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Legal Integration and Reforms – Innovation and Traditions

The goal of European legal integration is common civil law that would eliminate discrepancies between legal systems and ensure a common legal culture throughout Europe. Both international organisations and national legislative drafters have extended and intensified their activities in the name of bringing legal cultures closer together. International organisations have a growing impact on national law, as assimilation and adjustment of their developments to national law undoubtedly requires certain efforts from every legal order. Amendments to the codified legal sources of civil law in Europe also have their impact. Research into the laws of other countries and their use in the development of national laws have become unavoidable in performing the different tasks of unification.*[1]

Since regaining its independence, Estonia has had to rewrite its entire civil law. Legal political decisions have been made concerning which legal systems are suitable to serve as models in the preparation of laws. "Loans" from other countries are the most common method of legal exchange and unification of legal regulation. Legal systems have had and will have mutual effects through different channels. The loaning of an entire codification from another country can have a particularly large impact on the legal system.*[2] In the development of its own legal system, Estonia has borrowed ideas and regulations from several countries. The choices have been largely technical, without consideration to the social background. Regard was given to the available court practice of the respective countries and the actual application of various provisions.

Integration-orientated changes in the legal system imply legal reforms for Estonia. Reform means reconstruction, improvement of the bad or wrong, correction.*[3] In making improvements, account was taken of the effective laws of Western Europe as well as new ideas and theoretical solutions that have not been reflected in the legislation of any country. Parts of these are certainly innovative for the whole European civil law. However, the majority of changes are innovative only for Estonia's own civil law.*[4] No significant attention has been paid to issues such as the social consequences of innovation and its impact on the

1 *See* G.-R. de Groot. European Education in the 21st Century. The common law of Europe and the future of legal education. Ed. B. de Witte, C. Forder. Deventer, 1992, pp. 7–9.

2 *See* P. de Cruz. Comparative Law in a Changing World. London, Sydney, 1999, pp. 485–486.

3 *See* H. C. Black. Black's Law Dictionary. Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern. 6th edition, Minnesota: West Publishing Co, 1990.

4 The effect of Finland's joining the European Union on legal culture and legal traditions was *inter alia* discussed at the international conference "From Dissonance to Sense" at Porvoo in 1997.

formation of legal culture or changes in it. Any change can be effective only if it assimilated into the deeper structures of law and the social life structures of the particular jurisdiction that constitute a unique part of legal culture.*7

Legal innovation in a particular jurisdiction blends into it through legal traditions. As innovation finds its place in the new legal culture and is understood against the background of traditions, it can become a part of legal traditions and the legal system. One could agree with the position that we should begin not from innovation, but from mapping the existing traditions in order to harmonise law and have any success with it.*8

The problems of legal traditions and legal culture are becoming topical for the Estonian society. There was no social demand for this kind of discussion earlier, because everyone sensed the need to adopt new laws as quickly as possible to reflect the changed social order and ensure the efficiency of the economy. It was a popular belief that all social problems would be solved and an effective market guaranteed by the passing of laws. It was not acknowledged that law is not simply a normative text boiling down to formally defined acts. It has been said that the period of legal positivism has passed, which implies expansion of the concept of law and giving it a fresh consideration.*9

What is the unique legal culture of the Estonian jurisdiction, whose structures should accept the entirely foreign and little-known norms and rules of behaviour contained in new laws? Estonia has practically no tradition or experience in free market economy. Many market economy terms acquired substance only 3–4 years ago. Court practice, too, has been uncertain, as it has to rely on the Civil Code from 1965 and apply norms that are clearly not in accordance with the changed relations in society. How should law be developed, how should legal analogy be put to practice and by what arguments should the already established interpretation of norms dating back to the 1960s and 1970s, whose application has been similar for nearly 20 years, be questioned? It is not easy to find answers. The Supreme Court has assumed a role that the courts are not yet accustomed to, but the necessity for which is undoubtedly perceived – the role of developing law in issues where the effective law can no longer be applied in the old way, as this would cause judgements to contradict the principle of good faith.*10

