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About the Meaning of the Legal Aspect of Practical Semantics in Estonian Legal Order

Legal Order Must Be Transparent

In many aspects, young legal orders develop and are developed on the basis of the already existing theory and practice of law. Therefore it is absolutely evident that Estonian legal order cannot be original in its content by any means. At the same time, no models can be found for the semantic form of this legal order. Nevertheless, it is *ius scriptum* and its language of manifestation that play a decisive role in the legal culture of Continental Europe. This role is decisive for the reason that rationalisation of a legal order begins and ends with the legislative process, on the one hand, and the realisation of law (laws), on the other. Both of those factual components of rationalising a legal order are interrelated. In today's rule of law, special importance is attributed to the aspect of law-realisation related to the public authority, namely the application of law, in which the adjudicative activity of courts can be distinguished. Thus, in the rule of law, special importance is borne not only by the opportunity of protecting one's interests (both in private and public law) by means of the regular way of law but by legitimate, *i.e*. equitable, protection of those interests by independent courts. For that reason, it has been justifiably noted in specialist literature that in everyday legal practice and the related theory of law, more and more thought is given to the question of how rationality in legal behaviour and decisions or in scientific cognition can be attained, given the transparency between social relationships, which complicates orientation in the legal reality. In reality, it can and must be understood that the bounds of rational orientation have already been reached, if not crossed, long ago. Hence the following question emerges: what are the presumptions and limits for rationality in law and jurisprudence being possible at all? Are there any *a priori* reasonable principles, structures or procedures which can be cognised by everybody? Is it right that these principles, structures or procedures transform even the pre-legal order into a legal obligation which must be met inevitably as a norm of correct behaviour? Or are we not dealing with nationally organised legal systems that provide evolutionary independence to the power of their normative autonomy and the positivity of the political and legal decisions (which should be understood here as the national order of human behaviour), protected by themselves, not

only with regard to religion but also to human mind and morals, and that nowadays have no normative institutional rationality?*[7]

About the Starting Positions of the Structuring Theory of Law

This article is aimed at regarding, from the author's viewpoint, one possible jurisprudential theory for rational understanding of legal order – the structuring theory of law. It is very important that cognition of a legal order should be based on the rules which could be designated as "laws of jurisprudence". Naturally, this does not mean legislation within the concept of objective law. Rather, these laws can be referred to as certain regularities, ignorance of which would, however, either impossibilitate or substantially complicate the legal process of decision-making, both in law-making (as the so-called decisional function is contained in law itself*[8]) or the practical legal process of making decisions (the application of law).

In recent years, a conception involving cooperation between linguists and jurists has emerged in the discussion of jurisprudential methodology. This constitutes an interdisciplinary approach to motivation of legal decision-making and involves, on the one hand, "practical semantics" and researchers thereof*[9], and on the other hand, representatives of the so-called structuring theory of law.*[10] In specialist literature, the structuring theory of law has also been referred to as the Müller school.*[11] The role of language and linguistic arguments in the discussion and practice of legal working methods serves as a connective principle in such interdisciplinary approach (cooperation).

Practical semantics deals with the rules of language underlying the behaviour of those who participate in linguistic communication. Those rules cannot exist by themselves, extrabehaviourally. Practical semantics disagrees with the thesis of realistic semantics that the meaning of a legal norm can be objectively and unambiguously derived from the formulation of the norm. Understanding (cognition) of a legal norm is not determined by the formulation of the norm. The meaning of the formulation is determined in the interpretation practice and must be determined by the applier of law, because that applier is under the obligation to decide. Since the criteria of whether legal norms are complied with or not are established by the practice that has developed in a rule-of-law society, a departure from or nonadherence to that practice by the applier of law will change the content of the legal norm and constitute the creation of a new rule.*[12]

It must be noted that a rule and the formulation of the rule are two different entities. A legal norm is more than barely a text. In deciding about the meaning and content of a legal norm, legal practice must be taken into account.*[13] It was stressed already by Wittgenstein that words and sentences acquire specific meanings in the context of their application (the language game). The process of constituting a legal norm, *e.g.* the determination of the meaning of the formulation and the norm-texts themselves, are all parts of the single application practice.*[14] In addition, practical semanticists draw a distinction between interpretation and

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7 About the boundaries of rational orientation within law in connection with advancement of theories in law, see W. Krawietz. Vernunft versus Rationalität des Rechts. Zur Theoriebildung in der Rechtswissenschaft. In: Staat und Recht. H. Haller, C. Kopetzki, R. Novak, S. L. Paulson, B. Raschauer, G. Ress, E. Wiederin (Hrsg.). Wien-N.Y.: Springer, p. 1515.

