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Holders and Addressees of Basic Rights in the Constitution of the Republic of Estonia*

I. INTRODUCTION

The aim of the following article is to analyse two chosen topics of the general dogmatics of the basic rights[1] of the *Põhiseadus* (hereinafter referred to as the Constitution): the holders and the addressees of the basic rights. Those two different topics could be treated in two different articles. The reason to treat them in a single one is to identify both sides of the legal relations created by a basic right as a subjective right.[2]

It is recommendable to distinguish between three dimensions of legal problems: empirical, analytical, and normative.[3] The empirical dimension concerns the recognition of the positive valid law. The positive valid law used here consists mainly of basic rights of the Estonian Constitution. The analytical dimension comprises a conceptual and systematic investigation of the valid law. The normative dimension includes criticism of the valid law, especially of court decisions, and proposals for better solutions *de lege ferenda*. The main emphasis of this paper shall lie on the analytical dimension. Particular interest shall hereby belong to two kinds of arguments. Since German basic rights discussion will be used, the comparative arguments play a significant role. Besides, systematic arguments will be used frequently, since one of the starting points of the present paper is the requirement that a legal system should be consistent, i.e. contain no contradictions, and be coherent, i.e. be connected. This requirement derives from the principle of *Rechtsstaat*[4] which is as a constitutional principle anchored in § 10 of the Constitution.

II. HOLDERS OF BASIC RIGHTS

A. CONCEPT OF THE HOLDER OF A RIGHT

A holder of a right is the beneficiary of the right, the entitled subject.

B. HOLDERS OF BASIC RIGHTS

The holders of the basic rights are the entitled subjects of the basic rights. Somebody can only be entitled to a right if he has the corresponding capacity to carry that right. A holder of a basic right is consequently somebody who has the corresponding passive legal capacity.

In the law the passive legal capacity is attached to persons. Every human being is a person in the sense of the law, a natural person. In addition according to the law there are legal persons, e.g. a public limited company. These are artificial persons created by the law itself. In following it shall be clarified as to what kinds of persons are holders of basic rights under the Constitution of the Republic of Estonia.

1. Natural Persons

According to § 9 first paragraph of the Constitution the rights, freedoms and duties of each and every person,

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as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons. This provision makes two important statements.

First of all it states that the holders of basic rights of each and everybody are natural persons. Only natural persons can be citizens or stateless persons. Every natural person is either a citizen of some state or a stateless person, every citizen is either an Estonian citizen or a citizen of a foreign state. Therefore, the mentioned rights are provided for every natural person or respectively every natural person shall have these rights.

Secondly, the provision states that following the concept of the holdership of basic rights there are two kinds of rights: there are rights of each and every person and there are rights that do not apply to each and every person.

A. CATEGORIES OF HOLDERSHIP

Basic rights can be divided on the basis of the holdership of the right into rights of each and every person on the one hand and citizen's rights on the other hand. Whether there are other kinds of rights, shall be clarified as well.

(1) Rights of Each and Every Person

The rights of each and every person are rights borne by every person. The rights of each and every person can also be called human rights because every human being is a holder of these rights. However, they should be called rights of each and every person to avoid a possible confusion between the constitutional rights and rights included in the European Convention on Human Rights.[5]

(a) "Everyone" or "No One"

The rights of each and every person derive primarily from the following paragraphs of the second chapter of the Constitution: §§ 12, 13 second sentence of the first paragraph, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28 first paragraph, 29 second paragraph, 32, 35, 37, 40, 41, 43, 44 first paragraph, 45, 46, 47, 48 first sentence of the first paragraph, 49, 51 of the Constitution. In these provisions "everyone" or "no one" is mentioned *expressis verbis*. In §§ 27, 28 paragraph 4, 29 paragraph 5, 33, 38, 39, 113 of the Constitution "everyone" is not directly referred to but since the number of justified subjects is not restricted, it must be perceived that also these provisions are the basis for rights of each and every person which are equally borne by Estonian citizens, foreigners and persons without citizenship.

Rights described in § 28 first sentence of the second paragraph together with the third sentence of the second paragraph of the Constitution, § 29 first sentence of the first paragraph together with the third sentence of the first paragraph of the Constitution, § 31 first sentence together with third sentence of the Constitution, § 44 second and third paragraphs together with the fourth paragraph of the Constitution are also provisions containing rights of each and every person. Sections 28 third sentence of the second paragraph, third sentence of the first paragraph, 31 third sentence, 44 fourth paragraph of the Constitution mean that the legislator may restrict the corresponding rights of non-citizens only on the basis of non-possession of Estonian citizenship. But in order to restrict something, the corresponding rights of non-citizens shall result from these provisions of the Constitution. These provisions are therefore *lex specialis* with respect to the principle of equality which is anchored in § 12 first sentence of the first paragraph of the Constitution.

The Constitutional Review Chamber of the Estonian Supreme Court has defined everyone in a passage as "all natural persons (individuals) who are subject to the jurisdiction of a legal act".[6] In so far as all natural persons and individuals respectively are meant, I fully agree with the Court. The question is what does it mean if these individuals are required to be subject to the jurisdiction of a legal act? Does a legal act have a jurisdiction? And what legal act is actually meant? If the term "legal act" means an act of parliament that encroaches upon the rights of individuals, then the question is concerned, whether the parliament is an addressee of that right. In any case it is superfluous to enlarge the definition of everyone with the feature "subject to the jurisdiction of a legal act".

(b) Rights to Estonian Citizenship, § 8 first and second Paragraphs of the Constitution

Although in § 8 second paragraph of the Constitution everyone is mentioned, it may seem problematic to classify § 8 first and second paragraphs of the Constitution as rights of each and every person. Since in these provisions Estonian citizenship is mentioned, citizen's rights may be concerned. However it is not so, since the legal consequence of § 8 first and second paragraphs of the Constitution is the gaining of Estonian citizenship. The preconditions of a norm cannot logically stipulate the existence of some precondition that itself derives from the legal consequence of the same norm. This kind of norm would be senseless.

Moreover, § 8 first paragraph of the Constitution brings forward a question concerning the meaning of the term "every child". According to this provision every child shall be the entitled person. At first glance it may seem that this provision contains a particular child-right. Unfortunately it is not determined, how old a person shall be in order to be a child in the sense of § 8 first paragraph of the Constitution. Is a person a child until he goes to school, until he gets a passport, until he is a major, or does he stay a child of someone else forever? Since § 8 first paragraph of the Constitution is a right to Estonian citizenship, there is no rational reason why this right should not be exercised after reaching some certain age. This formulation should rather be understood that even a child has the right to Estonian citizenship. Of course, an adult has the right as well.

Therefore, § 8 first and second paragraphs of the Constitution are to be considered as rights of each and

every person. According to § 8 first paragraph of the Constitution every child of whose parents one is an Estonian citizen has the right to Estonian citizenship by birth.[7] The wording does not determine at what point of time the parent has to be an Estonian citizen. On the one hand one may follow from the formulation "citizenship by birth" that a parent has to have Estonian citizenship at the time of birth. On the other hand it is possible to interpret the provision in this way that one may get the right to Estonian citizenship by birth even years after his own birth if one of the parents gains Estonian citizenship later. The latter interpretation requires a different understanding of the Estonian citizenship by birth and again rises the problem until what age is a person a child.

Since the beginning of being a child is birth then the end is — as already mentioned — uncertain. Interpreting § 8 first paragraph of the Constitution word by word it is possible to grant the right to Estonian citizenship by birth e.g. to a 65-year-old person if his 90-year-old mother is naturalised. However, this interpretation seems to be too wide. While a person of whose parents one is at the time of his birth an Estonian citizen shall have the right to Estonian citizenship by birth, it shall be let open whether an infant will gain the right to Estonian citizenship by birth if one of his parents is naturalised. According to the wording of § 8 first paragraph of the Constitution this interpretation is possible.[8]

The most interesting problem of § 8 first paragraph of the Constitution is the question whether according to the wording one of the parents shall be an Estonian citizen or is it sufficient if one of the parents has the right to Estonian citizenship by birth. The latter interpretation is not covered by the wording of the provision. However, the problem could arise in the case of persons who are born in exile from parents who had or would have had the right to Estonian citizenship by birth but who did not impose this right. The authors of the text of the Constitution intended to include the Estonian emigrants who left the country during the Second World War and their descendants. In the Constitutional Assembly it was clearly stated: "Estonian emigrants who come back of their free will … shall inevitably have the right to Estonian citizenship."[9] It is not wrong to maintain that there was a general consensus on the Constitutional Assembly concerning this question. Thus, the genesis of the Estonian Constitution supports the interpretation beyond the wording of § 8 first paragraph of the Constitution.

Furthermore, it is justified from normative reasons to treat persons whose parents are Estonian citizens equally with persons whose parents have the right to Estonian citizenship by birth. Otherwise the rather accidental circumstance of the possibility of the realisation of the right would influence the existence of the right. A person whose parents would have had the right to Estonian citizenship by birth but have died without the possibility to exercise that right has to be treated equally to a person whose parents are Estonian citizens. Any other solution would lead to an unjustified unequal treatment of these two persons. Therefore, § 8 first paragraph of the Constitution should be interpreted widely in the sense that a person of whose parents one was an Estonian citizen or had the right to Estonian citizenship by birth shall have the right to Estonian citizenship by birth.[10]

(c) Freedom of Movement and Choice of Residence, § 34 of the Constitution

The classification of § 34 of the Constitution, according to which everyone who is legally in Estonia has the right to freedom of movement and to choice of residence, is questionable. On the one hand, it is possible to classify the provision as a source of a right that belongs to a special group of holders which consists of everyone who is legally in Estonia. Unfortunately, according to this interpretation the legislator could define the group of holders of this basic right. But this would mean that § 34 of the Constitution is enabled only within the framework of an Act of parliament. In view of §§ 3 first sentence of the first paragraph, 11, 14, 102 of the Constitution, the legislator is entitled to enact laws only within the framework of the Constitution but he does not possess the competence to define the span of force of the Constitution. The clause "everyone who is legally in Estonia has the right" cannot empower the legislator to constitute the group of holders of that right, which belongs to the right as such. Therefore, it is recommended to understand the particular clause as an immediate constitutional limit[11] of freedom of movement and choice of residence. If the right as such and its limits shall be distinguished,[12] then the clause "who is legally in Estonia" shall be understood as a limiting clause which can be separated from the right as such. Consequently, everyone has the right deriving from § 34 of the Constitution. It is therefore a right of each and every person. And if the legislator may restrict this right by defining the requirements for a legal entry and legal stay in Estonia, it concerns only the question how far-reaching is that *prima facie* (i.e. not definite) right.

(d) Right to Vote in Local Elections, § 156 of the Constitution

According to § 156 second paragraph of the Constitution all persons who reside permanently in the territory of the local government and have attained eighteen years of age possess the right to vote in local elections. All persons means each and everyone. The distinctive criterion is not citizenship but preconditions that the person must reside permanently in the territory of the local government and have attained eighteen years of age. Thus the rights deriving from § 156 of the Constitution are rights of each and everyone.

(2) Citizens' Rights [13]

Section 9 first paragraph of the Constitution leaves it open to define who are the holders of rights that are not of each and everybody. However, certain basic rights are borne only by the citizens of the Republic of Estonia. These rights are the citizens' rights.

(a) "Estonian Citizen(s)"

Citizens' rights are first of all such rights where the term "Estonian citizen(s)" is mentioned, like §§ 30; 36 first and second paragraphs; 42; 48 second sentence of the first paragraph; 54 second paragraph of the Constitution. If § 13 second sentence of the first paragraph of the Constitution obliges the Estonian state to protect "its citizens" abroad, then certainly Estonian citizens are meant. Furthermore, §§ 57 first paragraph and 60 second paragraph of the Constitution contain according to their wording citizens' rights deriving from outside of the second chapter of the Constitution.

(b) Rights Based on § 8 Paragraphs 3 and 4 of the Constitution

It is important to pay attention to § 8 third and fourth paragraphs of the Constitution. According to § 8 third paragraph no one shall be deprived of Estonian citizenship acquired by birth. According to § 8 fourth paragraph no one shall be deprived of Estonian citizenship because of his beliefs.

Although the one protected by these rights is "no one", they protect against the deprivation of Estonian citizenship and are therefore citizen's rights. Since these rights protect Estonian citizenship which is the precondition of possessing the rights of citizens, a question arises: at which point in time does the person have to be a citizen? If one would interpret these provisions in a way that the person has to be a citizen at the point in time when he lodges a complaint against the deprivation of Estonian citizenship, then a person who has been expatriated because of his convictions cannot claim for restoration of his citizenship if he was not an infant at the time the administrative act came into force. In the latter case § 8 second paragraph of the Constitution would apply. To avoid the cancellation of the rights from § 8 third and fourth paragraphs of the Constitution, the decisive moment must only be the moment of coming into force of the expatriating administrative act. From there it follows that in case of § 8 third and fourth paragraphs of the Constitution, the person must have had Estonian citizenship immediately before the coming into force of an expatriating administrative act to be the holder of these rights.

