materials, drawn from fundamental principles recognised by the laws of the Republic, general principles of law and objectives of constitutional value [4, p.57-89].

Probably, one of the most ‘profound’ modern legal theorists in the field of sources of law is Jean-Louis Bergel. But even he analyses
mostly possible classification of sources of law. He presents this classification: 1) substantial (various principles, social facts, temporal/spatial environment, collective/general will, different interests) and formal sources; 2) written and unwritten sources; 3) direct (law/statute and custom) and indirect (jurisprudence, doctrine, practice) sources [see also 15, p.102-130]; 4) official and unofficial sources. Author also talks about certain tension among broader concept of law as justice and its formulation (form) – as legal security [10, p.50-66]. Justice and legal security here we can understand as certain values which are behind the law and which can justify necessity not only of form of law but also – the law in broader sense as such.

Two similar terms 'source' and 'origin' of law sometimes are used in the same meaning by legal theory, but probably the first one is broader and includes also the second one. Etymologically speaking 'source' of law already holds a meaning that it use to exist even before the 'physical appearance' of (positive) law. We can say that 'source' of law is something what pre-exist and creates the positive law. From that we can grasp the separation between material (substantial, not necessarily written, direct or official) and formal sources of law. The question of formal sources of law is more technical one. What concerns material sources of law – today they are considered as substantive sources and consequently, the discussion, whether material sources of law should be taken into the consideration almost disappeared [3, p.232-233].

Discussion exists in other level – what are material sources of law, and answer to this question differs from theory to theory (jusnaturalistic, historical or common-law theory of law etc.). On the one hand, (material/substantial) sources of law can be described even as a fundament or legitimacy of law [6, p.52-57]. On the other hand kelsenian idea about hierarchy of formal sources of law (constitution, statute, governmental decree, judicial decision) still prevails in contemporary legal thinking and it is relevant for this thesis as well for it can help us in 'placing' organic laws in a certain structural legal environment.

Traditional positive theory of law uses terms of 'form of law' and 'source of law' as synonyms [27, p.115-117]. But fortunately in our days some efforts are made for solving this terminological problem. Concerning to modern legal theorist - R. S. Summers formality of law is one of the main characteristics of law [28, p.126]. The form of law he classifies into internal and external [29, p.243]. According to his definition only external form of law (how the content of law is encapsulated) can be considered as formal source of law (e.g. constitution, statute etc.). Therefore, the form of law can be considered as having a different meaning than positive 'source of law'. But author goes even further: in his concept of appropriate 'form of law' he includes also what he calls 'desiderata'

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*It was especially popular in soviet legal science. Unfortunately even recent Lithuanian book on legal theory (Vansčvičius St. Valstybės ir teisės teorija. JUSTITIA. 2000) considers 'source of law' and 'form of law' as synonyms and does not try to develop a discussion about relationship of these two terms.

*Actually he gives a broader classification: 1) minimal constitutive form of rule; 2)elaborated structural form of rule; 3)expressional form of rule; 4)encapsulatory form of rule, where first three I consider as 'internal' form and the last one - as external form of law.

*By internal form of law author understands a certain degree of completeness, cohesion, complexity of law etc.
referring to general rationales for formality and institutional and processual values (e.g. democracy, legitimacy, rationality, stability of legal system etc.). In this theory we found the idea that not only form affects the content, but also that good form tends to beget a good content. From his ideas we can also deduce that a formal character of legal system (with certain hierarchy of norms) should be considered as a value and not only as a 'pure' form of law. So thanks to this author, we can see that notions of 'source of law' and 'form of law' have rather different meaning.