8 See A. Aarnio. Laintulkinnan teoria. Porvoo-Helsinki-Juva: Werner Söderström Osakeyhtiö, 1988, pp. 62 *et seq*.

9 *E.g.* D. Busse. Normtextauslegung als Regelfeststellung? Zur Rolle von Wittgensteins Regelbegriff für die juristische Methodenlehre. In: O. Weinberger, P. Koller, A. Schramm (Hrsg.). Philosophie des Rechts, der Politik und der Gesellschaft. Akten des 12. Internationalen Wittgenstein Symposiums. Wien, 1998, pp. 207–210; R. Wimmer, R. Christensen. Praktisch-semantische Probleme zwischen Linguistik und Rechtstheorie. In: Fr. Müller. Untersuchungen zur Rechtslinguistik. Berlin, 1989, pp. 27–46.

10 *E.g.* Fr. Müller. Arbeitsmethoden des Verfassungsrecht. In: Seminar: Die juristische Methode im Staatsrecht. Suhrkamp, 1977, pp. 508–553; Fr. Müller. Strukturierende Rechtslehre. 1. Aufl., Berlin: D&H, 1984; 2. Aufl., D&H, Berlin, 1994; B. Jeand' Heur. Gemeinsame Probleme der Sprach- und Rechtswissenschaft aus der Sicht der Strukturierenden Rechtslehre. In: Fr. Müller. Untersuchungen zur Rechtslinguistik. Berlin: D&H, 1989, pp. 17–27.

11 M. Herbert. Rechtstheorie als Sprachkritik. 1. Aufl., Baden-Baden: Nomos Verl. Ges., 1995, p. 203.

12 See D. Busse. Zum Regel-Charakter von Normtextbedeutungen und Rechtsnormen. – Rechtstheorie 19/1988, pp. 310–311.

13 It must be added that such approach is not unfamiliar to legal practicians. During the past four years I have been providing supplementary training for Estonian administrative judges. At one seminar, I posed the question of what would be more needed by administrative judges as legal practicians and, with a view to legal decision-making, top-level decision-makers: either a "good" Act or a resolution of the Supreme Court in an analogous question. Nobody doubted in the necessity (*i.e*. usefulness) of a decision rendered by the Supreme Court (which is of the highest instance in the Republic of Estonia).

14 D. Busse (Note 6), pp. 319–321.

development of law. In summary it can be said that practical semantics regards the structuring theory as one conforming to the rule-concept conception of Wittgenstein in the study of legal methodology.*15 M. Herbert has characterised the structuring theory of law as a post-positivistic theory of legal methodology which disagrees with the traditional positivist approach, whereunder the applier of law gives preference to the legal norm (a norm may represent the objectified will of the legislator – the objective interpretation theory; a legal norm may contain the will of a historical legislator – the subjective interpretation theory).*16

Legal Work is Work with Legal Texts

The opinion that "... academic methodology provides a judge with neither assistance nor chances of verification"*17 has been expressed in specialist literature. In some aspects, however, the reason therefor is inherent in the practice itself. More exactly, the methodology of judges' work is narrow-scoped.*18 For example, a recent analysis of adjudications of the Estonian Supreme Court demonstrated that the systematic interpretation method had been one of the most extensively used while the legal historical approach had been practically unexploited. However, literary (linguistic) considerations are not out of place, and with a certain reason. Namely, legal practice is established more on argumentation and interpretation rules selected on the basis of pragmatic considerations rather than doctrinal methods.*19 All this implies that the problem of understanding legal text is not at all primary in a judge's practice. Therefore, legal practice cannot be assisted by one or other of the methodological concepts. At the same time, it is important to bring together the conditions (positions) of the theory and practice of decision-making. Figuratively, this would mean the preparation and development of theoretical bases for practical legal work.

On the other hand, there may be situations in which the main attention is focused on the text itself. For example, a draft Act entitled the "Act on ensuring the Intelligibility of Acts"*20 was introduced to the *Riigikogu* (Estonian parliament). Subsection 1 (1) ("Concept of intelligibility of an Act") thereof provides that an Act is deemed intelligible if its meaning can be understood, after necessary penetration, by a person with at least elementary education who is fluent in Estonian and who is not a specialist of law-making, jurisprudence or the specific field concerned by the Act. The following provisions relate the expression of the meaning of a law with the entry into force of the law in an explicit and unambiguous description of changes occurring in the legally regulated living mode of the society. However, a derogation is made with regard to terminologies of any specific field, which does not cover the concept of the intelligibility of Acts.