(c) Rights concerning the electoral procedure, § 60 second, third and fourth sentences of the first paragraph of the Constitution

Section 60 second, third and fourth sentences of the first paragraph of the Constitution do not mention the term "citizen". They state that members of the Riigikogu[14] shall be elected in free elections following the principle of proportionality, that elections shall be general, uniform and direct and that voting shall be secret.

Furthermore, according to their wording it may seem weird to interpret them as basic rights. These norms rather seem to prescribe the modalities of the electoral procedure of the Estonian parliament. However, they do not rule on any kind of internal procedure of the state organisation. Instead they rule on the participation of individuals at the formation of the legislative body. In consequence, they are of fundamental importance for the democratic process in Estonia, where the supreme power of state is vested in the people and shall be exercised by the people, §§ 1 first paragraph, 56 of the Constitution. Since the people consists of individuals and there is no higher authority who should supervise the exercise of the supreme power of the state, these provisions must contain individual rights. Therefore, if § 60 second, third and fourth sentences of the first paragraph of the Constitution are interpreted as basic rights provisions, the corresponding norms guarantee a right to free, proportional, general, uniform, direct, and secret voting. Since according to § 57 first paragraph of the Constitution the right to vote belongs only to Estonian citizens who have attained eighteen years of age, anything else cannot apply for the rights mentioned above. Therefore, § 60 second, third and fourth sentences of the first paragraph of the Constitution constitute citizens' rights.[15]

(d) Right to Refuse to Serve in the Defence Forces for Religious or Moral Reasons, § 124 Paragraph 2 of the Constitution

The wording of § 124 second paragraph of the Constitution does not support at first glance its classification as a basic right provision as well. According to this provision a person who refuses to serve in the Defence Forces for religious or moral reasons has a duty to perform alternative service pursuant to the procedure prescribed by law. However, empowering the parliament to rule an alternative service to the service in the Defence Forces, § 124 second paragraph of the Constitution constitutes a right to refuse to serve in the Defence Forces for religious or moral reasons. Since § 124 first paragraph of the Constitution empowers the parliament to oblige Estonian citizens by law to participate in national defence, § 124 second paragraph of the Constitution can logically be applied only for those who are obliged to participate in national defence, i.e. for citizens. Consequently, § 124 second paragraph of the Constitution contains a citizens' right as well.

(3) § 36 Third Paragraph of the Constitution as an Estonian's Right?

Section 36 third paragraph of the Constitution determines that every Estonian has the right to settle in Estonia. This is not a citizens' right, since such a right for citizens is already determined by § 36 first paragraph of the

Constitution. As a consequence, § 36 third paragraph of the Constitution would carry no independent meaning. One possibility of interpretation of § 36 third paragraph of the Constitution is that it constitutes a right of each and every person. Then, distinguishing the right and its limits, the immediate constitutional limit of this right would be that the person must be an Estonian. As a practical consequence everybody would have a *prima facie* right to settle in Estonia which includes the right to enter Estonia. This right is then excluded if the person is a non-Estonian. The other possible way to interpret § 36 third paragraph of the Constitution is as a third kind of basic right — an Estonian's right. Then, only Estonians would have the *prima facie* right to settle in Estonia. Both ways do not differ much. The crucial question will be in both cases, who is an Estonian in the sense of § 36 third paragraph of the Constitution? Does the group of Estonians consist of all Estonian citizens and somebody else, or are there some Estonian citizens who are not Estonians in that sense? These questions need closer research which does not fit into the framework of this article. Moreover, the author of this paper has doubts whether it can be sufficiently clarified at all.[16]

B. THE APPLICABILITY OF BASIC RIGHTS FOR INFANTS

The holdership of basic rights means that a person has the basic rights' capacity, i.e. the person possesses the right concerned. Every natural person, no matter of what age or with what kind of skills, has the basic rights' capacity.[17] Following the famous German state lawyer Günter Dürig a certain parallelism to the passive legal capacity of private law can be recognised.[18]

The question is whether infants can exercise basic rights and if yes then to what extent? The main hurdle to the application of basic rights for infants in Estonian constitutional law derives from §§ 27 third paragraph; 37 third paragraph of the Constitution. These provisions state the right of the parents to raise and care for their children and the right to have the final decision in the choice of education for their children. How far does the right to raise or decide about education reach? Do children have any rights at all according to these provisions?

In private law one distinguishes between passive and active legal capacity. Only majors have both, infants lack passive legal capacity. Following the parallelism of Günter Dürig one may ask whether there is anything like the distinction between passive and active legal capacity in the basic rights law? Is there anything like "active basic rights capacity" that children lack? This is the discussion about the so-called basic rights' age which is the capability of individuals to exercise basic rights independently.[19] To try to clarify the problems it makes sense to start with the text of the Constitution. It is easy to find that out in some provisions, like §§ 57 first paragraph, 60 second paragraph, 156 second paragraph of the Constitution the age is mentioned *expressis verbis* as a precondition of exercising that particular right. For example, § 57 first paragraph of the Constitution guarantees the right to vote to every Estonian citizen who has attained eighteen years of age. In most provisions, however, no clause concerning the age can be found.

Then, several provisions mention a child or children, like §§ 8 first paragraph, 27 third and fourth paragraph, 37 third paragraph, 44 second sentence of the third paragraph, school-age children, like § 37 second sentence of the first paragraph, or minors, like §§ 20 fourth paragraph, 24 second sentence of the third paragraph, 34 second sentence. A relevant argument in this context could be drawn from the wording of § 8 first paragraph of the Constitution. Section 8 first paragraph of the Constitution mentions "every child" as the holder of that right. Since § 8 first paragraph of the Constitution is the only provision in the Constitution that mentions "every child" as the holder of the corresponding right, one could argue *e contrario* that if in other provisions a child is not mentioned as the holder of the right he shall not have it. Such an interpretation must be rejected. Firstly, as argued above, the term "every child" is to be interpreted as everyone. Therefore, § 8 first paragraph of the Constitution is understood correctly: "Everyone of whose parents one is an Estonian citizen has the right to Estonian citizenship by birth."[20] Secondly, the unacceptable consequence of such an interpretation would be that an infant would lack e.g. the right to life (§ 16 of the Constitution) or the right not to be subjected to torture or to cruel or degrading treatment (§ 18 of the Constitution). Such a restriction cannot be justified as long as the present constitution is in force. Therefore, § 8 first paragraph of the Constitution does not support the exclusion of children from the protection of basic rights.

Distinguishing *prima facie* and definite rights, it seems that there is no rational reason to exclude even newborn children from the *prima facie* protection of basic rights. Therefore, even a newborn child is *prima facie* entitled to exercise all basic rights except those deriving from §§ 57 first paragraph, 60 second paragraph, 156 second paragraph of the Constitution, which require *expressis verbis* an age-limit of eighteen or twenty-one years. Consequently, a child may *prima facie* not be hindered by the addressees of the corresponding rights e.g. to learn (§ 37 first sentence of the first paragraph of the Constitution) or to go to church (§ 40 third paragraph of the Constitution). Moreover, even a newborn child has *prima facie* e.g. the right to freely obtain information for public use (§ 44 first paragraph of the Constitution), the right to freely disseminate ideas, opinions, beliefs, and other information (§ 45 of the Constitution), the right to address state agencies, local governments, and their officials with memoranda and petitions (§ 46 of the Constitution), and the

right to assemble and to conduct meetings (§ 47 of the Constitution). In order to be the holder of these rights, it must be completely irrelevant that the newborn child does not understand the information he obtains, is not able to express itself by word, to write anything, or to walk. Even some adults lack some of these skills.

The Constitutional Review Chamber of the Estonian Supreme Court has decided in two cases that infants enjoy the protection of basic rights. The first case concerned the infant's right of association. The court decided: "The Constitution does not limit the individual's right to associate into non-profit undertakings to the individual's active legal capacity under civil law. Thus, pursuant to § 48 first paragraph of the Constitution, the right of association must be guaranteed also to infants."[21] The second case concerned § 34 of the Constitution which constitutes the freedom of movement. The court decided that persons even younger than sixteen would be protected by this constitutional guarantee.[22]

Since infants have these rights only *prima facie*, the question arises whether they may have any definite rights as well? The main question resides rather in the extent to which infants can exercise their basic rights. The extent infants may exercise their basic rights cannot be the same as that of adults since in that case, e.g. the legal rules restricting the infants' active legal capacity would be in conflict with the Constitution, they would restrict constitutionally guaranteed freedom of infants. It seems that the crucial provisions influencing the allowed extent of infants' exercise of basic rights are §§ 27 third paragraph and 37 third paragraph of the Constitution. Section 27 third paragraph of the Constitution guarantees parents the right to raise and care for their children, and according to § 37 third paragraph of the Constitution parents shall have the final decision in the choice of education for their children. These provisions require further examination.

(1) Rights of Parents to Raise Their Children, § 27 Third Paragraph of the Constitution, and to the Final Decision in the Choice of Children's Education, § 37 Third Paragraph of the Constitution

Section 27 third paragraph; 37 third paragraph of the Constitution are the main provisions in the Estonian Constitution that restrict the *prima facie* rights of infants.

First, the relation between § 27 third paragraph of the Constitution and § 37 third paragraph of the Constitution should be clarified. If § 27 third paragraph of the Constitution constitutes the right of parents to raise and care for their children, it certainly means bringing up the children in the broadest sense. The right includes therefore all kinds of influences of parents on their children. But § 37 third paragraph of the Constitution grants parents the final decision in the choice of their children's education. Since education is a part of the upbringing of children, § 37 third paragraph of the Constitution does not introduce anything that is not already introduced by the right of parents to raise their children. Therefore, § 37 third paragraph of the Constitution is a *lex specialis* to the § 27 third paragraph of the Constitution.

May parents according to these rights influence their children as they like? How far reaching is the right to determine the education of a child? Distinguishing *prima facie* and definite rights, the rights of parents must be *prima facie* as well. There cannot be any definite right of parents to do anything they like with their children.

Both, § 27 third paragraph of the Constitution and § 37 third paragraph of the Constitution, show a similarly complicated structure of holders and addressees of these rights. According to the wording the holders of both rights are parents.[23] This covers in first order the natural mother and father if they are married. The mother should be the entitled person even if she is not married to the father of the child. But what about grandparents, adoptive or foster parents, the unmarried father of the child or the guardian? There are a plenty of unsolved problems left. The German Federal Constitutional Court has accepted adoptive parents[24] but excluded grandparents,[25] foster parents,[26] and guardians[27] as holders of the structurally similar parents' right in German *Grundgesetz*.[28] In the case of the unmarried father of a child the court accepted the holdership if he takes care of his child.[29] This rather differentiated solution shows the complexity of the matter.

Even more complicated is the question, against whom the right holds, i.e. the question of the addressees of the parents' rights. If public authorities interfere with the upbringing of children, they certainly are according to §§ 3 first sentence of the first paragraph, 14 of the Constitution the addressees of these rights. But are the children themselves addressees of these rights? Since this is a relationship between two individuals, it is a special case of the problem of *Drittwirkung*.[30]

(2) Parents-Child-Relationship

Whether an infant has any basic rights is not an all or nothing question. How much rights an infant has, depends on his parents. As long as the children and the parents agree there is no problem. A problem arises when they disagree.

Since infants are *prima facie* holders of all basic rights and parents have *prima facie* the right to raise them and to have the final decisions in all questions concerning the education, the rights of children and rights of parents collide. Since they collide, there cannot be any rigid age limit for exercising basic rights.[31] Therefore, no generalised answer could cover all cases and all basic rights. In a case of such collision of two principles a case by case decision is required.

The structural solution of the problem lies in understanding the constitutional age as a collision of principles. The basic rights are among others principles.[32] Principles are optimising commands. If two principles collide, then

the solution should be found on the basis of the principle of proportionality.[33]

To illustrate this result, an example is given. Assuming a father takes his eight-year-old son away from school to employ him in his enterprise full time. In such case the infant has on the one side a *prima facie* right according to § 37 first sentence of the first paragraph of the Constitution which everyone has: the right to education. One the other side, the father has a *prima facie* right according to § 27 third paragraph of the Constitution to bring up his child as he thinks is best. To solve the collision it is necessary to apply the three stages of the principle of proportionality.[34] In this case the solution does not depend on which principle is applied first.

If one starts off with the right of the infant, then the application of the principle of proportionality could look like this:

- Appropriateness: Father takes his son away from school to exercise his right to bring up his child. Taking his son away from school is an appropriate means of exercising that right.

- Necessity: A milder means would be if the father would let his child work in his enterprise besides going to school. But this is not as effective a means of exercising his right to bring up his child as taking his son away from school altogether, since his son cannot devote himself wholly to work because of school.

- Proportionality in the narrower sense: Parents' right to decide how to bring up their child is of important value since the way the child is brought up considerably affects the child's personality. On the other hand it is important that children attend school. At school they obtain knowledge necessary for their future life.