The rapid changes in the Estonian legal system have made a substantial contribution to the reorganisation of the economy and society and ensured the efficiency of reforms. However, the implementation of new laws has already raised the issue of the functions of law in today's society. A broad approach to law enables to determine the permanent basic functions of law as a normative regulation system. These functions include preventive influencing of behaviour and reorientation to avoid conflicts, organisation and harmonisation of activities within groups of humans, and satisfaction of group specific interests and common goals.*11 The task of law is thus to react to the needs of society and to have, above all, a regulative function for various groups. Law reflects the social values of the society and depends on them, while it controls the forms of economic and political activities in today's society (rule of law).*12

In socialist society, law did not exist apart from administrative and political control and planning. The task of law was to plan and organise the economic and social structures of the country.*13 A feature of socialist law was prerogativity, as opposed to the normativity common to Western legal systems.*14 To what extent, if at all, have the legal traditions formed in such a legal system been abandoned during a decade, and how many legal traditions does a new society have to offer to replace the discarded ones? Socialist law certainly does have its common features with the Western legal systems. The bases of the civil legislation of the Soviet Union and the related civil codes were largely based on the examples of the German BGB, the Swiss code of obligations and the French civil code.

7 S. Paasilehto. Challenges for Legal Cultural Change: Innovations and Traditions. From Dissonance to Sense. International Conference in Porvoo, Finland. August 28–31, 1997.

8 *Ibid*., p. 10.

9 C. Varga. European Integration and the Uniqueness of National Legal Cultures. The common law of Europe and the future of legal education. Ed. B. de Witte, C. Forder. Kluwer, 1992, p. 721.

10 *See* I. Kull. Võlaõiguse areng kohtupraktikas (Development of Law of Obligations in Court Practice). – Juridica, 1999, No. 9, p. 444.

11 R. Cotterrell. The Sociology of Law. An Introduction. 2nd ed., Mutterworth, 1992, p. 80.

12 G. Chieveley. The Future of the Common Law. The Wilberforce Lecture 1997. International and Comparative Law Quarterly. Vol. 46, Oct., 1977, pp. 759–760.

13 R. Cotterrell, pp. 84–85.

14 P. de Cruz, p. 186.

In the classical division of legal systems where all legal systems are, as a rule, divided into five categories*15, Estonia lost its former place among socialist legal systems after disintegration of the socialist bloc. The placement of a legal system provides certain orientation in specific areas of law, especially when the formation and differences of legal systems are studied comparatively.*16 As our laws are largely based on the example of German law, we have to look for the characteristic features of the orientation of changes in the German pandects system. The pandects system is characterised by concentrical systematism and the large relative importance of general principles.*17 The functioning of general principles in a society can be determined when the cultural, moral and ethical values that comprise the environment in which law functions are researched.

Legal tradition has been defined as a set of deeply rooted, historically formed attitudes to the nature of law, its role in the society and political ideology, the organisation and functioning of the legal system.*18 According to Merryman, while a legal system is a functioning set of legal institutions, procedures and rules, legal tradition puts the legal system in cultural perspective. He makes a sharp distinction between legal system and legal tradition. Based on legal traditions, jurisdictions have been divided into families of law. Jurisdictions are usually divided into legal systems or families of law on the basis of certain legal traditions, the characteristics of which correspond to the characteristics of the given legal system. Nowadays, however, we have to take account of the possibility that a legal system can have the characteristics of all traditional legal systems.*19

The issue of to what extent society has overcome the era of traditions has also been raised. The loss of traditions does not essentially imply the end of the impact of traditions, but rather their transformation and renewal, as the changed society invariably calls for new traditions.*20

When we try to find something in common for all today's legal systems, it would certainly be the use of sources of law. The use of court judgements as sources of law has grown in countries of civil law together with an expansion of the use of laws in countries of general law.*21 For example, § 1 of the Estonian draft General Part of the Civil Code Act prescribes that the sources of civil law are law and custom.