Apparently it must be admitted that the objective of the above-referred bill is rational in every way. It is, however, doubtful whether the intelligibility of legal language can be improved by means of legislation.*21 The problem lies in the fact that everyday language as a sign system used for understanding each other is, like the legal system, a complicated phenomenon. An intertwinement of those two complex systems can only result in new problems. And moreover, the complexity of legal language means more than only terminological matters.

Thus the already mentioned preparation and development of theoretical bases for practical legal work still have and will have their specific place. Problems of decisional theory and legal practice would then include the problems of norm and (legal) facts; the question the structure and normativity of norms; the question

15 In his works, Fr. Müller has used the term "Juristische Methodik" (legal methodology). See Fr. Müller. Juristische Methodik. 6. Aufl., Berlin: D&H, 1995.

16 M. Herbert, pp. 207–208.

17 J. Esser. Vorverständnis und Methodenwahl der Rechtssprechung. Rationalitätsgarantien der richterlichen Entscheidungspraxis. Frankfurt am Main: Athenäum Fischer Taschenbuch, 1970, p. 7.

18 J. Berkemann, H. Rüssmann (Hrsg.). Generalisierung und Individualisierung im Rechtsdenken. – ARSP Beiheft NF, 1992, No. 45, p. 8.

19 At the same time it is obvious that, for example, with regard to value requirements expected from law, it does not matter whether positive law establishes a left- or right-hand system of traffic. A judge assessing a traffic case would apparently not even think about the good or bad nature of the right-hand system of traffic used in Estonia. Similarly, it would be unreasonable to doubt in a traffic participant's value acceptance with regard to right-hand traffic.

20 Draft Act 253 SE II. It should be added that the problem of the intelligibility of legal language is topical not only in the so-called young democracies. For example, the author of this article knows about a campaign for "translating official documentation into the human language", which was launched in 1999 in the United States.

21 K. Floren, jurist, has commented on that draft as follows: "The unintelligibility of laws is but the most apparent part of the general officialese. Hopefully the drafters understand that the intelligibility of the language used in the official sphere, including the language of law, cannot be improved by a bare Act. Such pursuits resemble an order to start living well." – K. Floren. Kantseliiti ei hävita seadus, vaid toimetajad (Officialese is not Eradicated by Laws but Rather by Editors). – Eesti Päevaleht, 10 January 2000.

of overall boundedness to law, of what the judge is bound to and of how that boundedness will be realised by the judge.

The examination of those questions will be of practical relevance when legal methodology can overcome the understanding that it offers only value-free solutions to the decision-maker. In connection with the structuring theory of law, these problems have been under examination for more than 30 years.*[22] By today, the designation has acquired a conceptual character, particularly in the dogmatics of constitutional and administrative law but also in the theory of law as a whole.

At the same time, the structuring theory of law has not everywhere elicited extensive response. That is the case in German legal order, for example.*[23] To the knowledge of the author of this article, problems of the structuring theory of law have not met with thorough regard, in connection with the theory of law and Estonian legal order, in Estonia, either.

The basic problem in the structuring theory of law is still that concerning the nature of the actual (functioning) legal order. Attention thereto has repeatedly been invited in specialist literature.*[24] The problem lies in the very question of what is (should be) done by the subject who is making a legal decision (eliciting legal consequences into reality) when that subject subsumes objective law (*ius scriptum*) with regard to a case. In this point, rather laconic explanations have been offered by the legal positivist approach. It is the separation of the norm and the fact, distinguishment between law and reality as based on something therein – in the form as it has been rendered to the decision-maker – that provides the decision-maker with an understanding of the norm itself. Thus, normativity arises statically out of the case and, at the same time, the immediate content of legal text. And thus, legal work with a case that needs to be decided is principally reduced to the application of (an existing) legal norm. *Ius scriptum* is interpreted and, in best cases, concretised. In this approach, there are no problems with boundedness to law or reality or the constitutional requirement of boundedness to law.*[25] In positivistic terms, an act has no power over the legal norm. The norm regulates a case immediately, it need not be changed. The norm can be subsumed directly, a law worker (decision-maker) is bound by the content of the norm. A large part of the legal rules serve as both behavioural norms for citizens and decisional norms for courts and authorities.*[26] At the same time, it has been universally recognised that decision-making can never be as simple as bare deduction of a specific decision from the provided legal norm. In other words, norms provided by the state legislator are by no means pre-fabricated ready-to-use products.*[27]