Another relevant idea concerning sources of law is its relationship with legitimation/justification of law. Positive legal theory does not need to include the idea about legitimation of law. All legally correct enacted legal acts here are considered as legitimate. But already so called soft positivism accepts the idea that law should reflect certain social acceptance (e.g. hartian rule of recognition) and minimal degree of social morality. Jusnaturalism as legitimation of law understands its conformity with certain moral/religious values. The 'spirit of nation' justifies historical school of law. Legal realism and sociological school of law talks about necessary relationships between law and social reality (or social facts) [30]. Another interesting idea concerning legitimation of law is that it can be considered as not only a social acceptance but also as a kind of formality as well (structure, procedure, coherence etc.) [29, p. 247]. From these ideas we can grasp that in modern legal science legitimation/justification of law means not only a material/substantial source of law, but also can be understood through internal form of law (consistency, coherence, structural character and appropriate adoption procedure of the rule).

Now I would like to concentrate on the concept of hierarchy of legal norms. What concerns this subject in our days it is popular to talk about new legal paradigm - law as a network (Fr. réseau). I agree with this idea so far, but I would like to stress that concept of kelsenian traditional pyramid did not 'disappear' and in legal theory and practice still co-exist with this new paradigm. Existence of the phenomena of organic laws can only confirm this my thesis.

To sum up, from what have been said above we can see that the concept of sources of law is very related with the concept of law as such. This paper, leaving aside so called material/substantial sources of law will try to develop the subject concerning organic laws as formal, direct and official sources of law.

3. A short history of origins of organic laws

In this chapter I would like to raise a question concerning terminology. What does it mean a term 'organic' and where it comes from [compare these terms in 20 and 21]? 'Organ' is a Greek term and primarily means a tool or an instrument [18, p. 564]. I think that this term to social science came from natural and exact sciences: biology.

7 It can also be described as a reasonable choice for appropriate form of law.
8 It is interesting to stress so far that this idea can also be applied for 'organic laws'. E.g. see 3 formal requirements of Art. 46 of French Constitution (especially, obligatory control of Conseil Constitutionnel) guarantees better content of organic laws.

* According to this idea the legal system is not anymore a hierarchy, but it functions as some kind of network and can be compared with internet. Main examples of this kind of legal system are (i) reduction of State's law by European law on the one hand and by regional law on the other; (ii) delegation of some Parliamentary functions to the competence of Government; (iii) growing importance of judicial case-law in comparison with statutes (in Continent).
and chemistry. In legal science (especially in France) a word 'organic' is used in such expressions as 'organic analysis', 'organic criteria', 'organic point of view', 'organic sense' etc., when talking about methods, legal acts or functions with reference to (organic) character of their author [compare 12, p. 139; 31, p. 315; 7, p. 5].

After French revolution in XVIII century the term of 'organic laws' was introduced in legal science and practice. This term, according to Deslanders was used already in 1795, when a special committee was appointed in order to prepare certain 'lois organiques', which should apply the Constitution of 1793 [22, p. 291-292]. Later on, the term 'organic' was accepted in 'senatus consulte organiques' of 1804 and 1813 [32, p. 315-350]. But the first time a term of 'organic law' (loi organique) as legal instrument was introduced in the article 115 of the Constitution of 1848, according to which 'after the vote of the Constitution Constituent National Assembly shall adopt organic laws by enumeration which should be determined in special law' [24, p. 291-292]. Later in 1875 two organic laws, concerning elections of senators and deputies have been adopted. In the beginning of XX century French legal theory considered 'organic laws' only in relationship with their terminology, derived from the word 'organ' and according to specific domain of regulation. Organic laws were understood as laws which organise functioning of certain institution (organ), introduced by the text of Constitution [24, p. 571]. Constitution of 1946 in the first time in French constitutional

history formulated three articles with reference to organic laws. This tradition was taken over and developed by the Constitution of 1958. The Constitution referred to about 20 different organic laws in different articles. According to the specific domain they can be classified as follows: organisation of the functioning of the particular public organ/institution (Constitutional Council, Higher Judiciary Council, High Court of Justice etc.), constitutional status and ability to be elected of different public officials and other persons (judges, members of Parliament, etc.), modes of the elections of the President of the Republic, other questions (arts. 13, 34). From this we can see that usage of the term 'organic laws' have a long constitutional tradition in France.

It is difficult to grasp now why, how and where from the term of 'loi organique' has appeared in legal/political language at the end of XVIII century in France [25, p. 2]. But for this paper the most important question is not a terminological one. My task so far is to understand main aims and functions of organic laws.