The approximation of developments in various particular branches of law does not unanimously support the convergence of legal systems or the related formation of a common European law in the near future. Economic cooperation between European countries may accelerate the harmonisation process, but this would be only a small step toward unity. The main obstacles are the differences in ideology, political orientation, social and economic policy, moral values and philosophy, attitude to law and legal structures, and executive and administrative capacity.*22 Weighty arguments can be found in defence of the peculiarities and traditions of European families of law and jurisdictions. Pierre Legrand convincingly shows that law is the expression of traditions that are hundreds of years old and it cannot be changed without social impact. The convergence of legal systems ensures the universality of rules and the protection of economic and business interests, but law does not consist of positive norms only.*23 Although Estonia adopts the major institutes and regulations of the German legal system, the adopted laws cannot be guaranteed to be interpreted in the same way as they are in their country of origin or the regulations to work effectively apart from administration of justice.

Civil law has always been politically neutral and formal in the legal systems of continental Europe, thus being the former and carrier of traditions. Private law as a traditional area of law is thus a less active supporter of unification. Any interference with the established traditions of civil law can be viewed as a

15 K. Zweigert, H. Kötz. An Introduction to Comparative Law. 2nd revised ed., Oxford, 1987.

16 C. Bollen, G.-R. de Groot. The Sources and Background of European Legal Systems. Towards a European Civil Code. Ed. A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. E. du Perron, J. B. M. Vranken. Dordrecht/Boston/London, 1994, p. 97.

17 *See* K. Zweigert, H. Kötz. An Introduction to Comparative Law. 2nd revised ed., Oxford, 1992, p. 150.

18 P. de Cruz, p. 31.

19 N. K. Zweiger and H. Kötz divided families of law as follows: general, Roman, German, Northern countries, socialist, Far-East, Islamic, and Hindu family of law. There are other classifications, but the above legal systems can be traditionally found in the classifications made by various authors. The socialist legal system is not contained in the classification, but legal systems characterised by the features of socialist legal orders will certainly continue to exist for a long time. The majority of today's legal orders have the characteristics of mainly one legal tradition. P. de Cruz, p. 32.

20 If Estonia were a welfare society, Estonia would be characterised by the traditions attributable to a welfare society, which are based on areas regulated by law – family, job, education, health care, etc., *i.e.* traditions based on solidarity policy. S. Paasilehto, p. 5.

21 P. de Cruz, p. 36.

22 *Ibid*., p. 40.

23 P. Legrand. Against a European Civil Code. The Modern Law Review, 1997, Jan., Vol. 60, p. 425–428.

violation of intellectual independence.*[24] For members of the European Union, directives regulating the areas of private law bring about the need to amend the applicable codes and established theories. The borrowing of law may accelerate the development of civil law like a bloodless revolution.*[25] Court practice relying on the draft Law of Obligations Act is already forming in Estonia, which can be viewed as a certain fortification of traditions by court practise. How the innovation originating from different legal traditions will function in future is more difficult to predict.*[26]

Classical contract law carries the idea of freedom of contract. Civil law mainly tried to ensure freedom and equality. Every citizen had to be free in the formation of legal relationships. Control of contractual justice was given up. The freedom of contract can no longer be regarded as the core idea of the legal system today, because no actual freedom and equality of participants in civil relationships exists. Today's regulations rather carry the principle of contractual justice.*[27] Courts have the right to hold invalid the contractual provisions that impair the balance of the obligations and rights of the parties to the disadvantage of one party and conflict good morals.*[28] The model of the person participating in contractual relationships has changed. The model entails a responsible person who is aware of the consequences of his or her acts, can assess them, and knows better than anyone else what is best for him or her.

In a welfare society, the freedom of contract has to be replaced by contractual justice. It is essential to use more effective means in the protection of the interests of those who are not able to protect their interests themselves and subject themselves to obligations that do not correspond to their actual will. An effective means of defence is the distribution of risks between contracting parties. The right to contest contracts, the application of protective means, liability, etc. are largely based on the distribution of risk.