When we look at the administration of justice, another important (differentiated) structure of concretisation can be seen. Namely, the decision-making process embraces even those real-life facts that cannot be directly related to legal text, *i.e.* a legal norm. These facts become so-to-say codecisive components in the concretisation of law. However, they cannot be discussed very concretely, as courts change their rules in that respect on a case-by-case basis, behaving pragmatically. That way of action is necessary but theoretically, it represents a nonreflectory sign of the judge's activities in concretising the law. In this point, importance is borne by the empirical truth that such "enrichment" of the norm-text exists irrespective of whether it precedes the decision or the decision has been integrated into the motivation. This constitutes a linguistic bond between the language and factual data. That, and not only the norm-text*[28] is, for the structuring theory of law, the first normative phase in the concretisation of a legal norm. Hence, from the viewpoint of the structuring theory of law, the text of a norm is not normative in itself. In principle, this applies to all legal texts. For the structuring theory of law, the scope of a norm (legal facts/real-life aspects), which will then be selected from the scope of the case on the basis of the normative underlying principle (the norm-programme), are important for making a decision. This means that the decision-maker must reach

22 Fr. Müller. Normstruktur und Normativität. Zum Verhältnis von Recht und Wirklichkeit in der juristischen Hermeneutik, entwickelt an Fragen der Verfassungsinterpretation. Berlin: D&H, 1966; Fr. Müller. Strukturierende Rechtslehre (Note 4); Fr. Müller (Note 9).

23 Fr. Landeklos. Rechtsarbeit ist Textarbeit. – Kritische Justiz. 1997, p. 143.

24 See *e.g.* Fr. Müller. Recht – Sprache – Gewalt. Elemente einer Verfassugnstheorie. Berlin: D&H, 1975, p. 18.

25 Section 146 of the Constitution of the Republic of Estonia.

26 H. L. A. Hart. Concept of Law. Oxford, 1961, pp. 94 *et seq*. There, norms are classified into "primary rules" and "secondary rules".

27 See P. Werner. Die Normentheorie Helmut Schelskys als Form eines Neuen Institutionalismus. Berlin: D&H, 1995, p. 102; W. Krawietz. Verhältnis von Macht und Recht in staatlich organisierten Rechtssystemen. In: P. Hofmann, U. Mayer-Cordig, H. Wiedemann (Hrsg.). Festschrift für Klemens Pleyer zum 65. Geburtstag. Köln, Berlin, Bonn, München, 1986, pp. 217–235.

28 Legal language as used by jurists (lawyers) is not homogeneous. Thus, the language of norms, the language of enforcement acts (including court judgements), the law of jurisprudence can be distinguished. The latter is sometimes also referred to as the dogmatic language (see A. Podlech. Die juristische Fachsprache und die Umgangssprache. In: Fachsprache – Umgangssprache. Scriptor Verlag Kronberg /Ts, 1975, p. 161).

a situation in which the legal norm, as found and formed by the decision-maker, includes the norm-programme as well as the scope of the norm. Such text is potentially normative. The result of such work is expressed in the decisional norm. Observation of such legal work provides a picture which is substantially different from legal work carried out on the basis of legal positivism.

A legal norm is not found as the text of a law, the applier of law must "determine" the legal norm.*[29] Non-normative norm-texts and potentially normative legal norms must be kept separate from each other (in positivism, they are united). For the purposes of the structuring theory of law, it is important to stress that there are two matters: that which already exists and that which must be attained by the law worker. For that reason, there is, besides the work with legal text (the interpretation), also the selection (analysis of the scope of the norm) of circumstances which are normatively directed by means of the norm (programme) and which assist to making the decision and, in the final stage, the determination of the norm. Hence, for the structuring theory of law, a legal norm is like an "order model coined by circumstances" (*sachgeprägtes Ordnungsmodell*).*[30]

While only non-normative text of a norm exists in the beginning of the decision-making process and the normative legal norm is yet to be determined by the law worker, the static model of normativity must principally be replaced by a dynamic one, in order to provide an adequate description of how legal work functions in reality.