Taking the child away from school is a very serious encroachment of the child's right to education, since the child is left completely without the chance to exercise this right. At the same time attending school is not a serious encroachment of the father's right to bring up his child since the father can employ his child during school holidays. The father does not completely lose his right to bring up his child, this right is just restricted in some extent.

Both principles are important. If the father forbids his son to go to school so as to employ the child in his enterprise, then one principle is exercised to its full extent, while exercising the other is impossible. If the child is allowed to go to school, then also one principle is exercised to its full extent while the other is only slightly restricted and exercising is still possible. That leads to a conclusion that there is "more right" in the second case. Therefore the second situation is an ought and the first is forbidden. Consequently the father has no right to take his son away from school to employ him in his enterprise full time. Moreover, there shall be no father in Estonia who could forbid his child to go to school to employ the child full time in his enterprise. Consequently, even an eight-year-old child has a definite right to education deriving from § 37 first sentence of the first paragraph of the Constitution.

For several reasons, particularly for reasons of legal certainty, it is impossible to clarify the basic rights age always from case to case. The legislator is asked to meet some general regulations. As the two most important examples in the Estonian statutory law are § 9 first paragraph of the General Part Act of the Civil Code[35] and § 7 first paragraph of the Estonian Act of Churches and Parishes.[36] According to § 9 first paragraph of the General Part Act of the Civil Code, an at least eighteen-year-old person has an unlimited active legal capacity. Thus, in private law the will of parents is decisive until attaining of one's majority, i.e. eighteen years. According to § 7 first paragraph of the Act of Churches and Parishes a person starting from the age of fifteen years may belong to a parish without any consent of his parents. Both acts of the parliament are in accordance with the requirements of the constitutional principle of proportionality. They enlighten two important fields of the exercise of basic rights and enact general rules which assume the basic rights age for areas like freedom of contract or freedom of religion.

(3) Capacity to Be a Party of Court Proceedings and Ability to Take Legal Action

If a newborn child is a *prima facie* holder of all basic rights it is also a *prima facie* holder of § 15 first sentence of the first paragraph of the Constitution which guarantees the right of recourse to the courts to everyone whose rights and freedoms are violated. But what about the definite holdership which is connected to the particular basic rights' age?

Even a newborn child may be a party of court proceedings of course. It may e.g. be an owner and protect its ownership before a court against intrusions of third parties. But to take legal action requires some certain natural skills and qualities like e.g. the natural ability to make oneself understandable to other persons. This capacity should be called ability to take legal action. To exercise the right to recourse to court independently one must have the capacity to be a party of court proceedings and the ability to take legal action.

As a starting point, by attaining one's majority, a person is entitled to take all legal actions by himself because the law assumes that an eighteen-year-old person has all natural skills and qualities to manage his life independently. The exercise of all basic rights — but § 60 second paragraph of the Constitution[37] — can therefore be enforced by taking legal action since the person has attained the age of eighteen years and has reached the full active basic rights' capacity. The precondition is of course that basic rights are understood as subjective rights.[38]

On the other hand a person is unable to take legal action if he lacks the natural ability to make himself understandable to other persons. Thus, the ability to take legal

action depends on natural skills and qualities of the person, particularly on the ability to make oneself understandable to other persons. A newborn child cannot therefore have the ability to take legal action. Furthermore, the right to take legal action depends on the parents' right to raise their children and determine their education (§§ 27 third paragraph, 37 third paragraph of the Constitution).

Therefore, the means to find a definite solution is the principle of proportionality. Whether the solution differs from the definite basic rights' age in a particular case, remains open. However, smaller children who do not have the ability to take legal action should be represented by their parents. Older children should be able to take legal action by themselves even against the will of their parents. Unfortunately, there is no generalised answer that would cover all cases and all basic rights.

(4) Conclusions

If the persons who are of the age of basic rights — as described above — may exercise their basic rights independently, it should not be concluded *e contrario* that the persons who are not of the age of basic rights may not exercise their basic rights at all. Even small children may exercise basic rights, e.g. to go to church, but only pursuant to the instructions of their parents. Since on the other hand infants cannot have all the rights of adults, a golden mean must be established between the two extremes: having all rights and having no rights.

The basic rights' age shall be a legal institute *pro* and not *contra* children's rights. Not being of the age of basic rights should only, in this case, prevent the infant's independent exercise of basic rights if it would be disadvantageous for the infant itself. Although there are similarities, the basic rights age is not the same as active legal capacity of civil law according to § 9 of the General Part Act of the Civil Code. It requires a case by case decision. Therefore, the basic rights age is an institute for which the right solution can be found applying the principle of proportionality. Consequently it is not possible to set an age limit from which constitutional age starts, but it always depends on the specific case and the colliding principles.

C. WAIVER OF BASIC RIGHTS

A person waives a right if he disclaims or renounces a right that he may have otherwise had. Since the basic rights are subjective rights of individuals, a question arises, whether a holder of the basic rights can waive the protection guaranteed by basic rights against state encroachment. An example occurs when somebody allows the police to search his flat without the police having a search warrant (§ 33 of the Constitution), or allows without the court's authorisation to tap his phone (§ 43 of the Constitution), or if a suspect living alone waives his right to notify those closest to him according to § 21 third sentence of the first paragraph of the Constitution to keep the arrest secret from his acquaintances.

There are two senses of waiving a right. In the broader sense one waives a right always if one omits to exercise the right. In the narrower sense one waives a right if one agrees with the violation of a basic right. To be even more precise there would be a violation of a basic right without the agreement of the holder but as there is an agreement there is none. Thus, the waiver in the narrower sense eliminates the violation of a right. In following the concept the waiver of basic rights will be used in the narrower sense. Consequently, one does not waive a basic right if one e.g. does not start a family (§ 27 first paragraph of the Constitution), if one does not choose any profession (§ 29 first paragraph of the Constitution), if one does not attend meetings (§ 47 of the Constitution), or if one does not enter any non-profit organisation (§ 48 first paragraph of the Constitution). These are cases of a simple non-exercise of the rights.

May a holder of basic rights waive one or more of his rights? This question has been passionately discussed in Germany. There is a general consensus that it is possible to waive basic rights.[39] The crucial questions are, how far one can go in waiving one's rights, are there any limits of waiving basic rights, and if yes how far do they reach?

At first glance of the text of the Estonian Constitution, free will is anticipated *expressis verbis* in §§ 18 second paragraph, 24 first paragraph, 29 second paragraph, 42 of the Constitution. According to the wording it is possible to waive at least these particular basic rights. If these provisions are to be interpreted in the way that all possibilities of waivers of the basic rights are exhaustively listed in the Constitution, then all other waivers of basic rights are invalid. But this solution is not satisfactory, since there seems to be no rational reason why the right against collecting information about somebody's beliefs (§ 42 of the Constitution) may be validly waived, while if such collection of information takes place by tapping a citizen's telephone with his consent, the waiver is invalid.

Therefore, the clauses of free will cannot be considered to be an exhaustive list and the solution should be found in another way. It is certain that in the cases where the clauses of free will apply, the waiver of the basic rights is allowed and therefore valid. If no one shall be subjected to medical or scientific experiments against his free will (§ 18 second paragraph of the Constitution) then this means that scientists may carry out experiments with volunteers.

If one starts to look for answers to these questions one has to recall that the waiver of basic rights is exercise of basic rights.[40] The decision whether one wants to give up his position belongs to the corresponding freedom. On the other hand there are positions that one is not allowed to give up. For example, no one may waive the position that no other is allowed to kill him because killing of someone else is punishable as homicide. Thus, there are limits of waiving one's rights.

Basic rights are not only subjective rights. They have an objective side as well.[41] There is a minimum content in basic rights that is necessary for peaceful coexistence in a society. Because of this aspect the minimum content necessary for coexistence in society cannot be waived by the holders of basic rights.[42] These limits are not definite rules but depend on several aspects. In order to solve the problem it is necessary to return to the principle side of basic rights. Basic rights are, among others, optimising commands, which require as far-reaching fulfilment as possible with respect to factual and legal possibilities. This means, that also in this case the optimum for basic rights should be found using the principle of proportionality.[43]

According to this a case by case solution is required. The dividing line shall be ascertained separately for every basic right.[44] The intensity of the encroachment, duration of the waiver of a basic right, existence of the possibility to annul it, and the extent of voluntariness must also be taken into account while weighing.[45] German constitutional lawyers Bodo Pieroth and Bernhard Schlink propose furthermore a rule for weighing. Should the object of the particular basic right only be personal freedom then the waiver should be as a rule valid. Should the particular basic right be amongst others important for the development of the political opinion in society then the waiver should be as a rule void.[46] Such attempts should not be taken as final solutions but just as guidelines for weighing. Therefore, one should be generous while judging the validity of a waiver of e.g. the right to freely choose one's profession (§ 29 first paragraph of the Constitution) or the property right (§ 32 of the Constitution). On the other hand, the right to secret voting (§ 60 fourth sentence of the first paragraph of the Constitution) should be unwaiveable because the secrecy of voting is a precondition for the functioning of the whole democratic system.[47] Thus, there are some violations that cannot be eliminated by a waiver of basic rights.

D. BEGINNING AND ENDING OF THE HOLDERSHIP OF BASIC RIGHTS

According to § 8 first paragraph of the General Part Act of the Civil Code[48] passive legal capacity begins with the live birth of a human being and ends with death. There is no similar provision for the basic rights in the Constitution.

In principle, individuals have subjective rights derived from the basic rights from birth to death. The questions whether the protection by the basic rights extends also to a nasciturus before birth or after death are actually a separate topic each. Therefore, only a brief guideline of these problems shall be given.

(1) Before Birth

The holdership begins, at the latest, with the birth of a human being. Whether the holdership can begin before birth is an unsolved problem.

In Germany the Federal Constitutional Court has let the question open, whether a nasciturus is a holder of basic rights or not.[49] At the same time most authors declare the nasciturus for a holder of at least the basic right to life.[50] On the other hand the supporters of the minor opinion[51] deny the holdership of the nasciturus with considerable arguments.

It is not possible to go into this discussion very deeply here. However, there seem to be some crucial questions on a very basic level that might help to clarify the matter. The protection of life is not an all or nothing question but rather a question of optimal protection. The *prima facie* right to life is colliding with other *prima facie* rights and the solution should be found with help of the principle of proportionality case by case. However, in order to qualify for such a *prima facie* protection of life one has to be someone who lives. But who is someone who lives? If that someone shall be described as a human being we have to answer two questions. First, what is the rational distinguishing feature that requires and justifies the protection of life of humans and does not require the protection of life of e.g. chimpanzees? Second, does a nasciturus already have this distinguishing feature? The German philosopher Norbert Hoerster undertakes an attempt to find the answers for these difficult questions. According to him following on from the biological point of view and declaring the species "homo sapiens" one would crucially end up in a case of "speciesism" which is according to Norbert Hoerster analogous e.g. to the racism.[52] To avoid this, one has to look for another criterion than the biological one to distinguish humans from animals. According to Norbert Hoerster the crucial criterion is the long-term interest to survive.[53] Nasciturus lacks a corresponding sufficiently strong interest. Therefore, a nasciturus shall not be protected by the right to life.[54]

Even if one does not agree with his arguments it seems that the declaration of the nasciturus for a holder of at least the right to life shall be avoided. The holdership of basic rights as used here presupposes that the held rights are subjective rights. Correspondingly a holder is the entitled subject. It seems to be very problematic if a nasciturus has the subjective right to life against its mother. Since all subjective rights may according to § 15 first sentence of the first paragraph of the Constitution be protected by a complaint a nasciturus would in the case of an abortion have the right to recourse to the courts against its mother.[55] This result is disconcerting. Without being able to offer the final solution for the problem, the holdership of unborn children under the Estonian Constitution shall be rejected. The nasciturus does not have any subjective rights and it is therefore not a holder of basic rights.[56]

(2) After Death

The question whether a deceased could be a holder of basic rights seems to be at first glance peculiar because the person in question does not exist anymore. However, the German Federal Constitutional Court has decided that

human dignity and its protection shall not end with death.[57] Following the Court in Germany several authors declare the dead as holders of at least human dignity.[58] On the other hand the basic rights' holdership of the dead has been denied.[59] It does not mean that the second opinion will allow the disparagement of the dead. According to this view instead of a hardly imagineable basic rights' holdership by the dead, the respect of the living for the dead shall be protected.

It seems to be the better solution not to accept the dead's holdership of basic rights under the Estonian Constitution. There will still be enough reasons for protecting the memory of survivors. The holder of a right cannot be just an abstraction but shall be a person — natural or legal — who does exist.