The contract is certainly a most unified institute.*[29] At the same time, major changes have taken place in the legal regulation of entry into contracts, based on changes in doctrines *inter alia*. The scope of contractual law has significantly expanded today. An important innovation for the Estonian civil law is the major expansion of the circle of persons protected by law. This is an area where practically no traditions exist. The handsel institute that was in force before the year 1940 was a means by which the parties could enforce their positions in performing their contractual obligations. The civil code effective since 1965 contains no provisions to oblige the parties to act in good faith during negotiations and contractual relation. The General Part of the Civil Code Act § 108 (1) that entered into force on 1 September 1994 prescribes the obligation to exercise civil rights and perform civil obligations in good faith. The lawful obligation to act in good faith has thus already been in effect for 6 years. The provision has been referred to in the Estonian court practice only since 1998. The tradition of negotiations and the tradition of fair business relations in a wider sense have not yet developed.

In the draft Law of Obligations Act, the relations forming in the course of negotiations are also subjected to legal regulation. Subsection 12 (1) of the Law of Obligations Act prescribes that persons who hold pre-contractual negotiations or otherwise prepare for the conclusion of a contract must have reasonable regard to each other's interests and rights. The obligation to communicate objective data to each other during negotiations is particularly noted. The draft General Part of the Civil Code Act also contains a regulation providing for the grounds for contesting transactions due to errors and fraud.

The draft General Part of the Civil Code Act allows a transaction to be contested if a substantial error was caused by circumstances revealed by the other party or failure to reveal any circumstances, where revealing such would have been in accordance with the principles of good faith or where the other party was or had

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24 S. Paasilehto, p. 9.

25 P. de Cruz, p. 487.

26 I keep in mind attempts to unify the European civil law in sources such as UNIDROIT Principles of Commercial Contracts (PICC; 1994), Principles of European Civil Code (PECL), prepared by the Commission on European Contract Law, chairman Ole Lando; UN Convention on the International Sale of Goods (CISG) 1980. The importance of sociological elements in the harmonisation of law based on his US experience was discussed by Melvin E. Eisenberg in his article "Why is American Contract Law so Uniform?". – National Law in United States. Europäisches Vertragsrecht. H.-L. Weyers (Hrsg.). Referate und Sitzungsbericht der Arbeitssitzung der Fachgruppe Zivilrecht der Gesellschaft für Rechtvergleichung auf der Tagung vom 20.–22. Märtz 1996 in Jena. Baden-Baden, 1997, pp. 23–43.

27 European Contract Law. H. Kötz, A. Flessner. Vol. 1: Formation, Validity, and Content of Contracts; Contracts and Third Parties. 1997, p. 11.

28 Control of content also means the right of courts to interfere with the private autonomy of parties, by checking whether voluntariness and the completeness of information in the expression of will has been ensured in contractual relations. *See* S. A. Smith. Future Freedom and Freedom of Contract. – The Modern Law Review, 1996, Vol. 59, No. 2, p. 173.

29 The comparative study of the concept of contract and entry into contracts by P. Schlesinger convincingly demonstrated this. *See* P. Schlesinger. Formation of Contract, A Study of the Common Core of Legal Systems. 2 vols., 1968.

to be aware of the error and the leaving of the erring party in error conflicts with the principles of good faith. The person who concluded the transaction may not contest the transaction, if it bore the risk of erring under the circumstances and in accordance with the nature of the transaction or if its error would not be excusable considering the circumstances. The provisions concerning errors were based on the respective provisions of PECL.*[30]

An innovation that deserves special attention is the provision in the draft General Part of the Civil Code Act regulating the bases for establishing the duty to disclosure. Namely, regard has to be given to all circumstances in establishing the duty to disclosure, particularly circumstances that have obvious importance for the other party, the holding of special knowledge by the parties, the reasonable opportunities of the other party to receive the respective information, and the expenses of the party on receiving the information. These circumstances in assessing the duties to disclosure are not yet recognised by the civil laws of Europe. However, there is nothing new in it for the court practice of Western countries. It is usual practice in the courts of Western countries to have regard to the special knowledge of persons.*[31]