In methodological terms, this means that the positivist doctrine of subsumption is not able to offer, from the viewpoint of the rule of law, an adequate description of the phases of examining legal text and the selection of circumstances necessary for rendering a decision. A reduction of the decision-making to the logical scheme of subsumption (with a view to a syllogism) leaves a whole range of decisive stages latent.

Now we can ask whether such approach is of any practical assistance to legal practicians. Can such jurisprudential methodology be regarded as a structural model for concretisation of law?

It seems that an answer should be of a positive rather than negative character. In connection with the structuring theory of law, legal methodology is given the task of supplementing the process of concretising legal norms with one structural model of concretisation – the structural analysis.

The starting point is comprised by learning about the factual circumstances of the case (what actually happened) and by hypotheses put forth by the practician regarding the norm-text. This naturally includes, first of all, the so-called *canones* developed by jurisprudence. Thus the structuring theory of law is not characterised by a teleological approach only. Regardless of the application of *canones*, the question will always remain in the meaning and objective of concretising the norm-text, besides the work that must be done with other elements of concretisation.

Grounds for interpreting a norm-text by all those means which are known and recognised in the methodology are provided by the norm-programme. A practical decision-maker takes a decision about the scope of the norm (norm-area) by means of the norm-programme. The scope of a norm and the norm-programme provide the norm, under which subsumptions can be made. In that manner, a decisional norm can eventually be individualised.

On that basis, one of the most fundamental conclusions would be that in a democratic rule of law, the "factual normativity" should not arise even from the state's constitution. It is the task of the judge, who is bound by law, to find a lawful (normative) resolution by means of the decisional norm.

It has been stated in specialist literature that facts by themselves, without being verified, cannot be a part of that decisional norm in any manner. On the contrary, they are verified doubly in the analysis of the scope of the norm.*[31] It must first be asked whether the facts are relevant to the norm-programme. Secondly, are they compatible (with a view to the case) with the norm-programme? Otherwise they would be nothing more than facts and be omitted from the further decision-making process. On the other hand, if they are

29 It seems that the designation "to determine" justifies itself. The problem is in the fact that the object of regard is constituted by jurisprudence, as one immanent part of the law of science, which attempts to embrace the normative aspect of law, whereas this means the normative applicability of the norms of positive law. Hence, let us understand jurisprudence as the science of norms, which does not, however, imply that jurisprudence itself establishes norms (within the meaning of formal establishment of legal norms). On the contrary, "the science of norms" should be understood here as a system of notations about the applicable law. Thus jurisprudence deals with the problems of the normative applicability of objective law. K. Larenz. Methodenlehre der Rechtswissenschaft. Zweite, neu bearb. Aufl., Berlin: Springer, u.a. 1992, pp. 83 *et seq.*; R. Narits. Õigusteaduse metodoloogia (Methodology of the Science of Law). Tallinn: Õigusteabe AS Juura, 1997, pp. 32 *et seq.*

30 Fr. Müller (Note 4), p. 231.

31 Fr. Müller. Juristische Methodik. Ein Gespräch im Umkreis der Rechtstheorie. – Verwaltungsrundschau, 1994, 4, pp. 135–136.

compatible, they will fall within the scope of the norm and be a constituent part in decision-making. The structuring theory of law offers a differentiated answer even to the much-discussed question of the hierarchy of the elements of concretisation. This does not concern the determination of abstract conclusions belonging to a certain hierarchy but rather the ascertainment of a situation in which a rule for reaching a conclusion can be applied after all.

Practice has shown that not only elements of concretisation are used in deciding about a case. That is so for a specific objective reason. Namely, the process of concretisation is principally very extensive and it would be very problematic to have regard to all relevant methodical elements.

However, the question of hierarchy is topical when the use of different specific elements leads to different variants of meaning. In this point, the so-called preferred rules (rules that must be preferred) should be considered in order to avoid "cadi-justice". But what should serve as a basis with regard to preferred rules? The hierarchy of specific rules is generally oriented towards the proximity of each specific element to the norm-text. The closer a specific element is to the norm-text, the more preference must be given to that element. As stated in literature: "Without doubt, partial results of grammatical and systematic interpretation are more preferable. In terms of preferred rules, notations of the historical and genetic aspects have no decisive meaning, as neither is based on the interpretation of the norm-text."*[32]

The determination of limits for permissible specific results is one of the most problematic situations. The structuring theory of law tries, first of all, to construct the preferred rules so as to provide those rules with a perceptible connection with law itself. Such situation, however, also means that rules which are "close to law" are not insomuch provided with omnilateral methodological motivations. A preferred rule must, above all, be legally permissible, and at the same time methodologically possible. The same applies to the boundaries of the meanings of words.*[33] The interpretation of any text must begin with knowledge about the meanings of words. By this we understand the meaning of an expression or interrelated words within the general usage or, if it is ascertainable with regard to the case, special usage, *i.e*. usage in the specific law.