2. Legal Persons

All natural persons ("everyone", "Estonian citizen") are holders of the basic rights. Natural persons continue to be holders of basic rights even if they e.g. found a non-profit association. If the public authorities restrict operations of such an association then that instrument at the same time encroaches every member's basic rights. Thus, every member of the organisation has according to § 15 first sentence of the first paragraph of the Constitution the right to recourse to the court. But it is questionable whether the organisation itself can seek the court's protection in its own name. This question will be answered by § 9 second paragraph of the Constitution. According to that clause the rights, freedoms and duties set out in the Constitution shall extend to legal persons in so far as this lies in accordance with the general aims of legal persons and with the nature of such rights, freedoms and duties. Thus, certain superindividualistic units of organisation may be holders of basic rights as well. As argumentum *e contrario* it can be derived, that the basic rights should be understood individualistically without this clause.

The German *Grundgesetz* contains a similar provision to § 9 first paragraph of the Constitution. According to Article 19 third paragraph of the German Constitution basic rights also apply to domestic legal persons to the extent that the nature of such rights permits. The main difference between the analogous provisions in Estonian and German Constitutions is that in Germany only domestic legal persons will be protected while the Estonian Constitution does not make any difference between domestic or foreign legal persons.[60]

Section 9 second paragraph of the Constitution extends the protection of basic rights. It shall be distinguished from § 154 first paragraph of the Constitution according to which all local issues shall be resolved and managed by local governments, which shall operate independently. The latter provision constitutes no basic right but a *prima facie* competence of local governments to solve local problems independently. Since the provision contains only a *prima facie* right, it is structurally similar to basic rights.

Section 9 second paragraph of the Constitution contains three main requirements. First, the organisation shall be a legal person in the sense of the Constitution. Second, the application of basic rights shall be in accordance with the general aims of legal persons. Third, the application must be in accordance with the nature of the rights.

A. LEGAL PERSONS IN THE SENSE OF § 9 PARAGRAPH 2 OF THE CONSTITUTION

The concept of a legal person is not a concept of constitutional law but derives from the statutory law. If the legal order gives e.g. a union of individuals legal capacity then the consequence will be that the corresponding formation can independently bear rights and duties, e.g. be an owner or sue in its own name.[61]

(1) Legal Persons of Private Law

Since in the wording of § 9 second paragraph of the Constitution the concept of legal person has been used, the legal persons of private law are certainly included. Legal persons of private law are, according to § 2 first and third paragraphs of Estonian Commercial Code, in the first order a general partnership, limited partnership, private limited company, public limited company and commercial co-operative.[62] Legal persons of private law are furthermore, according to § 1 first and second paragraphs of the Foundations Act,[63] foundations, and according to § 2 first paragraph of the Non-profit Associations Act,[64] non-profit associations.

(2) Other Organisational Formations of Private Law that Are not Legal Persons

Legal persons in the strictest sense are only those organisational formations with full legal capacity. In private law there may be formations with just a partial legal capacity as well. An entity has partial legal capacity if the legal order recognises them as individual holders of at least one right. It is questionable, whether § 9 second paragraph of the Constitution applies only to entities with full legal capacity or whether other organisational formations with only partial legal capacity may be holders of basic rights too.

If one interprets § 9 second paragraph of the Constitution as a principle, then finding the solution is not difficult. The basic rights require *prima facie* full enforcement. Therefore, the question whether organisational formations with partial legal capacity can rely on basic rights must be answered in the affirmative. Consequently, also organisational formations with partial legal capacity that are not legal persons may be holders of basic rights. It cannot be in any other way since in the opposite case the capacity to bear basic rights would depend on the discretion of the lawgiver.[65] But basic rights are on the contrary individual rights against the state and therefore also against the legislator. In addition, the line between full and partial

legal capacity in not clear at all, since no legal person can have all the rights of an individual.[66] It is clear that a legal person can neither be the holder of the right to life (§ 16 of the Constitution) nor the holder of the right to protection of health (§ 28 first paragraph of the Constitution).

From the organisational formations with partial legal capacity social groups and organs of legal persons must be distinguished. Social groups and bodies of legal persons cannot be holders of rights and duties. They only can be addressees of organisational norms.[67] Social groups in that sense are e.g. a meeting, employees of an enterprise or a football team. In general, the bodies of legal persons of private law are according to § 44 first paragraph of the General Part Act of the Civil Code[68] the general meeting and the management board. E.g. in the case of a public limited company, which is a legal person of private law, according to Estonian Commercial Code[69] the bodies are the general meeting of stockholders (§ 290), the management board (§ 306 first paragraph) or the supervisory board (§ 316). Groups and bodies like those mentioned are not legal persons in the sense of § 9 second paragraph of the Constitution.

(3) Legal Persons of Public Law[70]

The wording of § 9 second paragraph of the Constitution mentions legal persons without making any difference between the legal persons of public and private law. According to the general and the professional legal usage of language the concept of legal person without any further specification means both legal person of public and private law.[71] However, it does not mean that the protection of basic rights expands also to legal persons of public law, since that expansion must occur in accordance with the general purposes of the legal person and the nature of such basic rights. Therefore the term "legal persons" can be neither an argument *pro* nor *contra* the basic rights' holdership of public law legal persons.

B. IN SO FAR AS THIS IS IN ACCORDANCE WITH THE GENERAL AIMS OF LEGAL PERSONS

The second part of the sentence of § 9 second paragraph of the Constitution sets limits to the extension of the holdership of basic rights to legal persons. First, the extension must occur in accordance with the general aims of legal persons. But what are the general aims of the legal persons? What are legal persons for?

The aim may be interpreted subjectively, according to the real will of the creator, or objectively, according to a reasonable solution from the point of view of the interpreter. The first argument is called a subjective-teleological or a genetic argument,[72] the second is called an objective-teleological argument.[73]

(1) General Aims of Legal Persons

The general aim cannot mean the purposes laid down in the rules of the legal person. These rules cannot contain general aims of legal persons but only the specific aim of the particular legal person. Therefore, we need to look for the general aims somewhere else.

The first answer is that a legal person is a purpose by itself. This is the case if it has a real personality. A legal person just exists and there are no further aims of its existence. This is the theory of the real personality of an association.[74] According to this theory, all legal persons would have their own passive and active legal capacity. Therefore, all entities which are legal persons in the sense of § 9 paragraph 2 of the Constitution would enjoy the full protection of all basic rights as far as such application is in accordance with the nature of the rights.

The second alternative is that a legal person is a simple legal abstraction which does not really exist. It is rather an imaginable entity, which is treated as a subject of rights and obligations.[75] According to this solution the general aim of legal persons as such is the simplification of individual action. Therefore, legal persons could enjoy the protection of basic rights only to the extent that these rights protect the natural persons who stand behind the legal persons.

If a legal person should have a real personality then every legal person should be protected because it has a value by itself. First of all, all the creations with a value by themselves should have the right to existence. That would lead to the conclusion that no legal person may ever be dissolved and e.g. the bankruptcy law would be unconstitutional. Such a solution would be peculiar. Therefore, the legal person shall be understood as a construction of legal science.[76] If there would be nothing like legal persons, the relations between individuals would get too complicated. If several natural persons join together e.g. to do business, questions like who owns how much of which part of the enterprise will arise. To avoid the overcomplexity of such relations and to simplify the application of legal norms to organised natural persons, the legal institute of legal person has been created. Therefore it is wrong to imagine legal person as some creation to which rights extend just because of its existence.[77] Thus, the most general aim of legal persons as such is the simplification of human action or, even more generally to confer more freedom. The legal person is therefore nothing else than just a means to an end and not a purpose by itself.[78]

But how does this solution fit to the general aims clause in § 9 second paragraph of the Constitution? If the general aim of legal persons is to confer more freedom to individuals, the applicability of basic rights to legal persons depends on whether there are individuals behind the legal person and whether they are concerned. Basic rights extend to legal persons only as far as the freedom of natural persons is protected. This solution corresponds to the theory of personal substratum.

(2) Theory of Personal Substratum

According to the theory of personal substratum one

always has to ask whether there are natural persons behind the legal person. This will be a rule for legal persons of private law but not for legal persons of public law. Thus, in principle legal persons of private law are holders of basic rights while legal persons of public law are not.[80] By this solution one has to remember that the distinction between legal persons of public and private law does not give a satisfactory answer to the question.[81] Often it is just a historical coincidence or legislator's arbitrariness whether a corporation or organisation is one of public or private law[82]. Thus, whether a legal person is a legal person of private or public law is just an indication *pro* or *contra* its basic rights' holdership. The real criterion is whether there is private freedom or public power behind the legal person. Only such legal persons can be holders of basic rights which exist because of private autonomy.[83]

The theory of personal substratum is not indisputable, since it excludes the basic rights' holdership of the legal persons of public law. Therefore, it has been criticised by several authors, who hold that legal persons of public law should be holders of basic rights as well.[84]

First, it has been argued that the constitutional provision which extends the holdership of basic rights to legal persons would be superfluous if the theory of personal substratum would really apply.[85] Indeed, it is possible to construct a legal system with effective protection of individual rights without any protection of legal persons. A comparable provision lacked e.g. in the earlier Estonian Constitutions from 1920,[86] 1933[87] and 1938[88]. From the present day legal systems e.g. in the Finnish legal system legal persons are not protected by basic rights at all.[89] But it does not mean that § 9 second paragraph of the Constitution is superfluous. Legal persons are holders of basic rights only thanks to this constitutional provision and only to that extent as stated in it. Without § 9 second paragraph of the Constitution there would be no holdership of basic rights under the Constitution. Thus, the theory of personal substratum does not make § 9 second paragraph of the Constitution superfluous.

Second, since a contractual transfer of basic rights should be excluded because of the highly personal nature of basic rights, the theory of personal substratum would break this rule.[90] Admittedly, basic rights should not be transferable. But § 9 second paragraph of the Constitution does not cause any transfer of basic rights. Like the legal institute of legal person is a fiction, § 9 second paragraph of the Constitution is a fiction as well. The norm constitutes simply the holdership of fictive subjects of the law but only insofar as is in accordance with the general aim of legal persons, according to which individual action is simplified. Section 9 second paragraph of the Constitution is not in contradiction with the highly personal nature of basic rights but it just creates a modification of this principle.

Third, a legal person, e.g. a foundation, might not have any persons behind it whose freedom of action should be protected.[91] To go even further, there are legal persons of public law which do not have natural persons behind them at all, but only the public power. But it is possible to distinguish private foundations which derive their competency from the private freedom from foundations which are just organisationally independent sub-units of public authorities. It is true that there are not specific individuals behind a foundation but it has once been created by somebody. And this act of creation gives us information to classify the foundation either as a holder of basic rights or not. And if the legal nature of the foundation has been changed during its existence, this act should be considered as well.

To argue even more in favour of the theory of personal substratum the main arguments brought out in the German discussion are presented.

The first is the so-called confusion argument which says that the state cannot be the holder and the addressee of basic rights at the same time.[92] The confusion argument is the weakest. It has been shown, that the confusion argument is no longer appropriate if there is more than one legal entity carrying public power involved.[93] And even if there was a single entity of state opposed to individuals, the confusion argument would not hold, because one norm may create rights and duties to one and the same person[94]. Of course, one norm may confer rights and duties to the same person. But there is still a reasonable content left if we understand basic rights as pre-state individual rights which are directed against the state to protect the sphere of individual freedom. Interpreted like this, basic rights cannot at the same time confer protection to the state itself or to its sub-units.

This is a combination of the confusion argument with the argument of individualism which has been brought out as the second argument to support the theory of personal substratum.[95] Against the latter it has been maintained that a legal person of public law can be in a similar position with respect to the public power as an individual, e.g. in private law relations.[96] This assertion is not true because legal persons are not purposes by themselves but means to an end while natural persons are purposes by themselves. Thus, legal persons can never be in a similar position to natural persons, even if e.g. the property of a public limited company is concerned. There is still a difference if e.g. both a natural person and a company have the right to property (§ 32 of the Constitution) because the legal person is an owner only to simplify the action of the shareholders. Since the state has the monopoly of power, basic rights are to balance it and not to confer some kind of protection to its sub-units.

According to the third argument basic rights' holdership of the legal persons fulfilling the functions of public power would lead to the paralysis and petrifaction of the organisational power of the public authorities. The state

has to be effective and should therefore be able to organise and reorganise itself without any restriction of the basic rights.[97]

If legal persons derive their competency from public authorities the relations between them and their creators are based on certain competency. Legal persons of public law act according to competency and not by exercising freedom. Therefore, the conflicts between them cannot be solved on the basis of basic rights but on the basis of their competency.[98] The extension of holdership of basic rights to legal persons fulfilling the functions of public power cannot expand their competency.[99] Thus, there cannot be any further protection for legal persons which derive their competency from public authorities.

(3) Modification of the Theory of Personal Substratum

According to the theory of personal substratum the criterion of distinguishing legal persons who are holders of basic rights from non-holders is whether there is private freedom or public power behind the legal person. Therefore, in principle the legal persons of private law are holders of basic rights and the legal persons of public law are not. The Estonian Constitution modifies this criterion and excludes the basic rights' holdership of legal persons of public law.