Regulation of the duty to disclosure by the Law of Obligations Act means that the pre-contractual negotiations stage is covered by contract law. When the obligation to present only truthful information that is clearly in the interests of the other party is imposed by law, then violation of this obligation has legal consequences. It is possible here to interpret the pre-contractual violation of the duty to disclosure as a delict followed by liability under the delict law. Claims on the grounds of violation of the duty to disclosure can be filed under the error and fraud regulation of the General Part of the Civil Code Act. The pre-contractual duty to disclosure can thus be subjected to provisions of contract law or delict law, or those regulating the contesting of transactions. Will the Estonian court practice recognise the obligations whose performance can be demanded through a court?*[32] These are questions to be finally answered only after the draft Act has been passed and entered into force. The establishment of the duty to disclosure by law has its economic consequences, but those should be the subject of a separate study.*[33]

For the Estonian court practice, this would be an innovation of major interest. While the law established the obligation to reveal information important to a negotiating party, it has not been studied what the actual traditions, norms and practice of business transactions are.

With a view to economic efficiency, courts should interfere where the protection of the interests of the parties is not an effective or sufficient insurance of the efficiency of economy. Where the persons participating in economic relationships do not find it necessary to give a binding nature to the expressions of will that give the other party reasonable grounds to believe that it was a legally binding commitment, then courts should interfere in the administration of justice.*[34] The current court practice, however, shows an opposite tendency. Parties are often permitted to derogate from their promises on the grounds that the effective laws lack provisions under which such promises could be regarded as binding. Courts have repeatedly stated in their judgements that preliminary agreements are not binding, since the effective law does not provide for the legal protection of such agreements. Preliminary agreements are a widely practised method in economic activities to strengthen one's position and ensure the keeping of promises.*[35]

There is much innovation yet much that is traditional in the future of law and legal systems. Legal integration and reforms can be successful only if regard is given to the social aspects of innovation. It is not enough to modernise doctrines if modified social institutions do not support this.

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30 UNIDROIT, Principles of international Commercial Contracts. Available at: http://www.unidroit.org/english/principles/contents.htm.

31 The respective Estonian court practice may be influenced by the model to be chosen or already chosen in the conclusion of contracts in economic activities. The Anglo-American legal system is rather sceptical about imposing such a general duty to disclosure. *See. e.g.* Good Faith and Fault in Contract Law. Ed. J. Beatson, D. Friedman. Oxford, 1995, pp. 107–108. For a comparative study in duty to disclosure in today's major legal orders, *see* A. M. Musy. Disclosure of Information in the Pre-contractual Bargaining. A Comparative Analyses. Available at: http://www.gelso.unitn.it/card-adm/Review/Contract/Musy-1995/musy1.htm.

32 *See* Precontractual Liability. Reports to the XIIIth Congress of International Academy of Comparative Law, Montreal, Canada, 18.–24. Aug. 1990. Ed. E. H. Hondius. Deventer, Boston, 1992; A. S. Hartkamp, M. M. M. Tillema. Contract Law in the Netherlands. The Hague, London, 1995, p. 78.

33 For respective research in the United States of America, *see* A. M. Musy. Disclosure of Information in the Pre-contractual Bargaining. A Comparative Analyses. Available at: http://www.gelso.unitn.it/card-adm/Review/Contract/Musy-1995/musy1.htm.

34 *See* S. A. Smith. Future Freedom and Freedom of Contract. The Modern Law Review, 1996, Vol. 59, No. 2, p. 173.

35 *See e.g.* judgements of the Tartu Circuit Court in civil cases II-2-385/97 and II-2-317/98. Available at: http://www.tarturk.just.ee/1997/tl/t/385.HTM and http://www.tarturk.just.ee/1998/lt/t/317.HTM (in Estonian).