The requirement that a decision must be compatible with the meaning of words is, in principle, normative and of a constitutional-law character. Judges must legitimatise their decisions by means of the text of norms enacted not by them but by the legislator.

Whether a possible meaning of a word can alone and directly demonstrate the limits of concretisation permissible under a rule of law is, however, an utterly different question.

Legal reality has shown that the interpretation of the norm-text in deciding about a case is necessitated by the sporadically indeterminable nature of law, or rather, legal texts. In many cases, the norm-text in its "pure form" does not elucidate the normative meanings of words. Legal texts are often either of a "loose-knit" nature or even "weak".*[34] In order to illustrate a so-called loose-knit case of semantic indeterminability, I should like to bring the example of § 3 of the Food Act*[35], which attempts to unfold the content of concepts used in the Act. One such concept is "handling", defined as market-oriented gathering, catching, hunting, growing, rearing, production or manufacture, processing, packaging, preservation, storage, loading, transport, export and import and sale or transfer, in some other manner (gifts, humanitarian aid, etc.), of food to another handler. The legislator has failed to fully elucidate the meaning of "handling". Moreover, the problem of "weak" concepts is particularly topical in Estonian legal order. Namely, legal regulation is needed in a range of fields for which even vernacular designations may be inexistent. There may also be situations in which the semantic boundaries of concepts used in legal text are unknown and even if they are known, the applier of law is not confident about a binding meaning.

It is in those cases that the one-sidedness (metaphysicality) of the positivist doctrine becomes perceptible. The meaning of law cannot be reached by a bare reference to the text of a norm. The legislator has had a notion about language and tried, by means of applying that notion, to relate the semantic form of the norm to a certain part of reality. Thus an essential conception of a norm cannot be perceived without applying the syntax and semantics of the norm-text in the same manner as this was done by the legislator. Further, the so-called systematic context must be kept in mind. One should have a look at other legislative materials (historical interpretation) and know the respective dogmatics (dogmatic concretisation), etc.

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32 Fr. Müller (Note 9), p. 253.

33 K. Larenz. Methodenlehre der Rechtswissenschaft. 2. Aufl., Berlin: 1991, pp. 208–218.

34 R. Narits. The Role of Language Cognition in Legal Method. – Juridica International. Law Review. University of Tartu, II, 1997, pp. 14–25.

35 Toiduseadus (Food Act) – Riigi Teataja (the State Gazette) I 1995, 21, 324.

In addition it must be said that even such legislative materials themselves need to be interpreted, because they are a part of the parliamentary legislative process but do not directly belong in the final result, *i.e*. the law. Therefore, the elucidation of the boundaries of the meanings of words in reality is nothing else than a concretisation of the norm-text by means of relevant and thorough study of linguistic data. Nevertheless, it can be asserted that such work practically results in the norm-programme.

Thus (the methodology of) the structuring theory of law offers not only "... the polar dualism of existence/obligation, norm/case, norm/reality, a notion about the application of law as a subsumption and syllogism, which is constituted by the concretisation of a norm (which is already contained in the law) as well as by the approval of other means of jurisprudence, but it also offers a conception regarding the boundaries of the meanings of words, where norm-texts acquire their provided specifiable force through language...".*36

A jurist/practician/decision-maker of the legal methodology that has been developed within the bounds of the structuring theory of law offers an option to provide critical reflections on his or her work and, with a view to the tasks of a democratic rule of law, to structuralise his or her work. The eyes and mind of a decision-maker do not move only between the norm and the facts of the case. A practician will not remain barely a passive party ("a talking text of the norm") but rather produce texts (the norm-programme, the legal norm and the decisional norm) on the basis of the non-normative, although binding, text of objective law.