In German discussion there is a general consensus that universities, churches, and broadcasting corporations enjoy the protection of basic rights even if they are legal persons of public law.[100] The reason for that is that all of them have some special close relation to a specific basic right: universities to the freedom of science, churches to the freedom of conscience and religion, and broadcasting corporations to the freedom of press.

Since there is no state church in Estonia (§ 40 second sentence of the second paragraph of the Constitution),[101] all churches have to be considered as legal entities of private law.[102] Thus, they are holders of the freedom of conscience and religion (§ 40 first paragraph of the Constitution) according to § 9 second paragraph of the Constitution. But what about universities and broadcasting corporations of public law? The Estonian Constitution gives an answer to this question, stating in § 38 second paragraph of the Constitution that universities and research institutions are autonomous within the restrictions prescribed by law.

Section 38 second paragraph of the Constitution is a peculiarity of the Estonian Constitution with historical tradition. It can systematically and historically only mean the universities and research institutions of public law. Private universities and scientific organisations are as legal persons of private law (§ 9 second paragraph of the Constitution) the entitled subjects of the freedom of science, § 38 first paragraph of the Constitution. From the systematic position of § 38 second paragraph of the Constitution in the second chapter of the Constitution with the title "Basic Rights, Freedoms and Duties" it does not follow that this provision foresees a *lex specialis* for all kinds of universities and research institutions. Moreover, such a *lex specialis* would be superfluous because of § 9 second paragraph of the Constitution. For example there is no special rule about autonomy for newspaper publishers in § 45 of the Constitution either. The wording of § 38 second paragraph of the Constitution speaks of research institutions[103] which indicates that scientific organisations of public law are meant. And finally, the autonomy of university clause has historically come into being as a guarantee of the independence of the public university[104] and as such took over in the Constitution from 1992.[105] Thus, although the norm has a similar structure as a basic right it is not one. It is like the autonomy clause for local government (§ 154 first paragraph of the Constitution) a competence that belongs to the sphere of state organisation and which has as its object the guarantee of some independence for some certain units of the public power.

If the universities of public law are the only units of public law except the local governments (§ 154 first paragraph of the Constitution) which have a special constitutional guarantee of autonomy, then it follows *argumentum e contrario* that the other units which fulfil functions of public power shall not be autonomous. Section 38 second paragraph of the Constitution makes sense only if it is exhaustive. If § 38 second paragraph of the Constitution is exhaustive, the legal persons which have public power behind them cannot be holders of basic rights at the same time.[106] The conclusion is that the legal persons of public law are always excluded from the holdership of basic rights under the Estonian Constitution.[107]

(4) Conclusion

The basic rights' holdership of legal persons is only then in accordance with the general aim of legal persons if such legal persons provide individual freedom. Legal persons who have public power behind them can never be holders of basic rights, they can be only autonomous. This means that, first, legal persons of public law cannot be holders of basic rights and, second, that legal persons of private law that represent public authorities or that fulfil functions of public power are not holders of basic rights.

Legal persons of public law cannot be holders of basic rights, they can only be autonomous if this has been stated explicitly. There are only two kinds of entities of public law which shall be autonomous according to the Constitution: local governments (§ 154 first paragraph of the Constitution) and universities (§ 38 second paragraph of the Constitution). All the other legal persons of public law are neither autonomous nor holders of basic rights.

Legal persons of private law that represent public authorities are not holders of basic rights because there is no individual freedom to be protected by basic rights. Such a legal person is e.g. a public limited company if the state

owns all shares. If a private person owns at least one share, there will be private freedom to be protected behind the company and the company will be a holder of basic rights.

If there is at least one private person behind a legal person of private law which fulfils functions of public power, then the legal person will not be a holder of basic rights as far as it performs functions of public power. In all other cases the legal person would be a holder of basic rights.

Other legal persons of private law are holders of basic rights. The crucial question is whether the extension of basic rights is in accordance with the nature of these rights.

C. NATURE OF RIGHTS

A legal person can rely on a basic right in so far as it is in accordance with the nature of that right. The extension of basic rights to legal persons is in accordance with the nature of rights if the basic right can be exercised by legal persons. This is the case when the action of a legal person can fall into the protectorate of the particular basic right.[108] Due to this limitation legal persons cannot rely on the right to life (§ 16 first sentence of the Constitution) or to protection of health (§ 28 first paragraph of the Constitution). They cannot marry or create a family (§ 27 first paragraph of the Constitution) nor may they have the right of parents to raise children (§ 27 third paragraph of the Constitution). On the other hand the subjective rights of legal persons do derive in first order from the basic rights related to profession (§ 29 first paragraph of the Constitution), free enterprise (§ 31 of the Constitution) and property (§ 32 first paragraph of the Constitution). Legal persons who are holders of basic rights certainly have the right to recourse to the courts deriving from § 15 first sentence of the first paragraph of the Constitution.

D. EXTENT OF THE HOLDERSHIP OF BASIC RIGHTS OF A LEGAL PERSON

The basic rights' holdership of legal persons is determined by their competency. They cannot have more competency on the basis of the Constitution than they already have on the basis of their creation act and rules.[109] Therefore, the extent of the legal capacity of a legal person determines also its Constitutional capacity.[110] As a consequence, organisational formations with partial legal capacity cannot extend their legal capacity according to § 9 second paragraph of the Constitution and turn it into a universal one. The protection of basic rights extends to them only to the extent of their legal capacity.

III. ADDRESSEES OF BASIC RIGHTS

A. CONCEPT OF THE ADDRESSEE OF A RIGHT

An addressee of a right is the obliged subject of a right.

B. ADDRESSEES OF BASIC RIGHTS, § 14 OF THE CONSTITUTION

The question of addressees of basic rights may seem at first glance easy to answer, since according to § 19 second paragraph of the Constitution everyone is obliged to honour and consider the rights and freedoms of others. Interpreting this provision in the widest possible way basic rights would apply in all legal relations, even in the so-called horizontal relations between individuals. If basic rights would apply between individuals everyone would be an addressee of basic rights. However, it is not so. Basic rights have not been included in the Constitution to oblige everybody e.g. not to forcibly enter someone else's dwelling, real or personal property under his control, or place of employment, except in the cases and pursuant to procedure provided by law, to protect public order, health or the rights and freedoms of others, to prevent a criminal offence, to apprehend a criminal offender, or to ascertain the truth in a criminal proceeding (§ 33 of the Constitution). The primary function of the basic rights is to give individuals protection against encroachments by the state.[111] Thus, § 19 second paragraph of the Constitution shall not be interpreted as the provision that constitutes the addressees of the basic rights but rather as a general constitutional duty of everyone to honour and to consider the rights and freedoms of others.[112]

The crucial provision for the addressees is § 14 of the Constitution according to which the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. In the following it shall be clarified which rights and freedoms are meant, who are the obliged subjects behind the formulation "the legislative, executive and judicial powers, and of local governments", and how the concept of guarantee should be interpreted.

1. Rights and Freedoms in the Sense of § 14 of the Constitution

Since § 14 of the Constitution refers only to rights and freedoms without any further precision, rights laid down in the Constitution itself must be meant. Therefore, rights and freedoms in the sense of § 14 of the Constitution are all basic rights contained in the second chapter of the Estonian Constitution. But rights and freedoms are also constitutional rights outside of the second chapter, e.g. §§ 57 first paragraph, 60 second, third and fourth sentences of the first paragraph, 60 second paragraph, 113, 124 second paragraph, 156 first, second and third sentences of the first paragraph, 156 second paragraph. All these provisions contain constitutional rights of individuals since subjective rights derive from them.

2. The Duty of the Legislative, Executive and Judicial Powers, and of Local Governments

According to § 14 of the Constitution the legislative, executive and judicial powers and local governments shall be obliged. Under the law, only a natural or legal person can be obliged. The powers are not subjects under the law but functions of the state. According to the principle of separation and balance of power the state power is divided among the organs mentioned in § 4 of the Constitution, i.e. among the Riigikogu (the parliament), the President of the Republic, the Government of the Republic and the courts. Therefore, as far as the legislative, executive and judicial powers are concerned, the legal person Republic of Estonia is meant.

A. LEGISLATIVE POWER

Section 14 of the Constitution states the duty of the legislation to guarantee basic rights. Indeed, the function of the basic rights is in the first order to give protection to individuals against the legislative power. From a constitutional point of view, these positions are so important that their granting or non-granting may not be left for the simple parliamentary majority to decide.[113] The basic rights are therefore a limitation of the competence of the legislative power.[114]

The concept of the legislation includes in the first place laws in the formal sense, i.e. acts of parliament.[115] A problem will thereby be whether the so-called ratification acts in the sense of § 121 of the Constitution are covered. The question is relevant, since § 123 second paragraph of the Constitution states that if laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply, i.e. the ratified treaties are directly applicable without any further transformation.[116] Thus, the Riigikogu may violate basic rights by ratifying an international treaty.

Now, on the one hand according to § 14 of the Constitution the legislation is bound by the basic rights and furthermore according to § 123 first paragraph of the Constitution it is forbidden to conclude international treaties which are in conflict with the Constitution. On the other hand there is the general principle of international law pacta sunt servanda.[117] Thus it is, for the Republic of Estonia, forbidden to conclude an international treaty that could violate the Constitution or particularly the basic rights, and in international relations, forbidden to break or violate an international treaty. If the legislator breaks the first rule, it would mean a dilemma that could not be solved in a satisfactory way considering both requirements. Therefore, such situation should be avoided by an intensive previous control. And if it should still happen since all cases cannot be foreseen, the treaty has to be interpreted in accordance with basic rights because §§ 14 and 123 first paragraph of the Constitution are the limits of the competence of the state in international relations and therefore also limits of the general principle of *pacta sunt servanda*.

According to the Estonian Constitution the President of the Republic may issue decrees which have the force of law (§§ 78 No. 7, 109, 110 of the Constitution). It is questionable whether these acts are covered by the concept of legislation. Furthermore, it is questionable whether the regulations of the Government of the Republic, local governments and other autonomous bodies are covered by the concept of legislation.[118] However, since they belong either to the legislative or to the executive power and § 14 of the Constitution binds both, no definite answer is needed here. The same applies for the internal rules of the legal persons of public law. Finally, the customary law is bound by § 14 of the Constitution as well.[119]

B. EXECUTIVE POWER

The executive power comprises in the first order the government and the administration.[120] Thus, the Government of the Republic and the administration are always bound by basic rights while exercising the public power. Moreover, legal persons of public law that fulfil functions of public power belong to the executive power as well.[121]

Apart from that there are two problems. Firstly, it is questionable whether the executive power includes even private persons who fulfil functions of public power, e.g. a notary public. Secondly, it has to be clarified whether the administrative authorities are included if they make business.

(1) Public Law Action of Persons of Private Law

If private persons fulfil functions of public power,[122] it is questionable whether they have to consider basic rights. If e.g. a notary public fulfils the function of legal certification which is a function of public power, is he then a part of the executive power in the sense of § 14 of the Constitution?

In § 14 of the Constitution the concept of executive power instead of the concept of administrative bodies has been used. The wording is therefore neutral. However, the state has the monopoly of public power and should actually fulfil all the functions of public power by itself. Since according to § 3 first sentence of the first paragraph of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith, the meaning of § 14 of the Constitution can only be that all public power shall be bound by basic rights. Therefore, it cannot make a difference who exercises it. If the state transfers a part of the public power to a person of private law, that person cannot be exempted from its constitutional obligation.[123] And private persons cannot have more power than transferred to them by the state. Consequently, persons of private law, like e.g. a notary public, belong to the executive power in the sense of § 14 of the Constitution.

As a consequence of this, the concept of the executive power in § 14 of the Constitution reaches even beyond the legal person Republic of Estonia and includes other legal subjects as well.

(2) Private Law Action of Legal Persons of Public Law

If the state, other legal persons of public law or even private persons exercise public power, they are included in executive power in the sense of § 14 of the Constitution. But what about the legal persons of public law while acting on the basis of private law? In German discussion three cases have been identified when the state or other legal persons of public law may act according to private law. The first type includes the fulfilment of functions of public power in the form of private law, like e.g. a waterworks as a public limited company.[124] The second case concerns the so-called enterprise of public administration, the only purpose of which is to earn money.[125] To this category belongs as a rule e.g. the state as shareholder. The third category contains the so-called assisting purchase of public administration, which covers the purchase of the material goods necessary for the administrative action, like e.g. office machines, cars, or real estate.[126]

Fulfilment of the functions of public power in the forms of private law cannot free the administration from being bound to the basic rights. Otherwise, for the state, a back door would be opened to escape into private law to bypass the duty of following the basic rights.[127] Thus, the fulfilment of functions of public power in the forms of private law belongs to the executive power in the sense of § 14 of the Constitution.[128]

Whether the state will be bound in the second and the third case, is questionable. The German *Bundesgerichtshof für Zivilsachen* has argued that the state is acting in the field of private law as a purchaser of office machines or acts as an entrepreneur on the market, it can refer to the private autonomy like any other participant of the market and is therefore not bound by basic rights.[129] However, according to the wording of § 14 of the Constitution all three state powers without any exceptions are bound by basic rights.