4. Aims and functions of organic laws

Before starting to talk about concrete aims and functions, it is very important to understand why certain countries have this legal instrument in their legal systems (and other countries do not have)? In order to answer this question we need to take a look into political history of the countries, holding organic laws.

Firstly, I need to state that only the minor part of the countries has this particular legal
Among them we can enumerate, first of all - France, then Italy, Spain, some countries of Latin America (e.g. Venezuela), some African countries (former French colonies, e.g. Chad), some Central and Eastern European countries (e.g. Czech Republic, Lithuania) and Russia. As we have already seen in the previous chapters, France should be considered as the country, which originated the phenomena of organic laws, therefore, it needs to be analysed more specifically.

French Constitution of 1958 changed traditional relationships between Parliament and executive and tended to decline an organic concept of law/statute. General De Gaulle, in order to ensure that Parliament could not change this new constitutional balance, introduced the institute of organic laws with special adoption procedure (art. 46) and obligatory control of their constitutionality by Constitutional Council (art. 61). So, the first aim of organic laws here can be described as a guarantee of new political equilibrium of the certain type of government of the State, which can be called by French term parlementarisme rationalisé [33, p. 722-723]. Another objective can be formulated as reduction of arbitrariness in legal acts of the Parliament, for all enacted organic laws have to pass the filter of obligatory constitutional control [34, p. 79]. Third aim of this novelty can be described as introduction of the flexible legal instrument, when Parliament in order to introduce some new provisions concerning certain important political questions does not need to amend the Constitution [33, p. 724].

Fourthly, the aim of organic law is to guarantee certain political stability, for modification of organic law (and to change political balance in this case) is more difficult than to pass ordinary law. Therefore, it requires certain political consensus among different political parties. The last function of the phenomena of organic laws can be described as safeguard of legal quality of legislation because of obligatory control of Constitutional Council of the text of organic laws.

Similar aims can be formulated for establishing of altre leggi costituzionali (articles 71, 116, 117, 132, 137) in Italian Constitution of 1947. Drafters of this constitution wanted to ensure certain political stability and better legal quality concerning the deliberation of some politically sensitive questions. What concerns leyes organicas in Spanish Constitution of 1978 it should be said that, besides functions and aims mentioned concerning the French lois organiques, the former seek to guarantee fundamental rights and public liberties (art. 81-c). This sensitivity concerning human rights can be explained by the earlier authoritarian Franco regime. What concerns newly re-established democracies in Eastern Europe it is not easy to grasp, why some of them included organic laws to their new legal systems and others did not. One of the reasons can be that organic laws is the legal phenomena, which was always consi-

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13 In Italy they are called constitutional laws (leggi costituzionali) and have the same adoption procedure as constitutional amendments. Nevertheless, formulation of the articles 71, 116, 117, 132 and 137 let us state that these legal instruments should be granted the similar status as French organic laws.

14 In CEE countries and Russia these laws also are named as constitutional laws (ustavi zakon, konstitucinis įstatymas, federálnyj konstitucionnyj zakon).

15 Jurisprudence of Constitutional Council concerning organic laws limited also governmental activity regarding usage of ordinances or decrees in the domain of organic laws (e.g. arts 37, 38, 41, 49 of the Constitution).

16 When in the process of drafting a Constitution of 1958, Government and Consultative constitutional committee use not to reach the consensus, question was left to regulate by organic law.
dered as helping for granting a legal/political stability in the society and reaching wider political consensus, especially after communistic authoritarian regimes. Probably, it was seen as an appropriate legal tool for helping to guarantee a democracy as such.

To sum up, all what has been said concerning different aims and functions of organic laws it should be said that specific domain and adoption procedure can serve as a tool for political and legal stabilisation. On the other hand, ‘rigidity’ of the elaboration and adoption of organic laws has a tendency of reducing an omnipotential power of classical parliamentarism and together with other constitutional provisions serves for parlementarisme rationalisé. Therefore, we can say that different countries holding the institute of organic laws have it for certain historical/traditional reasons or as a new political choice in order to establish new political/balance among executive and legislator.