A thorough examination of the described methods of work (production of text within one legal methodology) is a requisite for such exactitude which is necessary for the state, who establishes its legitimacy on a general and formalised (linguistically imparted) constitutional power. With a view to the Estonian situation and developments it must be said that in recent years Estonian society – in particular jurists – has begun to show interest in the question of the relationship between the textual provision and the meaning of law. The same problem has already attracted the attention of European legal culture for decades. However, we should not forget the situation from which we (Estonian society) originate and the amount of time that has been available in Estonia for creating and implementing a modern legal order.*37

Language Cognition and Democracy are Interrelated

The structuring theory of law has been criticised particularly from the aspect of democracy. Namely, that theory says that practical decision-making with regard to law and reality and the communication are transferred from law itself to the concretisation of law, and therefore the democratic legality of legalness rests no more with the legislation but is rather determined by means of legal methodology.

That criticism implies that it would be possible to win back a piece of "lost land" to the legislator by constructing the theory of legal norms. At the same time, however, the theory does not describe that "good" theory of legal norms.

It seems that this can only lead to a positive conception of legal methodology. If methodology were reduced to the principle that the text has a meaning *per se*, questions would arise about how the preconception constructs itself, about the role then played by real-life circumstances and about when they are relevant. A situation of certain uncontrolledness would arise. But first of all, if legal work were reduced only to understanding the text, there would be a lack of a bearing methodological conception about the selection of real data.*38

36 Fr. Müller (Note 9), p. 297.

37 In this point, I have mentioned only one aspect of the problem. Namely, the question cannot be nowadays reduced to the framework of only a national legal order. European Community law has already been created in converging Europe. For Estonia, this means that our national legal order must be shaped in good accordance with the legal order of the European Union. That must be done in order to make ourselves understandable. For example, Prof. U. Mereste, Member of the Estonian parliament (the *Riigikogu*) has written with regard to contract law: "It is natural that Estonian contract law should be shaped in good accordance with the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Commercial Contracts (PICC) and the UN Convention on the International Sale of Goods (CISG) of 1980, which has also been ratified by the *Riigikogu*". – U. Mereste. Missugune peaks olema Eesti eraõiguse süsteem? (What Should the Estonian System of Private Law Be Like?). – Riigikogu Toimetised, 2000, No. 1, p. 117.

38 See the criticism by I. Maus. Zur Problematik des Rationalitäts- und Rechtsstaatspostulats in der gegenwärtigen juristischen Methodik am Beispiel Friedrich Müllers. In: Abendrocht, Blanke, Preuß u.a. Ordnungsmacht? Frankfurt am Main, 1981; P. Röme. Kleine Bitte um ein wenig Positivismus. Thesen zur neueren Methodendiskussion. In: Abendrocht, Blanke, Preuß u.a. Der Kampf um das Grundgesetz über die politische Bedeutung der Verfassungsinterpretation. Frankfurt am Main, 1977.

It is true that involvement of real-life circumstances as an interim result of concretisation has been designated as a "legal norm" in the structuring theory of law. The verification scale is a norm-programme, created as a result of interpreting linguistic data. Initially, no real data has been entered in the norm-programme and therefore we cannot say that such a situation incorporates the very object of verification. The selection of real data as belonging to the norm-area, with prior formulation of linguistic data, results in the norm-programme.*[39] This method, which is normatively controlled in a certain sense and at the same time an independent stage of concretisation, manages to attain, to the contrary of the critics' views, something that is not a shortcoming of the structuring conception.

It may be added that the structuring theory of law does not limit itself to only designating that which has been found by its means. On the contrary, the work of norm construction represents a reflection on legal cognition based on real processes. In only this manner it becomes apparent that normativity is not a characteristic attributable only to norm-texts and that the structure of a norm does not mean too much, although it is the structure of the norm that can be found relatively easily. The conception of the decisional norm leads to the structure of the norm. This is not provided tangibly but is "... only a scientific interpretation model for the functioning and realisation of legal rules."*[40] Thus it is important to know that the process of concretisation of law is not comprised of something single and monolithic. The theory of legal norms must be able to see the multifaceted process of concretisation of laws with a view to its various stages, analyse those stages and, naturally, propose a theoretical model based on all of this. This also includes the task of identifying and describing connections between different stages and to determine the importance of interim results from one stage to another. And this is the point when constitutional fundamental norms and, additionally, the "laws" of jurisprudence become involved. By means thereof, single stages of concretisation can be structuralised and the connection between the stages can be seen. In this manner it is possible to demonstrate that the superiority of linguistic over real data and the analysis of the scope of a norm are a direct factual outcome based on normative requirements of law. Thus, the structuring theory of law and the norm model based thereon do not "bless" the superiority of the somewhat doubtful practice. However, the legal practice is taken into account.