The Constitution accepts only constituted exercise of public power. Nowhere does the constituted state have the right to arbitrariness like a private person. The basic rights shall therefore bind the state in all its forms and activities.[130] Thus, even the assistant purchase and commercial enterprise of the state belong to the executive power in the sense of § 14 of the Constitution. Particularly the principle of equality (§ 12 first paragraph of the Constitution) may become relevant in practice.

(3) Conclusions

The executive power in the sense of § 14 of the Constitution comprises first the government, the state administration and all legal persons of public law, no matter whether they act in the forms of public or private law. Furthermore, all private persons who fulfil functions of public power are covered.

C. JUDICIAL POWER

According to § 14 of the Constitution the judicial power has to guarantee rights and freedoms. The judicial power shall first protect the basic rights of the individuals against both the legislative and the judicial powers. Courts shall according to §§ 15 second paragraph, 152 of the Constitution not even apply any act of parliament that is in conflict with the Constitution. Furthermore, according to §§ 14, 15 second paragraph of the Constitution the judicial power is bound to the basic rights. This boundness consists of two aspects: it exists for both the court proceedings and the decision as the material result.[131] The judicial power is therefore obliged to guarantee the basic rights on the one hand in court proceedings and on the other hand to respect them in courts' decisions through following them and applying the statutory law in accordance therewith. Hereby the procedural basic rights of the Estonian Constitution, namely §§ 21, 22, 23 and 24, are of particular importance. They are special guarantees addressed directly to the judicial power. Under the material aspect all three — civil, criminal, and administrative justice — are bound.[132]

D. LOCAL GOVERNMENTS

Section 14 of the Constitution mentions separately the local governments. Since the local governments are legal persons of public law and the concept of executive power includes all legal persons of public law, special reference to local governments would be superfluous. The reason, why they are pointed out lays in the autonomy of local government. According to § 154 first paragraph of the Constitution all local issues shall be resolved and managed by local governments. Thus, § 154 first paragraph of the Constitution declares the local governments autonomous and grants them an original Constitution-based competence to solve local issues independently. Although this autonomy is not unrestricted, the definite classification of the local governments as a part of executive power may cause difficulties.[133]

Unfortunately, the emphasis of local governments is still puzzling rather than clarifying. While § 14 of the Constitution points out local governments as autonomous units, it does not mention universities and research institutions. According to § 38 second paragraph of the Constitution these institutions are autonomous as well. Does § 14 of the Constitution mean that e.g. public law universities are not bound to basic rights? If one would understand the emphasis of local governments as an exhaustive list of autonomous units who are bound to basic rights, as an *argumentum e contrario* it could be easily followed that other autonomous units are not bound. Since such an interpretation cannot be in accordance with § 3 first sentence of the first paragraph of the Constitution that forbids the exercising of the powers of state beyond the

competency laid down in the Constitution, such an interpretation would be wrong. Therefore, the separate mentioning of local governments in § 14 of the Constitution should be understood as a non-exhaustive and exceptional clause.

E. THE LEGAL CHANCELLOR AND THE STATE AUDIT OFFICE

Not mentioned in § 14 of the Constitution are the Legal Chancellor (§§ 139ff. of the Constitution) and the State Audit Office (§§ 132ff. of the Constitution). Furthermore, they are not easy to classify as belonging to one of the three functions of power.[134] Although the Legal Chancellor and the State Audit Office are not included in the text of § 14 of the Constitution, they are organs of the public power and thus addressees of basic rights as well.[135]

F. CONCLUSIONS

According to § 3 first sentence of the first paragraph of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Section 14 of the Constitution states the first provision more precisely and stresses the boundness of state powers to the basic rights. Therefore, all state powers, including the Legal Chancellor and the State Audit Office are bound to the basic rights according to § 14 of the Constitution.

3. Guarantee

The institutions listed in § 14 of the Constitution have to guarantee rights and freedoms. What does it mean to guarantee? Are they not allowed to violate the rights and freedoms of the citizens or are they even obliged to protect the holders of rights and freedoms against infringements from third parties? The correct answer can only be that they have to fulfil both functions. Only if they abstain from violating the basic rights of individuals and protect them against infringements from third parties (or powers) can they guarantee the basic rights.

Still it is not clear in what way institutions have to guarantee basic rights. Basic rights norms constitute subjective rights. If there is a subjective right it must hold against a second party, since subjective rights are positions and relations between two parties. A holder of the basic rights is the first party, he is the entitled person. But who is the second party, the obliged person? Section 14 of the Constitution answers this question. According to § 14 of the Constitution legislative, executive an judicial powers, i.e. the Republic of Estonia and all its sub-units with own legal capacity are obliged. But even the persons of private law fulfilling functions of public power are obliged as well. For example a public limited tram company is bound by the general principle of equality (§ 12 first paragraph of the Constitution).[136] The company performs the function of guaranteeing public transport to town-dwellers and is therefore not entitled to e.g. take without any reason different prices from the clients because it would be a violation of the general principle of equality. The concept "guarantee" therefore addresses the second party in the subjective basic rights relations. Thus, § 14 of the Constitution defines the addressees of the basic rights.

4. Conclusions

If the law is valid it shall be followed. If the constitution is valid then all institutions exercising public power shall follow its regulations. Although these statements are self-evident, § 14 of the Constitution is not only declarative. Section 14 of the Constitution defines the addressees of the basic rights and emphasises the obliged parties of subjective basic rights.

C. PRIVATE PERSONS AS ADDRESSEES OF BASIC RIGHTS, § 19 PARAGRAPH 2 OF THE CONSTITUTION?

Private persons are not the obliged subjects of basic rights. Section 14 of the Constitution determines the addressees of basic rights while obliging all three powers. The relations between private persons are relations of free and equal individuals. These relations are regulated by the private law which is determined by the private autonomy.[137]

However, according to § 19 second paragraph of the Constitution everyone shall honour and consider the rights and freedoms of others in exercising his rights and freedoms. Obviously basic rights have some influence even on the relations between individuals. This is the problem that has been named *Drittwirkung* in Germany.[138] What is, then, hidden behind the German expression "*Drittwirkung*"? Translating it literally into third-party application no clarity is reached. Therefore, another approach is needed.

The crucial questions are whether basic rights influence the relations between the individuals and if, then how do they influence these relations? These two problems have been called the problem of construction and the problem of collision.[139]

1. Construction of the Relations of *Drittwirkung*

In the following the problems will be analysed with the help of a famous case of the German Federal Constitutional Court. According to that case a Journal B published an article with an interview with a Princess A that described very personal details of private life of the princess. This interview never took place. A seeks for damages from B because of the violation of her right to privacy. But Journal B holds that its freedom of press would be violated then. How should the civil court decide?[140]

A. IMMEDIATE THIRD-PARTY APPLICATION OF BASIC RIGHTS

Logically it is possible to construct a legal relationship between two private persons on the basis of a basic rights

norm. In this case the state is not involved, there is only one legal relationship between two persons.

We can formulate the right as from the perspective of A as follows:

[1] A has a *prima facie* right against B to pay damages (conduct).

B's right would be formulated as follows:

[2] B has a *prima facie* right against A to omission of the encroachment of its freedom of press.

The example illustrates the theory of immediate third-party application of basic rights which has been established by Hans Carl Nipperdey. The main request of the theory of immediate third-party application is that basic rights provisions create immediately subjective rights of individuals.[142] Thus, applying the immediate *Drittwirkung*, both parties of a legal relation, the holder and the addressee, can be private persons. As in the present case, there will be two contrary subjective rights.

Such a construction has the fascination of its simplicity. However, it has been criticised by several authors. According to the first argument the immediate Drittwirkung could be dangerous for private autonomy.[143] If there is a confrontation between two private persons then private law applies. But when rights deriving from the Constitution become involved, then there would be in every private law relation at least two confronting basic rights. The means to solve the cases of basic rights is the principle of proportionality. Consequently, the standard of private autonomy will be replaced by the standard of principle of proportionality.

If one starts applying basic rights immediately in the relationships among individuals one has to generalise this idea and apply all of these rights in horizontal relations. But it is not possible. To carry it to extremes, one will face the situation where everybody has the right to be equally treated by everybody (§ 12 first paragraph of the Constitution). If somebody gets married or makes his last will and testament, he has to consider the rights of everybody. It is obvious that it would not only be dangerous for the private autonomy and the market economy but also for privacy. Furthermore, there are rights in the Constitution that in fact cannot be fulfilled by private persons. E.g. no private person is able to fulfil the requirements of the right deriving from § 44 third paragraph of the Constitution according to which Estonian citizens have the right to access information about themselves held in state agencies and local governments and in state and local government archives. No private person has, as a private person, access to these archives. Then, there are rights that in fact could be fulfilled by private persons, e.g. § 37 first paragraph of the Constitution (right to education), but immediately the problem arises who should be obliged to fulfil this duty. In consequential application everybody is (*prima facie*) obliged to grant education to everybody.

Additionally, the argument of monopoly of force of the State can be presented. Because the State is practically the only one that may legally use violence, the basic rights shall protect individuals against the superior strength of the State. There is no such relationship of superiority between two individuals.

Finally, it has been argued that in cases like employer-employee relations or lessor-tenant relations a comparable situation arises on the basis of social power.[144] At the same time no tangible criteria are presented on the content of social power and why it should be relevant in this context. Therefore, this argument seems to have a political background. Declaring private persons to be the addressees of basic rights would in consequential application lead to a State without liberal market economy. On the other hand, the contrary point of view does not exclude an extensive social security system but only points out the importance of the individual freedom as the cornerstone of the functioning of a democratic *Rechtsstaat*.[145]

B. MEDIATE THIRD-PARTY APPLICATION OF BASIC RIGHTS

Solving the problem according to the theory of immediate Drittwirkung is one possibility to construct the third-party application of basic rights. The other is the mediate third-party application of basic rights. The mediate third-party application was first pointed out by the German constitutional lawyer Günter Dürig.[146]

First of all, there is always an obligation of the legislator to enact laws that would protect private persons against others, e.g. criminal law or tort law.[147] This obligation exists regardless of the fact whether other private persons in fact commit offences or not, since the legislation is one of the basic functions of the state.

This relationship can be formulated:

[3] X has a definite right against S to enact protecting laws.[148]

The State or the legislator in the concrete case has a wide range of possible measures or discretion how to form this protection. In most cases of *Drittwirkung* the state has already fulfilled this duty and enacted the necessary protecting laws but there are also cases where exactly this is the main problem.[149]

To start with the relationships between the participants of the case, we can distinguish among three legal relations following the three participants.[150]

(1) The Horizontal Relationship between Two Private Persons

First of all, there must be a horizontal relationship between two individuals. In the case presented above we can formulate this relationship as follows:

[4] A has a *prima facie* right against B on damages.

When the State has fulfilled its duty to enact protecting laws, this relationship arises from the norms of the particular private law statute. It then has a form of a subjective

right of private law.

(2) The Vertical Relationship between the Claiming Private Person and the State

If the journal B publishes fabricated intimate details about the private life of A, A's right to privacy needs to be protected. The means for protection is damages. Basic rights contain norms that do not only require the omission of every encroachment but also protection, i.e. conduct. Therefore, the vertical relationship between the claiming party and the State can be abstractly formulated as follows:

[5] A has a *prima facie* right against S to protection.The idea to construct *Drittwirkung* with the help of the state's obligation to protection derives from German constitutional lawyer Günter Dürig.[151] Today, there are several authors who follow the construction proposed by him[152]. Furthermore, it has been recently clearly pointed out that rights to protection are subjective rights of individuals.[153]

(3) The Vertical Relationship between the Other Private Person and the State

The problem is that not only the claiming party has rights. The representatives of Journal B can argue that the payment of damages to a would violate their freedom of expression or press.

To formulate the right of the other private person abstractly:

[6] B has a *prima facie* right against S to omission of encroachment of his right.

Rights to omission of state encroachments are the classical function of basic rights.[154]

(4) Conclusions

To sum up, we have three kinds of relations among three parties. The relationship between the private persons usually consists of a private law claim. One of the private persons has a right to protection against the state and the other a right to keep away every encroachment of their freedom sphere. Both of the rights against the state lead, taken separately, to contradicting results. Therefore neither of them can be definite but only prima facie.

2. Construction of Collision of Rights by *Drittwirkung*

Taking A's right to privacy, the article of the journal was forbidden; taking the freedom of expression of the journal, it was allowed without any restrictions and B has not to pay any damages. This implicates already that we cannot solve such a case correctly without taking the rights of both private parties into account. Both norms behind these rights are to be considered as *prima facie* norms, which do not require their definite realisation but only an optimal realisation. This optimal realisation can only be reached applying the principle of proportionality[155]. According to this, the civil court which, pursuant to § 14 of the Constitution, is bound by the basic rights in the first case has to weigh A's right of privacy against B's right of expression and decide about the success of the claim and the sum of damages.