5. Conclusion

In this short paper I tried to develop some relevant concepts concerning organic laws: such as hierarchy of norms, sources of law and form of law in order to establish certain background for the history of origins of organic laws and to show some possible aims of adoption of these legal instruments. All this information, I hope, is very important for understanding, why Lithuanian constitutional power introduced these instruments into Lithuanian legal system by the Constitution of 1992. This paper does not develop other important question concerning organic laws, such as: their domain, adoption procedure, their place in the hierarchy of legal norms, the content of organic laws and their relationships with control of constitutionality. All these questions I left aside for the future broader research. What concerns this article I would like to make the conclusions as follows:

1. Institute of organic laws in different countries together with other legal institutes shows that in modern legal science a paradigm of traditional keizerian hierarchical pyramid co-exist with the concept of law as a network and do not ‘disappear’ from legal reality as some authors tend to say.

2. Concept of ‘sources of law’ is rather different from that of ‘form of law’.

3. France is the origin-country of organic laws.

4. Lithuanian constitutional laws (konsticiniai įstatymai) from their nature correspond to French organic laws (lois organiques).

5. Main aims of introduction constitutional laws into Lithuanian legal system should be considered as follows:
   (i) to establish a legal safeguard of new political equilibrium;
   (ii) to reduce a possibility of arbitrariness of ‘omnipotential’ Parliament what can be considered as one of the signs of mixed form of government (or parlementarisme rationalisé using French term);
   (iii) to guarantee certain political stability, for in order to adopt or modify an organic law – consensus of the main political parties is required;
   (iv) to have some more flexible legal instrument than constitutional amendments in order to regulate certain politically important questions;
   (v) to guarantee certain legal quality of legislation, for drafting of constitutional laws require more time and attention than it require adoption procedure of ordinary laws.
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Nors LR Konstitucija numato konstitucinių įstatymų priėmimo sąrašą, tačiau jau aštuoneri metai tokio sąrašo Seimas nėra patvirtinus. Tai yra tam tikra problema, juolab kad nei politikai, nei teisininkai šiuo klausimu nediskutuoja. Kadangi organinių/konstitucinių įstatymų institutą yra labai platus tyrimo objektas, autoriaus šiame darbe apibrėžo šio instituto atsiradimo Prancūzijoje analize (taip pat Italijoje, Ispanijoje ir kai kuriose Vidurio ir Rytų Europos šalyse) bei šių įstatymų galimų funkcijų ir tikslų formulavimą.

Straipsnyje taip pat aptariamos naujos teisės teorijos tendencijos teisės normų hierarchijos klausimu ir kritikuojama teisės įstatymų požiūriui į svarbių visuomeninių santykių reguliavimo būda bei parodomą jos skirtumą nuo teisės įstatymų sąlygų.

Straipsnyje teigiamai, kad Lietuvos konstituciniai įstatymų institutų reikėtų kildinti iš Prancūzijos organinių įstatymų. Pagal autorių, būtų galima išskirti šias konstitucinių įstatymų instituto atsiradimo Lietuvos teisės sistemoje tikslius:

1. garantuoti tam tikrą politinę pusiausvyrą ir stabiltumą, nes politiškai svarbių klausimų sprendimas paveikdama ne paprastai, o kvalifikuotai Seimo dauguma;
2. šis teisinis institutas gali būti traktuojamas kaip tam tikras Parlamento galių ribojimas, atitinkantis mišrią valdymo formą;
3. kita vertus, šie įstatymai yra kartu ir naujos teisės teorijos tendencijos teisės normų hierarchijos klausimu ir kritikuojama teisės įstatymų požiūriui į svarbių visuomeninių santykių reguliavimo būdo įvedimas;
4. įstatymų leidybos geresnės kokybės garantavimas, nes konstituciniams įstatymams parengti ir priimti yra skirtumai nuo nuo teisės įstatymų sąlygų.