In connection with the law-boundedness of judges, obliged by the rule of law, it is required under the principle of democracy that legal practicians, who are able to do that, should found (develop, tie) their decisions on democratically legitimatised legislation. Hence the matter is not about offering to the legislator an opportunity to reconquer some "lost land" by means of a jurisprudential conception. After all, the "lost land" can only be reconquered for the legislator by the legislator itself. For that purpose, the legislator producing legislative acts must have a keen view of the legal practice.

It is equally natural that the legislator can influence a judge's decision but not only by means of the text of a law. At the same time, it is the legal text that has a decisive role in moulding the decision, being, for any practician, the initial point of a legal solution (to the largest possible extent – according to one of the fundamental principles of the rule of law, namely the boundedness of public authorities primarily to the laws).

But is everything described until this point possible, or rather, real, after all? Yes, it is, if the text really serves as a starting point and if it is regarded seriously rather than "bent" from the very beginning.

Everything described can also be not possible. This would happen if a judge deciding about a specific case regards the text of a legislative act as one that is directly binding.

A bare norm-text is non-normative in the light of the structuring conception and, as such, it cannot have a binding regulatory effect on a specific case. The exploitation of different elements of concretisation helps to clarify the normativity of a text. For example, an element of dogmatic concretisation may be of such value to the understanding of a legal norm that the case may be even resolved thereunder. However, even such situations do not mean any special definedness (as a characteristic) of the norm-text, but rather imply the possibility of such definition. The theoretical source situation remains unchanged: all norm-texts are, in themselves – *i.e.* without context, etc. – equally undefined (within the meaning of "nonbinding"). However, language is language and in any case, practicians must continue their work with it. Thus, this is not a semantically idealistic (process of) definition but a rational activity, in which language cognition and cognition of facts meet.

39 Fr. Müller (Note 9), p. 252.

40 *Ibid*., pp. 138–139.

The structuring theory of law is also applicable to the cases of the so-called undefined legal concepts occurring in legal text. At the same time, it is true that, as stated in literature, "even methodologically correct attempts to interpret some legal rule are, every now and then, based on different interpretations. Particularly in the case of general clauses and undefined legal concepts, the administration of justice and the administration have some free space in interpretation and application, as they must meet the requirement of boundedness to the fundamental rights only constitutionally."*[41]

The structuring theory of law demonstrates how communication functions. And at the same time, the structuring theory manages to clearly demonstrate what fails to function: it is the boundedness of a legal practician to bare characters in legal text. No text alone can rule over decisions. On the contrary, an applier of law rules over the text and renders it ripe for decision-making. The legislator must express its principal notions in a norm (text), but cannot determine the meaning of that norm for a specific situation. On the other hand, it is required under the principle of democracy and the principle of the separation of powers that the legislator be provided with the "targets" of solutions (decisions). That paradox, a wish to bind legal practicians – without a respective norm existing for actual binding – demonstrates the importance of legal methodology particularly in a rule of law.

A state where the "power" of law and universal equality before the law are ensured – which actually is the task of the state – must create a situation in which law (justice) is not only positioned on the level of an abstract law but rather, justice must be actualised in the specific process of the application of law. Legal methodology creates, for practice, a working environment oriented towards resolving tasks of a rule of law, and the legislator has already left that working environment by issuing the norm-text. I have stressed that with Prof. Kalle Merusk in the monograph dedicated to Estonian constitutional law.*[42] Namely, in Estonia, the legislator has not identified a law (as an act of legislation) with (objective) law. In rendering decisions which are accordant with law, the court must first find the case-norm (the most relevant norm of objective law, given the case) and thereafter begin to find the decisional norm (which is in accordance with law).

Hence, the task of legal methodology is to develop the working techniques which enable to practically unite the forms of democracy, politics and the activities of judges in a rule of law. Legal text, being the result of a democratic legal policy, can fulfil its function only in a situation in which legal work has been cast in a mould which principally conforms to the rule of law.

Finally, I should like to mention that the discussed subject-matter falls beyond the framework of legal methodology and is directly related to the process of realising the idea of the rule of law. More exactly, that part of legal methodology which can be designated as the structuring theory of law is an immanent component or means of the reality in a rule of law.

41 B. Pieroth, B. Schink. Grundrechte. Staatsrecht. II. 12, überarb. Aufl., Heidelberg: C. F. Müller Verlag, 1996, p. 25.

42 R. Narits, K. Merusk. Constitutional Law. Estonia. The Hague, London, Boston: Kluwer Law International, 1999, pp. 64–65.