Since the structural solution of the problem of collision will still be the principle of proportionality, no matter if one applies the theory of immediate or mediate *Drittwirkung*, it is questionable whether these theories lead to different results at all. According to Robert Alexy all constructions lead to the same result. [156]

3. Conclusions

As a conclusion it is preferable to start out from the mediate third-party application of basic rights as defined above. Although, there should be no difference in the result, the theory of immediate third party application is exposed to theoretical problems as shown above.

Thus, according to § 19 second paragraph of the Constitution everyone shall honour and consider the rights and freedoms of others in exercising his rights and freedoms.[157] But still private persons are not addressees of the basic rights, since their rights and duties are influenced only by the third-party application of basic rights that is mediated by the state.[158]

IV. CONCLUSION

Holders of basic rights are first of all natural persons, i.e. individuals. These rights can be divided into rights of each and everybody and citizens' rights. Besides, there is a particular Estonians' right in § 36 third paragraph of the Constitution.

The holdership of basic rights begins with birth and ends with death. Basic rights are waiveable and they entitle even minors.

Furthermore, legal persons are holders of basic rights. But it applies only to the extent as they have rights of private persons behind them.

Addressees of basic rights are the State, other legal persons of public law, and even private persons who fulfil functions of public power. Other private persons are not addressees of basic rights although basic rights influence even the relations between individuals.

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Notes:

[1] In the English translation of the Estonian Constitution (Estonian Legislation in Translation, No 1, 1996), the concept "fundamental rights" is used instead of the concept "basic rights". The author uses the term "basic rights" in order to distinguish conceptually between the rights of the põhiseadus (literally: basic law), i.e. the Constitution of the Republic of Estonia from 28 June 1992, and the fundamental freedoms of the Convention for the Protection of Human Rights and Fundamental Freedoms from 4 November 1950.

[2] About the concept of subjective right, q.v.: Alexy 1994, p. 159 ff. All basic rights of the Estonian Constitution are subjective rights. (Detailed argumentation by: Ernits 1996, p. 464 ff.; disagreeing: Merusk 1995, p. 54.) E.g. in Germany there is a general consensus, that basic rights of the Grundgesetz (literally: basic law), i.e. the Constitution for the German Federative Republic from 23 May 1949, are subjective rights. (Jarass 1995c, mn. 14; Stern 1988, pp. 530 ff., 1201; Stern 1992, mn. 38 ff. [The abbreviation "mn." stands here and furthermore for margin number.]) Klaus Stern speaks even from self-evidence of the qualification of the basic rights as subjective rights today. (Stern 1992, mn. 40.) The German Federal Constitutional Court adds that in the case of a doubt, a subjective right shall be recognised. (BVerfGE [Decisions of German Federal Constitutional Court] vol. 6, pp. 386 [387].)

[3] Alexy 1991, p. 308 ff.; himself 1994, p. 23 ff.; Dreier 1981a, p. 10 ff.; himself 1981b, p. 51 ff.; himself 1981c, p. 88 ff.

[4] The equivalent of Rechtsstaat in English could be "rule of law" or to be more exact "state of law" principle.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms from 4 November 1950.

[6] Decision of the Constitutional Review Chamber of the Estonian Supreme Court from 10 May 1996, RT (Riigi Teataja = the State Gazette — the official publication for the legal acts of Estonia) I 1996, No 35, Art. 737.

[7] From the presumption of the right to Estonian citizenship by birth that one of the parents shall be an Estonian citizen does not follow that there is no right to Estonian citizenship by birth if both parents are Estonian citizens. If both par-

ents are Estonian citizens then one of the parents is an Estonian citizen (*argumentum a fortiori*). Thus, a child whose parents are Estonian citizens has the right to Estonian citizenship by birth.

[8] Interpreting § 8 first paragraph of the Constitution narrowly, the relevant parent shall be a natural parent in the legal sense. Adoptive parents would not count. It would be sufficient if e.g. the father of an illegitimate child is an Estonian citizen. Choosing the wide interpretation, natural and adoptive parents shall be treated equally.

[9] Põhiseadus ja Põhiseaduse Assamblee. (The Constitution and the Constitutional Assembly. [Materials of the Constitutional Assembly.]) Tallinn 1997, p. 135; cf. also pp. 176, 179, 415 ff., 421 ff., 456 ff., 580, 812 ff., 843.

[10] Interpreted in this way, § 8 first paragraph of the Constitution comprises the principle of *ius sanguinis* as the opposite to ius soli and declares it for the constitutional principle of the Constitution.

[11] About immediate constitutional limits in the sense as used here, see: Alexy 1994, p. 258 ff.

[12] Q.v. the theoretical reasoning of this distinction: Alexy 1994, pp. 250 ff.

[13] Taking the distinction between a right and its limits seriously, the criterion of citizenship belongs to the limits of a right (Alexy 1994, p. 260.). That means that theoretically it is possible to construct the citizens' rights as rights of each and everyone restricting them through the exclusion of the non-citizens from the protection of such rights later.

[14] Literally: “state assembly”. Riigikogu is the parliament of the Republic of Estonia.

[15] Article 38 first sentence of the first paragraph of the German *Grundgesetz* has a similar structure constituting the electoral principles for the German *Bundestag*. These elections shall be general, direct, free, equal, and secret. This provision constitutes at the same time a basic right of individuals, since it can be according to Article 93 first paragraph No 4a of the *Grundgesetz* protected by the individual constitutional complaint. (Cf.: Pieroth 1995, mn. 1; himself/Schlink 1996, mn. 1118 ff.)

[16] If it is not possible to give any adequate definition of the concept of Estonian, there would be *de lege ferenda* two possibilities to solve this problem: either to abolish § 36 third paragraph of the Constitution or to define the concept of Estonian in the Constitution as e.g. the German *Grundgesetz* contains in Article 116 first paragraph a definition of the term "*Deutscher*" (German).

[17] About German discussion, q.v.: Dürig 1959/1977, mn. 13; Jarass 1995e, mn. 8.

[18] Dürig 1959/1977, mn. 16.

[19] In German: Grundrechtsmündigkeit. Cf.: to the German discussion: Dürig 1959/1977, mn. 16 ff.; v. Münch 1992, mn. 11 ff.; v. Mutius 1987, p. 272 ff.; Pieroth/Schlink 1996, mn. 134 ff.

[20] Q.v. above II A 1 b (1) (b).

[21] Decision of the Constitutional Review Chamber of the Estonian Supreme Court from 10 May 1996, RT I 1996, No 35, Art. 737.

[22] Decision of the Constitutional Review Chamber of the Estonian Supreme Court from 6 October 1997, RT I 1997, No 74, Art. 1268.

[23] Since according to § 27 third paragraph of the Constitution parents have the duty to raise and care for their children as well, the holders of this right are children too. This part of the right shall not be the object of the scrutiny here.

[24] BVerfGE (fn. 2) vol. 24, pp. 119 (150).

[25] BVerfGE (fn. 2) vol.19, pp. 323 (329).

[26] BVerfGE (fn. 2) vol. 79, pp. 51 (60).

[27] BVerfGE (fn. 2) vol. 10, pp. 302 (328).

[28] Article 6 first sentence of the second paragraph of the German *Grundgesetz*: "Care and upbringing of children are the natural rights of the parents and primarily their duty."

[29] BVerfGE (fn. 2) vol. 56, pp. 363 (383 ff.); vol. 79, pp. 203 (210); vol. 84, pp. 168 (179).

[30] About the problem of *Drittwirkung*, q.v. below: III C.

[31] In German discussion the predominant opinion is that there shall be no definite age limit for the exercise of basic rights. Cf.: Maunz/Zippelius 1994, p. 143; v. Münch 1992, mn. 12 ff.; v. Mutius 1987, p. 274; Pieroth/Schlink 1996, mn. 135; Stern 1988, p. 1065.

[32] Alexy 1994, p. 122 ff.

[33] This has been recognised in an *obiter dictum* of a decision of the Estonian Riigikohus. (Decision of the Constitutional Review Chamber of the Estonian Supreme Court from 6 October 1997, RT I 1997, No 74, Art. 1268.)

[34] Alexy 1994, p. 78 ff., 100 ff., 143 ff. Cf.: to the principle of proportionality in Estonian literature: Maruste 1997, p. 98; Merusk 1995, p. 32; himself 1997, p. 55; Narits 1998, p. 192.

[35] English translation in: Estonian Legislation in Translation, No 12, 1996. The title of the law has been translated into English as "General Principles of the Civil Code Act". This translation is misleading. It is recommendable to translate the Estonian title "*Tsiviilseadustiku üldosa seadus*" into English as "General Part Act of the Civil Code" because a Civil Code Act does not exist yet.

[36] Kirikute ja koguduste seadus. (Churches and Congregations Act.) RT I 1993, No 30, Art. 510.

[37] Section 60 second paragraph of the Constitution requires candidates to the Riigikogu to have attained the age of twenty-one years.

[38] Ernits 1996, p. 464 ff.

[39] Bleckmann 1988, pp. 57 ff.; Ipsen 1997, mn. 71; Jarass 1995b, mn. 27; Maunz/Zippelius 1994, p. 152; v. Münch 1992, mn. 62 ff.; Pieroth/Schlink 1996, mn. 142 ff.; Robbers 1985, pp. 925 ff.; Sachs 1985, p. 418 ff.; himself 1996, mn. 33 ff.; Stern 1994, p. 887 ff.

[40] Cf: Pieroth/Schlink 1996, mn. 146.

[41] The idea derives from Carl Schmitt 1985a, p. 149 ff.; 160 ff.

[42] Cf. Pieroth/Schlink 1996, mn. 146.

[43] Cf.: to a similar solution: Robbers 1985, p. 930; Stern 1994, p. 921 ff.

[44] Pieroth/Schlink 1996, mn. 148; Robbers 1985, p. 927; Sachs 1985, p. 419 ff.; Stern 1994, p. 911, 925.

[45] Pieroth/Schlink 1996, mn. 150; Stern 1994,p. 912 ff.

[46] Pieroth/Schlink 1996, mn. 148. Compare to similar attempts: Stern 1994, pp. 911 ff.; Robbers 1985, pp. 927 ff.

[47] Cf.: to the German discussion: Maunz 1960-1991, mn. 54.

[48] English translation in: Estonian Legislation in Translation, No 12, 1996.

[49] BVerfGE (fn. 2) vol. 39, p. 1 (41); vol. 88, pp. 203 (251 ff.).

[50] First: Dürig 1958a, mn. 24; himself 1958c, mn. 21 ff. Him following: Höfling 1996, mn. 49, 51; Hohm 1986, p. 3108; Jarass 1995d, mn. 46a; Kunig 1991, pp. 417 ff.; himself 1992b, mn. 47 ff.; Murswiek 1996, mn. 144 ff.; v. Mutius 1983, p. 32; Lorenz 1989, mn. 10; Rüfner 1992a, mn. 17; Stern 1988, pp. 1056 ff., 1063; Schnapp 1984, p. 1.

[51] Hoerster 1989, p. 172 ff.; himself 1991, p. 55 ff.; Ipsen 1997, mn. 213, 233, 239.

[52] Hoerster 1991, p. 55 ff.

[53] Hoerster 1991, p. 69 ff.; 88 ff.

[54] Hoerster 1991, p. 131 ff.

[55] In the German discussion explicitly: Rüfner 1992a, mn. 17 and fn. 30.

[56] The question whether unborn life shall according to the Constitution be protected at all against abortion is an open one. Perhaps there is no definite legal

answer at all but the law is just able to define the limits within which the question should be let for the parliamentary majority to decide.

[57] BVerfGE (fn. 2) vol. 30, p. 173 (194).

[58] Höfling 1996, mn. 54; Kunig 1992a, mn. 15.

[59]Maunz/Zippelius 1994, p. 143. Confusing: Rüfner 1992a, mn. 18.

[60] In this sense also: Narits 1998, p. 175.

[61] About the concept of legal person in general q.v.: Rittner 1987.

[62] English translation in: Estonian Legislation in Translation, No 4-6, 1996.

[63] English translation in: Estonian Legislation in Translation, No 4-5, 1997.

[64] English translation in: Estonian Legislation in Translation, No 4-5, 1997.

[65] Cf.: Jarass 1995e. mn. 14.

[66] Cf.: Krebs 1992, mn. 31; Schnapp 1984, pp. 4 ff.

[67] Cf.: v. Mutius 1983, p. 38.

[68] English translation in: Estonian Legislation in Translation, No 12, 1996.

[69] English translation in: Estonian Legislation in Translation, No 4-6, 1996.

[70] Cf.: to the concept of legal person of public law in general: Merusk 1996, pp. 174 ff.

[71] Dreier 1973, p. 85.

[72] Alexy 1991, p. 291 ff.

[73] Alexy 1991, p. 295 ff.

[74] Gierke 1902, p. 12 ff.

[75] Windscheid/Kipp 1906, p. 255 ff.

[76] Kelsen 1960, p. 193.

[77] Cf.: Kelsen 1960, p. 182.

[78] Isensee 1992b, mn. 10.

[79] Founded by Günter Dürig 1959/1977, mn. 1 ff. It has been also adopted by the German Federal Constitutional Court: BVerfGE (fn. 2) vol. 21, pp. 362 (369).

[80] Cf.: Rüfner 1992a, mn. 64.

[81] Kröger 1981, p. 29; Rüfner 1992a, mn. 64; Stern 1988, pp. 1114 ff, 1158 ff.

[82] Bettermann 1969, p. 1324.

[83] Similar result in the German discussion: BVerfGE (fn. 2) vol. 21, pp. 362 (369 ff.); vol. 68, pp. 193 (206); Dürig 1959/1977, mn. 37; Isensee 1992b, mn. 24 ff. (slightly confusing because of remark in mn. 3); Krebs 1992, mn. 40 ff.; Kröger 1981, p. 28 ff.; Rüfner 1992a, mn. 64 ff.

[84] Bettermann 1969, pp. 1324 ff.; v. Mutius 1983, p. 38 ff.; Pieroth/Schlink 1996, mn. 175 ff.

[85] v. Mutius 1983, p. 40.

[86] RT 1920, No 113/114. German translation in: Die Verfassung der Republik Estland, Reval: Estländische Verlagsgesellschaft Wold. Kentmann & Co., 1928; Das Grundgesetz des Freistaats Estland, ed. by: Eugen Maddison and Oskar Angelus, Berlin: Carl Heymanns Verlag, 1928.

[87] RT 1933, No 86, Art. 628. German translation in: Die Verfassung des Estländischen Freistaats, Reval: Verlag der Revalschen Verlagsgenossenschaft, 1933.

[88] RT 1937, No 71, Art. 590. German translation in: Die Verfassung der Republik Estland, Tallinn: Estländische Druckerei AG, 1937.

[89] Hidén 1996, p. 759 ff. Look also to the old text of the Finnish Constitution: Hidén/Saraviita 1994, p. 276; Hidén 1971, p. 49 ff.

[90] v. Mutius 1983, p. 40.

[91] v. Mutius 1983, p. 40.

[92] BVerfGE (fn. 2) vol. 21, pp. 362 (370).

[93] Bettermann 1969, p. 1323.

[94] Bettermann 1969, p. 1323.

[95] Cf.: BVerfGE (fn. 2) vol. 21, p. 362 (369 ff.); Dürig 1959/1977, mn. 36.

[96] Bettermann 1969, p. 1326.

[97] BVerfGE (fn. 2) vol. 21, p. 362 (368 ff.).

[98] BVerfGE (fn. 2) vol. 21, p. 362 (370 ff.); Ipsen 1997, mn. 53; Jarass 1995e, mn. 16.

[99] Dürig 1959/1977, mn. 39; Rüfner 1992a, mn. 69.

[100] BVerfGE (fn. 2) vol. 15, pp. 256 (262); vol. 31, pp. 314 (322); vol. 42, pp. 312 (321 ff.); Badura 1986, C mn. 13; Dürig 1959/1977, mn. 41 ff.; Hesse 1995, mn. 286; Ipsen 1997, mn. 54; Jarass 1995e, mn. 18; Krebs 1992, mn. 44; Kröger 1981, p. 29; Krüger 1996, mn. 86 ff.; Maunz/Zippelius 1994, p. 142; Pieroth/Schlink 1996, mn. 174; Rüfner 1992a, mn. 73 ff.; Stern 1988, p. 1151 ff.

[101] The corresponding provision of the German Constitution finds itself in art. 137 subarticle 1 of the Weimar Constitution (The Constitution of the German Reich from 11 August 1919) which is according to art. 140 of the German Grundgesetz a part of the latter one. This principle of separation of state and church in Germany is broken by art. 140 of the *Grundgesetz* in conjunction with art. 137 subarticle 5 of the Weimar Constitution which allow under certain circumstances religious societies of public law. As a consequence of this, the problem arises whether a church of public law may be a holder of the freedom of religion. A similar mechanism as in the present day Germany found itself in § 14 third paragraph of the Estonian Constitution from 1938 (RT 1937, No 71, Art. 590). Whereas the second sentence states the general principle that there shall be no state church, the first sentence made an exception allowing the legislator to put "bigger churches … on the basis of public law". In contrast to that the 1992 Constitution — like the 1920 Constitution (RT 1920, No 113/114) — does not contain any exceptions to the prohibition clause of the state church. Since under the 1920 Constitution it was a general consent that religious societies of public law would violate the principle of separation of state and church the author pleads for the same solution under the 1992 Constitution.

[102] The Churches and Congregations Act. (Kirikute ja koguduste seadus. RT I 1993, No 30, Art. 510) should be interpreted in this sense.

[103] In Estonian "*teadusasutused*".

[104] Cf.: Laaman 1937, pp. 352 fIf.

[105] Põhiseadus ja Põhiseaduse Assamblee (fn. 9), p. 137.

[106] The Estonian legal system differs therefore from the German one in that broadcasting corporations of public law are not holders of basic rights. Different view for the public broadcasting companies: Alexy 1997, § 9 I 2 b (4).

[107]Cf.: Narits 1998, p. 176.

[108] Cf.: Badura 1986, C mn. 12; Bettermann 1969, p. 1324; Dürig 1959/1977, mn. 32; Krebs 1992, mn. 34; Maunz/Zippelius 1994, p. 141; Pieroth/Schlink 1996, mn. 163 ff.; Rüfner 1992a, mn. 37 ff.

[109] Cf.: to the Estonian discussion: Merusk 1996, p. 175.

[110] Cf.: to the German discussion: Dürig 1959/1977, mn. 29; v. Mutius 1983, p. 37.

[111] Cf.: BVerfGE (fn. 2) vol. 7, p. 198.

[112] Alexy 1997, § 4 II 2 a (1).

[113] Alexy 1994, p. 407.

[114] Whether the law violating the basic rights is null and void from the beginning or shall be first declared invalid, is a further problem and shall not be discussed here.

[115] Cf.: Dürig 1958a, mn. 101; Höfling 1995, p. 434; himself 1996, mn. 83; Stern 1988, p. 1267 ff.

[116] The concept of transformation applied here corresponds to that of Scheinin 1996, p. 13.

[117] Compare to this general principle: Jarass 1995f, mn. 3.

[118] For the legislative function: Merusk 1995, p. 13.

[119] Cf. to the solution offered here: Höfling 1995, p. 434; himself 1996, mn. 84; Rüfner 1992b, mn. 16 ff.; Stern 1988, p. 1269 ff.

[120] Cf.: Dürig 1958a, mn. 107; Höfling 1995, p. 435; Kunig 1992a, mn. 60; Rüfner 1992b, mn. 19. Estonian administrative lawyer Kalle Merusk does not distinguish between government and administration. (Merusk 1995, p. 12.)

[121] Stern 1988, p. 1334.

[122] Cf.: to the Estonian discussion: Merusk 1995, p. 68.

[123] Cf.: Ehlers 1995, § 2 mn. 80.

[124] Maurer 1995, § 3 mn. 9.

[125] Maurer 1995, § 3 mn. 8.

[126] Maurer 1995, § 3 mn. 7.

[127] Maunz/Zippelius 1994, p. 137. Cf. also: Maurer 1995, § 3 mn. 9; Rüfner 1992b, mn. 41; Stern 1988, pp. 1401, 1415 ff.

[128] Cf.: Ehlers 1995, § 2 mn. 76; Hesse 1995, mn. 347 ff.; Höfling 1995, p. 435; himself 1996, mn. 94; Jarass 1995c, mn. 18; Maunz/Zippelius 1994, p. 137; Maurer 1995, § 3 mn. 9; Pieroth/Schlink 1996, mn. 207; Rüfner 1992b, mn. 43; Stern 1988, p. 1415 ff.

[129] BGHZ (the German Federal Court for Civil Cases) vol. 36, pp. 91 (95 ff.); Badura 1986, I mn. 112; similarly Maunz/Zippelius 1994, p. 137.

[130] Hesse 1995, mn. 347 ff.; Höfling 1995, p. 435 ff.; himself 1996, mn. 95 ff.; Jarass 1995c, mn. 18; Pieroth/Schlink 1996, mn. 207; Stern 1988, pp. 1412 ff., 1416 ff.

[131] Dürig 1958, mn. 119 ff. Him follow: Höfling 1995, p. 436; himself 1996, mn. 97; Kunig 1992a, mn. 62; Stern 1988, p. 1429.

[132] About the exceptional features of the boundness of the civil justice, q.v, below: III C.

[133] Cf.: Stern 1988, pp. 1336, 1339 ff.

[134] The Legal Chancellor e.g. has been classified as an organ of the executive power (Põhiseadus ja Põhiseaduse Assamblee [fn. 9], p. 208), or of the legislative power (Schneider 1995, p. 25). According to §§ 139, 142 of the Constitution he could be even considered as a special kind of first instance of the constitutional court.

[135] As the State Audit Office deals with financial audit of the administration according to § 133 of the Constitution, the encroachment of the basic rights of individuals is improbable. A practical problem could arise with the Legal Chancellor. According to § 139 of the Constitution the competence of the Legal Chancellor is to implement control over legislation. E.g. § 12 No 2 of the Constitutional Review Court Procedure Act (Põhiseaduslikkuse järelevalve kohtumenetluse seadus. RT I 1993, No 25, Art. 435). English translation published in: International Human Rights Norms in the Nordic and Baltic Countries, ed. by Martin Scheinin, The Hague, London and Boston: Martinus Nijhoff Publishers, 1996, pp. 63-69) forbids the Constitutional Review Chamber of the Estonian Supreme Court to grant leave to an individual constitutional complaint. At the same time according to § 15 first sentence of the first paragraph of the Constitution everyone whose rights and freedoms are violated has the right of recourse to the courts. It is at least doubtful whether § 12(2) of the Constitutional Review Court Procedure Act is constitutional because someone whose basic right has been violated has according to this provision no right to recourse to the constitutional court. Therefore, the Legal Chancellor should proceed according to § 142 of the Constitution, i.e. first propose to the Riigikogu to bring the law into conformity with the Constitution and then propose to the Supreme Court to declare it invalid. The crucial problem is that if the Legal Chancellor does not fulfil his duty and violates a basic right there are no remedies against it.

[136] Cf.: Maurer 1995, § 3 mn. 9.

[137] Compare to the private autonomy: Höfling 1991, p. 1 ff.

[138] About the history of the concept of Drittwirkung, see: Stern 1988, p. 1513.

[139] Alexy 1994, p. 480.

[140] Modified: BVerfGE (fn. 2) vol. 34, p. 269 ff.

[141] Nipperdey 1962, p. 17 ff.

[142] Nipperdey 1962, p. 24.

[143] Dürig 1956, p. 167 ff.; himself 1958, mn. 129. Compare to the private autonomy: Höfling 1991, pp. 1 ff.

[144] Böckenförde 1992, p. 272.

[145] Cf.: Canaris 1984, p. 206 ff.

[146] Dürig 1956, p. 176 ff. The German Federal Constitutional Court adopted this theory. (BverfGE [fn. 2]vol. 7, pp. 198 [203 ff.].)

[147] Cf.: Alexy 1994, pp. 410 ff.; Canaris 1984, p. 245; Rüfner 1992b, mn. 59, 61 ff.; Stern 1988, pp. 1565 ff.

[148] "X" will be used for everybody and "S" for the State.

[149] Then the case would get more complicated because the question arises whether individuals may have subjective rights against the omission of the legislator.

[150] Cf.: Alexy 1994, p. 484 ff.

[151] Dürig 1958, mn. 131.

[152] Alexy 1994, p. 484 ff.; Canaris 1984, p. 228 ff.; Höfling 1991, pp. 52 ff.; Isensee 1992a, mn. 5, 134 ff.; Jarass 1995a, p. 351 ff.; Eckart Klein 1989, p. 1639 ff.; Rüfner 1992b, mn. 60; Starck 1981, p. 244; Stern 1988, pp. 1560 ff., 1570, 1573 ff.

[153] Alexy 1994, p. 414; Erichsen 1997, p. 88 ff.; Isensee 1992a, mn. 183 ff.; Eckart Klein 1989, p. 1637; Hans H. Klein 1994, p. 493.

[154] See further: Alexy 1994, p. 174 ff.

[155] Alexy 1994, p. 78 ff., 100 ff., 143 ff.

[156] Alexy 1994, p. 483 with indication of further sources in footnote 48. German constitutional lawyer Christian Starck has already, 1981, indicated the possibility of equal consequences of the different constructions. (Starck 1981, p. 243.)

[157] Q.V. also: Maruste 1994, p. 242 ff.

[158] Alexy 1994, p. 490